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INDIAN ACTS SECTION

CONTAINING

ACTS OF THE PARLIAMENT ASSENTED TO BY THE PRESIDENT.



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INDEX TO ACTS OF PARLIAMENT

(1) ALPHABETICAL LIST OF SHORT TITLE OF THE ACTS, 1971

The Agricultural Refinance Corporation (Amendment) Act, 1971 (39 of 1971) ...	(Index) 50	The Gujarat State Legislature (Delegation of Powers) Act, 1971 (35 of 1971) ...	(Index) 48
The Air Corporations (Amendment) Act, 1971 (49 of 1971) ...	(Index) 85	The High Court Judges (Conditions of Service) Amendment Act, 1971 (78 of 1971) ...	(Index) 160
The Indian Air Travel Tax Act, 1971 (43 of 1971) ...	(Index) 84	The Imports and Exports (Control) Amendment Act, 1971 (7 of 1971)...	(Index) 2
The Appropriation Act, 1971 (5 of 1971) ...	(Index) 1	The Industrial (Development and Regulation) Amendment Act, 1971 (72 of 1971) ...	(Index) 138
The Appropriation (No. 2) Act, 1971 (80 of 1971) ...	(Index) 20	The Industrial Disputes (Amendment) Act, 1971 (45 of 1971) ...	(Index) 80
The Appropriation (No. 3) Act, 1971 (58 of 1971) ...	(Index) 50	The International Air Ports Authority Act, 1971 (43 of 1971) ...	(Index) 69
The Appropriation (Railways) Act, 1971 (2 of 1971) ...	(Index) 1	The Jayanti Shipping Company (Acquisition of Shares) Act, 1971 (63 of 1971) ...	(Index) 116
The Appropriation (Railways) No. 2 Act, 1971 (19 of 1971) ...	(Index) 13	The Labour Provident Fund Laws (Amendment) Act, 1971 (16 of 1971) ...	(Index) 6
The Appropriation (Railways) No. 3 Act, 1971 (58 of 1971) ...	(Index) 111	The Maintenance of Internal Security Act, 1971 (26 of 1971) ...	(Index) 17
The Appropriation (Railways) Vote on Account Act, 1971 (1 of 1971) ...	(Index) 1	The Manipur Appropriation Act, 1971 (4 of 1971) ...	(Index) 1
The Appropriation (Vote on Account) Act, 1971 (6 of 1971) ...	(Index) 1	The Manipur Appropriation (No. 2) Act, 1971 (18 of 1971) ...	(Index) 13
The Arms (Amendment) Act, 1971 (55 of 1971) ...	(Index) 102	The Manipur Appropriation (Vote on Account) Act, 1971 (3 of 1971) ...	(Index) 1
The Asian Refractories Limited (Acquisition of Undertaking) Act, 1971 (65 of 1971) ...	(Index) 134	The Manipur (Hill Areas) District Council Act, 1971 (76 of 1971) ...	(Index) 150
The Bengal Finance (Sales Tax) Delhi Validation of Appointments and Proceedings) Act, 1971 (20 of 1971) ...	(Index) 14	The Medical Termination of Pregnancy Act, 1971 (34 of 1971) ...	(Index) 47
The Central Board of Direct Taxes (Validation of Proceedings) Act, 1971 (37 of 1971) ...	(Index) 49	The Mysore Appropriation Act, 1971 (11 of 1971) ...	(Index) 2
The Coal Bearing Areas (Acquisition and Development) Amendment and Validation Act, 1971 (54 of 1971) ...	(Index) 100	The Mysore Appropriation (No. 2) Act, 1971 (27 of 1971) ...	(Index) 20
The Coking Coal Mines (Emergency Provisions) Act, 1971 (64 of 1971)...	(Index) 120	The Mysore Appropriation (Vote on Account) Act, 1971 (10 of 1971) ...	(Index) 2
The Companies (Amendment) Act, 1971 — (80 of 1971) ...	(Index) 180	The Mysore State Legislature (Delegation of Powers) Act, 1971 (23 of 1971) ...	(Index) 15
The Companies (Surcharge on Income-Tax) Act, 1971 (62 of 1971) ...	(Index) 115	The Naval and Air-Craft Prize Act, 1971 (59 of 1971) ...	(Index) 112
The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 (56 of 1971) ...	(Index) 103	The Orissa Appropriation Act, 1971 (9 of 1971) ...	(Index) 2
The Constitution (Twenty-Fourth Amendment) Act, 1971 ...	(Index) 54	The Orissa Appropriation (Vote on Account) Act, 1971 (8 of 1971) ...	(Index) 2
The Constitution (Twenty-Sixth Amendment) Act, 1971 ...	(Index) 159	The Personal Injuries (Compensation Insurance) Amendment Act, 1971 (75 of 1971) ...	(Index) 149
The Defence of India Act, 1971 (42 of 1971) ...	(Index) 55	The Personal Injuries (Emergency Provisions) Amendment Act, 1971 (74 of 1971) ...	(Index) 149
The Delhi Sikh Gurdwaras (Management) Act, 1971 (24 of 1971) ...	(Index) 17	The Prevention of Food Adulteration (Amendment) Act, 1971 (41 of 1971) ...	(Index) 55
The Emergency Risks (Goods) Insurance Act, 1971 (50 of 1971) ...	(Index) 87	The Prevention of Insults to National Honour Act, 1971 (69 of 1971) ...	(Index) 137
The Emergency Risks (Undertakings Insurance Act, 1971 (51 of 1971) ...	(Index) 92	The Public Premises (Eviction of Unauthorized Occupants) Act, 1971 (40 of 1971) ...	(Index) 51
The Essential Commodities (Amendment) Act, 1971 (66 of 1971) ...	(Index) 135	The Punjab Appropriation Act, 1971 (25 of 1971) ...	(Index) 17
The Finance Act, 1971 (14 of 1971)...	(Index) 2	The Punjab State Legislature (Delegation of Powers) Act, 1971 (36 of 1971) ...	(Index) 49
The Finance (No. 2) Act, 1971 (32 of 1971) ...	(Index) 21	The Railway Passenger Fares Act, 1971 (46 of 1971) ...	(Index) 81
The Forward Contracts (Regulation) Amendment Act, 1971 (53 of 1971) ...	(Index) 99		
The General Insurance (Emergency Provisions) Act, 1971 (17 of 1971)...	(Index) 10		
The Gold (Control) (Amendment) Act, 1971 (21 of 1971) ...	(Index) 15		
The Gujarat Appropriation Act, 1971 (29 of 1971) ...	(Index) 20		

The Salaries and Allowances of Officers of Parliament (Amendment) Act, 1971 (22 of 1971) ...	(Index) 16	The Union Territories Taxation Laws (Amendment) Act, 1971 (73 of 1971) ...	(Index) 145
The Small Coins (Offences) Act, 1971 (52 of 1971) ...	(Index) 98	The U. P. Cantonments (Control of Rent and Eviction) (Repeal) Act, 1971 (68 of 1971) ...	(Index) 137
The Stamps and Excise Duties (Amendment) Act, 1971 (44 of 1971) ...	(Index) 79	The Viswa-Bharati (Amendment) Act, 1971 (57 of 1971) ...	(Index) 108
The State of Himachal Pradesh (Amendment) Act, 1971 (15 of 1971) ...	(Index) 5	The West Bengal Appropriation Act, 1971 (13 of 1971) ...	(Index) 2
The Supreme Court Judges (Conditions of Service) Amendment Act, 1971 (77 of 1971) ...	(Index) 159	The West Bengal Appropriation (No. 2) Act, 1971 (28 of 1971) ...	(Index) 20
The Indian Tariff (Amendment) Act, 1971 (87 of 1971) ...	(Index) 136	The West Bengal Appropriation (Vote on Account) Act, 1971 (12 of 1971) ...	(Index) 2
The Tax on Postal Articles Act, 1971 (47 of 1971) ...	(Index) 83	The West Bengal State Legislature (Delegation of Powers) Act, 1971 (31 of 1971) ...	(Index) 21
The Indian Telegraph (Amendment) Act, 1971 (33 of 1971) ...	(Index) 46		

(2) CHRONOLOGICAL LIST OF THE ACTS OF PARLIAMENT, 1971

The Constitution (Twenty Fourth Amendment) Act, 1971 ...	(Index) 54	23 of 1971—The Mysore State Legislature (Delegation of Powers) Act, 1971 ...	(Index) 16
The Constitution (Twenty Sixth Amendment) Act, 1971 ...	(Index) 159	24 of 1971—The Delhi Sikh Gurdwaras (Management) Act, 1971 ...	(Index) 17
1 of 1971—The Appropriation (Railways) Vote on Account Act, 1971 ...	(Index) 1	25 of 1971—The Punjab Appropriation Act, 1971 ...	(Index) 17
2 of 1971—The Appropriation (Railways) Act, 1971 ...	(Index) 1	26 of 1971—The Maintenance of Internal Security Act, 1971 ...	(Index) 17
3 of 1971—The Manipur Appropriation (Vote on Account) Act, 1971 ...	(Index) 1	27 of 1971—The Mysore Appropriation (No. 2) Act, 1971 ...	(Index) 20
4 of 1971—The Manipur Appropriation Act, 1971 ...	(Index) 1	28 of 1971—The West Bengal Appropriation (No. 2) Act, 1971 ...	(Index) 20
5 of 1971—The Appropriation Act, 1971 ...	(Index) 1	29 of 1971—The Gujarat Appropriation Act, 1971 ...	(Index) 20
6 of 1971—The Appropriation (Vote on Account) Act, 1971 ...	(Index) 1	30 of 1971—The Appropriation (No. 2) Act, 1971 ...	(Index) 20
7 of 1971—The Imports and Exports (Control) Amendment Act, 1971 ...	(Index) 2	31 of 1971—The West Bengal State Legislature (Delegation of Powers) Act, 1971 ...	(Index) 21
8 of 1971—The Orissa Appropriation (Vote on Account) Act, 1971 ...	(Index) 2	32 of 1971—The Finance (No. 2) Act, 1971 ...	(Index) 21
9 of 1971—The Orissa Appropriation Act, 1971 ...	(Index) 2	33 of 1971—The Indian Telegraph (Amendment) Act 1971 ...	(Index) 46
10 of 1971—The Mysore Appropriation (Vote on Account) Act, 1971 ...	(Index) 2	34 of 1971—The Medical Termination of Pregnancy Act, 1971 ...	(Index) 47
11 of 1971—The Mysore Appropriation Act, 1971 ...	(Index) 2	35 of 1971—The Gujarat State Legislature (Delegation of Powers) Act, 1971 ...	(Index) 48
12 of 1971—The West Bengal Appropriation (Vote on Account) Act, 1971 ...	(Index) 2	36 of 1971—The Punjab State Legislature (Delegation of Powers) Act, 1971 ...	(Index) 49
13 of 1971—The West Bengal Appropriation Act, 1971 ...	(Index) 2	37 of 1971—The Central Board of Direct Taxes (Validation of Proceedings) Act, 1971 ...	(Index) 49
14 of 1971—The Finance Act, 1971 ...	(Index) 2	38 of 1971—The Appropriation (No. 3) Act, 1971 ...	(Index) 50
15 of 1971—The State of Himachal Pradesh (Amendment) Act, 1971 ...	(Index) 5	39 of 1971—The Agricultural Refinance Corporation (Amendment) Act, 1971 ...	(Index) 50
16 of 1971—The Labour Provident Fund Laws (Amendment) Act, 1971 ...	(Index) 6	40 of 1971—The Public Premises (Eviction of Unauthorised Occupants) Act, 1971 ...	(Index) 51
17 of 1971—The General Insurance (Emergency Provisions) Act, 1971 ...	(Index) 10	41 of 1971—The Prevention of Food Adulteration (Amendment) Act, 1971 ...	(Index) 55
18 of 1971—The Manipur Appropriation (No. 2) Act, 1971 ...	(Index) 13	42 of 1971—The Defence of India Act, 1971 ...	(Index) 55
19 of 1971—The Appropriation Railways No. 2 Act, 1971 ...	(Index) 13	43 of 1971—The International Air Ports Authority Act (1971) ...	(Index) 69
20 of 1971—The Bengal Finance (Sales Tax) Delhi Validation of (Appointments and Proceedings) Act, 1971 ...	(Index) 14		
21 of 1971—The Gold (Control) (Amendment) Act, 1971 ...	(Index) 15		
22 of 1971—The Salaries and Allowances of Officers of Parliament (Amendment) Act, 1971 ...	(Index) 16		

Index to Acts of Parliament

44 of 1971—The Stamps and Excise Duties (Amendment) Act, 1971 ...	(Index) 79	63 of 1971—The Jayanti Shipping Company (Acquisition of Shares) Act, 1971 ...	(Index) 116
45 of 1971—The Industrial Disputes (Amendment) Act, 1971 ...	(Index) 80	64 of 1971—The Coking Coal Mines (Emergency Provisions) Act, 1971 ...	(Index) 120
46 of 1971—The Railway Passenger Fares Act, 1971 ...	(Index) 81	65 of 1971—The Asian Refractories Limited (Acquisition of Undertaking) Act, 1971 ...	(Index) 134
47 of 1971—The Tax on Postal Articles Act, 1971 ...	(Index) 83	66 of 1971—The Essential Commodities (Amendment) Act, 1971 ...	(Index) 135
48 of 1971—The Indian Air Travel Tax Act, 1971 ...	(Index) 84	67 of 1971—The Indian Tariff (Amendment) Act, 1971 ...	(Index) 136
49 of 1971—The Air Corporations (Amendment) Act, 1971 ...	(Index) 85	68 of 1971—The U. P. Cantonments (Control of Rent and Eviction) (Repeal) Act, 1971 ...	(Index) 137
50 of 1971—The Emergency Risks (Goods) Insurance Act, 1971 ...	(Index) 87	69 of 1971—The Prevention of Insults to National Honour Act, 1971 ...	(Index) 137
51 of 1971—The Emergency Risks (Undertakings) Insurance Act, 1971 ...	(Index) 92	72 of 1971—The Industrial (Development and Regulation) Amendment Act, 1971 ...	(Index) 138
52 of 1971—The Small Coins (Offences) Act, 1971 ...	(Index) 98	73 of 1971—The Union Territories Taxation Laws (Amendment) Act, 1971 ...	(Index) 145
53 of 1971—The Forward Contracts (Regulation) Amendment Act, 1971 ...	(Index) 99	74 of 1971—The Personal Injuries (Emergency Provisions) Amendment Act, 1971 ...	(Index) 149
54 of 1971—The Coal Bearing Areas (Acquisition and Development) Amendment and Validation Act, 1971 ...	(Index) 100	75 of 1971—The Personal Injuries (Compensation Insurance) Amendment Act, 1971 ...	(Index) 149
55 of 1971—The Arms (Amendment) Act, 1971 ...	(Index) 102	76 of 1971—The Manipur (Hill Areas) District Council Act, 1971 ...	(Index) 150
56 of 1971—The Comptroller and Auditor General's (Duties, Powers and Conditions of Service) Act, 1971 ...	(Index) 103	77 of 1971—The Supreme Court Judges (Conditions of Service) Amendment Act, 1971 ...	(Index) 159
57 of 1971—The Viswa-Bharati (Amendment) Act, 1971 ...	(Index) 108	78 of 1971—The High Court Judges (Conditions of Service) Amendment Act, 1971 ...	(Index) 160
58 of 1971—The Appropriation (Railways) No. 3 Act, 1971 ...	(Index) 111	80 of 1971—The Companies (Amendment) Act, 1971 ...	(Index) 180
59 of 1971—The Naval and Air Craft Prize Act, 1971 ...	(Index) 112		
62 of 1971—The Companies (Surcharge on Income-tax) Act, 1971 ...	(Index) 115		

THE
All India Reporter
1971

Acts of the Indian Parliament †

**THE APPROPRIATION (RAILWAYS)
VOTE ON ACCOUNT ACT, 1971.**

(Act No. 1 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Consolidated Fund of India for the services of a part of the financial year 1971-72 for the purposes of Railways.

(The Text of the Act not printed.)

*Received the assent of the President on 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext. p. 63.

**THE APPROPRIATION (RAILWAYS)
ACT, 1971.**

(Act No. 2 of 1971)*

(30th March, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the service of the financial year 1970-71 for the purposes of Railways.

(Text of the Act not printed.)

*Received the assent of the President on the 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext., p. 65.

**THE MANIPUR APPROPRIATION
(VOTE ON ACCOUNT) ACT, 1971.**

(Act No. 3 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Consolidated Fund of the Union territory of Manipur for the services of a part of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 30-3-1971, and published in Gazette of India, 30-3-1971, Pt. II-S. 1, Ext., p. 67.

**THE MANIPUR APPROPRIATION ACT,
1971.**

(Act No. 4 of 1971)*

(30th March, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of the Union territory of Manipur for the services of the financial year 1970-71.

(Text of the Act not printed.)

*Received the assent of the President on 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext., p. 70.

THE APPROPRIATION ACT, 1971.

(Act No. 5 of 1971)*

(30th March, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the services of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext., p. 72.

**THE APPROPRIATION (VOTE ON
ACCOUNT) ACT, 1971.**

(Act No. 6 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Consolidated Fund of India for the services of a part of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 30-3-1971, and was published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext. P. 76. For Statement of Objects and Reasons, see Gaz. of India, 27-3-1971, Pt. II-S. 2, Ext. P. 62.

†The Acts are not published in the Journal under the direction of the Government of India; and the Government is not responsible for the accuracy of reproduction.

THE IMPORTS AND EXPORTS (CONTROL) AMENDMENT ACT, 1971.

(Act No. 7 of 1971)*

An Act further to amend the Imports and Exports (Control) Act, 1947.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE IMPORTS AND EXPORTS (CONTROL) AMENDMENT ACT, 1971.

2. Amendment of long title and preamble.— In the Imports and Exports (Control) Act, 1947 (hereinafter referred to as the principal Act), in the long title and preamble, the words “to continue for a limited period powers” shall be omitted.

3. Amendment of Section 1.— In Section 1 of the principal Act, in sub-section (3), the words, figures and letters “and shall remain in force until the 31st day of March 1971” shall be omitted.

*Received the assent of the President on 30-3-1971. Act published in Gaz. of India, 30-3-1971, Pt. II-S. 1, Ext. For S.O.R. see Gaz. of India, 24-3-1971, Pt. II-S. 2, Ext., p. 6.

THE ORISSA APPROPRIATION (VOTE ON ACCOUNT) ACT, 1971.

(Act No. 8 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Consolidated Fund of the State of Orissa for the services of a part of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on the 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext., p. 48.

THE ORISSA APPROPRIATION ACT, 1971.

(Act No. 9 of 1971)*

(30th March, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of the State of Orissa for the services of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on the 30-3-1971, and was published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext. P. 52.

THE MYSORE APPROPRIATION (VOTE ON ACCOUNT) ACT, 1971.

(Act No. 10 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Con-

solidated Fund of the State of Mysore for the services of a part of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on the 30-3-1971, and published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext. P. 55.

THE MYSORE APPROPRIATION ACT, 1971.

(Act No. 11 of 1971)*

(30th March, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of the State of Mysore for the services of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 30-3-1971 and was published in the Gazette of India, 30-3-1971, Pt. II-S. 1, Ext. P. 59.

THE WEST BENGAL APPROPRIATION (VOTE ON ACCOUNT) ACT, 1971.

(Act No. 12 of 1971)*

(30th March, 1971)

An Act to provide for the withdrawal of certain sums from and out of the Consolidated Fund of the State of West Bengal for the services of a part of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 31-3-1971.

THE WEST BENGAL APPROPRIATION ACT, 1971.

(Act No. 13 of 1971)*

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of the State of West Bengal for the services of the financial year 1970-71.

(Text of the Act not printed.)

*Received the assent of the President on 31-3-1971.

THE FINANCE ACT, 1971

(Act No. 14 of 1971)*

(7th April, 1971)

An Act to continue for the financial year 1971-72 the existing rates of income-

*Received the assent of the President on 7-4-1971. Act published in Gaz. of Ind., 7-4-1971, Pt. II-S. 1, Ext. P. 105. For Statement of Objects and Reasons see Gaz. of India, 24-3-1971, Pt. II-S. 2, Ext. P. 15.

tax with certain modifications and to provide for the continuance of the provisions relating to special and regulatory duties of customs and excise and of certain commitments under the General Agreement on Tariffs and Trade and the discontinuance of the duty on salt for the said year.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE FINANCE ACT, 1971.

(2) Sections 2, 5 and 8 shall be deemed to have come into force on the 1st day of April, 1971.

2. Income-tax.— The provisions of Section 2 of, and the First Schedule to, the Finance Act, 1970, shall apply in relation to income-tax for the assessment year or, as the case may be, the financial year commencing on the 1st day of April, 1971, as they apply in relation to income-tax for the assessment year or, as the case may be, the financial year commencing on the 1st day of April, 1970, with the following modifications, namely:—

(a) in Section 2,—

(i) for the figures “1970”, wherever they occur, the figures “1971” shall be substituted;

(continued on Col. 2)

(ii) for sub-section (3), the following sub-section shall be substituted, namely:—

“(3) In cases to which Chapter XII or Section 164 of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act) applies, the tax chargeable shall be determined as provided in that Chapter or that section, and with reference to the rates imposed by sub-section (1) or the rates as specified in that Chapter or section, as the case may be.”;

(iii) in sub-section (5), the following proviso shall be inserted at the end, namely:—

“Provided that in respect of any income chargeable to tax under Section 164 of the Income-tax Act at the rate of sixty-five per cent., “advance tax” shall be computed at that rate;”

(b) in the First Schedule,—

(i) in Part I,—

(1) for Paragraph A, the following Paragraph shall be substituted, namely:—

“Paragraph A

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of Section 2 of the Income-tax Act, not being a case to which any other Paragraph of this Part applies,—

Rates of income-tax

(1) where the total income does not exceed Rs. 5,000	Nil;
(2) where the total income exceeds Rs. 5,000 but does not exceed Rs. 10,000	10 per cent. of the amount by which the total income exceeds Rs. 5,000;
(3) where the total income exceeds Rupees 10,000 but does not exceed Rs. 15,000	Rs. 500 plus 17 per cent. of the amount by which the total income exceeds Rs. 10,000;
(4) where the total income exceeds Rupees 15,000 but does not exceed Rs. 20,000	Rs. 1,350 plus 23 per cent. of the amount by which the total income exceeds Rs. 15,000
(5) where the total income exceeds Rupees 20,000 but does not exceed Rs. 25,000	Rs. 2,500 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000;
(6) where the total income exceeds Rupees 25,000 but does not exceed Rs. 30,000	Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000;
(7) where the total income exceeds Rupees 30,000 but does not exceed Rs. 40,000	Rs. 6,000 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000;
(8) where the total income exceeds Rupees 40,000 but does not exceed Rs. 60,000	Rs. 11,000 plus 60 per cent. of the amount by which the total income exceeds Rs. 40,000;
(9) where the total income exceeds Rupees 60,000 but does not exceed Rs. 80,000	Rs. 23,000 plus 70 per cent. of the amount by which the total income exceeds Rs. 60,000;
(10) where the total income exceeds Rupees 80,000 but does not exceed Rs. 1,00,000	Rs. 37,000 plus 75 per cent. of the amount by which the total income exceeds Rs. 80,000;
(11) where the total income exceeds Rupees 1,00,000 but does not exceed Rs. 2,00,000	Rs. 52,000 plus 80 per cent. of the amount by which the total income exceeds Rs. 1,00,000;
(12) where the total income exceeds Rupees 2,00,000	Rs. 1,32,000 plus 85 per cent. of the amount by which the total income exceeds Rs. 2,00,000;

Provided that for the purposes of this Paragraph, in the case of a Hindu undivided family which at any time during the previous year satisfies either of the following two conditions, namely:—

(a) that it has at least two members entitled to claim partition who are not less than eighteen years of age; or

(b) that it has at least two members entitled to claim partition who are not lineally descended one from the other and who are not lineally descended from any other living member of the family,—

(i) no income-tax shall be payable on a total income not exceeding Rs. 7,000;

(ii) where the total income exceeds Rs. 7,000 but does not exceed Rs. 7,660, the income-tax payable thereon shall not exceed forty per cent. of the amount by which the total income exceeds Rs. 7,000.

Surcharge on Income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax;

(2) in Paragraph C, the following Explanation shall be inserted at the end, namely:—

Explanation.— For the purposes of this Paragraph, “registered firm” includes an unregistered firm assessed as a registered firm under clause (b) of Section 183 of the Income-tax Act;

(ii) in Part III,—

(1) in the opening portion, after the words “as the case may be, “advance tax”, the brackets, words and figures “(not being “advance tax” in respect of any income chargeable to tax under Section 164 of the Income-tax Act at the rate of sixty-five per cent.)” shall be inserted;

(2) in Paragraph A, for the figures “1971” occurring in the proviso, the figures “1972” shall be substituted;

(3) in Paragraph C, the following Explanation shall be inserted at the end, namely:—

Explanation.— For the purposes of this Paragraph, “registered firm” includes an unregistered firm assessed as a registered firm under clause (b) of Section 183 of the Income-tax Act.

3. Special duties of customs.— (1)

In the case of goods chargeable with a duty of customs which is specified in the First Schedule to the Indian Tariff Act, 1934 (hereinafter referred to as the Tariff Act), or in that Schedule as amended from time to time, or in that Schedule read with any notification of the Central Government for the time being in force, there shall be levied and collected as an addition to, and in the same manner as, the total amount so chargeable, a special duty of customs equal to 10 per cent. of such amount:

Provided that in computing the total amount so chargeable, any duty chargeable

under Section 2A of the Tariff Act or Section 4 of this Act shall not be included.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 1972, except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

4. Regulatory duties of customs.—(1) With a view to regulating or bringing greater economy in imports, there shall be levied and collected, with effect from such date, and at such rate, as may be specified in this behalf by the Central Government by notification in the Official Gazette, on all or any of the goods mentioned in the First Schedule to the Tariff Act, or in that Schedule as amended from time to time, a regulatory duty of customs not exceeding—

(a) 25 per cent. of the rate, if any, specified in the said First Schedule read with any notification issued under Section 3A, or sub-section (1) of Section 4, of the Tariff Act; or

(b) 10 per cent. of the value of the goods as determined in accordance with the provisions of Section 14 of the Customs Act, 1962, whichever is higher:

Provided that different dates and different rates may be specified by the Central Government for different kinds of goods.

(2) Sub-section (1) shall come into force on the 16th day of May, 1971, and cease to have effect after the 15th day of May, 1972, except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The regulatory duty of customs leviable under this section in respect of any goods referred to in sub-section (1) shall be in addition to any other duty of customs chargeable on such goods under the Customs Act, 1962.

(4) The provisions of the Customs Act, 1962, and the rules and regulations made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the regulatory duty of customs leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of customs on such goods under that Act or those rules and regulations.

(5) Every notification issued under sub-section (1) shall, as soon as may be after it is issued, be placed before each House of Parliament.

5. Amendment of Act 1 of 1949.— In the Indian Tariff (Amendment) Act, 1949, in Sections 4 and 5, for the figures “1971”, the figures “1972” shall be substituted.

6. Special duties of excise on certain goods.—(1) When goods of the description mentioned in this section chargeable with a duty of excise under the Central Excises and Salt Act, 1944, as amended from time to time (hereinafter referred to as the Central Excises Act) read with any notification for the time being in force issued by the Central Government in relation to the duty so chargeable, are assessed to duty, there shall be levied and collected—

(a) as respects goods comprised in Items Nos. 6, 8, 9, 14D, 22A, 23A except sub-item (1) thereof, 23B, 28, 29, sub-items (2) and (3) of Item No. 31 and Item No. 32 of the First Schedule to the Central Excises Act a special duty of excise equal to 10 per cent. of the total amount so chargeable on such goods;

(b) as respects goods comprised in Items Nos. 2, 3 (1), sub-items I, II (2) and II (3) of Item No. 4, Items Nos. 15, 14, 14F, 15, 15A, 15B, 16, 16A, 17, 18A (2), 21, 22, 23, 23A (1), 27, 30, 31 (1), 33, sub-items (1), (3a) and (4) of Item No. 34 and sub-items II (1) and II (2) of Item No. 37 of that Schedule a special duty of excise equal to 20 per cent. of the total amount so chargeable on such goods; and

(c) as respects goods comprised in sub-item II (1) of Item No. 4 and Items Nos. 18, 18A (1), 18B, 20, 29A, 33A and sub-items (2) and (3) of Item No. 34 of that Schedule, a special duty of excise equal to 33 1/3 per cent. of the total amount so chargeable on such goods.

(2) Sub-section (1) shall cease to have effect after the 31st day of March, 1972, except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The duties of excise referred to in sub-section (1) in respect of the goods specified therein shall be in addition to the duties of excise chargeable on such goods under the Central Excises Act or any other law for the time being in force and such special duties shall be levied for purposes of the Union and the proceeds thereof shall not be distributed among the States.

(4) The provisions of the Central Excises Act and the rules made thereunder, including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules.

7. Regulatory duties of excise.—(1) With a view to regulating or bringing greater economy in consumption, there shall be levied and collected, with effect from such date, and at such rate, as may be specified

in this behalf by the Central Government by notification in the Official Gazette, on all or any of the goods mentioned in the First Schedule to the Central Excises Act, a regulatory duty of excise which shall not exceed 15 per cent. of the value of the goods as determined in accordance with the provisions of Section 4 of the Central Excises Act:

Provided that different dates and different rates may be specified by the Central Government for different kinds of goods.

(2) Sub-section (1) shall come into force on the 16th day of May, 1971, and cease to have effect after the 15th day of May, 1972, except as respects things done or omitted to be done before such cesser; and Section 6 of the General Clauses Act, 1897, shall apply upon such cesser as if the said sub-section had then been repealed by a Central Act.

(3) The duties of excise referred to in sub-section (1) in respect of the goods specified therein shall be in addition to the duties of excise chargeable on such goods under the Central Excises Act or any other law for the time being in force and such regulatory duties shall be levied for purposes of the Union and the proceeds thereof shall not be distributed among the States.

(4) The provisions of the Central Excises Act and the rules made thereunder including those relating to refunds and exemptions from duties, shall, as far as may be, apply in relation to the levy and collection of the regulatory duties of excise leviable under this section in respect of any goods as they apply in relation to the levy and collection of the duties of excise on such goods under that Act or those rules.

(5) Every notification issued under sub-section (1) shall, as soon as may be after it is issued, be placed before each House of Parliament.

8. Discontinuance of salt duty.—For the year beginning on the 1st day of April, 1971, no duty under the Central Excises Act or the Tariff Act shall be levied in respect of salt manufactured in, or imported into, India.

THE STATE OF HIMACHAL PRADESH (AMENDMENT) ACT, 1971

(Act No. 15 of 1971)

(19th April, 1971)

An Act to amend the State of Himachal Pradesh Act, 1970.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

*Received the assent of the President on 19-4-1971. Act published in Gaz. of India, 20-4-1971, Pt. II-S. 1, Ext. P. 113. For Statement of Objects and Reasons, see Gaz. of India, 30-3-1971, Pt. II-S. 2, Ext. P. 109.

1. Short title and commencement.— (1) This Act may be called THE STATE OF HIMACHAL PRADESH (AMENDMENT) ACT, 1971.

(2) It shall be deemed to have come into force on the 5th day of January, 1971.

2. Omission of Sections 8 and 9.— Sections 8 and 9 of the State of Himachal Pradesh Act, 1970 (hereinafter referred to as the principal Act) shall be omitted.

3. Amendment of Section 17.— In Section 17 of the principal Act, for clause (a) of sub-section (2), the following clause shall be substituted, namely:—

“(a) all the persons (or as many of them as are available) who, having been elected from Parliamentary constituencies in the Union territory of Himachal Pradesh, were members of the House of the People immediately before its dissolution by the order of the President published with notification No. 87/2/70/T, dated the 27th December, 1970, of the Lok Sabha Secretariat, in the Gazette of India, dated the 27th December, 1970, or if the delimitation of any constituencies is taken up after the first constitution, following such dissolution, of the House of the People, all the members elected to such House (or as many of them as are available) from Parliamentary constituencies in the State of Himachal Pradesh; and”.

4. Repeal and saving.— (1) The State of Himachal Pradesh (Amendment) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act as amended by the said Ordinance shall be deemed to have been done or taken under the principal Act as amended by this Act.

THE LABOUR PROVIDENT FUND LAWS (AMENDMENT) ACT, 1971

(Act No. 16 of 1971)*

(23rd April, 1971)

An Act further to amend the Coal Mines Provident Fund and Bonus Schemes Act, 1948, and the Employees' Provident Funds Act, 1952.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE LABOUR PROVIDENT FUND LAWS (AMENDMENT) ACT, 1971.

2. Amendment of long title.— In the long title to the Coal Mines Provident Fund and Bonus Schemes Act, 1948 (hereinafter referred to as the Coal Mines Act),

after the words “Provident Fund Scheme”, the words “, a Family Pension Scheme” shall be inserted.

3. Amendment of preamble.— In the preamble to the Coal Mines Act, the first paragraph shall be omitted.

4. Amendment of Section 1.— In sub-section (1) of Section 1 of the Coal Mines Act, after the words “Provident Fund”, the words “, Family Pension” shall be inserted.

5. Amendment of Section 2.— In Section 2 of the Coal Mines Act, after clause (e), the following clause shall be inserted, namely:—

“(ee) “Family Pension Fund” means the Family Pension Fund established under the Coal Mines Family Pension Scheme, framed under sub-section (1) of Section 3E;”.

6. Amendment of Section 3A.— In Section 3A of the Coal Mines Act,—

(a) in sub-section (3), after the words “The Board shall”, the words, figure and letter “, subject to the provisions of Section 3E,” shall be inserted;

(b) in sub-section (4), for the words “the Scheme aforesaid”, the words “the Coal Mines Provident Fund Scheme and the Coal Mines Family Pension Scheme” shall be substituted.

7. Amendment of Section 3C.— In sub-section (3) of Section 3C of the Coal Mines Act, after the words “Coal Mines Provident Fund Scheme”, the words “and the Coal Mines Family Pension Scheme” shall be inserted.

8. Insertion of new Sections 3E and 3F.— After Section 3D of the Coal Mines Act, the following sections shall be inserted, namely:—

“3E. Coal Mines Family Pension Scheme.— (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Coal Mines Family Pension Scheme for the purpose of providing family pension and life assurance benefits to such employees as are covered by the Coal Mines Provident Fund Scheme.

(2) There shall be established, as soon as may be after the framing of the aforesaid Scheme, a Family Pension Fund into which shall be paid from time to time in respect of every such employee—

(a) such portion, not exceeding one-fourth, of the amount payable under sub-section (1) of Section 10D as the employer's contribution as well as the employee's contribution, as may be specified in the said Scheme, and

(b) such sums, being not less than the aggregate of the amount payable in pursuance of clause (a) out of the employer's contribution under sub-section (1) of Section 10D and an amount equivalent to one-sixteenth of the employer's contribution under that sub-section in respect of such employee, as the Central Government may, after due appropriation made by Parliament by law in this behalf, specify.

*Received the assent of the President on 23-4-1971. Act published in Gaz. of India, 23-4-1971, Pt. II-S. 1, Ext. P. 115. For Statement of Objects and Reasons, see: Gaz. of India, 7-12-1970, Pt. II-S. 2, Ext. P. 1029.

(3) The Family Pension Fund shall vest in and be administered by the Board.

(4) Any scheme framed under the provisions of sub-section (1) may provide for all or any of the matters specified in the Second Schedule.

3F. Special grant by Central Government.—The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay such further sums as may be determined by it into the Family Pension Fund to meet all the expenses in connection with the administration of the Coal Mines Family Pension Scheme other than the expenses towards the cost of any benefits provided by or under the said Scheme.

9. Amendment of Section 5.—In sub-section (2) of Section 5 of the Coal Mines Act, for the words "Second Schedule", the words "Third Schedule" shall be substituted.

10. Amendment of Section 8.—In Section 8 of the Coal Mines Act, after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) The provisions of sub-section (1) and sub-section (2) shall, so far as may be, apply in relation to the family pension or any other amount payable under the Coal Mines Family Pension Scheme as they apply in relation to any amount payable out of the Fund."

11. Insertion of new Second Schedule.—The Second Schedule to the Coal Mines Act shall be re-numbered as the Third Schedule and before the Third Schedule as so re-numbered, the following Schedule shall be inserted, namely:—

"THE SECOND SCHEDULE

(See Section 3E)

MATTERS TO BE PROVIDED FOR IN THE COAL MINES FAMILY PENSION SCHEME

1. The employees or class of employees to whom the Coal Mines Family Pension Scheme shall apply and the time within which option to join that Scheme shall be exercised by those employees to whom the said Scheme does not apply.

2. Subject to the provisions of Section 3E (2), the portion of employer's and employee's contribution which may be credited to the Family Pension Fund and the manner in which it may be credited.

3. The contribution by the Central Government to the Family Pension Fund and the manner in which such contribution is to be made.

4. The manner in which the accounts of the Family Pension Fund shall be kept and the investment of moneys belonging to the Family Pension Fund with the Central Government at a rate of interest which

shall not be less than five and a half per centum per annum.

5. The form in which an employee shall furnish particulars about himself and his family whenever required.

6. The nomination of a person to receive the assurance amount due to the employee after his death and the cancellation or variation of such nomination.

7. The registers and records to be maintained in respect of employees, the form or design of any identity card, token or disc for the purpose of identifying any employee, or his nominee or a member of his family entitled to receive the pension.

8. The scales of family pension and the assurance amount.

9. The mode of disbursement of family pension and the arrangements to be entered into with such disbursing agencies as may be specified for the purpose.

10. The manner in which the expenses incurred in connection with the administration of the Coal Mines Family Pension Scheme may be paid by the Central Government to the Board.

11. Any other matter which is to be provided for in the Coal Mines Family Pension Scheme or which may be necessary or proper for the purpose of implementing the Coal Mines Family Pension Scheme."

12. Amendment of long title.—In the long title to the Employees' Provident Funds Act, 1952 (hereinafter referred to as the Provident Funds Act), after the words "provident funds", the words "and family pension fund" shall be inserted.

13. Amendment of Section 1.—In Section 1 of the Provident Funds Act,—

(a) in sub-section (1), after the words "Provident Funds", the words "and Family Pension Fund" shall be inserted;

(b) the proviso to sub-section (5) shall be omitted.

14. Amendment of Section 2.—In Section 2 of the Provident Funds Act,—

(a) after clause (g), the following clauses shall be inserted, namely:—

(gg) "Family Pension Fund" means the Family Pension Fund established under the Family Pension Scheme;

(ggg) "Family Pension Scheme" means the Employees' Family Pension Scheme framed under Section 6A;

(b) for clause (l), the following clause shall be substituted, namely:—

(l) "Scheme" means the Employees' Provident Fund Scheme framed under Section 5.

15. Amendment of Section 5A.—In Section 5A of the Provident Funds Act,—

(a) in sub-section (3), after the words "The Central Board shall", the words, figure and letter "subject to the provisions of Section 6A," shall be inserted;

(b) in sub-section (4), after the words "of the Scheme", the words "and the Family Pension Scheme" shall be inserted.

16. Amendment of Section 5D.— In sub-section (3) of Sec. 5D of the Provident Funds Act, after the words "the Scheme", the words "and the Family Pension Scheme" shall be inserted.

17. Amendment of Section 5E.— In Section 5E of the Provident Funds Act, after the words "the Scheme", the words "and the Family Pension Scheme" shall be inserted.

18. Insertion of new Sections 6A and 6B.— After Section 6 of the Provident Funds Act, the following sections shall be inserted, namely:—

"6A. Employees' Family Pension Scheme.— (1) The Central Government may, by notification in the Official Gazette, frame a scheme to be called the Employees' Family Pension Scheme for the purpose of providing family pension and life assurance benefits to the employees of any establishment or class of establishments to which this Act applies.

(2) There shall be established, as soon as may be after the framing of the Family Pension Scheme, a Family Pension Fund into which shall be paid from time to time in respect of every such employee—

(a) such portion, not exceeding one-fourth, of the amount payable under Section 6 as contribution by the employer as well as the employee, as may be specified in the Family Pension Scheme,

(b) such sums as are payable by the employer of an exempted establishment under sub-section (6) of Section 17, and

(c) such sums, being not less than the amount payable in pursuance of clause (a) out of the employer's contribution under Section 6, as the Central Government may, after due appropriation made by Parliament by law in this behalf, specify.

(3) The Family Pension Fund shall vest in and be administered by the Central Board.

(4) The Family Pension Scheme may provide for all or any of the matters specified in Schedule III.

(5) The Family Pension Scheme may provide that any of its provisions shall take effect either prospectively or retrospectively on such date as may be specified in this behalf in that Scheme.

6B. Special grant by Central Government.— The Central Government shall, after due appropriation made by Parliament by law in this behalf, pay such further sums as may be determined by it into the Family Pension Fund to meet all the expenses in connection with the administration of the Family Pension Scheme other than the expenses towards the cost of any benefits provided by or under the said Scheme."

19. Amendment of Section 7.— In sub-section (1) of Section 7 of the Provident Funds Act, for the words "any Scheme framed under this Act", the words "the Scheme or the Family Pension Scheme, as the case may be" shall be substituted.

20. Amendment of Section 7A.— In sub-section (1) of Section 7A of the Provident Funds Act, for the words "or of the Scheme", the words, "the Scheme or the Family Pension Scheme, as the case may be," shall be substituted.

21. Amendment of Section 8.— In clause (b) of Section 8 of the Provident Funds Act, for the words and figures "under Section 17", the words and figures "under Section 17 or in respect of the contribution payable by him towards the Family Pension Scheme under the said section 17" shall be substituted.

22. Amendment of Section 10.— In Section 10 of the Provident Funds Act, after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) The provisions of sub-section (1) and sub-section (2) shall, so far as may be, apply in relation to the family pension or any other amount payable under the Family Pension Scheme as they apply in relation to any amount payable out of the Fund."

23. Amendment of Section 11.— In clause (b) of Section 11 of the Provident Funds Act, after the words "under the rules of the provident fund," the words, brackets and figures "any contribution payable by him towards the Family Pension Fund under sub-section (6) of Section 17," shall be inserted.

24. Amendment of Section 13.— In Section 13 of the Provident Funds Act,—

(a) in sub-section (1), for the words "or of any Scheme", the words "the Scheme or the Family Pension Scheme" shall be substituted;

(b) sub-section (2A) shall be re-numbered as sub-section (2B) and before sub-section (2B) as so re-numbered, the following sub-section shall be inserted, namely:—

"(2A) Any Inspector appointed under sub-section (1) may, for the purpose of inquiring into the correctness of any information furnished in connection with the Family Pension Scheme or for the purpose of ascertaining whether any of the provisions of this Act or of the Family Pension Scheme have been complied with in respect of an establishment to which the Family Pension Scheme applies, exercise all or any of the powers conferred on him under clause (a), clause (b), clause (c) or clause (d) of sub-section (2).";

(c) in sub-section (2B) as so re-numbered, after the words, brackets and figure "under sub-section (2)", the words, brackets, figure and letter "or under sub-section

(2A), as the case may be," shall be inserted.

25. Amendment of Section 14.— In Section 14 of the Provident Funds Act,—

(a) in sub-section (1), for the words "or under any Scheme", the words "the Scheme or the Family Pension Scheme" shall be substituted;

(b) in sub-section (2), for the words "A Scheme framed under this Act", the words "The Scheme or the Family Pension Scheme" shall be substituted;

(c) in sub-section (3), for the words "or under any Scheme", the words "the Scheme or the Family Pension Scheme" shall be substituted.

26. Amendment of Section 14A.— In Section 14A of the Provident Funds Act,—

(a) in sub-section (1), for the words "or the Scheme made thereunder", the words "the Scheme or the Family Pension Scheme" shall be substituted;

(b) in sub-section (2), for the words "or the Scheme thereunder", the words "the Scheme or the Family Pension Scheme" shall be substituted.

27. Amendment of Section 17.— In Section 17 of the Provident Funds Act,—

(a) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) The Central Government may, by notification in the Official Gazette, and subject to such conditions as may be specified in the notification, exempt from the operation of all or any of the provisions of the Family Pension Scheme, any establishment if the employees of such establishment are in enjoyment of benefits in the nature of family pension, and the Central Government is of opinion that such benefits are on the whole not less favourable to such employees than the benefits provided under this Act or the Family Pension Scheme in relation to employees in any other establishment of a similar character;"

(b) in sub-section (4),—

(i) in clause (a), the word "and" occurring at the end shall be omitted;

(ii) after clause (a), the following clause shall be inserted, namely:—

"(aa) in the case of an exemption granted under sub-section (1A), with any of the conditions imposed under that sub-section; and"

(c) for sub-section (5), the following sub-sections shall be substituted, namely:—

"(5) Where any exemption granted under sub-section (1), sub-section (1A) or sub-section (2) is cancelled, the amount of accumulations to the credit of every employee to whom such exemption applied, in the provident fund or the family pension fund of the establishment in which he is employed, shall be transferred within such time and in such manner as may be specified in the Scheme or the Family Pension Scheme to the credit of his account in the Fund or the Family Pension Fund, as the case may be.

(6) Subject to the provisions of sub-section (1A), the employer of an exempted establishment or of an exempted employee of an establishment to which the provisions of the Family Pension Scheme apply, shall, notwithstanding any exemption granted under sub-section (1) or sub-section (2), pay to the Family Pension Fund such portion of the employer's contribution as well as the employee's contribution to its provident fund within such time and in such manner as may be specified in the Family Pension Scheme."

28. Amendment of Section 18.— In Section 18 of the Provident Funds Act, for the words "or under any Scheme", the words "the Scheme or the Family Pension Scheme" shall be substituted.

29. Amendment of Section 19.— In Section 19 of the Provident Funds Act, for the words "or any Scheme", the words "the Scheme or the Family Pension Scheme" shall be substituted.

30. Insertion of new Schedule III.— After Schedule II to the Provident Funds Act, the following Schedule shall be inserted, namely:—

"SCHEDULE III

(See Section 6A (4).)

MATTERS FOR WHICH PROVISION MAY BE MADE IN THE FAMILY PENSION SCHEME

1. The employees or class of employees to whom the Family Pension Scheme shall apply and the time within which option to join that Scheme shall be exercised by those employees to whom the said Scheme does not apply.

2. Subject to the provisions of Section 6A (2), the portion of employer's and employee's contribution which may be credited to the Family Pension Fund and the manner in which it may be credited.

3. The contribution by the Central Government to the Family Pension Fund and the manner in which such contribution is to be made.

4. The manner in which the accounts of the Family Pension Fund shall be kept and the investment of moneys belonging to the Family Pension Fund with the Central Government at a rate of interest which shall not be less than five and a half per centum per annum.

5. The form in which an employee shall furnish particulars about himself and his family whenever required.

6. The nomination of a person to receive the assurance amount due to the employee after his death and the cancellation or variation of such nomination.

7. The registers and records to be maintained in respect of employees, the form or design of any identity card, token or disc for the purpose of identifying any

employee, or his nominee or a member of his family entitled to receive the pension.

8. The scales of family pension and the assurance amount.

9. The manner in which the exempted establishments have to pay the contributions (both employer's and employee's shares) towards the Family Pension Fund and the submission of returns relating thereto.

10. The mode of disbursement of family pension and the arrangements to be entered into with such disbursing agencies as may be specified for the purpose.

11. The manner in which the expenses incurred in connection with the administration of the Family Pension Scheme may be paid by the Central Government to the Central Board.

12. Any other matter which is to be provided for in the Family Pension Scheme or which may be necessary or proper for the purpose of implementing the Family Pension Scheme."

31. Consequential amendment of Act 31 of 1956.— In Section 44 of the Life Insurance Corporation Act, 1956, after clause (f), the following clause shall be inserted, namely:—

"(g) any Family Pension Scheme framed under the Coal Mines Provident Fund, Family Pension and Bonus Schemes Act, 1948 or the Employees' Provident Funds and Family Pension Fund Act, 1952 for the purpose of providing family pension and life assurance benefits to the employees covered by the said Scheme."

32. Repeal and savings.— (1) The Labour Provident Fund Laws (Amendment) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Coal Mines Act or the Provident Funds Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the Coal Mines Act or the Provident Funds Act as amended by this Act, as the case may be, as if this Act had come into force on the 13th day of February, 1971.

THE GENERAL INSURANCE (EMERGENCY PROVISIONS) ACT, 1971

(Act No. 17 of 1971)*

(17th June, 1971)

An Act to provide for the taking over, in the public interest, of the management of general insurance business pending nationalisation of such business.

WHEREAS it is expedient in the public interest that general insurance business should be nationalised;

AND WHEREAS it is expedient that pending such nationalisation, adequate steps

should be taken to protect the interest of the policy-holders;

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE GENERAL INSURANCE (EMERGENCY PROVISIONS) ACT, 1971.

(2) It shall be deemed to have come into force on the 13th day of May, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "appointed day" means the 13th day of May, 1971;

(b) "Custodian" means the person appointed under Section 4 to take over the management of the undertaking of any insurer;

(c) "general insurance business" means fire, marine or miscellaneous insurance business, whether carried on singly or in combination with one or more of them, but does not include capital redemption business and annuity certain business;

(d) "Insurance Act" means the Insurance Act, 1938;

(e) "insurer" means an insurer, as defined in the Insurance Act, who carries on general insurance business in India, and includes an insurer whose registration under that Act has not remained wholly cancelled for a period of six months immediately before the appointed day, but does not include the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956, or any State Government which carries on general insurance business;

(f) "notified order" means an order notified in the Official Gazette;

(g) "prescribed" means prescribed by rules made under this Act;

(h) "undertaking", in relation to an insurer incorporated outside India, means the undertaking of that insurer in India;

(i) words and expressions used herein but not defined, and defined in the Insurance Act, have the meanings respectively assigned to them in that Act.

3. Management of undertakings to vest in Government on commencement of this Act.—

(1) On and from the appointed day, management of the undertakings of all insurers shall vest in the Central Government, and, pending the appointment of a Custodian for the undertaking of any insurer, the persons in charge of the management of such undertaking immediately before the appointed day shall on and from the appointed day, be in charge of the management of the undertaking for and on behalf of the Central Government; and the management of the undertaking of the insurer shall be carried on by them subject to the provisions contained in sub-sections (3) and (5) and to such further directions, if any, as the Central Government may

*Received the assent of the President on 17-6-1971. Act published in Gaz. of India, 17-6-1971, Pt. II-S. 1, Ext. P. 157.

give to them by notice addressed and sent to the principal officer of the insurer.

(2) Any contract, whether express or implied, providing for the management of the undertaking of an insurer, made before the appointed day between the insurer and any person in charge of the management of such undertaking immediately before the appointed day, shall be deemed to have terminated on the appointed day.

(3) No insurer shall, without the previous approval of the person specified by the Central Government in this behalf in respect of that insurer (hereinafter referred to as the "authorised person"),—

(a) make any payment or grant any loan otherwise than in accordance with the normal practice observed by him in respect of such matters immediately before the appointed day;

(b) incur any expenditure from the assets appertaining to the undertaking otherwise than for the purpose of making routine payments of salaries or commissions to employees; insurance agents or for the purpose of meeting the routine day to day expenditure;

(c) transfer or otherwise dispose of any such assets or create any charge, hypothecation, lien or other encumbrance thereon;

(d) invest in any manner any moneys forming part of such assets;

(e) acquire any immovable property out of any moneys forming part of such assets;

(f) enter into any contract of service or agency, whether expressly or by implication, for purposes connected wholly or partly with the undertaking or vary the terms and conditions of any such contract subsisting on the appointed day;

(g) enter into any other transaction relating to the undertaking of the insurer other than a contract relating to the transaction of general insurance business or vary the terms and conditions of any agreement relating to any such transaction subsisting at the commencement of this Act.

(4) The approval of the authorised person may be given either generally in relation to certain classes of transactions of the insurer or specially in relation to any of his transactions.

(5) Every insurer shall deposit all securities and documents of title to any assets appertaining to the undertaking in any Scheduled Bank or Nationalised Bank in which the insurer had an account immediately before the appointed day or in any branch of the State Bank in the place where the head office or the principal office of the insurer is situated or, where there is no branch of the State Bank in such place, the nearest branch of the State Bank; and no such security or document shall be withdrawn from the Scheduled Bank, the Nationalised Bank or the State Bank, as the case may be, except with the permission of the authorised person:

Provided that nothing contained in this sub-section shall apply to any security or document of title kept in trust with an Official Trustee in pursuance of the articles of association of an insurer unless the Central Government, by notified order, otherwise directs.

Explanation.— In this sub-section,—

(a) "Scheduled Bank" means a bank included for the time being in the Second Schedule to the Reserve Bank of India Act, 1934;

(b) "State Bank" means the State Bank of India constituted under the State Bank of India Act, 1955;

(c) "Nationalised Bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

(6) Every insurer shall deliver forthwith to the person specified in this behalf by the Central Government in respect of that insurer the following documents, namely:—

(a) the minutes book or any other book in India containing all resolutions up to the appointed day of the persons in charge of the management of the undertaking before the appointed day;

(b) the current cheque books relating to the undertaking which are at the head office or the principal office of the insurer;

(c) all registers or other books containing particulars relating to the investment of any moneys appertaining to the undertaking including investments on mortgaged properties and all loans granted and advances made;

(d) all brokers' notes or certificates in the possession of the insurer in respect of any orders for the investment of any moneys appertaining to the undertaking.

(7) Without prejudice to the generality of the powers conferred by sub-section (1) and to the provisions contained in sub-sections (3), (5) and (6), any direction issued under sub-section (1) may require the persons in charge of the management of the undertaking of an insurer under this Act to furnish to the Central Government or to the authorised person such returns, statements and other information relating to the undertaking as may be mentioned in the direction.

(8) The persons in charge of the management of the undertaking of an insurer under this Act shall be entitled to such remuneration, whether by way of allowance or salary or perquisites as the Central Government may fix; and any such person may, by giving one month's notice in writing to the Central Government of his intention so to do, relinquish charge of the management of the undertaking.

4. Power of Central Government to appoint Custodians to take over the management of the undertaking of the insurer.—

(1) The Central Government may, as soon as it is convenient administratively so to do,

appoint any person as Custodian for the purpose of taking over the management of the undertaking of an insurer and the person so appointed shall carry on the management of the undertaking of the insurer for and on behalf of the Central Government.

(2) On the appointment of a Custodian under sub-section (1), the charge of management of the undertaking of the insurer shall vest in him and all persons in charge of the management of such undertaking immediately before such appointment shall cease to be in charge of such management and shall be bound to deliver to the Custodian all books of account, registers or other documents in their custody relating to the undertaking of the insurer.

(3) Nothing contained in sub-sections (3), (5) and (6) of Section 3 shall apply to any insurer the charge of management of whose undertaking has been taken over by the Custodian, but the Central Government may issue such directions to the Custodian as to his powers and duties as it deems desirable in the circumstances of the case, and the Custodian may apply to the Central Government at any time for instructions as to the manner in which he shall conduct the management of the undertaking of the insurer or in relation to any matter arising in the course of such management.

(4) The Custodian shall receive from the funds of the undertaking for the charge of management of which he is appointed under sub-section (1) such remuneration as the Central Government may fix.

(5) The Custodian shall hold office during the pleasure of the Central Government.

5. Power of Custodian to institute proceedings, etc.— The Custodian may, in relation to the undertaking of any insurer the charge of management of which has been taken over by him, exercise—

(a) all or any of the powers which the Controller of Insurance may exercise under Section 106 or Section 107 of the Insurance Act;

(b) all or any of the powers under Section 52B, Section 52BB, Section 52C or Section 52D of the Insurance Act which an Administrator appointed under Section 52A of that Act could have exercised in relation to life insurance business of an insurer.

6. Payment of compensation.— (1) Every insurer shall be given by the Central Government compensation for the vesting in it, under Section 3, of the management of the undertaking of the insurer.

(2) For every month during which the management of the undertaking of the insurer remains vested in the Central Government, the amount of compensation referred to in sub-section (1) shall be—

(A) in the case of an insurer referred to in clause (b) of sub-section (9) of Section 2 of the Insurance Act,—

(i) where the insurer has declared a dividend during at least one of the three calendar years 1967, 1968 and 1969,—

(a) a sum equal to one-twelfth of the annual average (for the three years) of the amount distributed to shareholders as dividend; or

(b) a sum equal to two-and-a-half rupees for every thousand rupees or part thereof of the net premium income of the undertaking of insurer during the year 1969, whichever is greater;

(ii) in any other case, a sum equal to two-and-a-half rupees for every thousand rupees or part thereof of the net premium income of the undertaking of the insurer during the year 1969;

(B) in the case of an insurer referred to in clause (a) of sub-section (9) of Sec. 2 of the Insurance Act, a sum equal to two-and-a-half rupees for every thousand rupees or part thereof of the net premium income of the undertaking of the insurer in India during the year 1969.

7. Compensation how to be paid.—

(1) The compensation referred to in Section 6 shall be paid by the Central Government in cash to every insurer.

(2) The compensation received by an insurer under Section 6 shall be dealt with by him in such manner as may be prescribed.

8. Penalties.— If any person—

(a) fails to deliver to the Custodian any books of account, registers or any other documents in his custody relating to the undertaking of an insurer in respect of the management of which the Custodian has been appointed, or

(b) retains any property of such insurer appertaining to the undertaking of the insurer, or

(c) fails to comply with the provisions contained in sub-section (3) or sub-section (5) or sub-section (6) of Section 3, or

(d) fails to comply with any directions issued under sub-section (1) or sub-section (7) of Section 3,

he shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.

9. Insurer not to be wound up by Court.— No proceeding for the winding up of an insurer, the management of whose undertaking has vested in the Central Government, under this Act, or for the appointment of a Receiver in respect of such business, shall lie in any Court.

10. Exclusion of time of Act for computing period of limitation.— In computing the period of limitation prescribed by any law for the time being in force for any suit or application against any person by an insurer in respect of any matter arising out of his undertaking, the time during which this Act is in force shall be excluded.

11. Effect of Act on other laws.— The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act.

12. Delegation of powers.— The Central Government may, by notified order, direct that all or any of the powers exercisable by it under this Act may also be exercised by any such person as may be specified in the order.

13. Protection of action taken under this Act.— (1) No suit, prosecution or other legal proceeding shall lie against any Custodian or authorised person in respect of anything which is in good faith done or intended to be done under this Act.

(2) No suit or other legal proceeding shall lie against the Central Government or any Custodian or authorised person for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

14. New certificate of registration not to be issued.— Notwithstanding the provisions of Section 3 of the Insurance Act, the Controller of Insurance shall not, after the appointed day, issue any new certificate of registration under that section to any person.

15. Act where not to apply.— Nothing contained in this Act shall apply to—

(a) any insurer whose business is being voluntarily wound up or is being wound up by a Court;

(b) any insurer to whom the Insurance Act does not apply by reason of the provisions contained in Section 2E thereof;

(c) the Calcutta Hospital and Nursing Home Benefit Association, Limited;

(d) the Export Credit Guarantee Corporation;

(e) the Deposit Insurance Scheme;

(f) any scheme of insurance which might be exempted by the Central Government relating to—

(i) crop and cattle,

(ii) war risks,

(iii) emergency risks;

(g) general insurance business carried on by a State Government or by the Life Insurance Corporation of India.

16. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the form and manner in which books of account appertaining to undertakings shall be maintained by insurers;

(b) the manner in which any compensation payable under this Act shall be dealt with by an insurer;

(c) the circumstances in which the remuneration payable to persons in charge of the management of the undertaking of an insurer under this Act or to Custodians shall be met by the Central Government, whether wholly or in part;

(d) any other matter which is required to be, or may be, prescribed.

17. Repeal and savings.— (1) The General Insurance (Emergency Provisions) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken (including any direction given and orders and rules made) under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

THE MANIPUR APPROPRIATION (NO. 2) ACT, 1971

(Act No. 18 of 1971)*

(19th June, 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the Union territory of Manipur or the service of the financial year 1971-72.

(The text of the Act is omitted.)

*Received the assent of the President on 19-6-1971. Act published in Gaz. of India; 19-6-1971, Pt. II-Sec. 1, Ext. p. 165; For Statement of Objects and Reasons, see Gaz. of India; 11-6-1971, Pt. II-Sec. 2, Ext. p. 290.

THE APPROPRIATION (RAILWAYS) No. 2 ACT, 1971

(Act No. 19 of 1971)*

(23rd June, 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the service of the financial year 1971-72 for the purposes of Railways.

(The text of the Act is omitted.)

*Received the assent of the President on 23-6-1971. Act published in Gaz. of India; 24-6-1971, Pt. II-Sec. 1, Ext. p. 173. For Statement of Objects and Reasons, see Gaz. of India; 15-6-1971, Pt. II-S. 2, Ext. P. 315.

**THE BENGAL FINANCE (SALES TAX)
(DELHI VALIDATION OF APPOINT-
MENTS AND PROCEEDINGS)
ACT, 1971**

(Act No. 20 of 1971)*

(23rd June, 1971)

An Act to validate appointments of certain officers under the Bengal Finance (Sales Tax) Act, 1941, as in force in the union territory of Delhi and to validate proceedings taken by such officers under that Act and the Central Sales Tax Act, 1956.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. **Short title.**— This Act may be called **THE BENGAL FINANCE (SALES TAX) (DELHI VALIDATION OF APPOINTMENTS AND PROCEEDINGS) ACT, 1971.**

2. **Definitions.**— In this Act,—

(a) “Administrator” means the administrator of the Union Territory of Delhi appointed by the President under Article 239 of the Constitution;

(b) “appointment” means appointment as—

(a) Commissioner of Sales Tax; or
(b) Additional Commissioner of Sales Tax; or

(c) Deputy Commissioner of Sales Tax; or

(d) Assistant Commissioner of Sales Tax; or

(e) Sales Tax Officer; or

(f) Assistant Sales Tax Officer; or

(g) Inspector.

3. **Validation of appointments, assessments, etc.**— Notwithstanding anything contained in any judgment, decree or order of any court, tribunal or other authority,—

(a) no appointment of any person made or purporting to have been made under or for the purposes of the Bengal Finance (Sales Tax) Act, 1941, as in force in the Union Territory of Delhi (hereinafter referred to as the principal Act) before the commencement of this Act shall be deemed to be illegal or invalid or ever to have been illegal or invalid merely on the ground that such appointment was not made in accordance with the provisions of Section 3 of the principal Act or on the ground that such appointment was not made under that section or on both those grounds; and

(b) no assessment, re-assessment, levy or collection of any tax made or purporting

to have been made under the principal Act or under the Central Sales Tax Act, 1956, as the case may be, before the commencement of this Act and no jurisdiction exercised, no order made and no other act or proceeding or thing done or taken by, or before, a person referred to in cl. (a) in relation to such assessment, re-assessment, levy or collection shall be deemed to be illegal or invalid or ever to have been illegal or invalid merely on the ground that such jurisdiction was exercised or such order had been made or such other act or proceeding or thing had been done or taken by, or before, a person whose appointment was not made in accordance with or under the provisions of Section 3 of the principal Act, and accordingly—

(i) all appointments made or purporting to have been made under or for the purposes of the principal Act before the commencement of this Act shall, for all purposes, be deemed to be, and to have been, made in accordance with law;

(ii) the jurisdiction exercised, orders made and all other acts, proceedings or things done or taken by the Administrator or by a person whose appointment had been made as aforesaid or by any other officer of Government or by any tribunal or other authority in connection with the said appointments or in connection with the assessment, re-assessment, levy or collection of tax under the principal Act or under the Central Sales Tax Act, 1956, as the case may be, shall, for all purposes, be deemed to be and to have been exercised, made, done or taken in accordance with law; and

(iii) no suit or other proceedings shall be maintained or continued in any Court or before any tribunal or other authority whatsoever on the ground that any such appointment was illegal or invalid or any such jurisdiction, order or other act, proceeding or thing was not exercised, made, done or taken in accordance with law.

4. **Repeal and saving.**— (1) The Bengal Finance (Sales Tax) (Delhi Validation of Appointments and Proceedings) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under this Act, as if this Act had commenced on the 18th day of May, 1971.

*Received the assent of the President on 23-6-1971. Act published in Gaz. of India; 24-6-1971, Pt. II-Sec. 1, Ext., P. 169. For the Statement of Objects and Reasons, see Gaz. of India; 3-6-1971, Pt. II-S.2, Ext. P. 268.

THE GOLD (CONTROL) AMENDMENT ACT, 1971

(Act No. 21 of 1971)*

(24th June, 1971)

An Act further to amend the Gold (Control) Act, 1968.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE GOLD (CONTROL) AMENDMENT ACT, 1971.

(2) It shall be deemed to have come into force on the 20th day of May, 1971.

2. Amendment of Section 71.— In Section 71 of the Gold (Control) Act, 1968 (hereinafter referred to as the principal Act),—

(i) for sub-section (1), the following sub-section shall be, and shall be deemed always to have been substituted, namely:—

“(1) Any gold in respect of which any provision of this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, together with any package, covering or receptacle in which such gold is found, shall be liable to confiscation:

Provided that where it is established to the satisfaction of the officer adjudging the confiscation that such gold or other thing belongs to a person other than the person who has, by any act or omission, rendered it liable to confiscation, and such act or omission was without the knowledge or connivance of the person to whom it belongs, it shall not be ordered to be confiscated but such other action, as is authorised by this Act, may be taken against the person who has, by such act or omission, rendered it liable to confiscation.”;

(ii) for sub-sections (2), (3) and (4), the following sub-sections shall be substituted, namely:—

“(2) Where any package, covering or receptacle referred to in sub-section (1) contains any goods, such contents shall also be liable to confiscation.

(3) Where any gold is liable to confiscation under sub-section (1), it shall be so liable notwithstanding any change in its form, and where such gold is mixed with other goods in such manner that it cannot be separated from those other goods, the whole of such goods, including the gold, shall be liable to confiscation.

*Received the assent of the President on 24-6-1971. Act published in Gaz. of India; 25-6-1971, Pt. II-Sec. 1, Ext. P. 175. For Statement of Objects and Reasons, see Gaz. of India; 1-6-1971,—Pt. II-S. 2, Ext. P. 262.

(4) On and from the commencement of the Gold (Control) Amendment Act, 1971, the proviso to sub-section (1) shall also apply to any gold or other thing which is liable to confiscation under sub-section (2) or sub-section (3).”.

3. Amendment of Section 73.— In Section 73 of the principal Act, the word “twice” shall be, and shall be deemed always to have been, omitted.

4. Reopening of past confiscations.—

(1) Where any order made, before the commencement of this Act, for the confiscation of any gold or other thing or giving option to pay fine in lieu thereof is such that it could not have been made if the principal Act, as amended by this Act, were in force on the date on which the said order was made, the officer competent under Sec. 73 to adjudge such confiscation shall, on an application made to him by the person aggrieved by such order, set aside the order of confiscation or, as the case may be, the order giving option to pay fine in lieu of confiscation, and also any order imposing penalty in addition to confiscation or giving option to pay fine in lieu thereof, and make a fresh adjudication in accordance with the provisions of the principal Act, as amended by this Act.

(2) The power referred to in sub-section (1) shall be exercised by the officer specified therein in relation to the final order of adjudication of confiscation or giving option to pay fine in lieu thereof or imposing any penalty, whether or not such final order was made in appeal under S. 80 or in revision under Section 81 or Section 82.

(3) Every application referred to in sub-section (1) shall be made within ninety days from the commencement of this Act or within such further time, not exceeding ninety days, as the officer specified in that sub-section may, on sufficient cause being shown, allow.

(4) Where, and in so far as, any order for the confiscation of any gold or other thing, or any option given to pay fine in lieu of confiscation or imposing any penalty is modified or reversed, the officer specified in sub-section (1) shall make an order for such refund or restitution as the circumstances of the case may require:

Provided that where the restitution of any gold or other thing is not practicable, the said authority shall make an order for the payment to the person to whom such restitution is to be made, the market value of such gold or other thing, as on the date on which the fresh adjudication is made.

(5) Nothing in this section shall apply to any confiscation made, option given to pay fine in lieu of confiscation, or penalty imposed under Part XII-A of the Defence of India Rules, 1962.

5. **Validation.**— Notwithstanding any judgment, decree or order of any Court, any confiscation made, penalty imposed or fine levied under the Gold (Control) Act, 1968, before the commencement of this Act shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been made, imposed or levied in accordance with the provisions of the Gold (Control) Act, 1968, as amended by this Act.

6. **Repeal and savings.**— (1) The Gold (Control) Amendment Ordinance, 1971 is hereby repealed.

(2) Notwithstanding such repeal, anything done, any action taken or any order made under the said Ordinance shall be deemed to have been done, taken or made under the corresponding provisions of the Gold (Control) Act, 1968, as amended by this Act.

THE SALARIES AND ALLOWANCES OF OFFICERS OF PARLIAMENT (AMENDMENT) ACT, 1971

(Act No. 22 of 1971)*

(24th June, 1971)

An Act further to amend the Salaries and Allowances of Officers of Parliament Act, 1953.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. **Short title.**— This Act may be called THE SALARIES AND ALLOWANCES OF OFFICERS OF PARLIAMENT (AMENDMENT) ACT, 1971.

2. **Substitution of new section for Section 3.**— For Section 3 of the Salaries and Allowances of Officers of Parliament Act, 1953 (hereinafter referred to as the principal Act), the following section shall be substituted, namely:—

“3. **Salaries of officers of Parliament.**— There shall be paid to each officer of Parliament a salary of two thousand, two hundred and fifty rupees per mensem.”

3. **Amendment of Section 5.**— In Section 5 of the principal Act, the words “and to the Deputy Chairman and the Deputy Speaker a sumptuary allowance of two hundred and fifty rupees per mensem” shall be added at the end.

*Received the assent of the President on 24-6-1971. Act published in Gaz. of India; 25-6-1971, Pt. II-S. 1, Ext. P. 178. For Statement of Objects and Reasons, see Gaz. of India; 4-6-1971, Pt. II-S. 2, Ext. P. 280.

THE MYSORE STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971

(Act No. 23 of 1971)*

(26th June, 1971)

An Act to confer on the President the power of the Legislature of the State of Mysore to make laws.

BE it enacted by Parliament in the Twenty-second year of the Republic of India as follows:—

1. **Short title.**— This Act may be called THE MYSORE STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971.

2. **Definition.**— In this Act, “Proclamation” means the Proclamation issued on the 27th day of March, 1971, under Article 356 of the Constitution, by the President, and published with the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 457 of the said date.

3. **Conferment on the President of the power of the State Legislature to make laws.**— (1) The power of the Legislature of the State of Mysore to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President.

(2) In the exercise of the said power, the President may, from time to time, whether Parliament is or is not in session, enact, as a President's Act a Bill containing such provisions as he considers necessary:

Provided that before enacting any such Act, the President shall, whenever he considers it practicable to do so, consult a Committee constituted for the purpose, consisting of forty members of the House of the People nominated by the Speaker and twenty members of the Council of States nominated by the Chairman.

(3) Every Act enacted by the President under sub-section (2) shall, as soon as may be after enactment, be laid before each House of Parliament.

(4) Either House of Parliament may, by resolution, passed within thirty days from the date on which the Act has been laid before it under sub-section (3), which period may be comprised in one session or in two successive sessions, direct any modifications to be made in the Act and if the modifications are agreed to by the other House of Parliament during the session in which the Act has been so laid before it or the session succeeding, such modifications shall be given effect to by the President by enacting an amending Act under sub-section (2):

*Received the assent of the President on 26-6-1971. Act published in Gaz. of India; 28-6-1971, Pt. II-Sec. 1, Ext. P. 179. For Statement of Objects and Reasons, see Gaz. of India; 14-6-1971, Pt. II-S. 2, Ext. P. 301.

Provided that nothing in this sub-section shall affect the validity of the Act or of any action taken thereunder before it is so amended.

THE DELHI SIKH GURDWARAS (MANAGEMENT) ACT, 1971

(Act No. 24 of 1971)*

(26th June, 1971)

An Act to provide for the better management of certain Sikh Gurdwaras and Gurdwara property.

(Text of the Act not printed)

*Received the assent of the President on 26-6-1971. Act published in Gaz. of India; 28-6-1971, Pt. II-S. 1, Ext. P. 181. For Statement of Objects and Reasons, see Gaz. of India; 14-6-1971, Pt. II-S. 2, Ext. P. 310.

THE PUNJAB APPROPRIATION ACT, 1971

(Act No. 25 of 1971)*

(28th June, 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State of Punjab for the services of the financial year 1971-72.

(Text of the Act is omitted.)

*Received the assent of the President on 28-6-1971. Act published in Gaz. of India; 29-6-1971, Pt. II-S. 1 Ext. P. 187. For Statement of Objects and Reasons, see Gaz. of India; 21-6-1971, Pt. II-S. 2, Ext. F. 345.

THE MAINTENANCE OF INTERNAL SECURITY ACT, 1971

(Act No. 26 of 1971)*

(2nd July, 1971)

An Act to provide for detention in certain cases for the purpose of maintenance of internal security and matters connected therewith.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and extent.—(1) This Act may be called THE MAINTENANCE OF INTERNAL SECURITY ACT, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "appropriate Government" means, as respects a detention order made by the Central Government or a person detained

*Received the assent of the President on 2-7-1971. Act published in Gaz. of India; 2-7-1971, Pt. II-S. 1, Ext. P. 191. For Statement of Objects and Reasons, see Gaz. of India; 3-6-1971, Pt. II-S. 2, Ext. P. 276.

1971 Acts/2

under such order, the Central Government, and as respects a detention order made by a State Government or by an officer subordinate to a State Government or as respects a person detained under such order, the State Government;

(b) "detention order" means an order made under Section 3;

(c) "Foreigner" has the same meaning as in the Foreigners Act, 1946;

(d) "State Government" in relation to a Union Territory, means the administrator thereof.

3. Power to make orders detaining certain persons.—(1) The Central Government or the State Government may,—

(a) if satisfied with respect to any person (including a foreigner) that with a view to preventing him from acting in any manner prejudicial to—

(i) the defence of India, the relations of India with foreign powers, or the security of India, or

(ii) the security of the State or the maintenance of public order, or

(iii) the maintenance of supplies and services essential to the community, or

(b) if satisfied with respect to any foreigner that with a view to regulating his continued presence in India or with a view to making arrangements for his expulsion from India,

it is necessary so to do, make an order directing that such person be detained.

(2) Any of the following officers, namely:—

(a) district magistrates,

(b) additional district magistrates specially empowered in this behalf by the State Government,

(c) Commissioners of Police, wherever they have been appointed, may, if satisfied as provided in sub-cl. (ii) and (iii) of clause (a) of sub-section (1), exercise the power conferred by the said sub-section.

(3) When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the State Government to which he is subordinate together with the grounds on which the order has been made and such other particulars as in his opinion have a bearing on the matter, and no such order shall remain in force for more than twelve days after the making thereof unless in the meantime it has been approved by the State Government:

Provided that where under Section 8 the grounds of detention are communicated by the authority making the order after five days but not later than fifteen days from the date of detention, this sub-section shall apply subject to the modification that for the words "twelve days", the words "twenty-two days" shall be substituted.

(4) When any order is made or approved by the State Government under this section, the State Government shall, within

seven days, report the fact to the Central Government together with the grounds on which the order has been made and such other particulars as in the opinion of the State Government have a bearing on the necessity for the order.

4. Execution of detention orders.—

A detention order may be executed at any place in India in the manner provided for the execution of warrants of arrest under the Code of Criminal Procedure, 1898.

5. Power to regulate place and conditions of detention.— Every person in respect of whom a detention order has been made shall be liable—

(a) to be detained in such place and under such conditions, including conditions as to maintenance, discipline and punishment for breaches of discipline, as the appropriate Government may, by general or special order, specify; and

(b) to be removed from one place of detention to another place of detention, whether within the same State or in another State, by order of the appropriate Government;

Provided that no order shall be made by a State Government under clause (b) for the removal of a person from one State to another State except with the consent of the Government of that other State.

6. Detention orders not to be invalid or inoperative on certain grounds.— No detention order shall be invalid or inoperative merely by reason—

(a) that the person to be detained thereunder is outside the limits of the territorial jurisdiction of the Government or officer making the order; or

(b) that the place of detention of such person is outside the said limits.

7. Powers in relation to absconding persons.— (1) If the Central Government or the State Government or an officer specified in sub-section (2) of Section 3, as the case may be, has reason to believe that a person in respect of whom a detention order has been made has absconded or is concealing himself so that the order cannot be executed, that Government or officer may—

(a) make a report in writing of the fact to a Presidency Magistrate or a Magistrate of the first class having jurisdiction in the place where the said person ordinarily resides; and thereupon the provisions of Sections 87, 88 and 89 of the Code of Criminal Procedure, 1898, shall apply in respect of the said person and his property as if the order directing that he be detained were a warrant issued by the Magistrate;

(b) by order notified in the Official Gazette direct the said person to appear before such officer, at such place and within such period as may be specified in the

order; and if the said person fails to comply with such direction he shall, unless he proves that it was not possible for him to comply therewith and that he had, within the period specified in the order, informed the officer mentioned in the order of the reason which rendered compliance therewith impossible and of his whereabouts, be punishable with imprisonment for a term which may extend to one year or with fine or with both.

(2) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, every offence under clause (b) of sub-section (1) shall be cognizable.

8. Grounds of order of detention to be disclosed to persons affected by the order.— (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, but ordinarily not later than five days and in exceptional circumstances and for reasons to be recorded in writing, not later than fifteen days, from the date of detention, communicate to him the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order to the appropriate Government.

(2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

9. Constitution of Advisory Boards.—

(1) The Central Government and each State Government shall, whenever necessary, constitute one or more Advisory Boards for the purposes of this Act.

(2) Every such Board shall consist of three persons who are, or have been, or are qualified to be appointed as, Judges of a High Court, and such persons shall be appointed by the Central Government or the State Government, as the case may be.

(3) The appropriate Government shall appoint one of the members of the Advisory Board who is, or has been, a Judge of a High Court to be its Chairman, and in the case of a Union Territory the appointment to the Advisory Board, of any person who is a Judge of the High Court of a State shall be with the previous approval of the State Government concerned.

10. Reference to Advisory Boards.—

Save as otherwise expressly provided in this Act, in every case where a detention order has been made under this Act, the appropriate Government shall, within thirty days from the date of detention under the order, place before the Advisory Board constituted by it under Section 9 the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in case where the order has been made by an officer, also the report by such officer under sub-section (3) of Section 3.

11. Procedure of Advisory Boards.—

(1) The Advisory Board shall, after considering the materials placed before it and, after calling for such further information as it may deem necessary from the appropriate Government or from any person called for the purpose through the appropriate Government or from the person concerned, and if, in any particular case, it considers it essential so to do or if the person concerned desires to be heard, after hearing him in person, submit its report to the appropriate Government within ten weeks from the date of detention.

(2) The report of the Advisory Board shall specify in a separate part thereof the opinion of the Advisory Board as to whether or not there is sufficient cause for the detention of the person concerned.

(3) When there is a difference of opinion among the members forming the Advisory Board, the opinion of the majority of such members shall be deemed to be the opinion of the Board.

(4) Nothing in this section shall entitle any person against whom a detention order has been made to appear by any legal practitioner in any matter connected with the reference to the Advisory Board, and the proceedings of the Advisory Board and its report, excepting that part of the report in which the opinion of the Advisory Board is specified, shall be confidential.

12. Action upon the report of Advisory Board.—(1) In any case where the Advisory Board has reported that there is in its opinion sufficient cause for the detention of a person, the appropriate Government may confirm the detention order and continue the detention of the person concerned for such period as it thinks fit.

(2) In any case where the Advisory Board has reported that there is in its opinion no sufficient cause for the detention of the person concerned, the appropriate Government shall revoke the detention order and cause the person to be released forthwith.

13. Maximum period of detention.—The maximum period for which any person may be detained in pursuance of any detention order which has been confirmed under Section 12 shall be twelve months from the date of detention:

Provided that nothing contained in this section shall affect the power of the appropriate Government to revoke or modify the detention order at any earlier time.

14. Revocation of detention orders.—

(1) Without prejudice to the provisions of Section 21 of the General Clauses Act, 1897, a detention order may, at any time, be revoked or modified—

(a) notwithstanding that the order has been made by an officer mentioned in sub-section (2) of Section 3, by the State Government to which that officer is subordinate or by the Central Government;

(b) notwithstanding that the order has been made by a State Government or by the Central Government.

(2) The revocation or expiry of a detention order shall not bar the making of a fresh detention order under Section 3 against the same person in any case where fresh facts have arisen after the date of revocation or expiry on which the Central Government or a State Government or an officer, as the case may be, is satisfied that such an order should be made.

15. Temporary release of persons detained.—

(1) The appropriate Government may, at any time, direct that any person detained in pursuance of a detention order may be released for any specified period either without conditions or upon such conditions specified in the direction as that person accepts, and may, at any time, cancel his release.

(2) In directing the release of any person under sub-section (1), the appropriate Government may require him to enter into a bond with or without sureties for the due observance of the conditions specified in the direction.

(3) Any person released under sub-section (1) shall surrender himself at the time and place, and to the authority, specified in the order directing his release or cancelling his release, as the case may be.

(4) If any person fails without sufficient cause to surrender himself in the manner specified in sub-section (3), he shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both.

(5) If any person released under sub-section (1) fails to fulfil any of the conditions imposed upon him under the said sub-section or in the bond entered into by him, the bond shall be declared to be forfeited and any person bound thereby shall be liable to pay the penalty thereof.

16. Protection of action taken in good faith.—No suit or other legal proceeding shall lie against the Central Government or a State Government, and no suit, prosecution or other legal proceeding shall lie against any person, for anything in good faith done or intended to be done in pursuance of this Act.

17. Duration of detention in certain cases of foreigners.—

(1) Notwithstanding anything contained in this Act, any foreigner in respect of whom an order of detention has been made under this Act may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention, in any of the following classes of cases or under any of the following circumstances, namely:—

(a) where such foreigner enters or attempts to enter the territory of India or is found therein with arms, ammunition or explosives, or

(b) where such foreigner enters or attempts to enter a notified area or is found therein in contravention of Section 3 of the Criminal Law Amendment Act, 1961; or

(c) where such foreigner enters or attempts to enter the local limits or is found within the local limits of such area adjoining the borders of India as may be specified in an order made under Section 139 of the Border Security Force Act, 1968, without a valid travel document; or

(d) where the Central Government has reason to believe that such foreigner commits or is likely to commit any offence under the Official Secrets Act, 1923.

(2) In the case of any foreigner to whom sub-section (1) applies, Sections 10 to 13 shall have effect subject to the following modifications, namely:—

(a) in Section 10, for the words "shall, within thirty days", the words "may, at any time prior to but in no case later than three months before the expiration of two years" shall be substituted;

(b) in Section 11,—

(i) in sub-section (1), for the words "from the date of detention", the words "from the date on which reference is made to it" shall be substituted;

(ii) in sub-section (2), for the words "the detention of the person concerned", the words "the continued detention of the person concerned" shall be substituted;

(c) in Section 12, for the words "for the detention" in both the places where they occur, the words "for the continued detention" shall be substituted;

(d) in Section 13, for the words "twelve months" the words "three years" shall be substituted.

18. Repeal and saving.—(1) The Maintenance of Internal Security Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act as if this Act had come into force on the 7th day of May, 1971.

THE MYSORE APPROPRIATION (No. 2) ACT 1971

(Act No. 27 of 1971)*

(30th July 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State of Mysore for the services of the financial year 1971-72.

(Text of the Act not printed)

*Received the assent of the President on 30-7-1971. Act published in Gaz. of India; 30-7-1971, Pt. II-S. 1, Ext. P. 209. For Statement of Objects and Reasons, see Gaz. of India; 23-7-1971, Pt. II-S. 2, Ext. P. 468.

THE WEST BENGAL APPROPRIATION (No. 2) ACT, 1971

(Act No. 28 of 1971)*

(30th July 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State of West Bengal for the services of the financial year 1971-72.

(Text of the Act not printed)

*Received the assent of the President on 30-7-1971. Act published in Gaz. of India; 30-7-1971, Pt. II-S. 1, Ext. P. 213. For Statement of Objects and Reasons, see Gaz. of India; 26-7-1971, Pt. II-S. 2, Ext. P. 488.

THE GUJARAT APPROPRIATION ACT, 1971

(Act No. 29 of 1971)*

(30th July, 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of the State of Gujarat for the services of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 30-7-1971. Act published in Gaz. of India; 30-7-1971, Pt. II-S. 1, Ext. P. 218. For Statement of Objects and Reasons, see Gaz. of India; 23-7-1971, Pt. II-S. 2, Ext. P. 463.

THE APPROPRIATION (NO. 2) ACT, 1971

(Act No. 30 of 1971)*

(31st July, 1971)

An Act to authorise payment and appropriation of certain sums from and out of the Consolidated Fund of India for the services of the financial year 1971-72.

(Text of the Act not printed.)

*Received the assent of the President on 31-7-1971. Act published in Gaz. of India; 31-7-1971, Pt. II-S. 1, Ext. P. 227. For Statement of Objects and Reasons, see Gaz. of India; 21-7-1971, Pt. II-S. 2, Ext. P. 441.

THE WEST BENGAL STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971

(Act No. 31 of 1971)*

(7th August, 1971)

An Act to confer on the President the power of the Legislature of the State of West Bengal to make laws.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called **THE WEST BENGAL STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971.**

2. Definition.— In this Act, "Proclamation" means the Proclamation issued on the 29th day of June, 1971, under Article 356 of the Constitution, by the President, and published with the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 984 of the said date.

3. Conferment on the President of the power of the State Legislature to make laws.— (1) The power of the Legislature of the State of West Bengal to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President.

(2) In the exercise of the said power, the President may, from time to time, whether Parliament is or is not in session, enact as a President's Act, a Bill containing such provisions as he considers necessary:

Provided that before enacting any such Act, the President shall, whenever he considers it practicable to do so, consult a Committee constituted for the purpose, consisting of forty members of the House of the People, nominated by the Speaker, and twenty members of the Council of States nominated by the Chairman.

(3) Every Act enacted by the President under sub-section (2) shall, as soon as may be after enactment, be laid before each House of Parliament.

(4) Either House of Parliament may, by resolution passed within thirty days from the date on which the Act has been laid before it under sub-section (3), which period may be comprised in one session or in two successive sessions, direct any modifications to be made in the Act and if the modifications are agreed to by the other House of Parliament during the session in which the Act has been so laid before it or the session succeeding, such modifications shall be given effect to by the President by enacting an amending Act under sub-section (2):

*Received the assent of the President on 7-8-1971. Act published in Gaz. of India; 7-8-1971, Pt. II-S. 1, Ext. P. 235. For Statement of Objects and Reasons, see Gaz. of India; 16-6-1971, Pt. II-S. 2, Ext. P. 429.

Provided that nothing in this sub-section shall affect the validity of the Act or of any action taken thereunder before it is so amended.

THE FINANCE (NO. 2) ACT, 1971

(Act No. 32 of 1971)*

(10th August, 1971)

An Act to give effect to the financial proposals of the Central Government for the financial year 1971-72 and to provide for the levy of foreign travel tax.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and commencement.— (1) This Act may be called **THE FINANCE (NO. 2) ACT, 1971.**

(2) Save as otherwise provided in this Act, Sections 2 to 38 and Sections 53 and 54 shall be deemed to have come into force on the 1st day of April, 1971.

CHAPTER II

RATES OF INCOME-TAX

2. Income-tax.— (1) Subject to the provisions of sub-sections (2) and (3), for the assessment year commencing on the 1st day of April, 1971, income-tax shall be charged at the rates specified in Part I of the First Schedule and, in the cases to which Paragraphs A, B, C and D of that Part apply, shall be increased by a surcharge for purposes of the Union and in the cases to which Paragraph C applies, also by a special surcharge for purposes of the Union, calculated in each case in the manner provided therein.

(2) In making any assessment for the assessment year commencing on the 1st day of April, 1971, where the total income of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956, includes any profits and gains from life insurance business, the income-tax payable by it shall be the aggregate of the income-tax calculated—

(i) on the amount of profits and gains from life insurance business so included, at the rate applicable in the case of the Life Insurance Corporation of India, in accordance with Paragraph E of Part I of the First Schedule, to that part of its total income which consists of profits and gains from life insurance business; and

*Received the assent of the President on 10-8-1971. Act published in Gaz. of India, 10-8-1971, Pt. II-S. 1, Ext. P. 247. For Statement of Objects and Reasons, see Gaz. of India, 28-5-1971, Pt. II-S. 2, Ext. P. 258/49.

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(ii) on the remaining part of its total income, at the rate applicable to the company on its total income.

(3) In cases to which Chapter XII or Section 164 of the Income-tax Act, 1961 (hereinafter referred to as the Income-tax Act) applies, the tax chargeable shall be determined as provided in that Chapter or that section, and with reference to the rates imposed by sub-section (1) or the rates as specified in that Chapter or section, as the case may be.

(4) In cases in which tax has to be deducted under Sections 193, 194, 194A and 195 of the Income-tax Act at the rates in force, the deduction shall be made at the rates specified in Part II of the First Schedule.

(5) In cases in which income-tax has to be calculated under the first proviso to sub-section (5) of Section 132 of the Income-tax Act or charged under sub-section (4) of Section 172 or sub-section (2) of Section 174 or S. 175 or sub-sec. (2) of S. 176 of the said Act or deducted under Section 192 of the said Act from income chargeable under the head "Salaries" or deducted under sub-section (9) of Section 80E of the said Act from any payment referred to in the said sub-section (9) or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed, at the rate or rates in force, such income-tax or, as the case may be, "advance tax" shall be so calculated, charged, deducted or computed at the rate or rates specified in Part III of the First Schedule: Provided that in respect of any income chargeable to tax under Section 164 of the Income-tax Act at the rate of sixty-five per cent., "advance tax" shall be computed at that rate.

(6) For the purposes of this section and the First Schedule,—

(a) "company in which the public are substantially interested" means a company which is such a company as is referred to in Section 108 of the Income-tax Act;

(b) "domestic company" means an Indian company, or any other company which, in respect of its income liable to income-tax under the Income-tax Act, for the assessment year commencing on the 1st day of April, 1971, has made the prescribed arrangements for the declaration and payment within India of the dividends (including dividends on preference shares) payable out of such income in accordance with the provisions of Section 194 of that Act;

(c) "industrial company" means a company which is mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining.

Explanation.—For the purposes of this clause, a company shall be deemed to

be mainly engaged in the business of generation or distribution of electricity or any other form of power or in the construction of ships or in the manufacture or processing of goods or in mining, if the income attributable to any one or more of the aforesaid activities included in its total income of the previous year (as computed before making any deduction under Chapter VIA of the Income-tax Act) is not less than fifty-one per cent. of such total income;

(d) "tax free security" means any security of the Central Government issued or declared to be income-tax free, or any security of a State Government issued income-tax free, the income-tax whereon is payable by the State Government;

(e) all other words and expressions used in this section and the First Schedule but not defined in this sub-section and defined in the Income-tax Act shall have the meanings, respectively, assigned to them in that Act.

CHAPTER III

INCOME-TAX

3. Amendment of Section 2.—In Section 2 of the Income-tax Act,—

(a) for clause (17), the following clause shall be substituted, namely:—

(17) "company" means—

(i) any Indian company, or

(ii) any body corporate incorporated by or under the laws of a country outside India, or

(iii) any institution, association or body which is or was assessable or was assessed as a company for any assessment year under the Indian Income-tax Act, 1922 or which is or was assessable or was assessed under this Act as a company for any assessment year commencing on or before the 1st day of April, 1970, or

(iv) any institution, association or body, whether incorporated or not and whether Indian or non-Indian, which is declared by general or special order of the Board to be a company;

Provided that such institution, association or body shall be deemed to be a company only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971 or on or after that date) as may be specified in the declaration;

(b) in clause (18), after sub-clause (a), the following sub-clauses shall be inserted, namely:—

(aa) if it is a company which is registered under Section 25 of the Companies Act, 1956; or

(ab) if it is a company having no share capital and if, having regard to its objects, the nature and composition of its membership and other relevant considerations, it is declared by order of the Board to be a company in which the public are substantially interested;

Provided that such company shall be deemed to be a company in which the public are substantially interested only for such assessment year or assessment years (whether commencing before the 1st day of April, 1971 or on or after that date) as may be specified in the declaration; or;

(c) in clause (26),—

(i) after sub-clause (i), the following sub-clauses shall be inserted, namely:—

“(ia) a corporation established by or under a Central, State or Provincial Act;

(ib) any institution, association or body which is declared by the Board to be a company under clause (17);”;

(ii) in the proviso, for the words “registered office of the company”, the words “registered or, as the case may be, principal office of the company, corporation, institution, association or body” shall be substituted;

(d) after clause (43A), the following clause shall be inserted with effect from the 1st day of January, 1972, namely:—

“(43B) “Tax Recovery Commissioner” means a Commissioner or an Assistant Commissioner of Income-tax who may be authorised by the Central Government, by general or special notification in the Official Gazette, to exercise the powers of a Tax Recovery Commissioner;”.

4. Amendment of Section 10.— In Section 10 of the Income-tax Act,—

(a) in clause (20), for the words “which accrues or arises from the supply of a commodity or service within its own jurisdictional area;”, the words “which accrues or arises from the supply of a commodity or service (not being water or electricity) within its own jurisdictional area or from the supply of water or electricity within or outside its own jurisdictional area;” shall be substituted with effect from the 1st day of April, 1972;

(b) in clause (26A),—

(i) the brackets and words “(not being an individual who is in the service of Government)” shall be, and shall be deemed always to have been, omitted;

(ii) for the expression “1st day of April, 1970”, the expression “1st day of April, 1975” shall be substituted and shall be deemed to have been substituted with effect from the 1st day of April, 1970.

5. Amendment of Section 11.— In Section 11 of the Income-tax Act, after sub-section (1), the following sub-section shall be, and shall be deemed always to have been, inserted, namely:—

“(1A) For the purposes of sub-section (1),—

(a) where a capital asset, being property held under trust wholly for charitable or religious purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the capital gain arising from the transfer shall be deemed to have

been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of such capital gain;

(ii) where only a part of the net consideration is utilised for acquiring the new capital asset, so much of such capital gain as is equal to the amount, if any, by which the amount so utilised exceeds the cost of the transferred asset;

(b) where a capital asset, being property held under trust in part only for such purposes, is transferred and the whole or any part of the net consideration is utilised for acquiring another capital asset to be so held, then, the appropriate fraction of the capital gain arising from the transfer shall be deemed to have been applied to charitable or religious purposes to the extent specified hereunder, namely:—

(i) where the whole of the net consideration is utilised in acquiring the new capital asset, the whole of the appropriate fraction of such capital gain;

(ii) in any other case, so much of the appropriate fraction of the capital gain as is equal to the amount, if any, by which the appropriate fraction of the amount utilised for acquiring the new asset exceeds the appropriate fraction of the cost of the transferred asset.

Explanation.— In this sub-section,—

(i) “appropriate fraction” means the fraction which represents the extent to which the income derived from the capital asset transferred was immediately before such transfer applicable to charitable or religious purposes;

(ii) “cost of the transferred asset” means the aggregate of the cost of acquisition (as ascertained for the purposes of Sections 48 and 49) of the capital asset which is the subject of the transfer and the cost of any improvement thereto within the meaning assigned to that expression in sub-clause (b) of clause (1) of Section 55;

(iii) “net consideration” means the full value of the consideration received or accruing as a result of the transfer of the capital asset as reduced by any expenditure incurred wholly and exclusively in connection with such transfer.

6. Amendment of Section 13.— In Section 13 of the Income-tax Act, in sub-section (4) for the words “moneys of the trust or the institution”, the words “funds of the trust or the institution” shall be substituted.

7. Amendment of Section 16.— In Section 16 of the Income-tax Act, in clause (iv), with effect from the 1st day of April, 1972,—

(a) in sub-clause (b), for the entry “Rs. 60”, the entry “Rs. 75” shall be substituted.

(b) in sub-clause (c), for the entry "Rs. 35", the entry "Rs. 50" shall be substituted.

8. Amendment of Section 36. — In Section 36 of the Income-tax Act, in clause (viii) of sub-section (1), for the words "industrial development", the words "industrial or agricultural development" shall be substituted with effect from the 1st day of April, 1972.

9. Amendment of Section 40. — In Section 40 of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) in clause (a), sub-clause (v) shall be omitted;

(b) in clause (c), for the words "benefit derived by or accruing to it therefrom", the following shall be substituted, namely:—

"benefit derived by or accruing to it therefrom, so, however, that the deduction in respect of the aggregate of such expenditure and allowance in respect of any one person referred to in sub-clause (i) shall in no case exceed—

(A) where such expenditure or allowance relates to a period exceeding eleven months comprised in the previous year, the amount of seventy-two thousand rupees;

(B) where such expenditure or allowance relates to a period not exceeding eleven months comprised in the previous year, an amount calculated at the rate of six thousand rupees for each month or part thereof comprised in that period;

Provided that in a case where such person is also an employee of the company for any period comprised in the previous year, expenditure of the nature referred to in clauses (i), (ii), (iii) and (iv) of the second proviso to clause (a) of sub-section (5) of Section 40A shall not be taken into account for the purposes of sub-clause (A) or sub-clause (B), as the case may be.

10. Amendment of Section 40A. — In Section 40A of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) in sub-section (2), in the proviso to clause (a), for the words "provisions of this section", the words "provisions of this sub-section" shall be substituted;

(b) after sub-section (4), the following sub-sections shall be inserted, namely:—

(5) (a) Where the assessee—

(i) incurs any expenditure which results directly or indirectly in the payment of any salary to an employee or a former employee, or

(ii) incurs any expenditure which results directly or indirectly in the provision of any perquisite (whether convertible into money or not) to an employee or incurs directly or indirectly any expenditure or is entitled to any allowance in respect of any assets of the assessee used by an employee either wholly or partly for his own purposes or benefit,

then, subject to the provisions of clause (b),

so much of such expenditure or allowance as is in excess of the limit specified in respect thereof in clause (c) shall not be allowed as a deduction:

Provided that where the assessee is a company, so much of the aggregate of—

(a) the expenditure and allowance referred to in sub-clauses (i) and (ii) of this clause; and

(b) the expenditure and allowance referred to in sub-clauses (i) and (ii) of clause (c) of Section 40,

in respect of an employee or a former employee, being a director or a person who has a substantial interest in the company or a relative of the director or of such person, as is in excess of the sum of seventy-two thousand rupees shall in no case be allowed as a deduction:

Provided further that in computing the expenditure referred to in sub-clause (i) or the expenditure or allowance referred to in sub-clause (ii) of this clause or the aggregate referred to in the foregoing proviso, the following shall not be taken into account, namely:—

(i) the value of any travel concession or assistance referred to in clause (5) of Section 10;

(ii) passage moneys or the value of any free or concessional passage referred to in sub-clause (i) of clause (6) of Section 10;

(iii) any payment referred to in clause (iv) or clause (v) of sub-section (1) of Section 36;

(iv) any expenditure referred to in clause (ix) of sub-section (1) of Section 36.

(b) Nothing in clause (a) shall apply to any expenditure or allowance in relation to—

(i) any employee in respect of any period of his employment outside India;

(ii) any employee being an individual referred to in sub-clause (vii) or sub-clause (viii) of clause (6) of Section 10 in respect of any period during which he is entitled to the exemption under sub-clause (vii) or, as the case may be, sub-clause (viii) aforesaid;

(iii) any employee whose income chargeable under the head "Salaries" is seven thousand and five hundred rupees or less.

(c) The limits referred to in clause (a) are the following, namely:—

(i) in respect of the expenditure referred to in sub-clause (i) of clause (a), in the case of an employee, an amount calculated at the rate of five thousand rupees for each month or part thereof comprised in the period of his employment in India during the previous year, and in the case of a former employee, being an individual who ceases or ceased to be the employee of the assessee during the previous year or any earlier previous year, sixty thousand rupees;

(ii) in respect of the aggregate of the expenditure and the allowance referred to

in sub-clause (ii) of clause (a), one-fifth of the amount of the salary payable to the employee or an amount calculated at the rate of one thousand rupees for each month or part thereof comprised in the period of employment in India of the employee during the previous year, whichever is less.

Explanation 1.— The provisions of this sub-section shall apply notwithstanding that any amount not to be allowed under this sub-section is included in the total income of the employee or, as the case may be, the former employee.

Explanation 2.— In this sub-section,—

(a) “salary” has the meaning assigned to it in clause (1) read with clause 3) of Section 17 subject to the following modifications, namely:—

(1) in the said clause (1), the word “perquisites” occurring in sub-clause (iv) and the whole of sub-clause (vii) shall be omitted;

(2) in the said clause (3), the references to “assessee” shall be construed as references to “employee or former employee” and the references to “his employer or former employer” and “an employer or a former employer” shall be construed as references to “the assessee”;

(b) “perquisite” means—

(i) rent-free accommodation provided to the employee by the assessee;

(ii) any concession in the matter of rent respecting any accommodation provided to the employee by the assessee;

(iii) any benefit or amenity granted or provided free of cost or at concessional rate to the employee by the assessee;

(iv) payment by the assessee of any sum in respect of any obligation which, but for such payment, would have been payable by the employee; and

(v) payment by the assessee of any sum, whether directly or through a fund, other than a recognised provident fund or an approved superannuation fund, to effect an assurance on the life of the employee or to effect a contract for an annuity.

(6) Where the assessee incurs any expenditure by way of fees for services rendered by a person who at any time during the twenty-four months immediately preceding the previous year was an employee of the assessee,—

(Contd. on Col. 2)

(a) where such aggregate does not exceed Rs. 1,000

(b) where such aggregate exceeds Rupees 1,000 but does not exceed Rupees 5,000

(c) where such aggregate exceeds Rupees 5,000

(b) in sub-section (4), in clauses (ii) and (iv), for the words “fifteen thousand rupees”, the words “twenty thousand rupees” shall be substituted.

(a) such expenditure by way of fees, or

(b) where the assessee has also incurred in relation to such person any expenditure by way of salary referred to in sub-clause (i) of clause (a) of sub-section (5), the aggregate of such expenditure by way of fees and by way of salary, shall not be allowed as a deduction to the extent such expenditure by way of fees or, as the case may be, the aggregate of such expenditure by way of fees and by way of salary exceeds sixty thousand rupees.

11. Omission of Section 54A.— Section 54A of the Income-tax Act shall be omitted with effect from the 1st day of April, 1972.

12. Amendment of Section 58.— In clause (a) of sub-section (1) of section 58 of the Income-tax Act, sub-clause (iv) shall be omitted with effect from the 1st day of April, 1972.

13. Amendment of Section 67.— In Section 67 of the Income-tax Act,—

(a) in clause (a) of sub-section (1), for the words “registered firm”, the words, brackets, letter and figures “registered firm or an unregistered firm assessed as a registered firm under clause (b) of Section 183” shall be substituted;

(b) in sub-section (4), for the words “a firm treated as registered in accordance with the provisions of”, the words “an unregistered firm assessed as a registered firm under” shall be substituted.

14. Amendment of Section 80A.— In Section 80A of the Income-tax Act, in sub-section (3), for the word, figures and letter “Section 80L”, the words, figures and letters “Section 80MM or Section 80N or Section 80O” shall be substituted with effect from the 1st day of April, 1972.

15. Amendment of Section 80C.— In Section 80C of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) for sub-section (1), the following sub-section shall be substituted, namely:—

“(1) In computing the total income of an assessee, there shall be deducted, in accordance with and subject to the provisions of this section, an amount calculated, with reference to the aggregate of the sums specified in sub-section (2), at the following rates, namely:—

The whole of such aggregate;

Rs. 1,000 plus 50 per cent. of the amount by which such aggregate exceeds Rs. 1,000;

Rs. 3,000 plus 40 per cent. of the amount by which such aggregate exceeds Rs. 5,000.”;

16. Amendment of Section 80I.— In Section 80I of the Income-tax Act, in sub-section (1), for the words “eight per cent.”, the words “five per cent.” shall be substituted.

tuted with effect from the 1st day of April, 1972.

17. Amendment of Section 80L.— In Section 80L of the Income-tax Act, in sub-section (1), with effect from the 1st day of April, 1972,—

(a) for the words “Where the gross total income of an assessee includes any income by way of—”, the following shall be substituted, namely:—

“Where the gross total income of an assessee, being—

(a) an individual, or

(b) a Hindu undivided family, or

(c) an association of persons or a body of individuals consisting only of husband and wife governed by the system of community of property in force in the Union territories of Dadra and Nagar Haveli and Goa, Daman and Diu, includes any income by way of—”;

(b) in clause (vi), the word “or” occurring at the end shall be omitted;

(c) in clause (vii), for the word and figures “Section 36,” the words and figures “Section 36; or,” shall be substituted;

(d) after clause (vii), the following clause shall be inserted, namely:—

“(viii) interest on deposits with a co-operative society, not being a co-operative society referred to in clause (vi), made by a member of the society.”

18. Amendment of Section 80M.— In Section 80M of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) in sub-section (1),—

(i) for clauses (a) and (b), the following clauses shall be substituted, namely:—

“(a) sixty per cent. of such income, where the assessee is a domestic company;

(b) sixty-five per cent. of such income, where the assessee is a foreign company.”;

(ii) the Explanation shall be omitted;

(b) for sub-section (2) and the Explanation appearing below that sub-section, the following sub-section shall be substituted, namely:—

“(2) Where a company to which this section applies is entitled also to the deduction under Section 80K, the deduction under sub-section (1) shall be allowed in respect of income by way of dividends referred to therein as reduced by the amount of the deduction under Section 80K.”

19. Amendment of Section 80MM.— In Section 80MM of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) in sub-section (1),—

(i) for the words “assessee being an Indian company”, the words and brackets “assessee, being an Indian company or a person (other than a company) who is resident in India,” shall be substituted;

(ii) for the words “received by it”, the words “received by the assessee” shall be substituted;

(iii) for the words “Central Government”, in both the places where they occur, the word “Board” shall be substituted;

(iv) for the words “there shall be allowed a deduction”, the words “there shall, in accordance with and subject to the provisions of this section, be allowed a deduction” shall be substituted;

(v) after the proviso, the following proviso shall be inserted, namely:—

“Provided further that approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this sub-section by the Central Government before the 1st day of April, 1972, and every application for such approval of any such agreement pending with the Central Government immediately before that day shall stand transferred to the Board for disposal.”;

(b) after sub-section (2), the following sub-section shall be inserted, namely:—

“(2A) Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) shall not be admissible unless the accounts of the assessee for the previous year have been audited by an accountant as defined in the Explanation below sub-section (2) of Section 288, and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed.”.

20. Amendment of Section 80N.— In Section 80N of the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) for the words “assessee being an Indian company”, the words and brackets “assessee, being an Indian company or a person (other than a company) who is resident in India,” shall be substituted;

(b) for the words, figure and letters “Central Government in this behalf before the 1st day of October of the relevant assessment year”, the words “Board in this behalf” shall be substituted;

(c) the following provisos shall be inserted at the end, namely:—

“Provided that the application for such approval is made to the Board before the 1st day of October of the relevant assessment year;

Provided further that the approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this section by the Central Government before the 1st day of April, 1972, and every application for such approval of any such agreement pending with the Central Government immediately before that day shall stand transferred to the Board for disposal.”.

21. Substitution of new section for Section 80O.— For Section 80O of the

Income-tax Act, the following section shall be substituted with effect from the 1st day of April, 1972, namely:—

"800. Deduction in respect of royalties, etc., from certain foreign enterprises.—

(1) Where the gross total income of an assessee, being an Indian company or a person (other than a company) who is resident in India, includes any income by way of royalty, commission, fees or any similar payment received by the assessee from the Government of a foreign State or a foreign enterprise in consideration for the use outside India of any patent, invention, model, design, secret formula or process, or similar property right, or information concerning industrial, commercial or scientific knowledge, experience or skill made available or provided or agreed to be made available or provided to such Government or enterprise by the assessee, or in consideration of technical services rendered or agreed to be rendered outside India to such Government or enterprise by the assessee, under an agreement approved by the Board in this behalf, there shall be allowed, in accordance with and subject to the provisions of this section, a deduction of the whole of such income, in computing the total income of the assessee:

Provided that the application for the approval of the agreement referred to in this sub-section is made to the Board before the 1st day of October of the assessment year in relation to which the approval is first sought:

Provided further that approval of the Board shall not be necessary in the case of any such agreement which has been approved for the purposes of the deduction under this section by the Central Government before the 1st day of April, 1972, and every application for such approval of any such agreement pending with the Central Government immediately before that day shall stand transferred to the Board for disposal.

(2) Where the assessee is a person other than a company or a co-operative society, the deduction under sub-section (1) shall not be admissible unless the accounts of the assessee for the previous year have been audited by an accountant as defined in the Explanation below sub-section (2) of Section 288 and the assessee furnishes, along with his return of income, the report of such audit in the prescribed form duly signed and verified by such accountant and setting forth such particulars as may be prescribed."

22. Amendment of Section 80P.— In Section 80P of the Income-tax Act, in clause (a) of sub-section (2), with effect from the 1st day of April, 1972,—

(a) in sub-clause (v), the word "or" shall be inserted at the end;

(b) after sub-clause (v), the following sub-clauses shall be inserted, namely:—

"(v) the collective disposal of the labour of its members, or

(vii) fishing or allied activities, that is to say, the catching, curing, processing, preserving, storing or marketing of fish or the purchase of materials and equipment in connection therewith for the purpose of supplying them to its members."

(c) the following proviso shall be inserted at the end, namely:—

"Provided that in the case of a co-operative society falling under sub-clause (vi) or sub-clause (vii), the rules and bye-laws of the society restrict the voting rights to the following classes of its members, namely:—

(1) the individuals who contribute their labour or, as the case may be, carry on the fishing or allied activities;

(2) the co-operative credit societies which provide financial assistance to the society;

(3) the State Government."

23. Amendment of Section 80T.— In Section 80T of the Income-tax Act, in clause (b), with effect from the 1st day of April, 1972,—

(a) in sub-clause (i), for the words "forty-five per cent.", the words "thirty-five per cent." shall be substituted;

(b) in sub-clause (ii) and in the proviso, for the words "sixty-five per cent.", wherever they occur, the words "fifty per cent." shall be substituted.

24. Amendment of Section 86.— In Section 86 of the Income-tax Act, in clause (iii), after the words "unregistered firm", the brackets, words, letter and figures "[not being an unregistered firm assessed as a registered firm under clause (b) of Section 183]" shall be inserted.

25. Substitution of new Section for Section 115.— For Section 115 of the Income-tax Act, the following section shall be substituted with effect from the 1st day of April, 1972, namely:—

"115. Tax on capital gains in case of companies.— Where the total income of a company includes any income chargeable under the head "Capital gains" relating to capital assets other than short-term capital assets (such income being hereinafter referred to as long-term capital gains), the income-tax payable shall be the aggregate of—

(i) the amount of income-tax calculated on the amount of long-term capital gains included in the total income—

(a) at the rate of forty-five per cent. on so much of the amount of such long-term capital gains as relate to buildings or lands or any rights in buildings or lands; and

(b) at the rate of thirty-five per cent. on the balance of such long-term capital gains, if any; and

(ii) the amount of income-tax with which it would have been chargeable had

its total income been reduced by the amount of long-term capital gains referred to in clause (i).

26. Amendment of Section 194A.—In Section 194A of the Income-tax Act, in clause (v) of sub-section (3), after the words "by a co-operative society", the words "to a member thereof or" shall be inserted.

27. Amendment of Section 230A.—In Section 230A of the Income-tax Act, with effect from the 1st day of October, 1971,—

(a) in sub-section (1),—
(i) the brackets and words "(other than agricultural land)" shall be omitted;
(ii) in clause (a), for the words and figures "and the Gift-tax Act, 1958" the words, figures and brackets "the Gift-tax Act, 1958, the Super Profits Tax Act, 1963, and the Companies (Profits) Surtax Act, 1964" shall be substituted;

(b) after sub-section (2), the following sub-section shall be inserted, namely:—

"(3) The provisions of sub-section (1) shall not apply in a case where the person referred to in that sub-section is any such institution, association or body, or belongs to any such class of institutions, associations or bodies, as the Board may, for reasons to be recorded in writing, notify in this behalf in the Official Gazette."

28. Omission of Section 235.—Section 235 of the Income-tax Act shall be omitted with effect from the 1st day of April, 1972.

29. Amendment of Second Schedule.—In the Second Schedule to the Income-tax Act, with effect from the 1st day of January, 1972,—

(a) in Rules 82 and 83, for the words "Tax Recovery Officer", the words "Tax Recovery Commissioner, Tax Recovery Officer" shall be substituted;

(b) in Rule 86,—
(i) for sub-rule (1), the following sub-rule shall be substituted, namely:—

"(1) An appeal from any original order passed by the Tax Recovery Officer under this Schedule, not being an order which is conclusive, shall lie—

(a) in the case of a Tax Recovery Officer, being a Collector or an Additional Collector, to the revenue authority to which appeals ordinarily lie against the orders of a Collector under the law relating to land revenue of the State concerned;

(b) in the case of a Tax Recovery Officer, being an officer referred to in sub-clause (ii) of clause (44) of Section 2, to the revenue authority to which an appeal or an application for revision would ordinarily lie, if the order passed by him were the order under the law relating to land revenue or other public demand for the time being in force in the State concerned; and

(c) in the case of a Tax Recovery Officer, being an officer referred to in sub-

clause (iii) of clause (44) of Section 2, to the Tax Recovery Commissioner."

(ii) after sub-rule (3), the following sub-rule shall be inserted, namely:—

"(4) Notwithstanding anything contained in sub-rule (1), where a Tax Recovery Commissioner is authorised to exercise powers as such in respect of any area, then,—

(a) all appeals against the orders passed before the date of such authorisation by any Tax Recovery Officer authorised to exercise powers as such in respect of that area or an area which is included in that area, shall lie to such Tax Recovery Commissioner; and

(b) any proceeding by way of appeal against any orders referred to in clause (a) pending on the date mentioned in that clause before an appellate authority referred to in clause (a) or clause (b) of sub-rule (1) shall stand transferred to such Tax Recovery Commissioner for disposal."

(c) in Rule 87, for the word "officer", the words "Tax Recovery Commissioner, Tax Recovery Officer or other officer" shall be substituted;

(d) in Rule 92,—

(i) in sub-rule (1), for the words "Tax Recovery Officers", the words "Tax Recovery Commissioners, Tax Recovery Officers" shall be substituted;

(ii) in sub-rule (2), in clause (a), for the words "Tax Recovery Officers", the words "Tax Recovery Commissioners or Tax Recovery Officers" shall be substituted.

30. Amendment of Sixth Schedule.—In the Sixth Schedule to the Income-tax Act, with effect from the 1st day of April, 1972,—

(a) for the brackets, words, figures and letters "[See Sections 80B (7), 80I and 80M]", the following shall be substituted, namely:—

"[See Sections 80B (7) and 80I]";

(b) in item (2), the word "Aluminium", shall be omitted;

(c) items (10), (12), (14), (18) and (20) shall be omitted.

CHAPTER IV

WEALTH-TAX

31. Amendment of Section 4.—In Section 4 of the Wealth-tax Act, 1957 (hereinafter referred to as the Wealth-tax Act), with effect from the 1st day of April, 1972,—

(a) in sub-section (1),—

(i) in the proviso to clause (a), for the words, figures and letters "after the 31st day of March, 1964", the words, figures and letters "after the 31st day of March, 1964, but before the 1st day of April, 1972" shall be substituted;

(ii) in clause (b), for the words "member of an association of persons", the words and brackets "member of an association of

persons (not being a co-operative housing society)" shall be substituted;

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

"(1A) Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has, at any time after the 31st day of December, 1969, been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family, or throwing it into the common stock of the family (such property being hereinafter referred to as the converted property, then, notwithstanding anything contained in any other provision of this Act or in any other law for the time being in force, for the purpose of computing the net wealth of the individual under this Act for any assessment year commencing on or after the 1st day of April, 1972,—

(a) the individual shall be deemed to have transferred the converted property, through the family, to the members of the family for being held by them jointly;

(b) the converted property or any part thereof, in so far as it is attributable to the interest of the individual in the property of the family, shall be deemed to be assets belonging to the individual and not to the family;

(c) any part of the converted property in so far as it is attributable to the interest of the spouse or any minor child of the individual in the property of the family and where there is a partition (partial or total) amongst the members of the family, the converted property or any part thereof which is received by the spouse or minor child on such partition shall be deemed to be assets transferred indirectly by the individual to the spouse or minor child and the provisions of sub-section (1) shall, so far as may be, apply accordingly;

Provided that the property referred to in clause (b) or clause (c) shall, on being included in the net wealth of the individual, be excluded from the net wealth of the family or, as the case may be, the spouse or minor child of the individual."

(c) after sub-section (6) and before the Explanation, the following sub-section shall be inserted, namely:—

"(7) Where the assessee is a member of an association of persons, being a co-operative housing society, and a building or part thereof is allotted or leased to him under a house building scheme of the society, the assessee shall, notwithstanding anything contained in this Act or any other law for the time being in force, be deemed to be the owner of such building or part and the value of such building or part shall be included in computing the net wealth of the assessee; and in determining the value of such building or part the

value of any outstanding instalments of the amount payable under such scheme by the assessee to the society towards the cost of such building or part and the land appurtenant thereto shall, whether the amount so payable is described as such or in any other manner in such scheme, be deducted as a debt owed by him in relation to such building or part."

(d) in the Explanation,—

(i) in clause (a), the word "and" occurring at the end shall be omitted;

(ii) after clause (b), the following clauses shall be inserted, namely:—

"(c) the expression "property" includes any interest in property, movable or immovable, the proceeds of sale thereof and any money or investment for the time being representing the proceeds of sale thereof and where the property is converted into any other property by any method, such other property; and

(d) the expressions "interest of the individual in the property of the family" and "interest of the spouse or any minor child of the individual in the property of the family" mean, respectively, the proportion in which the individual or, as the case may be, the spouse or minor child would be entitled to share the property of the family if there had been a total partition in the family as on the valuation date of the family relevant to the assessment year for which the individual is to be assessed under sub-section (1A)."

32. Amendment of Section 5.— In Section 5 of the Wealth-tax Act,—

(a) in sub-section (i),—

(i) in clause (iv), the words "and exclusively used by him for residential purposes" shall be omitted with effect from the 1st day of April, 1972;

(ii) in clause (viii), after the words "articles intended for the personal or household use of the assessee", the words, "but not including jewellery" shall be inserted, and shall be deemed to have been inserted, with effect from the 1st day of April, 1963;

(iii) in clause (viii) as so amended, the following provisos and Explanations shall be inserted at the end with effect from the 1st day of April, 1972, namely:—

Provided that the furniture, utensils or other articles are neither made wholly or partly of, nor contain (whether by way of embedding, covering or otherwise), gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals;

Provided further that nothing in this clause shall operate to exclude from the net wealth of the assessee any conveyance or conveyances to the extent the value or the aggregate value thereof exceeds the sum of twenty-five thousand rupees.

Explanation 1.— For the purposes of this clause and clause (xiii), "jewellery" includes—

(a) ornaments made of gold, silver,

platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(b) precious or semi-precious stones, whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel.

Explanation 2.— For the purposes of this clause, “conveyance” means any motor car or other mechanically propelled vehicle, aircraft or boat;

(iv) in clause (xx) for the words, figures and letters “after the 31st day of March 1964”, the words, figures and letters “after the 31st day of March 1964, but before the 1st day of June, 1971” shall be substituted with effect from the 1st day of April, 1972;

(v) after clause (xxvii), the following clauses shall be inserted with effect from the 1st day of April, 1972, namely:—

“(xxviii) any shares held by the assessee in any co-operative society;

(xxix) any deposits with a co-operative society, not being deposits referred to in clause (xxvi) or clause (xxx), made by a member of the society;

(xxx) any deposits with a co-operative housing society made by a member of the society to whom a building or part thereof is allotted or leased under a house building scheme of the society, where such deposits have been made under such scheme.”

(b) in sub-sections (1A) and (3), for the brackets, figures and word “(xxvi), and (xxvii)”, the brackets, figures and word “(xxvi), (xxvii), (xxviii), and (xxix)” shall be substituted with effect from the 1st day of April, 1972.

33. Amendment of Section 18.— In Section 18 of the Wealth-tax Act, with effect from the 1st day of April, 1972,—

(a) in clause (i) of sub-section (1), for sub-clauses (A) and (B), the following sub-clauses shall be substituted, namely:—

“(A) the net wealth assessed under Section 16 as reduced by the amount specified in sub-section (1A), or

(B) the net wealth assessed under Section 17, where assessment has been made under that section, as reduced by—

(Contd. on Col. 2)

“(1) In the case of every individual or Hindu undivided family—

(a) where the net wealth does not exceed Rs. 5,00,000

(b) where the net wealth exceeds Rupees 5,00,000 but does not exceed Rupees 10,00,000

(c) where the net wealth exceeds Rupees 10,00,000 but does not exceed Rupees 15,00,000

(d) where the net wealth exceeds Rupees 15,00,000

(1) the net wealth, if any, assessed previously under Section 16 or Section 17, or

(2) the amount specified in sub-section (1A), whichever is greater.”

(b) after sub-section (1), the following sub-section shall be inserted, namely:—

“(1A) The amount referred to in sub-clause (A) and sub-clause (B) (2) of clause (i) of sub-section (1) shall be,—

(a) in the case of an individual, Rs. 1,00,000;

(b) in the case of a Hindu undivided family, Rs. 2,00,000; and

(c) in the case of a company, Rupees 5,00,000.”

34. Amendment of Section 21.— In Section 21 of the Wealth-tax Act, in sub-section (4), with effect from the 1st day of April, 1972,—

(a) in clause (a) and in the proviso, the words “in the case of an individual” shall be omitted;

(b) the following Explanation shall be inserted at the end, namely:—

Explanation.— Notwithstanding anything contained in section 5, in computing the net wealth for the purposes of this sub-section in any case, not being a case referred to in the proviso, any assets referred to in clauses (xv), (xvi), (xxii), (xxiii), (xxiv), (xxv), (xxvi), (xxvii), (xxviii) and (xxix) of sub-section (1) of that section shall not be excluded.”

35. Amendment of Section 32.— In Section 32 of the Wealth-tax Act, in Explanation, II, for the words “Tax Recovery Officer and the Tax Recovery Commissioner referred to in the Income-tax Act or the rules made thereunder shall be deemed to be the Tax Recovery Officer and the Tax Recovery Commissioner”, the words “Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer” shall be substituted with effect from the 1st day of January, 1972.

36. Amendment of Schedule.— In the Schedule to the Wealth-tax Act, with effect from the 1st day of April, 1972, in Part I—

(a) in Paragraph A,—

(i) for items (1) and (2), the following item shall be substituted, namely:—

Rate of tax

1 per cent of the net wealth;

Rs. 5,000 plus 2 per cent. of the amount by which the net wealth exceeds Rs. 5,00,000;

Rs. 15,000 plus 3 per cent. of the amount by which the net wealth exceeds Rupees 10,00,000;

Rs. 30,000 plus 8 per cent. of the amount by which the net wealth exceeds Rs. 15,00,000;

Provided that for the purposes of this item,—

(i) no wealth-tax shall be payable where the net wealth does not exceed the following limit, namely:—

(A) Rs. 1,00,000, in the case of an individual;

(B) Rs. 2,00,000, in the case of a Hindu undivided family;

(ii) the wealth-tax payable shall, in no case, exceed 10 per cent. of the amount by which the net wealth exceeds the limit specified in sub-clause (A) or, as the case may be, sub-clause (B) of clause (i) of this proviso.”;

(ii) item (3) shall be re-numbered as item (2);

(b) in Paragraph B, for the word, brackets and figure “item (3)”, wherever they occur, the word, brackets and figure “item (2)” shall be substituted.

CHAPTER V

OTHER DIRECT TAXES

37. Amendment of Act 18 of 1958.—
In the Gift-tax Act, 1958,—

(a) in Section 2, in clause (xii), for the words and figure “includes the transfer of any property deemed to be a gift under Section 4”, the words and figure “includes the transfer or conversion of any property referred to in Section 4, deemed to be a gift under that section” shall be substituted with effect from the 1st day of April, 1972;

(b) Section 4 shall, with effect from the 1st day of April, 1972, be re-numbered as sub-section (1) thereof and after sub-section (1) as so re-numbered, the following sub-section shall be inserted with effect from that day, namely:—

“(2) Where, in the case of an individual being a member of a Hindu undivided family, any property having been the separate property of the individual has been converted by the individual into property belonging to the family through the act of impressing such separate property with the character of property belonging to the family or throwing it into the common stock of the family (such property being hereafter in this sub-section referred to as the converted property), then, notwithstanding anything contained in any other provision of this Act or any other law for the time being in force, for the purpose of computation of the taxable gifts made by the individual, the individual shall be deemed to have made a gift of so much of the converted property as the members of the Hindu undivided family other than such individual would be entitled to, if a partition of the converted property had taken place immediately after such conversion.”;

(c) in Section 5, in sub-section (1),—

(i) in clause (v), for the word and figures “Section 88”, the word, figures and letter “Section 80C” shall be substituted, and shall be deemed to have been substituted with effect from the 1st day of April, 1968;

(ii) in clause (va), in sub-clause (i), for the words, brackets and figures “sub-s. (6) of Section 88 of the Income-tax Act, 1961”, the words, brackets, letters and figures “clause (b) of sub-section (2) of Section 80C of the Income-tax Act” shall be substituted, and shall be deemed to have been substituted with effect from the 1st day of April, 1968;

(d) in Section 33, in Explanation II, for the words “Tax Recovery Officer and the Tax Recovery Commissioner referred to in the Income-tax Act or the rules made thereunder shall be deemed to be the Tax Recovery Officer and the Tax Recovery Commissioner” the words “Tax Recovery Commissioner and the Tax Recovery Officer referred to in the Income-tax Act shall be deemed to be the Tax Recovery Commissioner and the Tax Recovery Officer” shall be substituted with effect from the 1st day of January, 1972;

(e) in Section 45, after Explanation 2, the following Explanation shall be inserted, namely:—

“Explanation 3.— For the removal of doubts, it is hereby declared that the exemption admissible under clause (e) in relation to gifts made by an institution or fund referred to in that clause shall not be denied merely or either or both of the following grounds, namely:—

(i) that, subsequent to the gift, any part of the income of the institution or fund has become chargeable to tax due to non-compliance with any of the provisions of Section 11 of the Income-tax Act;

(ii) that, under clause (c) of sub-section (1) of Section 13 of the Income-tax Act, the exemption under Section 11 of that Act is denied to the institution or fund in relation to any income arising to it from any investment referred to in clause (h) of sub-section (2) of Section 13 of the said Act where the aggregate of the funds invested by it in a concern referred to in the said clause (h) does not exceed five per cent. of the capital of that concern.”.

38. Amendment of Act 7 of 1964.—
In the Companies (Profits) Surtax Act, 1964,—

(a) in Section 18, for the figures and brackets “2 (44)”, the figures, brackets, letter and word “2 (43B) and (44)” shall be substituted with effect from the 1st day of January, 1972;

(b) for the Third Schedule, the following Schedule shall be substituted with effect from the 1st day of April, 1972, namely:—

"THE THIRD SCHEDULE

(See section 4)

RATES OF SURTAX

Surtax shall be charged on the amount (hereinafter referred to as the chargeable amount) by which the chargeable profits exceed the amount of the statutory deduction at the following rates, namely:—

- (i) on so much of the chargeable amount as does not exceed five per cent. of the amount of capital as computed in accordance with the Second Schedule ... 25 per cent.

(Contd. on Col. 2)

"1E GLUCOSE AND DEXTROSE AND PREPARATIONS THEREOF—

- (1) Glucose in whatever form, including liquid glucose dextrose mono-hydrate and anhydrous dextrose.
(2) Preparations of glucose and dextrose in which the reducing sugars expressed as anhydrous dextrose amount to more than eighty per cent. by weight.

(ii) after Item No. 1E, the following Item shall be inserted, namely:—

IF MAIDA—

"Maida" means the product of wheat known commercially as maida obtained by milling cleaned, hard or soft wheat or blends thereof in a roller flour mill.

(iii) In Item No. 6, for the entry in the third column, the entry "Nine hundred and twenty rupees per kilolitre at fifteen degrees of Centigrade thermometer" shall be substituted;

(iv) for Item No. 11A, the following Item shall be substituted, namely:—

"11A ALL PRODUCTS DERIVED FROM REFINING OF CRUDE-PETROLEUM OF SHALE (WHETHER GASEOUS, LIQUID, SEMI-SOLID, OR SOLID IN FORM), NOT OTHERWISE SPECIFIED INCLUDING REFINERY GASES, LUBRICATING OIL AND GREASES, WAXES AND COKE—

- (1) Mineral turpentine oil
(2) Liquefied petroleum gas
(3) Others

(v) after Item No. 11A as so amended, the following Items shall be inserted, namely:—

"11B COMPOUNDED LUBRICATING OILS AND GREASES, THAT IS TO SAY, LUBRICATING OILS AND GREASES OBTAINED BY COMPOUNDING OF MINERAL OILS WITH ANY OTHER INGREDIENTS.

Explanation.— The expression "mineral oil" has the meaning assigned to it in Explanation I to Item No. 6.

11C CALCINED PETROLEUM COKE. Twenty per cent. ad valorem."

(vi) for Item No. 14AA, the following Item shall be substituted, namely:—

(ii) on the balance, if any. of the chargeable amount ... 30 per cent."

**CHAPTER VI
INDIRECT TAXES****39. Amendment of Act 32 of 1934.—**

The Indian Tariff Act, 1934 (hereinafter referred to as the Tariff Act) shall be amended in the manner specified in the Second Schedule.

40. Amendment of Act 1 of 1944.—

In the Central Excises and Salt Act, 1944, in the First Schedule,—

(i) for Item No. 1E, the following Item shall be substituted, namely:—

Ten per cent. ad valorem."

Ten paise per kilogram."

Twenty per cent. ad valorem plus one hundred rupees per metric tonne.

Two hundred and fifty rupees per metric tonne.

Twenty per cent. ad valorem."

Twenty per cent. ad valorem."

Twenty per cent. ad valorem."

"14AA CHEMICALS, THE FOLLOW- Ten per cent. ad valorem.";
ING, NAMELY:—

- (1) Calcium carbide.
- (2) Bleaching paste and bleaching powder.
- (3) Sodium hydrosulphite.
- (4) Bicarbonate of soda.
- (5) Bichromates of potassium or sodium.
- (6) Hydrogen peroxide.
- (7) Potassium permanganate.

(vii) for Item No. 14F, the following Item shall be substituted, namely:—

"14F COSMETICS AND TOILET PRE- Twenty five per cent. ad valorem.";
PARATIONS NOT CONTAINING
ALCOHOL OR OPIUM, INDIAN
HEMP, OR OTHER NARCOTIC
DRUGS OR NARCOTICS, NAME-
LY:—

- (i) Preparations for the care of the skin including beauty creams, vanishing creams, cold creams, make-up creams, cleansing creams, skin foods and tonics, face powders, baby powders, toilet powders, talcum powders and lipsticks.
- (ii) Preparations for the care of the hair—
 - (a) Hair lotions, creams and pomades.
 - (b) Perfumed hair oils.
 - (c) Shampoos whether or not containing soap or detergent.

Explanation.— "Alcohol", "Opium", "Indian hemp", "narcotic drugs" and "narcotics" have the meanings, respectively, assigned to them in Section 2 of the Medicinal and Toilet Preparations (Excise Duties) Act, 1955.

(viii) in Item No. 15, for the entry in the third column against sub-item 1 (2), the entry "Twelve and a half per cent. ad valorem." shall be substituted;

(ix) for Item No. 15A, the following Item shall be substituted, namely:—

**"15A ARTIFICIAL OR SYNTHETIC RE-
SINS AND PLASTIC MATERIALS,
AND ARTICLES THEREOF—**

- (1) Artificial or synthetic resins and plastic materials in any form, whether solid, liquid or pasty, or as powder, granules or flakes, or in the form of moulding powders, the following, namely:— **Thirty per cent. ad valorem.**
 - (i) Condensation, Poly-condensation and Poly-addition products, whether or not modified or polymerised, including Phenoplasts, Aminoplasts, Alkyds, Polyamides, Polyurethane, Polyallyl Esters and other Unsaturated Polyesters;
 - (ii) Polymerisation and Copolymerisation products including Polyethylene and Polytetrahaloethylene, Polyisobutylene, Polystyrene, Polyvinyl chloride, Polyvinyl acetate, Polyvinyl Chloroacetate and other Polyvinyl derivatives, Polyacrylic and Polymethacrylic derivatives and Coumarone-Indene resins; and
 - (iii) Cellulose acetate (including di-or tri-acetate), Cellulose acetate butyrate and Cellulose propionate, Cellulose

acetate-propionate, Ethyl cellulose and Benzyl cellulose, whether plasticised or not, and plasticised Cellulose nitrate.

- (2) Articles made of plastics, all sorts, including tubes, rods, sheets, foils, sticks, other rectangular or profile shapes, whether laminated or not, and whether rigid or flexible, including layflat tubings and polyvinyl chloride sheets, not otherwise specified.

Thirty per cent. ad valorem.

- (3) Polyurethane foam.

Forty per cent. ad valorem.

- (4) Articles made of polyurethane foam.

Forty per cent. ad valorem.

Explanation.— For the purpose of sub-item (2), "plastics" means the various artificial or synthetic resins or plastic material included in sub-item (1).

- (x) in Item No. 16A, for the entries in the third column against sub-items (1) and (2), the entries "Forty per cent. ad valorem." and "Twenty-five per cent. ad valorem." shall, respectively, be substituted;

- (xi) after Item No. 22B, the following items shall be inserted, namely:—

"22C LINOLEUM, THAT IS TO SAY, COVERING MATERIAL PREPARED ON A BASE OF PAPER OR PAPER BOARD (INCLUDING FELT PAPER OR FELT PAPER BOARD) OR TEXTILE FABRICS, BY IMPREGNATION OR COATING WITH A LINOLEUM CEMENT.

Twenty per cent. ad valorem.

22D ARTICLES OF READY-TO-WEAR APPAREL (KNOWN COMMERCIALY AS READY-MADE GARMENTS), INCLUDING UNDER GARMENTS AND BODY-SUPPORTING GARMENTS BUT EXCLUDING ARTICLES OF HOSIERY, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER.

Ten per cent. ad valorem.

22E TYPEWRITER AND SIMILAR RIBBONS, WHETHER OR NOT ON SPOOLS.

Ten per cent. ad valorem.

- (xii) in Item No. 23A, for the entries in the third column against sub-items (1) and (4), the entries "Fifteen per cent. ad valorem." and "Twenty per cent. ad valorem." shall, respectively, be substituted;

- (xiii) in Item No. 23B, for the entry in the third column against each of the sub-items (1) and (4), the entry "Twenty per cent. ad valorem." shall be substituted;

- (xiv) after Item No. 23C, the following item shall be inserted, namely:—

"23D MOSAIC TILES, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER.

Ten per cent. ad valorem.

Explanation.— For the purposes of this item, "mosaic tiles" means tiles known commercially as mosaic tiles.

- (xv) in Item No. 27, after sub-item (e), the following sub-item shall be inserted, namely:—

(f) Containers made of aluminium.

Twenty-five per cent. ad valorem.

Explanation.— “Containers” means containers ordinarily intended for packing of goods for sale, including casks, drums, cans, boxes, gas cylinders and pressure containers, whether in assembled or unassembled condition, and containers known commercially as flattened or folded containers.

(xvi) after Item No. 30A, the following Item shall be inserted, namely:—

“30B MOTOR STARTERS Ten per cent. ad valorem.”;

(xvii) in Item No. 32, for the entries in the third column against sub-items (1), (2), (3) and (4), the entries “Twenty per cent. ad valorem.”, “Thirty per cent. ad valorem.”, “Ten per cent. ad valorem.” and “Twenty-five per cent. ad valorem.” shall, respectively, be substituted;

(xviii) for Item No. 33, the following Item shall be substituted, namely:—

“33 ELECTRIC FANS, ALL SIZES—

(1) Table, cabin, carriage, pedestal and air circulator fans, of a diameter not exceeding 40.6 centimetres. Six per cent. ad valorem.

(2) Those designed for use in an industrial system as parts indispensable for its operation and have been given for that purpose some special shape or quality which would not be essential for their use for any other purpose. Ten per cent. ad valorem.

(3) Not otherwise specified. Ten per cent. ad valorem.”;

(xix) after Item No. 33D, the following Item shall be inserted, namely:—

“33E ELECTRICITY SUPPLY METERS— Ten per cent. ad valorem.”;

“Electricity supply meters” means meters for measuring and registering the amount of electricity consumed in ampere hours or multiples thereof, or the amount of electric energy consumed, in watt hours or multiples thereof.

(xx) after Item No. 34A, the following Items shall be inserted, namely:—

“34A PARTS AND ACCESSORIES OF MOTOR VEHICLES, NOT OTHERWISE SPECIFIED. Ten per cent. ad valorem.

Explanation.— The expression “Motor vehicles” has the meaning assigned to it in Item No. 34.

34B WORKS TRUCKS, MECHANICALLY PROPELLED, USED FOR SHORT DISTANCE TRANSPORT OR HANDLING OF GOODS, THE FOLLOWING, NAMELY:— Ten per cent. ad valorem.”;

(1) Forklift trucks.

(2) Platform trucks.

(xx) after Item No. 34A, the following Items shall be inserted, namely:—

“37B CINEMATOGRAPH PROJECTORS. Twenty per cent. ad valorem.

37C PHOTOGRAPHIC CAMERAS. Twenty per cent. ad valorem.”;

(xxii) in each of the Items Nos. 41 and 42, for the entry in the third column, the entry “Two paise each.” shall be substituted;

(xxiii) Item No. 44 shall be omitted;

(xxiv) for Item No. 46, the following Item shall be substituted, namely:—

“46 METAL CONTAINERS NOT ELSEWHERE SPECIFIED. Ten per cent. ad valorem.”;

Explanation.— The expression “containers” has the meaning assigned to it in the Explanation to Item No. 27.

(xxv) after Item No. 48, the following items shall be inserted, namely:—

49 ROLLING BEARINGS, THAT IS TO SAY, BALL OR ROLLER BEARINGS, ALL SORTS. Ten per cent. ad valorem.

50 WELDING ELECTRODES, ALL SORTS. Ten per cent. ad valorem.

51 COATED ABRASIVES AND GRINDING WHEELS, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER, THE FOLLOWING, NAMELY:— Ten per cent. ad valorem.

(1) Natural or artificial abrasive powder or grain on a base of woven fabric, of paper, of paper board or of other materials, whether or not cut to shape or sewn or otherwise made up.

(2) Grinding wheels and the like (including grinding, sharpening, polishing, trueing and cutting wheels, heads, discs and points), of natural stone (agglomerated or not), of agglomerated natural or artificial abrasives, or of pottery, with or without cores, shanks, sockets, axles and the like of other materials, but not mounted on frame-works; segments and other finished parts of such wheels, of natural stone (agglomerated or not), of agglomerated natural or artificial abrasives, or of pottery.

Explanation.— The expression “grinding wheels and the like” and “segments and other finished parts of such wheels” shall mean those used on machine tools, electromechanical or pneumatic hand tools, for the trimming, polishing, sharpening, trueing or cutting of metals, stone, glass, plastics, ceramics, rubber, leather, mother of pearl, ivory and the like.

52 BOLTS AND NUTS, THREADED OR TAPPED, AND SCREWS, OF BASE METAL OR ALLOYS THEREOF, IN OR IN RELATION TO THE MANUFACTURE OF WHICH ANY PROCESS IS ORDINARILY CARRIED ON WITH THE AID OF POWER. Ten per cent. ad valorem.

Explanation.— The expression “bolts and nuts, threaded or tapped, and screws” used in this Item shall include bolt-ends, screw studs, screw studing, self-tapped screws, screw hooks and screw rings.

53 ZIP OR SLIDE FASTENERS AND PARTS THEREOF—

(1) Zip or Slide Fasteners.

Twenty per cent. ad valorem.

(2) Parts of Zip or Slide Fasteners.

Twenty-five per cent. ad valorem.

54 PRESSURE COOKERS—

Twenty per cent. ad valorem.

“Pressure cookers” means enclosed cooking vessels for use with an external heat source, capable of maintaining working steam pressure known commercially as pressure cookers.

55. VACUUM FLASKS AND OTHER
VACUUM VESSELS AND PARTS
THEREOF—

(1) Vacuum flasks and other vacuum vessels. Fifteen per cent. ad valorem.

(2) Parts of vacuum flasks and other vacuum vessels. Twenty per cent. ad valorem.

56. PLAYING CARDS.

Twenty per cent. ad valorem.

57 CAMPHOR.

Ten per cent. ad valorem.

58 MENTHOL.

Ten per cent. ad valorem.

59 ELECTRIC INSULATING TAPES,
IN OR IN RELATION TO THE
MANUFACTURE OF WHICH ANY
PROCESS IS ORDINARILY CAR-
RIED ON WITH THE AID OF
POWER.

Ten per cent. ad valorem.

60 ADHESIVE TAPES, ALL SORTS,
NOT ELSEWHERE SPECIFIED,
INCLUDING CELLULOSE AD-
HESIVE TAPES AND PAPERBACK-
ED ADHESIVE TAPES, IN OR IN
RELATION TO THE MANUFAC-
TURE OF WHICH ANY PROCESS
IS ORDINARILY CARRIED ON
WITH THE AID OF POWER.

Ten per cent. ad valorem.

41. Amendment of Act 58 of 1957.—
In the First Schedule to the Additional
Duties of Excise (Goods of Special Import-
ance) Act, 1957,—

(i) in Item No. 4, under "II. Manufac-
tured tobacco—", for the entry in the third
column against sub-item (2), the entry
"Seventy-five per cent. ad valorem." shall
be substituted;

(ii) in Item No. 19, for sub-item I (2),
the following sub-item shall be substituted,
namely:—

"(2) Others—

(a) Cotton fabrics, superfine	25 paise per square metre.
(b) Cotton fabrics, fine	15 paise per square metre.
(c) Cotton fabrics, medium-A	6 paise per square metre.
(d) Cotton fabrics, medium-B	6 paise per square metre.
(e) Cotton fabrics, coarse	4 paise per square metre.
(f) Cotton fabrics, not otherwise	25 paise per square metre."

42. Amendment of Act 27 of 1958.—
In Section 3 of the Mineral Products (Addi-
tional Duties of Excise and Customs) Act,
1958, in sub-section (1), in the Table, for
the entry in the second column against
item 3, the entry "Five hundred rupees per
kilolitre at fifteen degrees of Centigrade
thermometer" shall be substituted.

CHAPTER VII
FOREIGN TRAVEL TAX

43. Extent and commencement.—
(1) The provisions of this Chapter extend to
the whole of India except the State of Jam-
mu and Kashmir.

(2) They shall come into force on such
date as the Central Government may, by
notification in the Official Gazette, appoint.

44. Definitions.— In this Chapter,
unless the context otherwise requires,—

(a) "aircraft" means any aircraft as de-
fined in Section 2 of the Aircraft Act, 1934,
which is used (whether exclusively or not)
for the carriage of passengers;

(b) "carrier" means the person or autho-
rity undertaking the carriage of a passenger
on an international journey and includes any
agent, representative or other person acting
on behalf of such person or authority;

(c) "customs port" and "customs air-
port" mean, respectively, a port or airport
appointed as such under clause (a) of Sec-
tion 7 of the Customs Act, 1962;

(d) "fare" means the total amount of
all charges of whatever nature (including
charges, if any, for provision of food or ac-
commodation) payable to the carrier by or
on behalf of a passenger in respect of his
international journey;

(e) "international journey", in relation
to a passenger, means—

(i) his journey from the last customs
port or customs airport of departure of the
ship or aircraft in the territories to which
this Chapter extends to a place outside In-
dia, and includes further journeys by such
passenger outside India by the same or
different carriers;

(ii) his journey from a place outside
India to the first customs port or customs
airport of arrival of the ship or aircraft in
the said territories,

*15-10-1971 — See Gaz. of India; 1-10-
1971, Pt. II-S. 3 (i) Ext. P. 927, for ap-
pointed date.

irrespective of whether the journey commences or terminates at such customs port or customs airport;

(f) "passenger" means any person travelling on board a ship or an aircraft on an international journey except—

(i) a person employed or engaged in any capacity on board the ship or aircraft on the business thereof;

(ii) a person on board the ship or aircraft either in pursuance of obligations laid upon the master, captain or other person in charge of the ship or aircraft to carry shipwrecked or distressed or other persons or by reason of any circumstances which neither the master or captain or other person in charge of the ship or aircraft nor the charterer, if any, could have prevented or forestalled;

(g) "ship" means a ship used (whether exclusively or not) for the carriage of passengers.

45. Foreign travel tax.— (1) With effect from the date of commencement of this Chapter, there shall be levied and paid to the Central Government in respect of every international journey by a passenger, where the fare for such journey is paid or is payable in Indian currency, a tax (hereafter in this Chapter referred to as the foreign travel tax) at the rate of fifteen per cent. of the fare paid or payable by such passenger for such journey.

Explanation.— When a passenger performs an international journey at a concessional rate or without being charged any fare, the fare ordinarily payable for the journey shall, for the purposes of this section, be deemed to be the fare payable by such passenger.

(2) In accordance with rules made under this Chapter, the foreign travel tax shall be collected by the carrier undertaking the carriage of the passengers, or, where the tickets or other relevant documents for such carriage are not issued by such carrier, by the carrier to whom such tickets or other documents relate, as an addition to the fares payable by such passengers and shall be paid to the Central Government.

46. Power to exempt.— Notwithstanding anything contained in this Chapter, the Central Government may,—

(a) by notification in the Official Gazette, and subject to such conditions and limitations as may be specified therein, exempt wholly or to such extent as may be specified in the notification, any class or classes of passengers or any category or categories of passengers under any such class from the payment of foreign travel tax if that Government is satisfied that it is necessary so to do in the public interest;

†For such exemptions, see G.S.R. 1454, 1455, 1456, 1457, 1458 published in Gaz. of India; 1-10-1971, Pt. II-S. 3 (i), Ext. Pp. 940, 941, 943, 944.

(b) by order in writing, and subject to such conditions and limitations as may be specified therein, exempt wholly or to such extent as may be specified in the order, any passenger from the payment of the said tax if that Government is satisfied, for reasons to be recorded in the order, that it is necessary or expedient so to do, having regard to the special circumstances of his case and the purpose of his journey.

47. Penalty.— Any carrier contravening the provisions of sub-section (2) of Section 45 and any person committing a breach of any rule or regulation made under this Chapter shall be liable to a penalty not exceeding five thousand rupees and such penalty may be adjudged by such authority and in such manner as may be specified in the rules made under this Chapter.

48. Protection of action taken in good faith.— No suit or other legal proceeding shall lie against the Central Government and no suit, prosecution or other legal proceeding shall lie against any officer or authority of that Government for anything in good faith done or intended to be done in pursuance of this Chapter or the rules and regulations made thereunder.

49. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules† for carrying out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the assessment and collection of the foreign travel tax including the charges for collection payable to carriers, the authorities by whom adjudication of penalty and other functions under this Chapter are to be discharged, the issue of notices requiring payment of such tax, the manner in which such tax shall be payable, the recovery of any such tax due to the Central Government in the same manner as an arrear of land revenue or in any other manner, and the procedure for claiming refund of any amount paid under this Chapter;

(b) the powers of authorities referred to in clause (a) to enter, inspect and search any ship or aircraft or any premises of a carrier and to examine any tickets, books of account, returns or other documents for the purpose of carrying out any duty imposed on any such authority by or under this Chapter;

Provided that the provisions of the Code of Criminal Procedure, 1898, relating to searches shall, so far as they are applicable, apply in relation to searches under rules made under this clause;

(c) the procedure for adjudication of penalty;

†Foreign Travel Tax Rules, 1971, see Gaz. of India 1-10-1971, Pt. II-S. 3 (i), Ext. P. 928.

(d) appeal and revision in the case of any order made under this Chapter, the manner in which and the time within which appeal may be preferred or application for revision may be made and the fees payable therefor;

(e) any other matter which is to be, or may be, provided for by rules under this Chapter.

50. Power to make regulations.— (1) The Central Board of Excise and Customs constituted under Section 3 of the Central Boards of Revenue Act, 1963, may, by notification in the Official Gazette, make regulations* consistent with this Chapter and the rules made thereunder, generally to carry out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for—

(a) the returns and other particulars and information which carriers shall furnish, the authorities to whom, and the intervals at which, such returns, particulars and information shall be furnished;

(b) supplemental matters arising out of any rule made by the Central Government under this Chapter.

51. Rules and notifications to be laid before Parliament.— Every rule made under this Chapter and every notification issued under Section 46 shall be laid as soon as may be after it is made or issued before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or notification or both Houses agree that the rule should not be made or the notification should not be issued, the

*For Foreign Travel Tax Regulations, 1971, see Gaz. of India; 1-10-71, Pt. II-S. 3 (i), Ext. P. 945.

rule or notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or notification.

CHAPTER VIII MISCELLANEOUS

52. Amendment of Act 6 of 1898.— In the First Schedule to the Indian Post Office Act, 1898, for the sub-heading "Parcels" and the entries thereunder, the following shall be substituted, namely:—

"Parcels

For a weight not exceeding four hundred grams	One rupee.
For every four hundred grams, or fraction thereof, exceeding four hundred grams	One rupee."

53. Amendment of Act 47 of 1961.— In the Deposit Insurance Corporation Act, 1961, in Section 30, for the words "nine accounting years", the words "fourteen accounting years" shall be substituted.

54. Housing and Urban Development Finance Corporation Private Ltd. to be exempt for a certain period from liability to pay income tax and surtax.— Notwithstanding anything contained in the Income-tax Act or the Companies (Profits) Surtax Act, 1964, the Housing and Urban Development Finance Corporation Private Ltd. (a Government company as defined in Section 617 of the Companies Act, 1956) shall not be liable to pay any tax, under either of the two Acts first mentioned, on its income, profits or gains for the previous year relevant to the assessment year commencing on the 1st day of April, 1971 and for the nine previous years next following that previous year.

55. Repeal.— Section 2 of the Finance Act, 1971 is hereby repealed and shall be deemed never to have been enacted.

THE FIRST SCHEDULE

(See section 2)

PART I

INCOME-TAX AND SURCHARGES ON INCOME-TAX

Paragraph A

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of Section 2 of the Income-tax Act, not being a case to which any other Paragraph of this Part applies,—

Rates of income-tax

- | | |
|---|---|
| (1) where the total income does not exceed Rs. 5,000 | Nil; |
| (2) where the total income exceeds Rs. 5,000 but does not exceed Rs. 10,000 | 10 per cent. of the amount by which the total income exceeds Rs. 5,000; |
| (3) where the total income exceeds Rs. 10,000 but does not exceed Rs. 15,000. | Rs. 500 plus 17 per cent. of the amount by which the total income exceeds Rs. 10,000; |

- | | |
|---|--|
| (4) where the total income exceeds Rs. 15,000 but does not exceed Rs. 20,000 | Rs. 1,350 plus 23 per cent. of the amount by which the total income exceeds Rs. 15,000; |
| (5) where the total income exceeds Rs. 20,000 but does not exceed Rs. 25,000 | Rs. 2,500 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000; |
| (6) where the total income exceeds Rs. 25,000 but does not exceed Rs. 30,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (7) where the total income exceeds Rs. 30,000 but does not exceed Rs. 40,000 | Rs. 6,000 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rs. 40,000 but does not exceed Rs. 60,000 | Rs. 11,000 plus 60 per cent. of the amount by which the total income exceeds Rs. 40,000; |
| (9) where the total income exceeds Rs. 60,000 but does not exceed Rs. 80,000 | Rs. 23,000 plus 70 per cent. of the amount by which the total income exceeds Rs. 60,000; |
| (10) where the total income exceeds Rs. 80,000 but does not exceed Rs. 1,00,000 | Rs. 37,000 plus 75 per cent. of the amount by which the total income exceeds Rs. 80,000; |
| (11) where the total income exceeds Rs. 1,00,000 but does not exceed Rs. 2,00,000 | Rs. 52,000 plus 80 per cent. of the amount by which the total income exceeds Rs. 1,00,000; |
| (12) where the total income exceeds Rs. 2,00,000 | Rs. 1,32,000 plus 85 per cent. of the amount by which the total income exceeds Rs. 2,00,000; |

Provided that for the purposes of this Paragraph, in the case of a Hindu undivided family which at any time during the previous year satisfies either of the following two conditions, namely:—

(a) that it has at least two members entitled to claim partition who are not less than eighteen years of age, or

(b) that it has at least two members entitled to claim partition who are not

(Contd. in Col. 2)

lineally descended one from the other and who are not lineally descended from any other living member of the family,—

(i) no income-tax shall be payable on a total income not exceeding Rs. 7,000;

(ii) where the total income exceeds Rs. 7,000 but does not exceed Rs. 7,660, the income-tax payable thereon shall not exceed forty per cent. of the amount by which the total income exceeds Rs. 7,000.

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 10,000 | 15 per cent. of the total income; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 20,000 | Rs. 1,500 plus 25 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rs. 20,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000. |

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph C

In the case of every registered firm,—

Rates of income-tax

- | | |
|--|---|
| (1) where the total income does not exceed Rs. 10,000 | Nil; |
| (2) where the total income exceeds Rs. 10,000 but does not exceed Rs. 25,000 | 4 per cent. of the amount by which the total income exceeds Rs. 10,000; |

- (3) where the total income exceeds Rs. 25,000 but does not exceed Rs. 50,000 Rs. 600 plus 6 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rs. 50,000 but does not exceed Rs. 1,00,000 Rs. 2,100 plus 12 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rs. 1,00,000 Rs. 8,100 plus 20 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by the aggregate of surcharges for purposes of the Union calculated as specified hereunder:—

(a) in the case of a registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent. of such total income, a surcharge calculated at the rate of ten per cent. of the amount of income-tax computed at the rate hereinbefore specified;

(b) in the case of any other registered firm, a surcharge calculated at the rate of
(Contd. on Col. 2)

twenty per cent. of the amount of income-tax computed at the rate hereinbefore specified; and

(c) a special surcharge calculated at the rate of ten per cent. on the aggregate of the following amounts, namely:—

(i) the amount of income-tax computed at the rate hereinbefore specified; and

(ii) the amount of the surcharge calculated in accordance with clause (a), or, as the case may be, clause (b) of this sub-paragraph.

Explanation.—For the purposes of this Paragraph, “registered firm” includes an unregistered firm assessed as a registered firm under clause (b) of Section 183 of the Income-tax Act.

Paragraph D

In the case of every local authority,—

Rate of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per cent. of such income-tax.

Paragraph E

In the case of the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

(i) on that part of its total income which consists of profits and gains from life insurance business 52.5 per cent.;

(ii) on the balance, if any, of the total income the rate of income-tax applicable in accordance with Paragraph F of this Part, to the total income of a domestic company which is a company in which the public are substantially interested.

Paragraph F

In the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

I. In the case of a domestic company—

(1) where the company is a company in which the public are substantially interested,—

(i) in a case where the total income does not exceed Rs. 50,000 45 per cent. of the total income;

(ii) in a case where the total income exceeds Rs. 50,000 55 per cent. of the total income;

(2) where the company is not a company in which the public are substantially interested,—

(i) in the case of an industrial company—

(a) on so much of the total income as does not exceed Rs. 10,00,000 55 per cent.;

(b) on the balance, if any, of the total income 60 per cent.;

(ii) in any other case 65 per cent. of the total income:

Provided that income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rupees 50,000, shall not exceed the aggregate of—

(a) the income-tax which would have been payable by the company if its total income had been Rs. 50,000 (the income of Rs. 50,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 50,000, than a domestic company—

(Contd. in Col. 2)

II. In the case of a company other

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, or

(b) fees for rendering technical services received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964,

and where such agreement has, in either case, been approved by the Central Government

(ii) on the balance, if any, of the total income

50 per cent.

70 per cent.

PART II

Rates for deduction of tax at source in certain cases

In every case in which under the provisions of Sections 193, 194, 194A and 195 of the Income-tax Act, tax is to be deducted at the rates in force, deduction shall be made from the income subject to deduction, at the following rates:—

	Income-tax	
	Rate of income-tax	Rate of surcharge
1. In the case of a person other than a company—		
(a) where the person is resident—		
(i) on income by way of interest other than "Interest on securities"	10 per cent.	Nil
(ii) on any other income (excluding interest payable on a tax free security)	20 per cent.	8 per cent.
(b) where the person is not resident in India—		
(i) on the whole income (excluding interest payable on a tax free security)	Income-tax at 30 per cent. and surcharge at 4.5 per cent. of the amount of the income or income-tax and surcharge on income-tax in respect of the income at the rates prescribed in Paragraph A of Part III of this Schedule, if such income had been the total income, whichever is higher;	

(ii) on the income by way of interest payable on a tax-free security	15 per cent.	2.25%
2. In the case of a company—		
(a) where the company is a domestic company—		
(i) on income by way of interest other than "Interest on securities"	20 per cent.	Nil
(ii) on any other income (excluding interest payable on a tax-free security)	22 per cent.	Nil
(b) where the company is not a domestic company—		
(i) on the income by way of dividends payable by any domestic company	24.5 per cent.	Nil
(ii) on the income by way of royalties payable by an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, and which has been approved by the Central Government	50 per cent.	Nil
(iii) on the income by way of fees payable by an Indian concern for rendering technical services in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964, and which has been approved by the Central Government	50 per cent.	Nil
(iv) on the income by way of interest payable on a tax-free security	44 per cent.	Nil
(v) on any other income	70 per cent.	Nil

PART III

Rates for calculating or charging income-tax in certain cases, deducting income-tax from income chargeable under the head "Salaries" or any payment referred to in sub-section (9) of Section 80E and computing "advance tax".

In cases in which income-tax has to be calculated under the first proviso to sub-section (5) of Section 132 of the Income-tax Act or charged under sub-section (4) of Section 172 or sub-section (2) of Section 174 or Section 175 or sub-section (2) of Section 176 of the said Act or deducted under Section 192 of the said Act from income chargeable under the head "Salaries" or deducted under sub-section (9) of Section 80E of the said Act from any payment referred to in the said sub-section (9) or in which the "advance tax" payable under Chapter XVII-C of the said Act has to be computed, at the rate or rates in force, such income-tax or, as the case may

be, "advance tax" (not being "advance tax" in respect of any income chargeable to tax under Section 164 of the Income-tax Act at the rate of sixty-five per cent.) shall be so calculated, charged, deducted or computed at the following rate or rates:—

Paragraph A

In the case of every individual or Hindu undivided family or unregistered firm or other association of persons or body of individuals, whether incorporated or not, or every artificial juridical person referred to in sub-clause (vii) of clause (31) of Section 2 of the Income-tax Act, not being a case to which any other Paragraph of this Part applies,—

Rates of income-tax

(1) where the total income does not exceed Rs. 5,000	Nil;
(2) where the total income exceeds Rupees 5,000 but does not exceed Rs. 10,000	10 per cent. of the amount by which the total income exceeds Rs. 5,000;
(3) where the total income exceeds Rupees 10,000 but does not exceed Rs. 15,000	Rs. 500 plus 17 per cent. of the amount by which the total income exceeds Rs. 10,000;
(4) where the total income exceeds Rupees 15,000 but does not exceed Rs. 20,000	Rs. 1,350 plus 23 per cent. of the amount by which the total income exceeds Rs. 15,000;
(5) where the total income exceeds Rupees 20,000 but does not exceed Rs. 25,000	Rs. 2,500 plus 30 per cent. of the amount by which the total income exceeds Rs. 20,000;

(Contd. on Col. 2)

- | | |
|--|--|
| (6) where the total income exceeds Rupees 25,000 but does not exceed Rs. 30,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 25,000; |
| (7) where the total income exceeds Rupees 30,000 but does not exceed Rs. 40,000 | Rs. 6,000 plus 50 per cent. of the amount by which the total income exceeds Rs. 30,000; |
| (8) where the total income exceeds Rupees 40,000 but does not exceed Rs. 60,000 | Rs. 11,000 plus 60 per cent. of the amount by which the total income exceeds Rs. 40,000; |
| (9) where the total income exceeds Rupees 60,000 but does not exceed Rs. 80,000 | Rs. 23,000 plus 70 per cent. of the amount by which the total income exceeds Rs. 60,000; |
| (10) where the total income exceeds Rupees 80,000 but does not exceed Rs. 1,00,000 | Rs. 37,000 plus 75 per cent. of the amount by which the total income exceeds Rs. 80,000; |
| (11) where the total income exceeds Rupees 1,00,000 but does not exceed Rs. 2,00,000 | Rs. 52,000 plus 80 per cent. of the amount by which the total income exceeds Rs. 1,00,000; |
| (12) where the total income exceeds Rupees 2,00,000 | Rs. 1,32,000 plus 85 per cent. of the amount by which the total income exceeds Rs. 2,00,000; |

Provided that for the purposes of this Paragraph, in the case of a Hindu undivided family which at any time during the previous year relevant to the assessment year commencing on the 1st day of April, 1972 satisfies either of the following two conditions, namely:—

(a) that it has at least two members entitled to claim partition who are not less than eighteen years of age, or

(b) that it has at least two members entitled to claim partition who are not lineally descended one from the other and who are not lineally descended from any other living member of the family;

(i) no income-tax shall be payable on a total income not exceeding Rs. 7,000;

(ii) where the total income exceeds Rs. 7,000 but does not exceed Rs. 7,660, the income-tax payable thereon shall not exceed forty per cent. of the amount by which the total income exceeds Rs. 7,000.

(Contd. on Col. 2)

Surcharge on income-tax

The amount of income-tax computed in accordance with the preceding provisions of this Paragraph shall be increased by a surcharge for purposes of the Union calculated at the following rates, namely:—

(a) in a case where the 10 per cent. total income does not exceed Rs. 15,000

(b) in any other case 15 per cent.:

Provided that the amount of surcharge payable shall, in no case, exceed the aggregate of the following sums, namely:—

(i) an amount calculated at the rate of 10 per cent. on the amount of income-tax on an income of Rs. 15,000, if such income had been the total income (the income of Rs. 15,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the person concerned); and

(ii) 40 per cent. of the amount by which the total income exceeds Rs. 15,000.

Paragraph B

In the case of every co-operative society,—

Rates of income-tax

- | | |
|---|---|
| (1) where the total income does not exceed Rs. 10,000 | 15 per cent. of the total income; |
| (2) where the total income exceeds Rupees 10,000 but does not exceed Rs. 20,000 | Rs. 1,500 plus 25 per cent. of the amount by which the total income exceeds Rs. 10,000; |
| (3) where the total income exceeds Rupees 20,000 | Rs. 4,000 plus 40 per cent. of the amount by which the total income exceeds Rs. 20,000. |

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of fifteen per cent. of such income-tax.

Paragraph C

In the case of every registered firm,—

Rates of income-tax

- | | |
|---|------|
| (1) where the total income does not exceed Rs. 10,000 | Nil; |
|---|------|

- (2) where the total income exceeds Rupees 10,000 but does not exceed Rs. 25,000 4 per cent. of the amount by which the total income exceeds Rs. 10,000;
- (3) where the total income exceeds Rupees 25,000 but does not exceed Rs. 50,000 Rs. 600 plus 6 per cent. of the amount by which the total income exceeds Rs. 25,000;
- (4) where the total income exceeds Rupees 50,000 but does not exceed Rs. 1,00,000 Rs. 2,100 plus 12 per cent. of the amount by which the total income exceeds Rs. 50,000;
- (5) where the total income exceeds Rupees 1,00,000 Rs. 8,100 plus 20 per cent. of the amount by which the total income exceeds Rs. 1,00,000.

Surcharges on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by the aggregate of surcharges for purposes of the Union calculated as specified hereunder:—

(a) in the case of a registered firm whose total income includes income derived from a profession carried on by it and the income so included is not less than fifty-one per cent. of such total income, a surcharge calculated at the rate of ten per cent. of the amount of income-tax computed at the rate hereinbefore specified;

(b) in the case of any other registered firm, a surcharge calculated at the rate of twenty per cent. of the amount of income-tax computed at the rate hereinbefore specified; and

(c) a special surcharge calculated at the rate of fifteen per cent. on the aggregate of the following amounts, namely:—

(Contd. on Col. 2)

(i) the amount of income-tax computed at the rate hereinbefore specified; and

(ii) the amount of the surcharge calculated in accordance with clause (a), or, as the case may be, clause (b) of this subparagraph.

Explanation.— For the purposes of this Paragraph, “registered firm” includes an unregistered firm assessed as a registered firm under clause (b) of Section 183 of the Income-tax Act.

Paragraph D.

In the case of every local authority,—

Rates of income-tax

On the whole of the total income 50 per cent.

Surcharge on income-tax

The amount of income-tax computed at the rate hereinbefore specified shall be increased by a surcharge for purposes of the Union calculated at the rate of fifteen per cent. of such income-tax.

Paragraph E

In the case of the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

(i) on that part of its total income which consists of profits and gains from life insurance business 52.5 per cent.;

(ii) on the balance, if any, of the total income the rate of income-tax applicable, in accordance with Paragraph F of this Part, to the total income of a domestic company which is a company in which the public are substantially interested.

Paragraph F

In the case of a company, other than the Life Insurance Corporation of India established under the Life Insurance Corporation Act, 1956,—

Rates of income-tax

I. In the case of domestic company—

(1) where the company is a company in which the public are substantially interested,—

(i) in a case where the total income does not exceed Rs. 50,000 45 per cent. of the total income;

(ii) in a case where the total income exceeds Rs. 50,000 55 per cent. of the total income;

(2) where the company is a company in which the public are substantially interested,—

(i) in the case of an industrial company—

(a) on so much of the total income as does not exceed Rs. 10,00,000 55 per cent.;

(b) on the balance, if any, of the total income

(ii) in any other case

Provided that the income-tax payable by a domestic company, being a company in which the public are substantially interested, the total income of which exceeds Rs. 50,000, shall not exceed the aggregate of—

(a) the income-tax which would have (Contd. on Col. 2)

II. In the case of a company other

(i) on so much of the total income as consists of—

(a) royalties received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 31st day of March, 1961, or

(b) fees for rendering technical services received from an Indian concern in pursuance of an agreement made by it with the Indian concern after the 29th day of February, 1964,

and where such agreement has, in either case, been approved by the Central Government

(ii) on the balance, if any, of the total income

THE SECOND SCHEDULE

(See Section 39)

In the First Schedule to the Tariff Act,—

(i) in Items Nos. 1 (1), 39 (2), 46 (6), 58 (1), 73 (15) (a), 73 (15) (b), 75 (4), 75 (9), 75 (10), 75 (11), 75 (12), 75 (12A), 75 (14) and 75 (15), for the entry against each of them in the fourth column, the entry "100 per cent. ad valorem." shall be substituted;

(ii) in Item No. 5 (2), for the entries in the fourth and sixth columns, the entries "100 per cent. ad valorem." and "90 per cent. ad valorem." shall, respectively, be substituted;

(iii) in Item No. 9 (3), for the entries in the fourth and sixth columns against sub-item (a), the entries "Rs. 60 per kilogram." and "Rs. 60 per kilogram less 7½ per cent. ad valorem." shall, respectively, be substituted;

(iv) in Items Nos. 75 (2), 75 (3) and 75 (13), for the entries against each of them in the fourth and fifth columns, the entries "100 per cent. ad valorem." and "92½ per cent. ad valorem." shall, respectively be substituted;

(v) in Item No. 75 (18), for the entry in the fourth column against sub-item (b) (ii), the entry "100 per cent. ad valorem." shall be substituted;

(vi) in Item No. 87C, for the entry in the fourth column against sub-item (i), the entry "30 per cent. ad valorem." shall be substituted.

60 per cent.;

65 per cent. of the total income:

been payable by the company if its total income had been Rs. 50,000 (the income of Rs. 50,000 for this purpose being computed as if such income included income from various sources in the same proportion as the total income of the company); and

(b) eighty per cent. of the amount by which its total income exceeds Rs. 50,000, than a domestic company—

50 per cent.;

70 per cent.

THE INDIAN TELEGRAPH (AMENDMENT) ACT, 1971

(Act No. 33 of 1971)*

(10th August, 1971)

An Act further to amend the Indian Telegraph Act, 1885.

BE it enacted by Parliament in the Twenty-second year of the Republic of India as follows:—

1. Short title.— This Act may be called THE INDIAN TELEGRAPH (AMENDMENT) ACT, 1971.

2. Insertion of new Section 6A.— After Section 6 of the Indian Telegraph Act, 1885 (hereinafter referred to as the principal Act), the following section shall be inserted, namely:—

"6A. Power to notify rates for transmission of messages to countries outside India.— (1) The Central Government may, from time to time, by order, notify the rates at which, and the other conditions and restrictions subject to which, messages shall be transmitted to any country outside India.

(2) In notifying the rates under subsection (1), the Central Government shall have due regard to all or any of the following factors, namely:—

(a) the rates for the time being in force, for transmission of messages, in countries outside India;

*Received the assent of the President on 10-8-1971. Act published in Gaz. of India, 10-8-1971, Pt. II-S. I, Ext. P. 245. For Statement of Objects and Reasons, see Gaz. of India, 17-12-1970, Pt. II-S. 2, Ext. P. 1399.

(b) the foreign exchange rates for the time being in force;

(c) the rates for the time being in force for transmission of messages within India;

(d) such other relevant factors as the Central Government may think fit in the circumstances of the case."

3. Amendment of Section 7.—In sub-section (2) of Section 7 of the principal Act, in clause (a), the words "within India" shall be inserted at the end.

4. Omission of Section 29.—Section 29 of the principal Act shall be omitted.

THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971

(Act No. 34 of 1971)*

(10th August, 1971)

An Act to provide for the termination of certain pregnancies by registered medical practitioners and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title, extent and commencement.—(1) This Act may be called THE MEDICAL TERMINATION OF PREGNANCY ACT, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "guardian" means a person having the care of the person of a minor or a lunatic;

(b) "lunatic" has the meaning assigned to it in Section 3 of the Indian Lunacy Act, 1912;

(c) "minor" means a person who, under the provisions of the Indian Majority Act, 1875, is to be deemed not to have attained his majority;

(d) "registered medical practitioner" means a medical practitioner who possesses any recognised medical qualification as defined in clause (h) of Section 2 of the Indian Medical Council Act, 1956, whose name has been entered in a State Medical Register and who has such experience or training in gynaecology and obstetrics as may be prescribed by rules made under this Act.

*Received the assent of the President on 10-8-1971. Act published in Gaz. of India, 10-8-1971, Pt. II-S. 1, Ext. P. 237. For Statement of Objects and Reasons, see Gaz. of India, 17-11-1969, Pt. II-S. 2, Ext. P. 880.

3. When pregnancies may be terminated by registered medical practitioners.—

(1) Notwithstanding anything contained in the Indian Penal Code, a registered medical practitioner shall not be guilty of any offence under that Code or under any other law for the time being in force, if any pregnancy is terminated by him in accordance with the provisions of this Act.

(2) Subject to the provisions of sub-section (4), a pregnancy may be terminated by a registered medical practitioner,—

(a) where the length of the pregnancy does not exceed twelve weeks, if such medical practitioner is, or

(b) where the length of the pregnancy exceeds twelve weeks but does not exceed twenty weeks, if not less than two registered medical practitioners are, of opinion, formed in good faith, that—

(i) the continuance of the pregnancy would involve a risk to the life of the pregnant woman or of grave injury to her physical or mental health; or

(ii) there is a substantial risk that if the child were born, it would suffer from such physical or mental abnormalities as to be seriously handicapped.

Explanation I.—Where any pregnancy is alleged by the pregnant woman to have been caused by rape, the anguish caused by such pregnancy shall be presumed to constitute a grave injury to the mental health of the pregnant woman.

Explanation II.—Where any pregnancy occurs as a result of failure of any device or method used by any married woman or her husband for the purpose of limiting the number of children, the anguish caused by such unwanted pregnancy may be presumed to constitute a grave injury to the mental health of the pregnant woman.

(3) In determining whether the continuance of a pregnancy would involve such risk of injury to the health as is mentioned in sub-section (2), account may be taken of the pregnant woman's actual or reasonably foreseeable environment.

(4) (a) No pregnancy of a woman, who has not attained the age of eighteen years, or, who, having attained the age of eighteen years, is a lunatic, shall be terminated except with the consent in writing of her guardian.

(b) Save as otherwise provided in clause (a), no pregnancy shall be terminated except with the consent of the pregnant woman.

4. Place where pregnancy may be terminated.—No termination of pregnancy shall be made in accordance with this Act at any place other than—

(a) a hospital established or maintained by Government, or

(b) a place for the time being approved for the purpose of this Act by Government.

5. Sections 3 and 4 when not to apply.—(1) The provisions of Section 4,

and so much of the provisions of sub-section (2) of Section 3 as relate to the length of the pregnancy and the opinion of not less than two registered medical practitioners, shall not apply to the termination of a pregnancy by a registered medical practitioner in a case where he is of opinion, formed in good faith, that the termination of such pregnancy is immediately necessary to save the life of the pregnant woman.

(2) Notwithstanding anything contained in the Indian Penal Code, the termination of a pregnancy by a person who is not a registered medical practitioner shall be an offence punishable under that Code, and that Code shall, to this extent, stand modified.

Explanation.— For the purposes of this section, so much of the provisions of clause (d) of Section 2 as relate to the possession, by a registered medical practitioner, of experience or training in gynaecology and obstetrics shall not apply.

6. Power to make rules:— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the experience or training, or both, which a registered medical practitioner shall have if he intends to terminate any pregnancy under this Act; and

(b) such other matters as are required to be or may be, provided by rules made under this Act.

(3) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

7. Power to make regulations.— The State Government may, by regulations,—

(a) require any such opinion as is referred to in sub-section (2) of Section 3 to be certified by a registered medical practitioner or practitioners concerned, in such form and at such time as may be specified in such regulations, and the preservation or disposal of such certificates;

(b) require any registered medical practitioner, who terminates a pregnancy, to give intimation of such termination and

such other information relating to the termination as may be specified in such regulations;

(c) prohibit the disclosure, except to such persons and for such purposes as may be specified in such regulations, of intimations given or information furnished in pursuance of such regulations.

(2) The intimation given and the information furnished in pursuance of regulations made by virtue of clause (b) of sub-section (1) shall be given or furnished, as the case may be, to the Chief Medical Officer of the State.

(3) Any person who wilfully contravenes or wilfully fails to comply with the requirements of any regulation made under sub-section (1) shall be liable to be punished with fine which may extend to one thousand rupees.

8. Protection of action taken in good faith.— No suit or other legal proceeding shall lie against any registered medical practitioner for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

THE GUJARAT STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971 (Act No. 35 of 1971)*

(10th August, 1971)

An Act to confer on the President the power of the Legislature of the State of Gujarat to make laws.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE GUJARAT STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971.

2. Definition.— In this Act, "Proclamation" means the Proclamation issued on the 13th day of May, 1971, under Article 356 of the Constitution by the President, and published with the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 691 of the said date.

3. Conferment on the President of the power of the State Legislature to make laws.— (1) The power of the Legislature of the State of Gujarat to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President.

(2) In the exercise of the said power, the President may, from time to time, whe-

*Received the assent of the President on 10-8-1971. Act published in Gaz. of India, 10-8-1971, Pt. II-S. 1, Ext. P. 241. For Statement of Objects and Reasons see Gaz. of India, 22-6-1971, Pt. II-S.2, Ext. P. 349.

ther Parliament is or is not in session, enact, as a President's Act, a Bill containing such provisions as he considers necessary:

Provided that before enacting any such Act, the President shall whenever he considers it practicable to do so, consult a Committee constituted for the purpose, consisting of thirty-four members of the House of the People nominated by the Speaker and seventeen members of the Council of States nominated by the Chairman.

(3) Every Act enacted by the President under sub-section (2) shall, as soon as may be after enactment, be laid before each House of Parliament.

(4) Either House of Parliament may, by resolution passed within thirty days from the date on which the Act has been laid before it under sub-section (3), which period may be comprised in one session or in two successive sessions, direct any modifications to be made in the Act and if the modifications are agreed to by the other House of Parliament during the session in which the Act has been so laid before it or the session succeeding, such modifications shall be given effect to by the President by enacting an amending Act under sub-section (2):

Provided that nothing in this sub-section shall affect the validity of the Act or of any action taken thereunder before it is so amended.

THE PUNJAB STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971 (Act No. 36 of 1971)*

(10th August, 1971)

An Act to confer on the President the power of the Legislature of the State of Punjab to make laws.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called the PUNJAB STATE LEGISLATURE (DELEGATION OF POWERS) ACT, 1971.

2. Definition.— In this Act, "Proclamation" means the Proclamation issued on the 15th day of June, 1971, under Article 356 of the Constitution by the President, and published with the notification of the Government of India in the Ministry of Home Affairs No. G.S.R. 944 of the said date.

3. Conferment on the President of the power of the State Legislature to make laws.— (1) The power of the Legislature

*Received the assent of the President on 10-8-1971. Act published in Gaz. of India, 10-8-1971, Pt. II-S. 1, Ext. P. 243. For Statement of Objects and Reasons, see Gaz. of India 22-6-1971, Pt. II-S. 2, Ext. P. 354.

of the State of Punjab to make laws, which has been declared by the Proclamation to be exercisable by or under the authority of Parliament, is hereby conferred on the President.

(2) In the exercise of the said power, the President may, from time to time, whether Parliament is or is not in session, enact, as a President's Act, a Bill containing such provisions as he considers necessary:

Provided that before enacting any such Act, the President shall, whenever he considers it practicable to do so, consult a Committee constituted for the purpose, consisting of thirty members of the House of the People nominated by the Speaker and fifteen members of the Council of States nominated by the Chairman.

(3) Every Act enacted by the President under sub-section (2) shall, as soon as may be after enactment, be laid before each House of Parliament.

(4) Either House of Parliament may, by resolution passed within thirty days from the date on which the Act has been laid before it under sub-section (3), which period may be comprised in one session or in two successive sessions, direct any modifications to be made in the Act and if the modifications are agreed to by the other House of Parliament during the session in which the Act has been so laid before it or the session succeeding, such modifications shall be given effect to by the President by enacting an amending Act under sub-section (2):

Provided that nothing in this sub-section shall affect the validity of the Act or of any action taken thereunder before it is so amended.

THE CENTRAL BOARD OF DIRECT TAXES (VALIDATION OF PRO- CEEDINGS) ACT, 1971 (Act No. 37 of 1971)*

(14th August, 1971)

An Act to provide for validation of certain proceedings in relation to direct taxes and for matters connected therewith:

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE CENTRAL BOARD OF DIRECT TAXES (VALIDATION OF PROCEEDINGS) ACT, 1971.

2. Validation of certain proceedings.— Notwithstanding any judgment, decree or

*Received the assent of the President on 14-8-1971. Act published in Gaz. of India, 14-8-1971, Pt. II-S. 1, Ext. P. 295. For Statement of Objects and Reasons, see Gaz. of India, 18-12-1970, Pt. II-S. 2, Ext. P. 1403 and also Gaz. of India, 9-7-1971, Pt. II-S. 2, Ext. P. 424.

order of any court, tribunal or any other authority, no approval, declaration, determination, recognition, direction, instruction, notification, order or rule, or other thing or action given, made, granted, issued, done or taken or purporting to have been given, made, granted, issued, done or taken by the Central Board of Direct Taxes, constituted under the Central Boards of Revenue Act, 1963, in the exercise of the powers or the performance of the duties entrusted to it by the Central Government or by or under any law (not being the Estate Duty Act, 1953) shall be deemed to be invalid or ever to have been invalid by reason only of the fact that such approval, declaration, determination, recognition, direction, instruction, notification, order, rule, thing or action was given, made, granted, issued, done or taken by the Chairman and other members of the said Board either singly or jointly, without having been validly entrusted with the powers or duties in that behalf in accordance with the provisions of the aforesaid 1963-Act or the rules made thereunder, and accordingly:†

(a) all acts,† proceedings or things done or taken in pursuance of such approval, declaration, determination, recognition, direction, instruction, notification, order, rule, thing or action shall, for all purposes, be deemed to be, and to have always been, done or taken in accordance with law; and

(b) no suit or other proceeding shall be instituted or continued against the Government or any person or authority whatsoever on the ground that any such act, proceeding or thing was not done or taken in accordance with law.

THE APPROPRIATION (NO. 3) ACT, 1971

(Act No. 38 of 1971)*

(15th August, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the services of the financial year 1971-72.

Text of the Act not printed.

†Corrected by Errata published in Gaz. of India, 11-10-1971, Pt. II-S. 1, Ext. P. 524.

*Received the assent of the President on 15-8-1971. Act published in Gaz. of India, 15-8-1971, Pt. II-S. 1, Ext. P. 297. For Statement of Objects and Reasons, see Gaz. of India, 9-8-1971, Pt. II-S. 2, Ext. P. 572.

THE AGRICULTURAL REFINANCE CORPORATION (AMENDMENT) ACT, 1971

(Act No. 39 of 1971)*

(15th August, 1971)

An Act further to amend the Agricultural Refinance Corporation Act, 1963:

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE AGRICULTURAL REFINANCE CORPORATION (AMENDMENT) ACT, 1971:

2. Amendment of Section 2.— In Section 2 of the Agricultural Refinance Corporation Act, 1963 (hereinafter referred to as the principal Act), after clause (a), the following Explanation shall be inserted and shall be deemed always to have been inserted, namely:—

Explanation.— For the purposes of this clause, "pisciculture" includes the development of fisheries, both inland and marine, catching off the fish and all activities connected therewith or incidental thereto;.

3. Amendment of Section 20.— In Section 20 of the principal Act,—

(i) In sub-section (1), after clause (b), the following clause shall be inserted, namely:—

"(bb) borrow money from the Reserve Bank out of the National Agricultural Credit (Long Term Operations) Fund established under Section 46A of the Reserve Bank of India-Act, 1934";

(ii) in sub-section (2), for the words, brackets and letters "and outstanding under clauses (b) and (c) of that sub-section", the words, brackets and letters "and outstanding under clauses (b), (bb) and (c) of that sub-section" shall be substituted.

4. Consequential amendment of Act 2 of 1934.— In Section 46A of the Reserve Bank of India Act, 1934, in sub-section (2), after clause (d) and before the Explanation, the following clause shall be inserted, namely:—

"(e) the making to the Agricultural Refinance Corporation of loans and advances repayable on the expiry of fixed periods not exceeding twenty years from the date of making such loan or advance."

*Received the assent of the President on 15-8-1971. Act published in Gaz. of India, 15-8-1971, Pt. II-S. 1, Ext. P. 299. For Statement of Objects and Reasons, see Gaz. of India, 18-6-1971, Pt. II-S. 2, Ext. P. 339.

†Corrected by a Corrigendum — See Gaz. of India, 30-10-1971, Pt. II-S. 1, Ext. P. 372.

THE PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1971

(No. 40 of 1971)

CONTENTS

1. Short title, extent and commencement.
2. Definitions.
3. Appointment of estate officers.
4. Issue of notice to show cause against order of eviction.
5. Eviction of unauthorised occupants.
6. Disposal of property left on public premises by unauthorised occupants.
7. Power to require payment of rent or damages in respect of public premises.
8. Powers of estate officers.
9. Appeals.
10. Finality of orders.
11. Offences and penalty.
12. Power to obtain information.
13. Liability of heirs and legal representatives.
14. Recovery of rent, etc. as an arrear of land revenue.
15. Bar of jurisdiction.
16. Protection of action taken in good faith.
17. Delegation of powers.
18. Power to make rules.
19. Repeal.
20. Validation.

THE PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1971

(Act No. 40 of 1971)*

(23rd August, 1971)

An Act to provide for the eviction of unauthorised occupants from public premises and for certain incidental matters.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title, extent and commencement.—(1) This Act may be called THE PUBLIC PREMISES (EVICTION OF UNAUTHORISED OCCUPANTS) ACT, 1971.

(2) It extends to the whole of India.

(3) It shall be deemed to have come into force on the 16th day of September, 1958 except Sections 11, 19 and 20 which shall come into force at once.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "corporate authority" means—

(i) any company or Corporation referred to in sub-clause (1), or

(ii) the Corporation or any committee or the Authority referred to in sub-cl. (2), of clause (e) of this section;

(b) "estate officer" means an officer appointed as such by the Central Government under Section 3;

(c) "premises" means any land or any building or part of a building and includes,—

(i) the garden, grounds and outhouses, if any, appertaining to such building or part of a building, and

(ii) any fittings affixed to such building or part of a building for the more beneficial enjoyment thereof;

(d) "prescribed" means prescribed by rules made under this Act;

(e) "public premises" means any premises belonging to or taken on lease or requisitioned by, or on behalf of, the Central Government, and includes—

(1) any premises belonging to, or taken on lease by, or on behalf of—

(i) any company as defined in Sec. 3 of the Companies Act, 1956 in which not less than fifty-one per cent. of the paid-up share capital is held by the Central Government; and

(ii) any Corporation (not being a company as defined in Section 3 of the Companies Act, 1956 or a local authority) established by or under a Central Act and owned or controlled by the Central Government, and

(2) in relation to the Union territory of Delhi—

(i) any premises belonging to the Municipal Corporation of Delhi or any municipal committee or notified area committee, and

(ii) any premises belonging to the Delhi Development Authority whether such premises are in the possession of, or leased out by, the said Authority;

(f) "rent", in relation to any public premises, means the consideration payable periodically for the authorised occupation of the premises, and includes—

(i) any charge for electricity, water or any other services in connection with the occupation of the premises,

(ii) any tax (by whatever name called) payable in respect of the premises, where such charge or tax is payable by the Central Government or the corporate authority;

(g) "unauthorised occupation", in relation to any public premises, means the occupation by any person of the public premises without authority for such occupation, and includes the continuance in occupation by any person of the public premises after the authority (whether by way of grant or any other mode of transfer) under which he was allowed to occupy the premises has expired or has been determined for any reason whatsoever.

3. Appointment of estate officers.—The Central Government may, by notification in the Official Gazette,—

(a) appoint such persons, being gazetted officers of Government or officers of equivalent rank of the corporate authority,

*Received the assent of the President on 23-8-1971. Act published in Gaz. of India, 24-8-1971; Pt. II-S. 1, Ext. E. 301. For Statement of Objects and Reasons, see Gaz. of India; 5-7-1971; Pt. II-S. 2, Ext. P. 372.

as it thinks fit, to be estate officers for the purposes of this Act; and

(b) define the local limits within which, or the categories of public premises in respect of which, the estate officers shall exercise the powers conferred, and perform the duties imposed, on estate officers by or under this Act.

4. Issue of notice to show cause against order of eviction.— (1) If the estate officer is of opinion that any persons are in unauthorised occupation of any public premises and that they should be evicted, the estate officer shall issue in the manner hereinafter provided a notice in writing calling upon all persons concerned to show cause why an order of eviction should not be made.

(2) The notice shall—

(a) specify the grounds on which the order of eviction is proposed to be made; and

(b) require all persons concerned, that is to say, all persons who are, or may be, in occupation of, or claim interest in, the public premises, to show cause, if any, against the proposed order on or before such date as is specified in the notice, being a date not earlier than ten days from the date of issue thereof.

(3) The estate officer shall cause the notice to be served by having it affixed on the outer door or some other conspicuous part of the public premises, and in such other manner as may be prescribed, whereupon the notice shall be deemed to have been duly given to all persons concerned.

(4) Where the estate officer knows or has reasons to believe that any persons are in occupation of the public premises, then, without prejudice to the provisions of sub-section (3), he shall cause a copy of the notice to be served on every such person by post or by delivering or tendering it to that person or in such other manner as may be prescribed.

5. Eviction of unauthorised occupants.— (1) If, after considering the cause, if any, shown by any person in pursuance of a notice under Section 4 and any evidence he may produce in support of the same and after giving him a reasonable opportunity of being heard, the estate officer is satisfied that the public premises are in unauthorised occupation, the estate officer may make an order of eviction for reasons to be recorded therein directing that the public premises shall be vacated, on such date as may be specified in the order, by all persons who may be in occupation thereof or any part thereof, and cause a copy of the order to be affixed on the outer door or some other conspicuous part of the public premises.

(2) If any person refuses or fails to comply with the order of eviction within thirty days of the date of its publication

under sub-section (1), the estate officer or any other officer duly authorised by the estate officer in this behalf may evict that person from, and take possession of, the public premises and may, for that purpose, use such force as may be necessary.

6. Disposal of property left on public premises by unauthorised occupants.— (1) Where any persons have been evicted from any public premises under Section 5, the estate officer may, after giving fourteen days' notice to the persons from whom possession of the public premises has been taken and after publishing the notice in at least one newspaper having circulation in the locality, remove or cause to be removed or dispose of by public auction any property remaining on such premises.

(2) Where any property is sold under sub-section (1), the sale proceeds thereof shall, after deducting the expenses of the sale and the amount, if any, due to the Central Government or the corporate authority on account of arrears of rent or damages or costs, be paid to such person or persons as may appear, to the estate officer to be entitled to the same:

Provided that where the estate officer is unable to decide as to the person or persons to whom the balance of the amount is payable or as to the apportionment of the same, he may refer such dispute to the civil court of competent jurisdiction and the decision of the court thereon shall be final.

7. Power to require payment of rent or damages in respect of public premises.—

(1) Where any person is in arrears of rent payable in respect of any public premises, the estate officer may, by order, require that person to pay the same within such time and in such instalments as may be specified in the order.

(2) Where any person is, or has at any time been, in unauthorised occupation of any public premises, the estate officer may, having regard to such principles of assessment of damages as may be prescribed, assess the damages on account of the use and occupation of such premises and may, by order, require that person to pay the damages within such time and in such instalments as may be specified in the order.

(3) No order under sub-section (1) or sub-s. (2) shall be made against any person until after the issue of a notice in writing to the person calling upon him to show cause within such time as may be specified in the notice, why such order should not be made, and until his objections, if any, and any evidence he may produce in support of the same, have been considered by the estate officer.

8. Powers of estate officers.— An estate officer shall, for the purpose of holding any inquiry under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908,

when trying a suit in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) any other matter which may be prescribed.

9. Appeals.—(1) An appeal shall lie from every order of the estate officer made in respect of any public premises under Section 5 or Section 7 to an appellate officer who shall be the district judge of the district in which the public premises are situate or such other judicial officer in that district of not less than ten years' standing as the district judge may designate in this behalf.

(2) An appeal under sub-section (1) shall be preferred,—

(a) in the case of an appeal from an order under Section 5, within fifteen days from the date of publication of the order under sub-section (1) of that section; and

(b) in the case of an appeal from an order under Section 7, within fifteen days from the date on which the order is communicated to the appellant:

Provided that the appellate officer may entertain the appeal after the expiry of the said period of fifteen days, if he is satisfied that the appellant was prevented by sufficient cause from filing the appeal in time.

(3) Where an appeal is preferred from an order of the estate officer, the appellate officer may stay the enforcement of that order for such period and on such conditions as he deems fit.

(4) Every appeal under this section shall be disposed of by the appellate officer as expeditiously as possible.

(5) The costs of any appeal under this section shall be in the discretion of the appellate officer.

(6) For the purposes of this section, a presidency-town shall be deemed to be a district and the chief judge or the principal judge of the city civil court therein shall be deemed to be the district judge of the district.

10. Finality of orders.—Save as otherwise expressly provided in this Act, every order made by an estate officer or appellate officer under this Act shall be final and shall not be called in question in any original suit, application or execution proceeding and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.

11. Offences and penalty.—(1) If any person who has been evicted from any public premises under this Act again occupies the premises without authority for such occupation, he shall be punishable with imprisonment for a term which may extend to

one year, or with fine which may extend to one thousand rupees, or with both.

(2) Any magistrate convicting a person under sub-section (1) may make an order for evicting that person summarily and he shall be liable to such eviction without prejudice to any other action that may be taken against him under this Act.

12. Power to obtain information.—If the estate officer has reason to believe that any persons are in unauthorised occupation of any public premises, the estate officer or any other officer authorised by him in this behalf may require those persons or any other person to furnish information relating to the names and other particulars of the persons in occupation of the public premises and every person so required shall be bound to furnish the information in his possession.

13. Liability of heirs and legal representatives.—(1) Where any person against whom any proceeding for the determination of arrears of rent or for the assessment of damages is to be or has been taken dies before the proceeding is taken or during the pendency thereof, the proceeding may be taken or, as the case may be, continued against the heirs or legal representatives of that person.

(2) Any amount due to the Central Government or the corporate authority from any person whether by way of arrears of rent or damages or costs shall, after the death of the person, be payable by his heirs or legal representatives but their liability shall be limited to the extent of the assets of the deceased in their hands.

14. Recovery of rent, etc., as an arrear of land revenue.—If any person refuses or fails to pay the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-s. (2) of that section or the costs awarded to the Central Government or the corporate authority under sub-sec. (5) of Sec. 9 or any portion of such rent, damages or costs, within the time, if any, specified therefor in the order relating thereto, the estate officer may issue a certificate for the amount due to the Collector who shall proceed to recover the same as an arrear of land revenue.

15. Bar of jurisdiction.—No court shall have jurisdiction to entertain any suit or proceeding in respect of the eviction of any person who is in unauthorised occupation of any public premises or the recovery of the arrears of rent payable under sub-section (1) of Section 7 or the damages payable under sub-sec. (2) of that section or the costs awarded to the Central Government or the corporate authority under sub-section (5) of Section 9 or any portion of such rent, damages or costs.

16. Protection of action taken in good faith.—No suit, prosecution or other legal proceeding shall lie against the Central Government or the corporate authority or the

appellate officer or the estate officer in respect of anything which is in good faith done or intended to be done in pursuance of this Act or of any rules or orders made thereunder.

17. Delegation of powers.— The Central Government may, by notification in the Official Gazette, direct that any power exercisable by it under this Act shall, subject to such conditions, if any, as may be specified in the notification, be exercisable also by a State Government or an officer of the State Government.

18. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the form of any notice required or authorised to be given under this Act and the manner in which it may be served;

(b) the holding of inquiries under this Act;

(c) the distribution and allocation of work to estate officers and the transfer of any proceeding pending before an estate officer to another estate officer;

(d) the procedure to be followed in taking possession of public premises;

(e) the manner in which damages for unauthorised occupation may be assessed and the principles which may be taken into account in assessing such damages;

(f) the manner in which appeals may be preferred and the procedure to be followed in appeals;

(g) any other matter which has to be or may be prescribed.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

19. Repeal.— The Public Premises (Eviction of Unauthorised Occupants) Act, 1958 is hereby repealed.

20. Validation.— Notwithstanding any judgment, decree or order of any Court, anything done or any action taken (including rules or orders made, notices issued, evictions ordered or effected, damages assessed, rents or damages or costs recovered and proceedings initiated) or purported to

have been done or taken under the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 (hereafter in this section referred to as the 1958-Act) shall be deemed to be as valid and effective as if such thing or action was done or taken under the corresponding provisions of this Act which, under sub-section (3) of Section 1 shall be deemed to have come into force on the 16th day of September, 1958, and accordingly—

(a) no suit or other legal proceeding shall be maintained or continued in any Court for the refund of any rent or damages or costs recovered under the 1958-Act where such refund has been claimed merely on the ground that the said Act has been declared to be unconstitutional and void; and

(b) no Court shall enforce a decree or order directing the refund of any rent or damages or costs recovered under the 1958-Act merely on the ground that the said Act has been declared to be unconstitutional and void.

THE CONSTITUTION (TWENTY-FOURTH AMENDMENT) ACT, 1971*

(5th November, 1971.)

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE CONSTITUTION (TWENTY-FOURTH AMENDMENT) ACT, 1971.

2. Amendment of Article 13.— In Article 13 of the Constitution, after cl. (3), the following clause shall be inserted, namely:—

“(4) Nothing in this Article shall apply to any amendment of this Constitution made under Article 368.”

3. Amendment of Article 368.— Article 368 of the Constitution shall be re-numbered as clause (2) thereof, and—

(a) for the marginal heading to that Article, the following marginal heading shall be substituted, namely:—

“Power of Parliament to amend the Constitution and procedure therefor.”;

(b) before clause (2) as so re-numbered, the following clause shall be inserted, namely:—

“(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of

*Received the assent of the President on 5-11-1971. Act published in Gaz. of India; 5-11-1971, Pt. II-S. 1, Ext. P. 405. For Statement of Objects and Reasons, see Gaz. of India; 28-7-1971, Pt. II S. 2, Ext. P. 491.

this Constitution in accordance with the procedure laid down in this Article.”;

(c) in clause (2) as so re-numbered, for the words “it shall be presented to the President for his assent and upon such assent being given to the Bill,” the words “it shall be presented to the President who shall give his assent to the Bill and thereupon” shall be substituted;

(d) after clause (2) as so re-numbered, the following clause shall be inserted, namely:—

“(3) Nothing in Article 13 shall apply to any amendment made under this Article.”.

THE PREVENTION OF FOOD ADULTERATION (AMENDMENT) ACT, 1971 (Act 41 of 1971)*

(30th November, 1971)

An Act further to amend the Prevention of Food Adulteration Act, 1954.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE PREVENTION OF FOOD ADULTERATION (AMENDMENT) ACT, 1971.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 1.—In Section 1 of the Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the principal Act), in sub-section (2), the words “except the State of Jammu and Kashmir” shall be omitted.

3. Insertion of new Section 2A.—After Section 2 of the principal Act the following section shall be inserted, namely:—

“2A. Rule of construction.—Any reference in this Act to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State.”

4. Amendment of Section 25.—In Section 25 of the principal Act, in its application to the State of Jammu and Kashmir, after sub-section (2), the following sub-section shall be inserted, namely:—

“(3) (a) References to the commencement of this Act in this section shall be construed as references to the commencement of the Prevention of Food Adulteration (Amendment) Act, 1971.

(b) For the avoidance of doubt, it is hereby declared that the provisions of sub-

section (2) shall be without prejudice to the provisions contained in Section 6 of the General Clauses Act, 1897 which shall also apply to the repeal of the corresponding law in force in the State of Jammu and Kashmir as if such corresponding law had been an enactment.”.

THE DEFENCE OF INDIA ACT, 1971 (Act No. 42 of 1971)

CONTENTS

CHAPTER I

Preliminary

1. Short title, extent, application, duration and savings.
2. Definitions.

CHAPTER II

Emergency Powers.

3. Power to make rules.
4. Special powers to control civilian personnel employed in connection with the Armed Forces of the Union.
5. Enhanced penalties.
6. Temporary amendments to Acts.

CHAPTER III

Special Tribunals.

7. Constitution of Special Tribunals.
8. Jurisdiction of Special Tribunals.
9. Procedure of special Tribunals.
10. Exclusion of public from proceedings of special tribunals.
11. Powers of Special Tribunals.
12. Sentences of Special Tribunals.

CHAPTER IV

Employment of Technical Personnel in the National Service.

13. Definitions.
14. Liability for employment in national service.
15. National Service Tribunals.
16. Notified Establishments.
17. Employment of technical personnel in the national service.
18. Reinstatement.
19. Relinquishment of employment by dismissal of and engagement by establishment of technical personnel.
20. Penalties and procedure.
21. Service of summons, notices, orders etc.
22. Power to make rules.

CHAPTER V

Requisitioning and Acquisition of Immovable Property.

23. Requisitioning of immovable property.
24. Payment of compensation.
25. Power to obtain information and give direction.
26. Power of entry into, and inspection of property etc.
27. Eviction from requisitioned property.
28. Penalty for contravention of any order regarding requisitioning.

*Received the assent of the President on 30-11-1971. Act published in Gaz. of India; 30-11-1971, Pt. II-S. 1, Ext. P. 415. For Statement of Objects and Reasons see Gaz. of India; 29-7-1971, Pt. II-S. 2, Ext. P. 497.

29. Release from requisition.
30. Acquisition of requisitioned property.
31. Compensation for acquisition of requisitioned property.
32. Power to make rules.
33. Certain properties requisitioned under previous law to be deemed to be requisitioned under this chapter.

CHAPTER VI

Supplemental.

34. Power to delegate.
35. Rules to be laid before Houses of Parliament.
36. Jurisdiction of ordinary courts.
37. Effect of Act and rules, etc. inconsistent with other enactments.
38. Ordinary avocations of life to be interfered with as little as possible.
39. Savings as to orders.
40. Protection of action taken under the Act.

THE DEFENCE OF INDIA ACT, 1971

(Act No. 42 of 1971)*

(4th December, 1971)

An Act to provide for special measures to ensure the public safety and interest, the defence of India and civil defence and for the trial of certain offences and for matters connected therewith.

WHEREAS the President has declared by Proclamation under clause (1) of Article 352 of the Constitution that a grave emergency exists whereby the security of India is threatened by external aggression;

AND WHEREAS it is necessary to provide for special measures to ensure the public safety and interest, the defence of India and civil defence, and for the trial of certain offences and for matters connected therewith;

BE it, therefore, enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent, application, duration and savings.—(1) This Act may be called THE DEFENCE OF INDIA ACT, 1971.

(2) It extends to the whole of India and it applies also—

(a) to citizens of India outside India;

(b) to persons in the service of the Government, wherever they may be;

(c) in respect of the regulation and discipline of the naval, military and air forces or any other armed forces of the Union, to members of, and persons attached to, em-

ployed with, or following, those forces, wherever they may be;

(d) to, and to persons on, ships and aircraft registered in India, wherever they may be.

(3) It shall come into force at once and shall remain in force during the period of operation of the Proclamation of Emergency and for a period of six months thereafter, but its expiry under the operation of this sub-section shall not affect—

(a) the previous operation of, or anything duly done or suffered under, this Act or any rule made thereunder or any order made under any such rule, or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under this Act or any rule made thereunder or any order made under any such rule, or

(c) any penalty, forfeiture or punishment incurred in respect of any offence under this Act or any contravention of any rule made under this Act or of any order made under any such rule, or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if this Act had not expired.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "civil defence" has the same meaning as in clause (a) of Section 2 of the Civil Defence Act, 1968;

(b) "enemy" means—

(i) any person or country committing external aggression against India;

(ii) any person belonging to a country committing such aggression;

(iii) such other country as may be declared by the Central Government to be assisting the country committing such aggression;

(iv) any person belonging to such other country;

(c) "enemy territory" means—

(i) any area which is under the sovereignty of a country referred to in sub-clause (i), or a country referred to in sub-clause (iii), of clause (b) of this section;

(ii) any area which the Central Government may, by notification in the Official Gazette, specify to be enemy territory for the purposes of this Act or any rule made thereunder;

(d) "military operations" means the operations of the Armed Forces of the Union;

(e) "occupied territory" means any territory of India which is for the time being in the occupation of a country referred to in sub-clause (i), or a country referred to in sub-clause (iii), of clause (b) of this section;

(f) "prescribed" means prescribed by rules made under this Act;

*Received the assent of the President on 4-12-1971. Act published in Gaz. of India; 4-12-1971; Pt. II-S. 1, Ext. P. 443.

(g) "Proclamation of Emergency" means the Proclamation issued under Cl. (1) of Article 352 of the Constitution on the 8th day of December, 1971;

(h) "State Government",—

(i) in relation to the autonomous State of Meghalaya means,—

(a) as respects any matter with respect to which the Legislature of Meghalaya has power to make laws, the Government of Meghalaya; and

(b) as respects any other matter, the Government of Assam;

(ii) in relation to a Union territory, means the administrator thereof appointed by the President under Article 239 of the Constitution;

(iii) in relation to the North-East Frontier Agency, as defined in the North-East Frontier Areas (Administration) Regulation, 1954, means the Governor of Assam acting as the agent of the President.

CHAPTER II

EMERGENCY POWERS

3. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make such rules as appear to it necessary or expedient for securing the defence of India and civil defence, the public safety, the maintenance of public order or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community.

(2) Without prejudice to the generality of the powers conferred by sub-section (1), the rules may provide for, and may empower any authority to make orders providing for, all or any of the following matters, namely:—

(1) ensuring the safety and welfare of the Armed Forces of the Union, ships and aircraft and preventing the prosecution of any work likely to prejudice the operations of the Armed Forces of the Union;

(2) prohibiting anything likely to prejudice the training, discipline or health of the Armed Forces of the Union;

(3) preventing any attempt to tamper with the loyalty of persons in, or to dissuade (otherwise than with advice given in good faith to the person dissuaded for his benefit or that of any member of his family or any of his dependents) persons from entering the service of the Government;

(4) preventing or prohibiting anything likely to assist the enemy or to prejudice the successful conduct of military operations or civil defence including—

(a) communications with the enemy or agents of the enemy.

(b) acquisition, possession without lawful authority or excuse and publication of information likely to assist the enemy;

(c) contribution to, participation or assistance in, the floating of loans raised by or on behalf of the enemy;

(d) advance of money to, or contracts or commercial dealings with the enemy, enemy subjects or persons residing, carrying on business, or being, in enemy territory or occupied territory; and

(e) acts, publications or communications prejudicial to civil defence or military operations;

(5) preventing the spreading without lawful authority or excuse of reports or the prosecution of any purpose likely to cause disaffection or alarm; or to prejudice India's relations with foreign powers or to prejudice maintenance of peaceful conditions in any area or part of India, or to promote feelings of ill-will, enmity or hatred between different classes of the people of India;

(6) requiring the publication of news and information;

(7) (a) prohibiting the printing or publishing of any newspaper, news-sheet, book or other document containing matters prejudicial to the defence of India and civil defence, the public safety, the maintenance of public order, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community;

(b) demanding security from any press used for the purpose of printing or publishing, and forfeiting the copies of, any newspaper, news-sheet, book or other document containing any of the matters referred to in sub-clause (a);

(c) forfeiture of such security and the circumstances in which and the authority by whom such forfeiture may be ordered;

(d) closing down any press or any premises used for the purpose of printing or publishing any newspaper, news-sheet, book or other document containing any of the matters referred to in sub-clause (a) in spite of the forfeiture of such security;

(8) regulating the conduct of persons in respect of areas the control of which is considered necessary or expedient, and the removal of persons from such areas;

(9) requiring any person or class of persons to comply with any scheme of defence;

(10) ensuring the safety of—

(a) ports, dockyards, lighthouses, lightships and aerodromes;

(b) railways, tramways, roads, bridges, canals and all other means of transport by land or water;

(c) telegraphs, post offices, signalling apparatus and all other means of communication;

(d) sources and systems of water-supply, works for the supply of water, gas or electricity, and all other works for public purposes;

(e) vessels, aircraft, transport vehicles as defined in the Motor Vehicles Act, 1939, and rolling stocks of railways and tramways;

†For Defence of India Rules, 1971 — See Gaz. of India; 5-12-1971, Pt. II-S. 3 (i), Ext. P. 1141.

(f) warehouses and all other places used or intended to be used for storage purposes;

(g) mines, oil-fields, factories or industrial or commercial undertakings generally, or any mine, oil-field, factory or industrial or commercial undertaking in particular;

(h) laboratories and institutions where scientific or technological research or training is conducted or imparted;

(i) all works and structures being part of, or connected with, anything earlier mentioned in this clause; and

(j) any other place or thing used or intended to be used for the purposes of Government or a local authority or a semi-Government or autonomous organisation, the protection of which is considered necessary or expedient for securing the defence of India and civil defence, the public safety, the public order, or the efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community;

(11) the demolition, destruction or rendering useless in case of necessity of any building or other premises or any other property;

(12) prohibiting or regulating traffic, and the use of vessels, buoys, lights and signals, in ports and territorial, tidal and inland waters;

(13) the control of persons entering, travelling in, or departing from, India;

(14) restricting and regulating the charter of foreign vessels and aircraft;

(15) regulating the structure and equipment of vessels for the purpose of ensuring the safety thereof and of persons therein;

(16) regulating work in dockyards, shipyards and aerodromes in respect of the construction and repairs of vessels and aircraft;

(17) prohibiting or regulating the sailings of vessels from ports, traffic at aerodromes and the movement of aircraft, and traffic on railways, tramways and roads, and reserving and requiring to be adapted, for the use of the Government, all or any accommodation in vessels, aircraft, railways, tramways or road vehicles for the carriage of persons, animals or goods;

(18) the impressment of vessels, aircraft, vehicles and animals, for transport;

(19) prohibiting or regulating the use of postal, telegraphic or telephonic services, including the taking possession of such services, and the delaying, seizing, intercepting or interrupting of postal articles or telegraphic or telephonic messages;

(20) regulating the delivery otherwise than by postal or telegraphic service of postal articles and telegrams;

(21) the control of trade or industry for the purpose of regulating or increasing the supply of, and the obtaining of information with regard to articles or things of any description whatsoever which may be used in connection with the conduct of military

operations or civil defence or for maintaining supplies and services essential to the life of the community;

(22) the control of generation, supply, distribution, use or consumption, of electrical energy;

(23) the taking over by the Central Government or the State Government, for a limited period, of the management of any property (including any undertaking) relating to supplies and services essential to the life of the community;

(24) the control of agriculture (including the cultivation of agricultural land and crops to be raised therein) for the purpose of increasing the production and supply of foodgrains and other essential agricultural products;

(25) the provision, storage and maintenance of commodities and things required for the conduct of military operations or for the defence of India and civil defence;

(26) the requisition of services of persons for maintaining supplies and services essential to the life of the community;

(27) the provision, construction, maintenance or alteration of buildings, premises or other structures or excavations required for the conduct of military operations or the defence of India and civil defence;

(28) prohibiting, restricting or otherwise regulating the bringing into, or taking out of, India of goods or articles of any description (including coin, bullion, bank notes, currency notes, securities and foreign exchange), and bringing into any part or place in India of any such goods or articles as aforesaid intended to be taken out of India without being removed from the ship, aircraft or other conveyance in which they are being carried and applying the provisions of the Customs Act, 1962, and in particular Section 11 thereof to such prohibitions, restrictions and regulations;

(29) controlling the possession, use or disposal of, or dealing in, coin, bullion, bank notes, currency notes, securities or foreign exchange;

(30) the control of any road or pathway, waterway, ferry or bridge, river, canal or other source of water-supply;

(31) the requisitioning and acquisition of any movable property; and the principles on which and the manner in which compensation shall be determined and given in respect of such requisitioning or acquisition;

(32) the prevention of any corrupt practice or abuse of authority or other mala fide action in relation to the production, storage, purchase, sale, supply or transport of goods for any purpose connected with the defence of India and civil defence, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community;

(33) the prevention of hoarding, profiteering, blackmarketing, or adulteration of, or any other unfair practices in relation to, any goods procured by or supplied to

the Government or notified by or under the rules as essential to the life of the community;

(34) prohibiting or regulating the possession, use or disposal of—

(a) explosives, inflammable substances, corrosive and other dangerous substances or articles, arms and ammunitions of war;

(b) vessels;

(c) wireless telegraphic apparatus;

(d) aircraft; and

(e) photographic and signalling apparatus and any means of recording information;

(35) prohibiting or regulating the bringing into, or taking out of, India and the possession, use or transmission of ciphers and other secret means of communicating information;

(36) prohibiting or regulating the publication of inventions and designs;

(37) prohibiting or regulating the publication of results of research work having a bearing on efforts relating to defence of India or military operations;

(38) preventing the disclosure of official secrets;

(39) prohibiting or regulating meetings, assemblies, fairs and processions;

(40) preventing or controlling any use of uniforms, whether official or otherwise, flags, official decorations like medals, badges and other insignia and anything similar thereto, where such use is calculated to deceive or to prejudice the public safety, the maintenance of public order, the defence of India and civil defence;

(41) ensuring the accuracy of any report or declaration legally required of any person;

(42) preventing the unauthorised change of names;

(43) preventing anything likely to cause misapprehension in respect of the identity of any official person, official document or official property or in respect of the identity of any person, document or property purporting to be, or resembling, an official person, official document or official property;

(44) the accommodation in any area of persons evacuated from another area and the regulation of the conduct of evacuated persons accommodated in such area;

(45) the billeting of evacuated persons or persons authorised to exercise functions under this Act;

(46) the entry into, and search of, any place reasonably suspected of being used for any purpose prejudicial to the public safety or interest, to the defence of India and civil defence or to the efficient conduct of military operations, and for the seizure and disposal of anything found there and reasonably suspected of being used for such purpose;

(47) the preparation of any scheme of defence service or any other service co-

nected with the defence of India and requiring any person or class of persons to comply with such scheme;

(48) the eviction of unauthorised occupants from such public premises [as defined in the Public Premises (Eviction of Unauthorised Occupants) Act, 1971] as are, in the opinion of the Central Government required for the purposes connected with the defence of India and civil defence, the public safety or interest, the efficient conduct of military operations or the maintenance of supplies and services essential to the life of the community.

(3) The rules made under sub-sec. (1) may further—

(i) provide for the arrest and trial of persons contravening any of the rules or any order issued thereunder;

(ii) provide that any contravention of, or any attempt to, contravene, or any abetment of, or any attempt to abet, the contravention of any of the provisions of the rules or any order issued under any such provision, shall be punishable with imprisonment for a term which may extend to seven years, or with fine, or with both;

(iii) provide for the seizure, detention and forfeiture of any property in respect of which such contravention, attempt or abetment as is referred to in clause (ii) has been committed and for the adjudication of such forfeiture whether by a court or by any other authority;

(iv) confer powers and impose duties—

(a) upon the Central Government or officers and authorities of the Central Government as respects any matter, notwithstanding that the matter is one in respect of which the State Legislature has power to make laws; and

(b) upon any State Government or officers and authorities of any State Government as respects any matter, notwithstanding that the matter is one in respect of which the State Legislature has no power to make laws;

(v) prescribe the duties and powers of public servants and other persons as regards preventing the contravention of, or securing the observance of, the rules or any order made thereunder;

(vi) provide for preventing obstruction and deception of, and disobedience to, any person acting, and interference with any notice issued, in pursuance of the rules or any order made thereunder;

(vii) prohibit attempts by any person to screen from punishment any one, other than the husband or wife of such person, contravening any of the rules or any order made thereunder;

(viii) empower or direct any authority to take such action as may be specified in the rules or as may seem necessary to such authority for the purpose of ensuring the

public safety or interest or the defence of India and civil defence;

(ix) provide for charging fees in respect of the grant or issue of a licence, permit, certificate or other document for the purposes of the rules.

4. **Special powers to control civilian personnel employed in connection with the Armed Forces of the Union.**—The Central Government may, by notification in the Official Gazette, direct by general or special order that any persons who not being members of the Armed Forces of the Union are attached to, or employed with, or following, those Forces, shall be subject to naval, military or air force law, and thereupon such persons shall be subject to discipline and liable to punishment for offences under the Navy Act, 1957, the Army Act, 1950, and the Air Force Act, 1950, as the case may be, as if they were included in such class of persons subject to any of those Acts as may be specified in the notification or in the absence thereof, by an officer empowered by the Central Government in this behalf.

5. **Enhanced penalties.**—(1) If any person contravenes, with intent to wage war against India or to assist any country committing external aggression against India, any provision of the rules made under S. 3 or any order issued under any such rule, he shall be punishable with death or imprisonment for life or imprisonment for a term which may extend to ten years and shall also be liable to fine.

(2) If any person,—

(a) contravenes any such provision of, or any such rule or order made under, the Aircraft Act, 1934, as may be notified in this behalf by the Central Government, or

(b) in any area notified in this behalf by a State Government, contravenes any such provision of, or any such rule made under, the Arms Act, 1959, the Indian Explosives Act, 1884, the Explosive Substances Act, 1908, or the Inflammable Substances Act, 1952, as may be notified in this behalf by the State Government,

he shall, notwithstanding anything contained in any of the aforesaid Acts or rules made thereunder, be punishable with imprisonment for a term which may extend to five years, or, if his intention is to assist any country committing external aggression against India, or to wage war against India, with death or imprisonment for life or imprisonment for a term which may extend to ten years and shall, in either case, also be liable to fine.

(3) For the purposes of this section, any person who attempts to contravene, or abets or attempts to abet, or does any act preparatory to, a contravention of any provision of any law, rule or order shall be deemed to have contravened that provision.

6. **Temporary amendments to Acts.**—During the continuance in force of this Act,—

(1) the Official Secrets Act, 1923, shall have effect as if,—

(a) in sub-section (1) of Section 5, after the words “in such a place”, the words and figures “or which relates to or is used in a protected area as defined in the rules made under the Defence of India Act, 1971, or relates to anything in such area”, had been inserted; and after the words “an enemy”, the words and figures “as defined in the Defence of India Act, 1971”, had been inserted;

(b) for sub-section (4) of Section 5, the following sub-section had been substituted, namely:—

“(4) A person guilty of an offence under this section shall be punishable with imprisonment for a term which may extend to five years, or if such offence is committed with intent to assist any country committing external aggression against India or to wage war against India, with death or imprisonment for life or imprisonment for a term which may extend to ten years and shall, in either case, also be liable to fine.”;

(2) the Aircraft Act, 1934, shall have effect as if—

(a) at the end of clause (r) of sub-section (2) of Section 5, the following words had been inserted, namely:—

“including the taking of steps necessary to secure compliance with, or to prevent contravention of, the rules regulating such matters, or where any such rule has been contravened, to rectify, or to enable proceedings to be taken in respect of, such contravention”;

(b) in clause (b) of sub-section (1) of Section 8, for the words, brackets, letters and figures “clause (h) or clause (i) of sub-section (2) of Section 5”, the words, brackets, letters and figures “clause (d), (e), (h), (i), (k) or (l) of sub-section (2) of section 5, or the commission of an offence punishable under Section 11”, had been substituted;

(c) in Section 11, after the words “in the air” the words “or in such a manner as to interfere with any of the Armed Forces of the Union or any ships or aircraft” had been inserted;

(d) in Section 13, for the words, brackets, letter and figures “clause (i) of sub-section (2) of Section 5”, the words, brackets, letters and figures “clause (c), (d), (e), (h), (i), (j) or (k) of sub-section (2) of Section 5 or punishable under Section 11” had been substituted; and

(e) Section 14 had been omitted;

(3) the Payment of Wages Act, 1936, shall have effect as if after clause (i) of sub-section (2) of Section 7, the following clause had been inserted, namely:—

“(ii) deductions made with the written authorisation of—

(i) the employed person; or

(ii) the president or secretary of the registered trade union of which the employ-

ed person is a member on such conditions as may be prescribed, for contribution to the National Defence Fund or to any Defence Savings Scheme approved by the State Government;";

(4) the Motor Vehicles Act, 1939 (in this clause referred to as the "said Act") shall have effect subject to the following provisions, namely:—

(a) the State Government may, by notification in the Official Gazette, authorise, subject to such conditions, if any, as it may think fit to impose, any person—

(i) also to perform such functions of the State Government under Chapter IV (in this clause referred to as the "said Chapter") of the said Act, other than the making of rules as may be specified in the notification; and

(ii) to perform to the exclusion of the State Transport Authority or Regional Transport Authority, as the case may be, such functions of the State Transport Authority or any Regional Transport Authority under the said Chapter as may be specified in the notification,

and the expression "proper authority" in this clause shall, in relation to the performance of any such function as aforesaid, be construed in accordance with the provisions of such notification, if any, relating to that function;

(b) notwithstanding anything to the contrary in Section 58 or Section 62 of the said Act, the proper authority may grant a permit or a temporary permit under the said Chapter to be effective for any specified period or for the period of operation of this Act, whichever is less;

(c) the State Government may, by general or special order, in writing, provide that the proper authority,—

(i) in deciding to grant or refuse to grant a permit under the said Chapter, shall not be bound to take into consideration representations made by any persons other than the applicant for the permit or to follow the procedure laid down in Section 57 of the said Act; and may take into consideration an application for a stage carriage permit or a public carrier's permit which has not complied with the provisions of sub-section (2) of that section;

(ii) in fixing the maximum and minimum fares or freights for stage carriages and public carriers, shall not be bound to give the representatives of the interests affected an opportunity of being heard or to follow the procedure laid down in Sec. 43 of the said Act, or where such action is taken for the purpose of preventing the charge of excess fares or freights, to have regard to any of the considerations set forth in clauses (a) to (d) of sub-section (1) of that section;

(d) without prejudice to the provisions of Section 60 of the said Act, the proper authority may, if in its opinion the public interest so requires, cancel, or modify the

conditions of, or suspend for such period as it thinks fit, any permit or countersignature under the said Chapter which is valid in its jurisdiction;

(e) the Central Government or the State Government may, by general or special order in writing, exempt from all or any of the provisions of the said Chapter any transport vehicle used or required for use in connection with any work or purpose declared by the Central Government or, as the case may be, the State Government in the order to be a work or purpose connected with the defence of India, the conduct of military operations or civil defence;

(f) if the State Government by general or special order in writing so directs, the provisions of sub-section (2) of Section 38 of the said Act shall have effect in relation to any controlled motor vehicles specified in the order as if in the said sub-section, the words "not being in any case more than two years or less than six months" and the proviso and the Explanation had been omitted.

Explanation.— In this clause "controlled motor vehicle" means any motor vehicle declared by the Government to be a controlled motor vehicle by order made in this behalf;

(5) the Civil Defence Act, 1968, shall have effect as if,—

(a) for sub-section (3) of Section 3, the following sub-section had been substituted, namely:—

"(3) Any rule made under sub-section (1) may provide that a contravention thereof or any order made or direction given thereunder shall be punishable with imprisonment for a term which may extend to three years, or with fine, or with both;"

(b) in Section 11, sub-section (2) had been omitted;

(c) after Section 16, the following sections had been inserted, namely:—

"16A. Power of the Central Government to delegate.— The Central Government may, by order, direct that any power or duty, which by this Act or any rule made thereunder is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged also by any officer or authority subordinate to the Central Government.

16B. Effect of order made by the Central Government, etc.— Any order made by the Central Government or the officer or authority authorised by it under Section 16A in relation to a matter to which this Act or any rule made thereunder relates shall have effect, notwithstanding anything contained in any order made by the State Government or any other authority with regard to such matter;"

(d) in Section 19, after the words "authorised by", the words "the Central Government," had been inserted;

(6) the Maintenance of Internal Security Act, 1971, shall have effect as if,—

(a) in sub-section (2) of Section 1, the words "except the State of Jammu and Kashmir" had been omitted and the following proviso had been inserted at the end, namely:—

"Provided that every person in respect of whom an order of detention made under the Jammu and Kashmir Preventive Detention Act, 1964, is in force immediately before the commencement of the Defence of India Act, 1971, shall continue to be governed by the provisions of that Act in respect of such detention as if this Act had not been extended to the State of Jammu and Kashmir";

(b) in Section 2, after clause (d), the following clause had been inserted, namely:—

"(e) any reference in this Act to a law which is not in force in the State of Jammu and Kashmir shall, in relation to that State, be construed as a reference to the corresponding law, if any, in force in that State";

(c) in sub-section (2) of Section 3, for the words, brackets, figures and letter "may, if satisfied as provided in sub-clauses (ii) and (iii) of clause (a) of sub-section (1)", the words, brackets and figure "may also, if satisfied as provided in sub-section (1)," had been substituted;

(d) in Section 13, after the words "from the date of detention", the words and figures "or until the expiry of the Defence of India Act, 1971, whichever is later" had been inserted;

(e) after Section 17, the following section had been inserted, namely:—

17A. Duration of detention in cases of detention on certain grounds.—(1) Notwithstanding anything contained in the foregoing provisions of this Act, during the period of operation of the Proclamation of Emergency issued on the 3rd day of December, 1971, any person (including a foreigner) in respect of whom an order of detention has been made under this Act, may be detained without obtaining the opinion of the Advisory Board for a period longer than three months, but not exceeding two years from the date of his detention in any of the following classes of cases or under any of the following circumstances, namely:—

(a) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the defence of India, relations of India with foreign powers or the security of India; or

(b) where such person had been detained with a view to preventing him from acting in any manner prejudicial to the security of the State or the maintenance of public order.

(2) In the case of any person to whom sub-section (1) applies, Sections 10 to 13

shall have effect subject to the following modifications, namely:—

(a) in Section 10, for the words "shall, within thirty days", the words "may, at any time prior to but in no case later than three months before the expiration of two years" shall be substituted;

(b) in Section 11,—

(i) in sub-section (1), for the words "from the date of detention", the words "from the date on which reference is made to it" shall be substituted;

(ii) in sub-section (2), for the words "the detention of the person concerned," the words "the continued detention of the person concerned" shall be substituted;

(c) in Section 12, for the words "for the detention" in both the places where they occur, the words "for the continued detention" shall be substituted;

(d) in Section 13, for the words "twelve months", the words "three years" shall be substituted.

CHAPTER III

SPECIAL TRIBUNALS

7. Constitution of Special Tribunals.

—(1) The State Government may, for the whole or any part of the State, constitute one or more Special Tribunals which, or each of which, shall consist of three members appointed by that Government.

(2) No person shall be appointed as a member of a Special Tribunal unless he—

(a) is qualified under clause (2) of Article 217 of the Constitution for appointment as a Judge of a High Court; or

(b) has for a total period of not less than three years exercised, whether continuously or not, the powers under the Code of Criminal Procedure, 1898 (hereafter in this Chapter referred to as the Code) of any one or more of the following, namely:—

(i) Sessions Judge, Additional Sessions Judge, Chief Presidency Magistrate, Additional Chief Presidency Magistrate,

(ii) District Magistrate, Additional District Magistrate.

(3) At least one member of a Special Tribunal shall be qualified for appointment thereto under clause (a) of sub-section (2), and where only one member is so qualified under that clause, at least one other member shall be qualified for appointment under clause (b) of that sub-section by virtue of having exercised powers exclusive of those specified in sub-clause (ii) of the said clause (b).

8. Jurisdiction of Special Tribunals.—

During the period during which the Proclamation of Emergency is in operation, the State Government may, by general or special order, direct that a Special Tribunal shall try any offence—

(a) under any rule made under Section 3, or

(b) punishable with death, or imprisonment for life or imprisonment for a term which may extend to ten years under Section 5 of this Act or under sub-section (4) of Section 5 of the Official Secrets Act, 1923, as amended by Section 6 of this Act, triable by any court having jurisdiction within the local limits of the jurisdiction of the Special Tribunal and may, in any such order, direct the transfer to the Special Tribunal of any particular case from any other Special Tribunal or any other, criminal court not being a High Court.

9. Procedure of Special Tribunals.—

(1) A Special Tribunal may take cognizance of offences without the accused being committed to it for trial.

(2) Save in cases of trials of offences punishable with death or imprisonment for life or imprisonment for a term which may extend to five years or more, it shall not be necessary in any trial for a Special Tribunal to take down the evidence at length in writing, but the Special Tribunal shall cause a memorandum of the substance of what each witness deposes, to be taken down, and such memorandum shall be signed by a member of the Special Tribunal and shall form part of the record.

(3) A Special Tribunal shall not be bound to adjourn any trial for any purpose unless such adjournment is, in its opinion, necessary in the interests of justice.

(4) A Special Tribunal shall not, merely by reason of a change in its members, be bound to recall and to re-hear any witness who has given evidence, and it may act on the evidence already recorded by or produced before it.

(5) After an accused person has once appeared before it, a Special Tribunal may try him in his absence if, in its opinion, his absence has been brought about by the accused himself for the purpose of impeding the course of justice, or if the behaviour of the accused in court has been such as, in the opinion of the Special Tribunal, to impede the course of justice.

(6) In the event of any difference of opinion among the members of a Special Tribunal, the opinion of the majority shall prevail.

(7) The State Government may, by notification in the Official Gazette, make rules providing for—

(i) the times and places at which Special Tribunals may sit; and

(ii) the procedure to be adopted in the event of any member of a Special Tribunal being prevented from attending throughout the trial of any accused person.

(8) A Special Tribunal shall, in all matters in respect to which no procedure has been prescribed by this Act or by rules made thereunder, follow the procedure prescribed by the Code for the trial of warrant cases by Magistrates.

10. Exclusion of public from proceedings of Special Tribunals.— In addition,

and without prejudice, to any powers which a Special Tribunal may possess by virtue of any law for the time being in force to order the exclusion of the public from any proceedings, if at any stage in the course of a trial of any person before a Special Tribunal, application is made by the prosecution, on the ground that the publication of any evidence to be given or of any statement to be made in the course of the trial would be prejudicial to the safety of the State, that all or any portion of the public shall be excluded during any part of the hearing, the Special Tribunal may make an order to that effect, but the passing of the sentence shall in any case take place in public.

11. Powers of Special Tribunals.—

A Special Tribunal shall have all the powers conferred by the Code on a Court of Session exercising original jurisdiction.

12. Sentences of Special Tribunals.—

(1) A Special Tribunal may pass any sentence authorised by law.

(2) A person sentenced by a Special Tribunal—

(a) to death or imprisonment for life, or

(b) to imprisonment for a term of five years or more,

under this Act or the rules made thereunder or under sub-section (4) of Section 5 of the Official Secrets Act, 1923, as amended by Section 6 of this Act,

shall have a right of appeal to the High Court within whose jurisdiction the sentence has been passed, but save as aforesaid and notwithstanding the provisions of the Code, or of any other law for the time being in force, or of anything having the force of law by whatsoever authority made or done, there shall be no appeal from any order or sentence of a Special Tribunal and no court shall have authority to revise such order or sentence, or to transfer any case from a Special Tribunal, or to make any order under Section 491 of the Code, or have any jurisdiction of any kind in respect of any proceedings of a Special Tribunal.

(3) The powers conferred upon the appropriate Government by Chapter XXIX of the Code shall apply in respect of a person sentenced by a Special Tribunal.

CHAPTER IV

EMPLOYMENT OF TECHNICAL PERSONNEL IN THE NATIONAL SERVICE

13. Definitions.— In this Chapter, unless the context otherwise requires,—

(a) "employment in the national service" means employment in a notified establishment in pursuance of an order passed under Section 17;

(b) "employer" means any person who employs technical personnel to do any work in an establishment and includes any person entrusted with the supervision and

control of technical personnel in such an establishment;

(c) "establishment" means —

(i) any office, or

(ii) any place where any industry, trade, business or occupation is carried on; and includes any technical institution or training centre established, selected or approved by the Central Government;

(d) "National Service Tribunal" means a Tribunal constituted under Section 15;

(e) "notified establishment" means any Government establishment, any establishment belonging to a corporation owned, controlled or managed by the Government and any establishment declared by notification under sub-section (1) of Section 16 to be engaged in work of national importance;

(f) "notified occupation" means any occupation which the Central Government may, by rules made under this Chapter, specify as a notified occupation for the purposes of this Chapter;

(g) "technical personnel" means all persons who possess knowledge of or skill in one or more of the notified occupations, whether or not they are employed in any establishment, and includes such persons or class of persons undergoing training in any of those occupations in any establishment as may be declared by the Central Government by notification in the Official Gazette to be technical personnel for the purposes of this Chapter.

14. Liability for employment in national service.— All technical personnel, being citizens of India and not being members of the Armed Forces of the Union or members of any Reserve of any such Force who are liable, under the terms of their service in such Reserve, to be called up for service at any time and not only on partial or general mobilisation, shall be liable under this Chapter to undertake employment in the national service.

15. National Service Tribunals.— (1) The Central Government shall constitute, for such areas and in such places as it thinks fit, National Service Tribunals to exercise the functions assigned to such Tribunals by or under this Chapter.

(2) The composition, powers and procedure of National Service Tribunals shall be such as may be prescribed.

16. Notified establishments.— (1) The Central Government may, by notification in the Official Gazette, declare any establishment, which is engaged in work which, in the opinion of the Central Government, is likely to assist the defence of India and civil defence, the efficient conduct of military operations, or the maintenance or increase of supplies and services essential to the life of the community, to be an establishment engaged in work of national importance and thereupon such establishment shall be a notified establishment and while making such declaration, the Central Gov-

ernment may require that establishment to make such provisions as may be specified in the notification in regard to the terms of service and conditions of work of its employees.

(2) Every notified establishment shall be eligible to apply to a National Service Tribunal or to the Central Government for technical personnel and having so applied, shall take into its employment such technical personnel within such period and on such terms and conditions as may be prescribed.

17. Employment of technical personnel in the national service.— (1) Subject to any rules made in this behalf under this Chapter, the Central Government may require a National Service Tribunal to report what technical personnel, whether employed in an establishment or not, is available within its jurisdiction for employment in the national service and may by order in writing,—

(a) require the employer in any establishment by which such technical personnel is employed to release such personnel as may be specified in the order, for employment in the national service;

(b) direct any technical personnel to undertake such employment in the national service as may be specified in the order;

(c) direct that any technical personnel engaged in any establishment under conditions not amounting to employment in the national service shall, for the purposes of sub-section (3), be deemed to have been taken into employment in the national service; and

(d) require any notified establishment, notwithstanding that it has not made any application under Section 16, to take into its employment such technical personnel within such period as may be specified in the order.

(2) Notwithstanding anything in sub-section (1), a National Service Tribunal may—

(a) exercise the powers conferred on the Central Government by clauses (a) and (b) of sub-section (1);

(b) require by order any employer to give training in his establishment to persons for qualifying them as technical personnel;

(c) direct by order technical personnel to present themselves at such place and time as may be specified in the order for interview or inquiry and if so required, for submission to a test of their technical skill.

(3) Any order made by the Central Government under sub-section (1) and by a National Service Tribunal under sub-section (2) shall be complied with within such period or on such date as may be specified in this behalf in the order.

(4) The Central Government or, as the case may be, a National Service Tribunal, may, by order in writing, transfer technical personnel from one form or place of em-

ployment in the national service to another, and the employer and the personnel concerned shall comply with such order.

(5) No person included in the definition of technical personnel, who has been directed to undertake employment in the national service or transferred from one form or place of employment to another under the foregoing provisions, shall be discharged from or leave his employment in such service unless the employer or person concerned has previously obtained the permission of the Central Government or, as the case may be, of the National Service Tribunal.

(6) Any person included in the definition of technical personnel who is required to undertake employment in the national service or transferred from one form or place of employment to another under the foregoing provisions of this section, may be required by the Central Government or, as the case may be, the National Service Tribunal concerned, to submit himself to be examined by such medical authority as may be prescribed.

(7) An appeal shall lie to the Central Government against any order passed by a National Service Tribunal under this section and the decision of the Central Government shall be final.

(8) The terms of service of technical personnel taken into employment in the national service shall be such as may be prescribed.

Provided that any rights which such technical personnel may have under the provident or superannuation fund or other scheme relating to gratuity, bonus or other benefit for the advantage of employees maintained by the establishment from which they are released shall be preserved.

18. Re-instatement.—(1) Every person who was employed in an establishment immediately before his employment in the national service and whose employment in the national service has not been terminated by dismissal for serious misconduct shall, on his release from such employment in the national service, be entitled to be reinstated in his former employment, in accordance with such conditions as may be prescribed.

Provided that in determining such conditions regard shall be had to the additional skill and experience acquired by him in the course of his employment in the national service.

(2) The Central Government may by rules made in this behalf provide for the appointment of Technical Personnel (Re-instatement) Tribunals to deal with such matters in relation to re-instatement of persons released from employment in the national service as may be prescribed.

19. Relinquishment of employment by, dismissal of, and engagement by establishment of, technical personnel.—(1) Sub-

ject to any rules made in this behalf, a National Service Tribunal may require any establishment (including a notified establishment) to post before a specified date and to keep posted, on its premises notices intimating that—

(a) no person included within the definition of technical personnel who is employed in the establishment shall at any time after the posting of the notice, leave his employment without the previous permission in writing of the National Service Tribunal;

(b) if the National Service Tribunal refuses such permission, that Tribunal may lay down, subject to the prescribed conditions, the terms of service on which the employer shall continue to retain him in employment;

(c) if any such person leaves his employment without the previous permission in writing of the Tribunal as aforesaid he may be directed by the Tribunal to return to his employment.

(2) After notices referred to in sub-section (1) have been posted on the premises of any establishment (including a notified establishment), no employer in the establishment shall engage, discharge or dismiss any person included in the definition of technical personnel except in accordance with rules made in this behalf.

20. Penalties and procedure.—(1) Whoever contravenes any order of the Central Government or of a National Service Tribunal made under Section 17 or wilfully fails to comply with any summons, requirement, direction or order issued or made by the Central Government or by a National Service Tribunal under any other provision of this Chapter shall be punishable with imprisonment for a term not exceeding six months, or with fine not exceeding one thousand rupees, or with both.

(2) No court shall take cognizance of any offence punishable under sub-section (1) except with the previous sanction in writing,—

(a) in the case of contravention of any order or any wilful failure to comply with any summons, requirement or direction of the Central Government, of the Central Government;

(b) in the case of contravention of any order or any wilful failure to comply with any summons, requirement or direction of a National Service Tribunal, of the National Service Tribunal.

(3) Notwithstanding anything contained in the Code of Criminal Procedure, 1898, an offence punishable under sub-section (1) shall be cognizable.

(4) No court inferior to a Presidency Magistrate or a Magistrate of the First Class shall try any offence punishable under sub-section (1).

21. Service of summons, notices, orders, etc.— Any summons, notice, re-

quirement, direction or order issued, made or given to any person under this Chapter may be served by being sent by registered post addressed to that person at his last known residence.

22. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Chapter.

(2) Without prejudice to the generality of the foregoing power, such rules may prescribe—

(a) the occupations which shall be notified occupations for the purposes of this Chapter;

(b) the composition, powers and procedure of National Service Tribunals;

(c) the technical personnel, which may be taken into the employment of any notified establishment under sub-section (2) of Section 16 and the period within which and the terms and conditions on which such personnel shall be so taken;

(d) the medical authority before whom any person may be required to submit himself for examination under sub-section (6) of Section 17;

(e) the terms of service of technical personnel taken into employment in the national service;

(f) the conditions in accordance with which persons released from employment in the national service may be re-instated in their former employment;

(g) the appointment of Technical Personnel (Re-instatement) Tribunals and the matters in relation to re-instatement which such Tribunals may be required to deal with;

(h) the provisions relating to engagement, discharge or dismissal of persons by any employer in any establishment on the premises of which notices have been posted under sub-section (1) of Section 19;

(i) any other matter which may be prescribed or which is to be provided for by rules.

(3) Any rule made under this Chapter may provide that a contravention of the rule shall be punishable with imprisonment for a term not exceeding six months, or with fine not exceeding one thousand rupees, or with both.

CHAPTER V REQUISITIONING AND ACQUISITION OF IMMOVABLE PROPERTY

23. Requisitioning of immovable property.— (1) Notwithstanding anything contained in any other law for the time being in force, if in the opinion of the Central Government or the State Government it is necessary or expedient so to do for securing the defence of India, civil defence, public safety, maintenance of public order or efficient conduct of military operations, or for maintaining supplies and services essential to the life of the community, that Gov-

ernment may by order in writing requisition any immovable property and may make such further orders as appear to that Government to be necessary or expedient in connection with the requisitioning:

Provided that no property or part thereof which is exclusively used by the public for religious worship shall be requisitioned.

(2) The requisition shall be effected by an order in writing addressed to the person deemed by the Central Government or the State Government, as the case may be, to be the owner or person in possession of the property, and such order shall be served in the prescribed manner on the person to whom it is addressed.

(3) Whenever any property is requisitioned under sub-section (1), the period of such requisition shall not extend beyond the period for which such property is required for any of the purposes mentioned in that sub-section.

24. Payment of compensation.— Whenever in pursuance of Section 23, the Central Government or the State Government, as the case may be, requisitions any immovable property, there shall be paid to the persons interested compensation the amount of which shall be determined by taking into consideration the following, namely:—

(i) the rent payable in respect of the property or if no rent is payable, the rent payable in respect of similar property in the locality;

(ii) if in consequence of the requisition of the property the person interested is compelled to change his residence or place of business, the reasonable expenses (if any) incidental to such change;

(iii) such sum or sums, if any, as may be found necessary to compensate the person interested for damage caused to the property on entry after requisition or during the period of requisition, other than normal wear and tear.

Provided that where any person interested being aggrieved by the amount of compensation so determined makes an application within the prescribed time to the Central Government or the State Government, as the case may be, for referring the matter to an arbitrator, the amount of compensation to be paid shall be such as the arbitrator appointed in this behalf by the Central Government or the State Government, as the case may be, may determine:

Provided further that where there is any dispute as to the title to receive the compensation or as to the apportionment of the amount of compensation, it shall be referred to an arbitrator appointed in this behalf by the Central Government or the State Government, as the case may be, for determination, and shall be determined in accordance with the decision of such arbitrator.

Explanation.— In this section and in Section 31, the expression "person interested" in relation to any property includes all persons claiming or entitled to claim an interest in the compensation payable on account of the requisitioning or acquisition of that property under this Act.

25. Power to obtain information and give direction.— The Central Government or the State Government, as the case may be, may, with a view to requisitioning any property under Section 23 or determining the compensation payable under Section 24, by order—

(a) require any person to furnish to the authority mentioned therein such information in his possession relating to any property as may be specified;

(b) direct that the owner, occupier or the person in possession of the property shall not, without the permission of Government, dispose of it or where it is a building, structurally alter it till the expiry of such period as may be specified in the order.

26. Power of entry into, and inspection of, property, etc.— Any person authorised in this behalf by the Central Government or the State Government, as the case may be, may enter into any immovable property and inspect such property for the purpose of determining whether, and if so in what manner, an order under Section 23 should be made in relation to such property or with a view to securing compliance with any order made under that section.

27. Eviction from requisitioned property.— (1) Any person remaining in possession of any requisitioned property in contravention of any order made under Section 23 may be summarily evicted from the property by any officer empowered in this behalf by the Central Government or the State Government, as the case may be.

(2) Any officer so empowered may, after giving to any woman not appearing in public reasonable warning and facility to withdraw, remove or open any lock or bolt or break open any door of any building or do any other act necessary for effecting such eviction.

28. Penalty for contravention of any order regarding requisitioning.— If any person contravenes any order made under Section 23 or Section 25, he shall be punishable with imprisonment for a term which may extend to one year, or with fine, or with both.

29. Release from requisition.— (1) Where any property requisitioned under Section 23 is to be released from such requisition, the Government by which or under whose authority the property was requisitioned or any person generally or specially authorised by it in this behalf may, after such inquiry, if any, as it or he may in any case consider necessary to make or cause to be made, specify by order

in writing the person to whom possession of the property shall be given and such possession shall, as far as practicable, be given to the person who appears to the Government or, as the case may be, the person authorised as aforesaid, to be entitled to the possession of the property at the time such order is made.

(2) The delivery of possession of the property to the person specified in the order under sub-section (1) shall be a full discharge of the Government from all liabilities in respect of the property, but shall not prejudice any rights in respect of the property which any other person may be entitled by due process of law to enforce against the person to whom possession of the property is delivered.

30. Acquisition of requisitioned property.— (1) Any immovable property which has been requisitioned under Section 23 may, in the manner hereinafter provided, be acquired in the circumstances and by the Government specified below, namely:—

(a) where any works have, during the period of requisition, been constructed on, in or over the property wholly or partly at the expense of any Government, the property may be acquired by that Government if it decides that the value of or the right to use, such works shall, by means of the acquisition of the property, be preserved or secured for the purposes of any Government, or

(b) where the cost to any Government of restoring the property to its condition at the time of its requisition as aforesaid would, in the determination of that Government, be excessive having regard to the value of the property at that time, the property may be acquired by that Government.

(2) When any Government as aforesaid decides to acquire any immovable property, it shall serve on the owner thereof or where the owner is not readily traceable or the ownership is in dispute, by publishing in the Official Gazette, a notice stating that the Government has decided to acquire it in pursuance of this section.

(3) Where a notice of acquisition is served on the owner of the property or is published in the Official Gazette under sub-section (2), then, at the beginning of the day on which the notice is so served or published, the property shall vest in the Government free from any mortgage, pledge, lien or other similar encumbrances and the period of requisition thereof shall come to an end.

(4) Any decision or determination of a Government under sub-section (1) shall be final, and shall not be called in question in any court.

(5) For the purposes of this section, "works" includes every description of buildings, structures and improvements of the property.

31. Compensation for acquisition of requisitioned property.— (1) The compensation payable for the acquisition of any property under Section 30 shall be the price which the requisitioned property would have fetched in the open market if it had remained in the same condition as it was at the time of requisitioning and been sold on the date of acquisition.

(2) Where any person interested is aggrieved by the amount of compensation determined in accordance with sub-section (1), he may make an application within the prescribed time to the Central Government or the State Government, as the case may be, for referring the matter to an arbitrator appointed in this behalf by the Central Government or the State Government; and the amount of compensation to be paid shall be such as may be determined by the arbitrator in accordance with sub-section (1).

(3) The provisions of Section 25 and Section 26 shall apply in relation to the acquisition of any property or the determination of compensation for such acquisition as they apply in relation to the requisitioning of any property or the determination of compensation for such requisitioning.

(4) Where there is any dispute as to the title to receive the compensation or as to the apportionment of the amount of compensation, it shall be referred to an arbitrator appointed in this behalf by the Central Government or the State Government, as the case may be, for determination, and his decision thereon shall be final.

32. Power to make rules.— (1) The Central Government or the State Government, as the case may be, may, by notification in the Official Gazette, make rules for carrying out the purposes of this Chapter.

(2) In particular, and without prejudice to the generality of the foregoing powers, such rules may prescribe—

(a) the procedure to be followed in arbitration proceedings under this Chapter;

(b) the period within which the owner of any property or any other person interested in the amount of compensation may apply to the Government concerned for referring the matter to an arbitrator;

(c) the principles to be followed in apportioning the costs of proceedings before the arbitrator;

(d) the method of payment of compensation;

(e) the manner of service of notices and orders;

(f) any other matter which has to be, or may be, prescribed.

33. Certain properties requisitioned under previous law to be deemed to be requisitioned under this Chapter.— Any property referred to in sub-section (1) of Section 25 of the Requisitioning and Acquisition of Immovable Property Act, 1952,

which continued to be subject to requisition under the said Act and has not, immediately before the commencement of this Act, been released from requisitioning shall, notwithstanding anything contained in any other law for the time being in force, be deemed to be the property requisitioned under sub-section (1) of Section 23 if such property is, in the opinion of the Central Government, now required for any of the purposes specified in that sub-section:

Provided that—

(a) all determinations, agreements or awards for the payment of compensation in respect of any such property for any period of requisition before the commencement of this Act and in force immediately before such commencement, shall continue to be in force and shall apply to the payment of compensation in respect of that property for any period after such commencement.

(b) anything done or deemed to have been done or any action taken or deemed to have been taken (including any orders, notifications or rules made or issued or deemed to have been made or issued) under the Requisitioning and Acquisition of Immovable Property Act, 1952, shall, in so far as it is not inconsistent with the provisions of this Chapter or any rules or orders made thereunder, be deemed to have been done or taken under this Chapter.

CHAPTER VI SUPPLEMENTAL

34. Power to delegate.— (1) The Central Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed upon the Central Government shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged also—

(a) by any officer or authority subordinate to the Central Government, or

(b) whether or not the power or duty relates to a matter with respect to which a State Legislature has power to make laws, by any State Government or by any officer or authority subordinate to such Government, or

(c) by any other authority.

(2) The State Government may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed on the State Government or which, being by this Act or any such rule conferred or imposed on the Central Government has been directed under sub-section (1) to be exercised or discharged by the State Government, shall, in such circumstances and under such conditions, if any, as may be specified in the direction, be exercised or discharged by any officer or authority not being (except in the case of a Union territory) an officer or au-

thority subordinate to the Central Government.

(3) The Government of Assam may, by order, direct that any power or duty which by this Act or by any rule made under this Act is conferred or imposed on it shall, in relation to the autonomous State of Meghalaya, be exercised or discharged in such circumstances and under such conditions, if any, as may be specified in the direction by the Government of Meghalaya or by any officer or authority subordinate to that Government.

35. Rules to be laid before Houses of Parliament.— Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

36. Jurisdiction of ordinary courts.— (1) Except as may be provided in this Act or in any rule made thereunder or in any order made under any such rule by the Central Government or the State Government or by any officer not below the rank of Collector empowered under sub-section (1) or sub-section (2) of Section 34 to make such order, the ordinary criminal and civil courts shall continue to exercise jurisdiction.

(2) For the removal of doubts, it is hereby declared that any provision in any such rule or order as aforesaid to the effect that the decision of any authority not being a court shall be final or conclusive shall be a sufficient excepting provision within the meaning of sub-section (1).

37. Effect of Act and rules, etc., inconsistent with other enactments.— The provisions of this Act or any rule made thereunder or any order made under any such rule shall have effect notwithstanding anything inconsistent therewith contained in any enactment other than this Act or in any instrument having effect by virtue of any enactment other than this Act.

38. Ordinary avocations of life to be interfered with as little as possible.— Any authority or person acting in pursuance of this Act shall interfere with the ordinary avocations of life and the enjoyment of property as little as may be consonant with the purpose of ensuring the public safety and interest and the defence of India and civil defence.

39. Savings as to orders.— (1) No order made in exercise of any power conferred by or under this Act shall be called in question in any court.

(2) Where an order purports to have been made and signed by any authority in exercise of any power conferred by or under this Act a court shall, within the meaning of the Indian Evidence Act, 1872, presume that such order was so made by that authority.

40. Protection of action taken under the Act.— (1) No suit, prosecution or other legal proceeding shall lie against any person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder or any orders issued under any such rule.

(2) Save as otherwise expressly provided under this Act, no suit or other legal proceeding shall lie against the Government for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of this Act or any rule made thereunder or any order issued under any such rule.

THE INTERNATIONAL AIRPORTS AUTHORITY ACT, 1971 [ACT NO. 43 OF 1971]

CONTENTS

CHAPTER I

Preliminary

1. Short title, commencement and application.
2. Definitions.

CHAPTER II

The International Airports Authority of India

3. Constitution and incorporation of the Authority.
4. Disqualification for office of member.
5. Term of office and conditions of service of members.
6. Vacation of office of member.
7. Eligibility of member for reappointment.
8. Meetings.
9. Vacancy in the Authority not to invalidate proceedings.
10. Appointment of officers and other employees of the Authority.
11. Authority to act on business principles.

CHAPTER III

Property and Contracts

12. Transfer of assets and liabilities of Central Government to the Authority.

13. Compulsory acquisition of land for the Authority.
14. Contracts by the Authority.
15. Mode of executing contracts on behalf of the Authority.

CHAPTER IV

Functions of the Authority

16. Functions of the Authority.

CHAPTER V

Finance, Accounts and Audit

17. Power of the Authority to charge fees, rent, etc.
18. Additional capital and grants to the Authority by the Central Government.
19. Fund of the Authority.
20. Allocation of surplus funds.
21. Submission of programme of activities and financial estimates.
22. Investment of funds.
23. Borrowing powers of the Authority.
24. Accounts and audit.

CHAPTER VI

Miscellaneous

25. Submission of annual reports to Parliament.
26. Delegation.
27. Authentication of orders and other instruments of the Authority.
28. Officers and employees of the Authority to be public servants.
29. Protection of action taken under the Act.
30. Custody and disposal of lost property.
31. Provisions relating to income-tax.
32. Power of the Authority to undertake certain works.
33. Power of Central Government to temporarily divest the Authority from the management of any airport.
34. Power of Central Government to supersede the Authority.
35. Power of Central Government to issue directions.
36. Power of Central Government to make rules.
37. Power of the Authority to make regulations.
38. Supplemental provisions respecting regulations.
39. Penalty for breach of certain regulations.
40. Power to remove difficulties.
41. Amendment of Act 22 of 1934.

THE INTERNATIONAL AIRPORTS AUTHORITY ACT, 1971

(Act No. 43 of 1971)*

(8th December, 1971)

An Act to provide for the constitution of an authority for the management of certain aerodromes whereat international air transport services are operated or are intended to be operated and for matters connected therewith.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, commencement and application.— (1) This Act may be called THE INTERNATIONAL AIRPORTS AUTHORITY ACT, 1971.

(2) It shall come into force on such date as the Central Government may by notification in the Official Gazette, appoint.

(3) It applies, in the first instance, to the aerodromes of Bombay (Santa Cruz), Calcutta (Dum Dum), Delhi (Palam) and Madras (Meenambakkam) and the Central Government may, by notification in the Official Gazette, apply the provisions of this Act to any other aerodrome whereat international air transport services are operated or are intended to be operated and with effect from such date as may be specified in the notification.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "airport" means an aerodrome as defined in Clause (2) of Section 2 of the Aircraft Act, 1934 and to which this Act applies or is made applicable;

(b) "airstrip" means an area used or intended to be used for the landing and take-off of aircraft with short take-off and landing characteristics and includes all buildings and structures thereon or appertaining thereto;

(c) "Authority" means the International Airports Authority of India constituted under section 3;

(d) "Chairman" means the Chairman of the Authority;

(e) "heliport" means an area, either at ground level or elevated on a structure, used or intended to be used for the landing and take-off of helicopters and includes an area for parking helicopters and all buildings and structures thereon or appertaining thereto;

(f) "member" means a member of the Authority and includes the Chairman but

*Received the assent of the President on 8-12-1971. Act published in Gaz. of India; 9-12-1971, Pt. II-S. 1, Ext. P. 569. For Statement of Objects and Reasons, see Gaz. of India; 9-7-1971, Pt. II-S. 2, Ext. P. 412.

for the purposes of Sections 4, 5, 6 and 7 does not include the ex-officio member referred to in clause (b) of sub-section (3) of section 3;

(g) "prescribed" means prescribed by rules made under this Act; and

(h) "regulations" means regulations made under this Act.

CHAPTER II

THE INTERNATIONAL AIRPORTS AUTHORITY OF INDIA

3. Constitution and incorporation of the Authority.— (1) With effect from the commencement of this Act, the Central Government shall constitute an authority to be called the International Airports Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid having perpetual succession and a common seal with power, subject to the provisions of this Act, to acquire, hold and dispose of property both moveable and immovable, and to contract and shall by the said name sue and be sued.

(3) The Authority shall consist of—

(a) a Chairman to be appointed by the Central Government;

(b) the Director-General of Civil Aviation, ex-officio; and

(c) not less than six and not more than thirteen members to be appointed by the Central Government.

(4) The Chairman shall be a whole-time member and the other members referred to in clause (c) of sub-section (3) may be appointed as whole-time or part-time members as the Central Government may think fit.

(5) The names of persons appointed as members shall be notified by the Central Government in the Official Gazette.

(6) During the temporary absence of the Chairman, the Central Government may appoint another member to act as the Chairman.

4. Disqualification for office of member.— A person shall be disqualified for being appointed as a member if he—

(a) has been convicted and sentenced to imprisonment for an offence, which, in the opinion of the Central Government, involves moral turpitude; or

(b) is an undischarged insolvent; or

(c) is of unsound mind and stands so declared by a competent Court; or

(d) has been removed or dismissed from the service of the Government or a corporation owned or controlled by the Government; or

(e) has, in the opinion of the Central Government, such financial or other interest in the Authority as is likely to affect prejudicially the discharge by him of his functions as a member.

5. Term of office and conditions of service of members.— (1) Subject to the pro-

visions of Section 6, every member shall hold office for a period of three years from the date on which he assumes office:

Provided that Central Government may—

(a) terminate the appointment of any whole-time member, who is not a servant of the Government, after giving him notice for a period of not less than three months or in lieu thereof on payment of an amount equal to his salary and allowances, if any, for a period of three months;

(b) terminate the appointment of any part-time member who is not a servant of the Government after giving him notice for such period as may be prescribed; and

(c) terminate at any time the appointment of any member who is a servant of the Government.

(2) The other conditions of service of the members shall be such as may be prescribed.

(3) Any member may resign his office by giving notice in writing for such period as may be prescribed to the Central Government and, on such resignation being notified in the Official Gazette by that Government, such member shall be deemed to have vacated his office.

(4) A casual vacancy caused by the resignation of a member under sub-sec. (3) or otherwise may be filled by fresh appointment and the person so appointed shall hold office for the remaining period for which the member in whose place he is appointed would have held office.

6. Vacation of office of member.— The Central Government shall remove a member if he—

(a) becomes subject to any of the disqualifications mentioned in Section 4:

Provided that no member shall be removed on the ground that he has become subject to the disqualification mentioned in clause (e) of that section, unless he has been given a reasonable opportunity of being heard in the matter; or

(b) refuses to act or becomes incapable of acting; or

(c) is, without obtaining leave of absence from the Authority, absent from three consecutive meetings of the Authority; or

(d) in the opinion of the Central Government, has so abused his position as to render his continuance in office detrimental to the public interest.

Provided that no member shall be removed under this clause unless he has been given a reasonable opportunity of being heard in the matter.

7. Eligibility of member for reappointment.— Any person ceasing to be a member shall, unless disqualified under S. 4, be eligible for re-appointment as such.

8. Meetings.— (1) The Authority shall meet at such times and places and shall observe such rules of procedure in regard to the transaction of business at its meetings

(including the quorum at meetings) as may be provided by regulations.

(2) The Chairman, or, if for any reason he is unable to attend any meeting, any other member chosen by the members present at the meeting, shall preside at the meeting.

(3) All questions which come up before any meeting of the Authority shall be decided by a majority of the votes of the members present and voting, and, in the event of an equality of votes, the Chairman, or in his absence, the person presiding, shall have and exercise a second or casting vote.

9. Vacancy in the Authority not to invalidate proceedings.— No act or proceeding of the Authority shall be deemed to be invalid by reason merely of any vacancy in, or any defect in the constitution of, the Authority.

10. Appointment of officers and other employees of the Authority.— (1) For the purpose of enabling it efficiently to discharge its functions under this Act, the Authority shall, subject to the provisions of Section 12 and to such rules as may be prescribed in this behalf, appoint (whether on deputation or otherwise) such number of officers and other employees as it may consider necessary:

Provided that the appointment of such category of officers as may be specified after consultation with the Chairman in such rules, shall be subject to the approval of the Central Government.

(2) Subject to the provisions of Section 12, every officer or other employee appointed by the Authority shall be subject to such conditions of service and shall be entitled to such remuneration as may be determined by regulations.

11. Authority to act on business principles.— In the discharge of its functions under this Act, the Authority shall act, so far as may be, on business principles.

CHAPTER III PROPERTY AND CONTRACTS

12. Transfer of assets and liabilities of Central Government to the Authority.—

(1) Save as otherwise provided in sub-s. (2), as from such date as the Central Government may appoint by notification in the Official Gazette in relation to any airport,—

(a) all properties and other assets vested in the Central Government for the purposes of the airport and administered by the Director-General of Civil Aviation immediately before such day shall vest in the Authority;

(b) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with, or for the Central Government immediately before such day for or in connection with purposes of the airport shall be deemed to have been incurred, entered into

and engaged to be done by, with, or for the Authority;

(c) all non-recurring expenditure incurred by the Central Government for or in connection with the purposes of the airport up to such day and declared to be capital expenditure by the Central Government shall, subject to such terms and conditions as may be determined by the Central Government, be treated as the capital provided by the Central Government to the Authority;

(d) all sums of money due to the Central Government in relation to the airport immediately before such day shall be deemed to be due to the Authority;

(e) all suits and other legal proceedings instituted or which could have been instituted by or against the Central Government immediately before such day for any matter in relation to the airport may be continued or instituted by or against the Authority;

(f) every employee holding any office under the Central Government immediately before such day solely or mainly for or in connection with such affairs of the airport as are relevant to the functions of the Authority under this Act shall be treated as on deputation with the Authority but shall hold his office in the Authority by the same tenure and upon the same terms and conditions of service as respects remuneration, leave, provident fund, retirement or other terminal benefits as he would have held such office, if the Authority had not been constituted and shall continue to do so until the Central Government, either on its own motion or at the request of the Authority, recalls such employee to its service or until the Authority, with the concurrence of the Central Government, duly absorbs such employee in its regular service, whichever is earlier:

Provided that during the period of deputation of any such employee with the Authority, the Authority shall pay to the Central Government, in respect of every such employee, such contribution towards his leave salary, pension and gratuity as the Central Government may, by order, determine:

Provided further that any such employee, who has, in respect of the proposal of the Authority to absorb him in its regular service, intimated within such time as may be specified in this behalf by the Authority his intention of not becoming a regular employee of the Authority, shall not be absorbed by the Authority in its regular service.

(2) As from the date determined by the Central Government under the proviso to sub-section (2) of Section 16,—

(a) the equipment and appliances relating to air navigation services and the buildings used exclusively for such services immediately before such day shall vest in the Authority;

(b) all debts, obligations and liabilities incurred, all contracts entered into and all matters and things engaged to be done by, with, or for the Central Government immediately before such day for or in connection with air navigation services shall be deemed to have been incurred, entered into and engaged to be done by, with, or for the Authority;

(c) all sums of money due to the Central Government for or in connection with air navigation services immediately before such day shall be deemed to be due to the Authority;

(d) all suits and other legal proceedings instituted or which could have been instituted by or against the Central Government immediately before such day for any matter in connection with air navigation services may be continued or instituted by or against the Authority;

(e) every employee holding any office under the Central Government immediately before such day solely or mainly for or in connection with air navigation services shall be treated as on deputation with the Authority but shall hold his office in the Authority by the same tenure and upon the same terms and conditions of service as respects remuneration, leave, provident fund, retirement or other terminal benefits as he would have held such office if the Authority had not been constituted and shall continue to do so until the Central Government, either on its own motion or at the request of the Authority, recalls such employee to its service or until the Authority, with the concurrence of the Central Government, duly absorbs such employee in its regular service, whichever is earlier;

Provided that during the period of deputation of any such employee with the Authority, the Authority shall pay to the Central Government, in respect of every such employee, such contribution towards his leave salary, pension and gratuity as the Central Government may, order, determine;

Provided further that any such employee, who has, in respect of the proposal of the Authority to absorb him in its regular service, intimated within such time as may be specified in this behalf by the Authority his intention of not becoming a regular employee of the Authority, shall not be absorbed by the Authority in its regular service.

(3) If any dispute or doubt arises as to which of the properties, rights or liabilities of the Central Government have been transferred to the Authority or as to which of the employees serving under the Central Government are to be treated as on deputation with the Authority, under this section, such dispute or doubt shall be decided by the Central Government in consultation with the Authority and the decision of the Central Government thereon shall be final.

(4) Notwithstanding anything contained in the Industrial Disputes Act, 1947 or in any other law for the time being in force,

the absorption of any employee by the Authority in its regular service under this section shall not entitle such employee to any compensation under that Act or other law and no such claim shall be entertained by any court, tribunal or other authority.

(5) In this section and in Section 16, the expression "air navigation services", in relation to any airport, means air traffic services (including aeronautical and flight information services), aeronautical communication and navigational aids and meteorological services at such airport.

13. Compulsory acquisition of land for the Authority.— Any land required by the Authority for discharging its functions under this Act shall be deemed to be needed for a public purpose and such land may be acquired for the Authority under the provisions of the Land Acquisition Act, 1894 or of any other corresponding law for the time being in force.

14. Contracts by the Authority.— Subject to the provisions of Section 15, the Authority shall be competent to enter into and perform any contract necessary for the discharge of its functions under this Act.

15. Mode of executing contracts on behalf of the Authority.— (1) Every contract shall, on behalf of the Authority, be made by the Chairman or such other member or such officer of the Authority as may be generally or specially empowered in this behalf by the Authority and such contracts or class of contracts as may be specified in the regulations shall be sealed with the common seal of the Authority:

Provided that no contract exceeding such value or amount as the Central Government may, from time to time, by order, fix in this behalf shall be made unless it has been previously approved by the Authority:

Provided further that no contract for the acquisition or sale of immovable property or for the lease of any such property for a term exceeding thirty years and no other contract exceeding such value or amount as the Central Government may, from time to time, by order, fix in this behalf shall be made unless it has been previously approved by the Central Government.

(2) Subject to the provisions of subsection (1), the form and manner in which any contract shall be made under this Act shall be such as may be prescribed by regulations.

(3) No contract which is not in accordance with the provisions of this Act and the regulations shall be binding on the Authority.

CHAPTER IV FUNCTIONS OF THE AUTHORITY

16. Functions of the Authority.— (1) Subject to the rules, if any, made by the Central Government in this behalf, it shall be the function of the Authority to manage the airports efficiently.

(2) It shall be the duty of the Authority to provide at the airports such services and facilities as are necessary or desirable for the efficient operation of air transport services thereat:

Provided that the function of providing air navigation services at the airports shall continue to be discharged by the Central Government until such date as that Government may, by order, determine.

(3) Without prejudice to the generality of the provisions contained in sub-Ss. (1) and (2), the Authority may—

(a) plan, develop, construct and maintain runways, taxiways, aprons and terminal and ancillary buildings at the airports;

(b) construct residential buildings and create townships for its employees;

(c) establish and maintain hotels, restaurants and rest-rooms at or near the airports;

(d) establish warehouses at the airports for the storage or processing of goods;

(e) arrange for postal, money exchange, insurance and telephone facilities for the use of passengers and other persons at the airports;

(f) make appropriate arrangements for watch and ward at the airports;

(g) regulate and control the plying of vehicles, and the entry and exit of passengers and visitors, in the airports with due regard to the protocol functions of the Government of India;

(h) develop and provide consultancy services in India and abroad in relation to planning and development of airports or any facilities thereat;

(i) establish and manage heliports and airstrips;

(j) provide such transport facilities as are, in the opinion of the Authority, necessary to the passengers travelling by air;

(k) form one or more companies under the Companies Act, 1956 or under any other law relating to companies to further the efficient discharge of the functions imposed on it by this Act; and

(l) take all such steps as may be necessary or convenient for, or may be incidental to, the exercise of any power or the discharge of any function conferred or imposed on it by this Act.

(4) In the discharge of its functions under this section, the Authority shall have due regard to the development of air transport service and to the efficiency, economy and safety of such service.

(5) Nothing contained in this section shall be construed as—

(a) imposing an obligation on the Authority to discharge any function or duty under this section with respect to any airport in relation to which a notification has not been issued under sub-sec. (1) of Section 12;

(b) authorising the disregard by the Authority of any law for the time being in force; or

(c) authorising any person to institute any proceeding in respect of a duty or liability to which the Authority or its officers or other employees would not otherwise be subject.

CHAPTER V

FINANCE, ACCOUNTS AND AUDIT

17. Power of the Authority to charge fees, rent, etc.—The Authority may—

(i) with the previous approval of the Central Government, charge fees or rent—

(a) for the landing, housing or parking of aircrafts or for any other service or facility offered in connection with aircraft operations, at any airport, heliport or airstrip.

Explanation.—In this sub-clause "aircraft" does not include an aircraft belonging to the Indian Defence Services and "aircraft operations" do not include operations of any aircraft belonging to the said Services;

(b) for the amenities given to the passengers and visitors at any airport, heliport or airstrip;

(c) for the use and enjoyment by persons of facilities and other services provided by the Authority at any airport, heliport or airstrip;

(ii) with due regard to the instructions that the Central Government may give to the Authority, from time to time, charge fees or rent from persons who are given by the Authority any facility for carrying on any trade or business at any airport.

18. Additional capital and grants to the Authority by the Central Government.—The Central Government may, after due appropriation made by Parliament by law in this behalf,—

(a) provide any capital over and above the capital provided under clause (c) of sub-section (1) of Section 12, that may be required by the Authority for the discharge of its functions under this Act or for any purpose connected therewith on such terms and conditions as that Government may determine;

(b) pay to the Authority, on such terms and conditions as the Central Government may determine, by way of loans or grants such sums of money as that Government may consider necessary for the efficient discharge by the Authority of its functions under this Act.

19. Fund of the Authority.—(1) The Authority shall have its own fund and all receipts of the Authority shall be credited thereto and all payments of the Authority shall be made therefrom.

(2) The Authority shall have power, subject to the provisions of this Act, to spend such sums as it thinks fit to cover all administrative expenses of the Authority and on objects or for purposes authorised by this Act and such sums shall be treated

as expenditure out of the fund of the Authority.

(3) All moneys standing at the credit of the Authority which cannot immediately be applied as provided in sub-section (2) shall be deposited in the State Bank of India or in such scheduled bank or banks and subject to such conditions as may from time to time be specified by the Central Government.

Explanation.—In this sub-section "scheduled bank" has the same meaning as in clause (e) of Section 2 of the Reserve Bank of India Act, 1934.

20. Allocation of surplus funds.—(1) The Authority may, from time to time, set apart such amounts as it thinks fit as a reserve fund or funds for the purpose of expanding existing facilities or services or creating new facilities or services at any airport or for the purpose of providing against any temporary decrease of revenue or increase of expenditure from transient causes or for purposes of replacement or for meeting expenditure arising from loss or damage from fire, cyclone, air-crash or other accident or for meeting any liability arising out of any act or omission in the discharge of its functions under this Act:

Provided that without prejudice to the right of the Authority to establish specific reserves for one or more specific purposes, the Authority shall also have the power to establish a general reserve:

Provided further that the sums set apart annually in respect of each or any of the specific and general reserves and the aggregate at any time of such sums shall not exceed such limits as may, from time to time, be fixed in that behalf by the Central Government.

(2) After making provision for such reserve fund or funds and for bad and doubtful debts, depreciation in assets and all other matters which are usually provided for by companies registered and incorporated under the Companies Act, 1956, the Authority shall pay the balance of its annual net profits to the Central Government.

21. Submission of programme of activities and financial estimates.—(1) The Authority shall before the commencement of each financial year, prepare a statement of the programme of its activities during the forthcoming financial year as well as a financial estimate in respect thereof.

(2) The statement prepared under sub-section (1) shall, not less than three months before the commencement of each financial year, be submitted for approval to the Central Government.

(3) The statement and the financial estimates of the Authority may, with the approval of the Central Government, be revised by the Authority.

22. Investment of funds.—The Authority may invest its funds (including any

reserve fund) in the securities of the Central Government or in such other manner as may be prescribed.

23. Borrowing powers of the Authority.—(1) The Authority may, with the consent of the Central Government or in accordance with the terms of any general or special authority given to it by the Central Government, borrow money from any source by the issue of bonds, debentures or such other instruments as it may deem fit for discharging all or any of its functions under this Act.

(2) The Central Government may guarantee in such manner as it thinks fit the repayment of the principal and the payment of interest thereon with respect to the loans borrowed by the Authority under sub-section (1).

(3) Subject to such limits as the Central Government may, from time to time, lay down, the Authority may borrow temporarily by way of overdraft or otherwise such amounts as it may require for discharging its functions under this Act.

24. Accounts and audit.—(1) The Authority shall maintain proper accounts and other relevant records and prepare an annual statement of accounts including the profit and loss account and the balance-sheet in such form as may be prescribed by the Central Government in consultation with the Comptroller and Auditor-General of India.

(2) The accounts of the Authority shall be audited annually by the Comptroller and Auditor-General of India and any expenditure incurred by him in connection with such audit shall be payable by the Authority to the Comptroller and Auditor-General of India.

(3) The Comptroller and Auditor-General of India and any person appointed by him in connection with the audit of the accounts of the Authority shall have the same rights and privileges and authority in connection with such audit as the Comptroller and Auditor-General has in connection with the audit of Government accounts and, in particular, shall have the right to demand the production of books, accounts, connected vouchers, documents and papers and inspect any of the offices of the Authority.

(4) The accounts of the Authority as certified by the Comptroller and Auditor-General of India or any other person appointed by him in this behalf together with the audit report thereon shall be forwarded annually to the Central Government and that Government shall cause the same to be laid before both Houses of Parliament.

CHAPTER VI

MISCELLANEOUS

25. Submission of annual reports to Parliament.—(1) The Authority shall, as soon as may be after the end of each finan-

cial year, prepare and submit to the Central Government in such form as may be prescribed a report giving an account of its activities during that financial year and the report shall also give an account of the activities which are likely to be undertaken by the Authority during the next financial year.

(2) The Central Government shall cause such report to be laid before both Houses of Parliament as soon as may be after it is submitted.

26. **Delegation.**—The Authority may, by general or special order in writing, delegate to the Chairman or any other member or to any officer of the Authority, subject to such conditions and limitations, if any, as may be specified in the order, such of its powers and functions under this Act (except the powers under Section 37) as it may deem necessary.

27. **Authentication of orders and other instruments of the Authority.**—All orders and decisions of the Authority shall be authenticated by the signature of the Chairman or any other member authorised by the Authority in this behalf and all other instruments executed by the Authority shall be authenticated by the signature of an officer of the Authority authorised by the Authority in this behalf.

28. **Officers and employees of the Authority to be public servants.**—All officers and employees of the Authority shall, when acting or purporting to act in pursuance of the provisions of this Act or of any rule or regulation made thereunder, be deemed to be public servants within the meaning of Section 21 of the Indian Penal Code.

29. **Protection of action taken under the Act.**—No suit, prosecution or other legal proceeding shall lie against the Authority or any member or any officer or other employee of the Authority for anything which is in good faith done or intended to be done in pursuance of this Act or of any rule or regulation made thereunder or for any damage sustained by any aircraft or vehicle in consequence of any defect in any of the airports or other things belonging to or under the control of the Authority.

30. **Custody and disposal of lost property.**—Subject to such regulations as the Authority may make in this behalf, the Authority shall provide for securing the safe custody and restoration of any property which, while not in proper custody, is found on any premises belonging to the Authority or under its overall control or in any aircraft on any such premises.

31. **Provisions relating to income-tax.**—For the purposes of the Income-tax Act, 1961 or any other enactment for the time being in force relating to income-tax or any other tax on income, profits or gains, the Authority shall be deemed to be a company within the meaning of the Income-tax

Act, 1961 and shall be liable to tax accordingly on its income, profits and gains.

32. **Power of the Authority to undertake certain works.**—The Authority may undertake to carry out on behalf of any person any works or services or any class of works or services on such terms and conditions as may be agreed upon between the Authority and the person concerned.

33. **Power of Central Government to temporarily divest the Authority from the management of any airport.**—(1) If at any time the Central Government is of opinion that in the public interest it is necessary or expedient so to do, it may, by order, direct the Authority to entrust the management of any airport with effect from such date and to such person as may be specified in the order and the Authority shall be bound to comply with such direction:

Provided that before an order is made under this sub-section the Authority shall be given a reasonable opportunity of being heard in the matter.

(2) Where the management of any airport is entrusted to any person specified under sub-section (1) (hereafter in this section referred to as the authorised person), the Authority shall cease to exercise and discharge all its powers and functions under this Act in relation to such airport and such powers and functions shall be exercised and discharged by the authorised person in accordance with the instructions, if any, which the Central Government may give to the authorised person from time to time:

Provided that no such power or function as may be specified by the Central Government by a general or special order shall be exercised or discharged by the authorised person except with the previous sanction of the Central Government.

(3) An order made under sub-section (1) shall, unless rescinded, be in operation for a period of six months from the date on which the management of the airport is entrusted to the authorised person:

Provided that the Central Government may extend such period for a further period or periods not exceeding eighteen months.

(4) During the operation of an order made under sub-section (1), it shall be competent for the Central Government to issue, from time to time, such directions to the Authority as are necessary to enable the authorised person to exercise the powers and discharge the functions of the Authority under this Act in relation to the airport, the management of which has been entrusted to him and in particular to transfer any sum of money from the fund of the Authority to the authorised person for the management of the airport and every such direction shall be complied with by the Authority.

(5) On the cesser of operation of any order made under sub-section (1) in relation to any airport, the authorised person

shall cease to exercise and perform the powers and functions of the Authority under this Act in relation to such airport and the Authority shall continue to exercise and perform such powers and functions in accordance with the provisions of this Act.

(6) On the cesser of operation of any order made under sub-section (1) in relation to any airport, the authorised person shall hand over to the Authority any property (including any sum of money or other asset) remaining with him in connection with the management of such airport.

(7) Anything done or any action taken lawfully by the authorised person in relation to any airport during the period of operation of an order made under sub-section (1) shall be deemed to have been done or taken by the Authority and shall be binding on the Authority.

34. Power of Central Government to supersede the Authority.— (1) If, at any time, the Central Government is of opinion—

(a) that on account of a grave emergency, the Authority is unable to discharge the functions and duties imposed on it by or under the provisions of this Act; or

(b) that the Authority has persistently made default in complying with any direction issued by the Central Government under this Act or in the discharge of the functions and duties imposed on it by or under the provisions of this Act and as a result of which default the financial position of the Authority or the administration of any airport has deteriorated; or

(c) that circumstances exist which render it necessary in the public interest so to do, the Central Government may, by notification in the Official Gazette, supersede the Authority for such period, not exceeding six months, as may be specified in the notification:

Provided that before issuing a notification under this sub-section for the reasons mentioned in clause (b), the Central Government shall give a reasonable opportunity to the Authority to show cause why it should not be superseded and shall consider the explanations and objections, if any, of the Authority.

(2) Upon the publication of a notification under sub-section (1) superseding the Authority,—

(a) all the members shall, as from the date of supersession, vacate their offices as such;

(b) all the powers, functions and duties which may, by or under the provisions of this Act, be exercised or discharged by or on behalf of the Authority, shall, until the Authority is re-constituted under sub-section (3), be exercised and discharged by such person or persons as the Central Government may direct;

(c) all property owned or controlled by the Authority shall, until the Authority is

re-constituted under sub-section (3), vest in the Central Government.

(3) On the expiration of the period of supersession specified in the notification issued under sub-section (1), the Central Government may—

(a) extend the period of supersession for such further term, not exceeding six months, as it may consider necessary; or

(b) re-constitute the Authority by fresh appointment and in such case any persons who vacated their offices under clause (a) of sub-section (2) shall not be deemed disqualified for appointment:

Provided that the Central Government may, at any time before the expiration of the period of supersession, whether as originally specified under sub-section (1) or as extended under this sub-section, take action under clause (b) of this sub-section.

(4) The Central Government shall cause a notification issued under sub-section (1) and a full report of any action taken under this section and the circumstances leading to such action to be laid before both Houses of Parliament at the earliest opportunity.

35. Power of Central Government to issue directions.— (1) Without prejudice to the foregoing provisions of this Act, the Authority shall, in the discharge of its functions and duties under this Act, be bound by such directions on questions of policy as the Central Government may give in writing to it from time to time:

Provided that the Authority shall, as far as practicable, be given opportunity to express its views before any direction is given under this sub-section.

(2) The decision of the Central Government whether a question is one of policy or not shall be final.

36. Power of Central Government to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the conditions of service of the Chairman and other members under Section 5 including the salaries payable to the Chairman and to the members who are required to render whole-time service and the fees and allowances payable to the members who are required to render part-time service;

(b) the period of notice required to terminate the appointment of any member, who is required to render part-time service and who is not a servant of the Government, under Section 5, and the period of notice that may be given to the Central Government by a member before he resigns his office, under that section;

(c) the conditions and limitations subject to which the Authority may appoint

officers and other employees under sub-section (1) of Section 10;

(d) the terms and conditions subject to which the non-recurring expenditure incurred by the Central Government for or in connection with the purposes of any airport shall be treated as the capital provided by the Central Government to the Authority under clause (c) of sub-section (1) of Section 12;

(e) the manner in which the Authority may invest its funds under Section 22;

(f) the form in which the Authority shall prepare the annual statement of accounts including the profit and loss account and the balance-sheet under Section 24; and

(g) any other matter which is to be or may be prescribed.

(3) Every rule made under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule, or both Houses agree that the rule should not be made, the rule shall, thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

37. Power of the Authority to make regulations.—(1) The Authority may make regulations not inconsistent with this Act and the rules made thereunder to provide for all matters for which provision is necessary or expedient for the purpose of giving effect to the provisions of this Act.

(2) Without prejudice to the generality of the foregoing power, such regulations may provide for—

(a) the times and places of the meetings of the Authority and the procedure to be followed for the transaction of business at such meetings under sub-section (1) of Section 8;

(b) the conditions of service and the remuneration of officers and other employees appointed by the Authority;

(c) the contracts or class of contracts which are to be sealed with the common seal of the Authority and the form and manner in which a contract may be made by the Authority;

(d) the storage or processing of goods in any warehouse established by the Authority under clause (d) of sub-section (3) of Section 16 and the charging of fees for such storage or processing;

(e) the custody and restoration of lost property and the terms and conditions under which lost property may be restored to the person entitled thereto, under Section 30;

(f) the disposal of any lost property in cases where such property is not restored under Section 30;

(g) securing the safety of aircraft, vehicles, and persons using the airport and preventing danger to the public arising from the use and operation of aircraft in the airport;

(h) preventing obstruction within the airport for its normal functioning;

(i) prohibiting the parking or waiting of any vehicle or carriage within the airport except at places specified by the Authority;

(j) prohibiting or restricting access to any part of the airport;

(k) preserving order within the airport and preventing damage to property therein;

(l) regulating or restricting advertising within the airport;

(m) requiring any person, if so directed by an officer appointed by the Authority in this behalf, to leave the airport or any particular part of the airport; and

(n) generally for the efficient and proper management of the airport.

38. Supplemental provisions respecting regulations.—(1) Any regulation which may be made by the Authority under this Act may be made by the Central Government by notification in the Official Gazette within one year of the constitution of the Authority and any regulation so made may be altered or rescinded by the Authority by means of a regulation made by it under this Act.

(2) No regulation made by the Authority under this Act shall have effect until it has been approved by the Central Government and published in the Official Gazette.

39. Penalty for breach of certain regulations.—Any regulation made under any of the clauses (g) to (m) (inclusive) of sub-section (2) of Section 37 may provide that a contravention thereof shall be punishable with fine which may extend to five hundred rupees and in the case of a continuing contravention with an additional fine which may extend to twenty rupees for every day during which such contravention continues after conviction for the first such contravention.

40. Power to remove difficulties.—(1) If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by general or special order published in the Official Gazette, make such provisions not inconsistent with the provisions of this Act as appear to it to be necessary or expedient for the removal of the difficulty:

Provided that no such order shall be made after the expiration of one year from the commencement of this Act.

(2) Every order made under sub-section (1) shall be laid, as soon as may be after it is made, before each House of Par-

liament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if before the expiry of the session in which it is so laid, or the session immediately following both Houses agree in making any modification in the order or both Houses agree that the order should not be made, the order shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that order.

41. Amendment of Act 22 of 1934.—In sub-section (2) of Section 5 of the Aircraft Act, 1934, for clause (b), the following clause shall be substituted, namely:—

“(b) the licensing, inspection and regulation of aerodromes, the conditions under which aerodromes may be maintained, the prohibition or regulation of the use of unlicensed aerodromes and the fees which may be charged at those aerodromes to which the International Airports Authority Act, 1971 does not apply or is not made applicable;

Provided that until the date determined by the Central Government under the proviso to sub-section (2) of Section 16 of the International Airports Authority Act, 1971 any rule made under this clause may provide for the charging of fees for providing air traffic services (including aeronautical and flight information services), aeronautical communication and navigational aids and meteorological services at any aerodrome to which the said Act applies or is made applicable;”.

THE STAMP AND EXCISE DUTIES

(AMENDMENT) ACT, 1971

[ACT NO. 44 OF 1971]*

(8th December, 1971)

An Act further to amend the Indian Stamp Act, 1899, the Central Excises and Salt Act, 1944 and the Union Duties of Excise (Distribution) Act, 1962.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE STAMP AND EXCISE DUTIES (AMENDMENT) ACT, 1971:

(2) It shall be deemed to have come into force on the 15th day of November, 1971.

*Received the assent of the President on 8-12-1971. Act published in Gaz. of India; 9-12-1971, Pt. II-S. 1, Ext. P. 587. For Statement of Objects and Reasons, See Gaz. of India; 23-11-1971, Pt. II-S. 2, Ext. P. 751.

2. Amendment of Act 2 of 1899.—In the Indian Stamp Act, 1899, after Section 3, the following section shall be inserted, namely:—

“3A. Instruments chargeable with additional duty.—(1) Every instrument chargeable with duty under Section 3 read with Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62 (a) of Schedule I shall, in addition to such duty, be chargeable with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under sub-section (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription “refugee relief” whether with or without any other design, picture or inscription.

(3) Except as otherwise provided in sub-section (2), the provisions of this Act shall, so far as may be, apply in relation to the additional duties chargeable under sub-section (1) in respect of the instruments referred to therein as they apply in relation to the duties chargeable under Section 3 in respect of those instruments.”

3. Amendment of Act 1 of 1944.—In the First Schedule to the Central Excises and Salt Act, 1944, after Item No. 60, the following Item shall be inserted, namely:—

‘61 NEWSPAPERS AND 2 Paise
ALL OTHER PRINT- per copy.
ED PERIODICALS

Explanation.—For the purposes of this Item, “newspaper” means any printed periodical word containing news or comments on news.

4. Amendment of Act 3 of 1962.—In the Union Duties of Excise (Distribution) Act, 1962, in Section 2, after the words and figures “duties of excise levied and collected under the Central Excises and Salt Act, 1944,” the brackets, words and figures “(other than duties of excise levied and collected under that Act on newspapers and all other printed periodicals falling under Item No. 61 of the First Schedule to that Act)” shall be inserted.

5. Repeal and saving.—(1) The Stamp and Excise Duties (Amendment) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Indian Stamp Act, 1899, the Central Excises and Salt Act, 1944, or the Union Duties of Excise (Distribution) Act, 1962, as amended by the said Ordinance, shall be deemed to have been done or taken under the corresponding provisions of the Indian Stamp Act, 1899, the Central Excises and Salt Act, 1944, or as the case may be, the Union Duties of Excise (Distribution) Act, 1962, as amended by this Act.

THE INDUSTRIAL DISPUTES**(AMENDMENT) ACT, 1971****[ACT NO. 45 OF 1971]*****(8th December, 1971)**

An Act further to amend the Industrial Disputes Act, 1971.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and Commencement.—

(1) This Act may be called THE INDUSTRIAL DISPUTES (AMENDMENT) ACT, 1971.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 2.—In Section 2 of the Industrial Disputes Act, 1947 (hereinafter referred to as the principal Act),—

(a) in sub-clause (i) of clause (a), for the words and figures 'the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948, or the "Indian Airlines" and "Air-India" Corporations established under Section 3 of the Air Corporations Act, 1953, or, the words and figures 'the Industrial Finance Corporation of India established under Section 3 of the Industrial Finance Corporation Act, 1948, or the Employees' State Insurance Corporation established under Section 3 of the Employees' State Insurance Act, 1948, or the "Indian Airlines" and "Air-India" Corporations established under Section 3 of the Air Corporations Act, 1953, or the Life Insurance Corporation of India established under Section 3 of the Life Insurance Corporation Act, 1956, or' shall be substituted;

(b) after clause (g), the following clause shall be inserted, namely:—

'(gg) "executive", in relation to a trade union, means the body, by whatever name called, to which the management of the affairs of the trade union is entrusted;'

(c) after clause (ll), the following clause shall be inserted, namely:—

'(lll) "office bearer", in relation to a trade union, includes any member of the executive thereof, but does not include an auditor;'

(d) in clause (n), after sub-clause (i), the following sub-clause shall be inserted, namely:—

'(ia) any service in, or in connection with the working of, any major port or dock;'

*Received the assent of the President on 8-12-1971. Act published in Gaz. of India; 9-12-1971, Pt. II-S. 1, Ext. P. 559. For Statement of Objects and Reasons, see Gaz. of India; 9-8-1971, Pt. II-S. 2, Ext. P. 564.

†15-12-1971 — See Gaz. of India; 14-12-1971, Pt. II-S. 3 (ii), Ext. P. 3379.

3. Insertion of new Section 11-A.—After Section 11 of the principal Act, the following section shall be inserted, namely:—

"11A. Powers of Labour Courts, Tribunals and National Tribunals to give appropriate relief in case of discharge or dismissal of workmen.— Where an industrial dispute relating to the discharge or dismissal of a workman has been referred to a Labour Court, Tribunal or National Tribunal for adjudication and, in the course of the adjudication proceedings, the Labour Court, Tribunal or National Tribunal, as the case may be, is satisfied that the order of discharge or dismissal was not justified, it may, by its award, set aside the order of discharge or dismissal and direct reinstatement of the workman on such terms and conditions, if any, as it thinks fit, or give such other relief to the workman including the award of any lesser punishment in lieu of discharge or dismissal as the circumstances of the case may require:

Provided that in any proceeding under this section the Labour Court, Tribunal or National Tribunal, as the case may be, shall rely only on the materials on record and shall not take any fresh evidence in relation to the matter."

4. Amendment of Section 25FFF.—In Section 25FFF of the principal Act,—

(a) in sub-section (1), for the existing Explanation, the following Explanation shall be substituted, namely:—

"Explanation.— An undertaking which is closed down by reason merely of—

(i) financial difficulties (including financial losses); or

(ii) accumulation of undisposed of stocks; or

(iii) the expiry of the period of the lease or licence granted to it; or

(iv) in a case where the undertaking is engaged in mining operations, exhaustion of the minerals in the area in which such operations are carried on; shall not be deemed to be closed down on account of unavoidable circumstances beyond the control of the employer within the meaning of the proviso to this sub-section;'

(b) after sub-section (1), the following sub-sections shall be inserted, namely:—

"(1A) Notwithstanding anything contained in sub-section (1), where an undertaking engaged in mining operations is closed down by reason merely of exhaustion of the minerals in the area in which such operations are carried on, no workman referred to in that sub-section shall be entitled to any notice or compensation in accordance with the provisions of Section 25F, if—

(a) the employer provides the workman with alternative employment with effect from the date of closure at the same remuneration as he was entitled to receive, and on the same terms and conditions of ser-

vice as were applicable to him, immediately before the closure;

(b) the service of the workman has not been interrupted by such alternative employment; and

(c) the employer is, under the terms of such alternative employment or otherwise, legally liable to pay to the workman, in the event of his retrenchment, compensation on the basis that his service has been continuous and has not been interrupted by such alternative employment.

(1B) For the purposes of sub-sections (1) and (1A), the expressions "minerals" and "mining operations" shall have the meanings respectively assigned to them in clauses (a) and (d) of Section 3 of the Mines and Minerals (Regulation and Development) Act, 1957*.

5. Amendment of Section 33.— In the Explanation to sub-section (3) of Section 33 of the principal Act, for the words "an officer", the words "a member of the executive or other office bearer" shall be substituted.

6. Amendment of Section 36.— In sub-section (1) of Section 36 of the principal Act, for the words "an officer", wherever they occur, the words "any member of the executive or other office bearer" shall be substituted.

7. Amendment of First Schedule.— In the First Schedule to the principal Act, item 18 shall be omitted.

THE RAILWAY PASSENGER FARES ACT, 1971

[NO. 46 OF 1971]*

(9th December, 1971)

An Act to provide for the levy of a tax on railway fares.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.— (1) This Act may be called THE RAILWAY PASSENGERS FARES ACT, 1971.

(2) It shall be deemed to have come into force on the 22nd day of October, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "fare" means the total amount of all charges of whatever nature payable by a passenger or group of passengers in respect of his or their carriage, and includes—

(i) haulage charges for supply of carriages of particular types;

(ii) empty haulage charges on tourist cars and saloons;

(iii) charges for pilot engines; and
(iv) charges for dining cars attached to special trains, but does not include—

(i) the tax payable under this Act;

(ii) terminal taxes, pilgrim taxes and tolls on bridges;

(iii) reservation charges (including reservation charges for sleeping accommodation); and

(iv) hire, detention and stabling charges in respect of passenger traffic booked in reserved carriages and special trains;

(b) "passenger" means any person travelling on a railway in any description or class of train or carriage on payment of his fare, whether at full rates or at concessional rates;

(c) "railway" and "railway administration" have the meanings respectively assigned to them in the Indian Railways Act, 1890.

3. Levy of tax on passenger fares.—

(1) Subject to the provisions of this Act, there shall be levied and collected on fares paid by passengers carried by any railway in India, whether by itself or in conjunction with any other mode of transport or in conjunction with any railways in any adjacent country, a tax at the rate specified in that behalf in the Schedule:

Provided that no tax shall be levied under this sub-section on fares paid by passengers for journeys commencing on or before the 14th day of November, 1971.

(2) The tax levied under sub-section (1) shall be collected by the railway administration as an addition to the fares and the railway administration shall have all the powers and remedies for the recovery thereof as though the same were a rate or fare which the railway administration is empowered to levy under the Indian Railways Act, 1890.

4. Rules for computing tax on passenger fares.— In computing the tax payable under this Act, the following rules shall apply, namely:—

Rule 1.— The tax leviable shall, wherever necessary, be rounded off to the nearest multiple of five paise, two and one-half paise and over being counted as five paise and less than two and one-half paise being disregarded.

Rule 2.— In the case of return tickets, the tax shall be computed separately with reference to each of the journeys covered by the return ticket as if the said journeys had been performed on separate tickets.

Rule 3.— In the case of tickets issued from or to out-agencies or city booking offices, the tax shall be leviable only in respect of the fare attributable to the actual journey by railway.

5. Power to exempt.— Where the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, exempt, either in whole or

* Received the assent of the President on 9-12-1971. Act published in Gaz. of India: 10-12-1971, Pt. II-S. 1, Ext. P. 593.

in part, and either absolutely or subject to such conditions as it may specify in the notification, any passengers or class of passengers from the tax leviable under this Act.

6. Distribution of proceeds of tax.—

During each financial year ending on or after the 31st day of March, 1972, there shall be paid to each State (not being a Union territory) such sum of money as bears to the net proceeds of the tax collected under this Act during that year in all the territories of India, the same proportion as the aggregate of the fares collected in that State during that year bears to the aggregate of the fares collected in all the territories of India during that year.

7. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, rules so made may—

(a) regulate the collection by or on behalf of the railway administration of the tax levied under this Act and provide for the authority to which, and the time and manner in which, the tax shall be paid;

(b) prescribe the form of the returns to be submitted by any authority collecting the tax and the particulars to be contained therein and the manner in which it is to be verified;

(c) Provide for the time at which, and the manner in which, any payments to States under this Act are to be made, for the making of adjustments between one financial year and another and for any other incidental or ancillary matters relating to such payments.

(3) In making rules under this section, the Central Government may direct that a breach of any of those rules shall be punishable with fine which may extend to one thousand rupees for each such breach.

(4) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if, before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

8. Repeal and saving.— (1) The Railway Passenger Fares Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

THE SCHEDULE

(See Section 3)

Description of traffic	Rate of tax
1. Passengers travelling by railway otherwise than on railway season tickets or mileage coupons—	
(a) where the fare is less than one rupee	Nil
(b) where the fare is one rupee or more	5% of the fare
2. Passengers travelling by railway on season tickets	5% of the value of each season ticket
Provided that where the season ticket for travel by any particular class is for journey between two places in respect of which the fare for a single journey ticket of the same class is less than one rupee, the tax payable shall be nil.	
3. Passengers travelling by railway on mileage coupons	5% of the cost of the coupons or five paise, whichever is more.

THE TAX ON POSTAL ARTICLES ACT, 1971

(No. 47 of 1971)*

(9th December, 1971)

An Act to provide for the levy of a tax on certain postal articles.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title, extent and commencement.— (1) This Act may be called THE TAX ON POSTAL ARTICLES ACT, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall be deemed to have come into force on the 15th day of November, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "money order" means a money order referred to in Chapter IX of the Indian Post Office Act, 1898;

(b) "phonogram" means a telegraphic message sent to or received from a telegraph office by a subscriber over the telephone;

(c) "postal article" means any letter, letter-card, book, pattern or sample packet, parcel or any other article or thing (not being a postcard or a newspaper transmissible by post as a registered newspaper) which is transmissible by post and for the transmission of which postage is chargeable under the Indian Post Office Act, 1898 and includes a money order, a phonogram and a telegram;

(d) "rules" means rules made under this Act;

(e) "telegram" means written matter intended to be transmitted by telegraph;

(f) "telegraph" shall have the same meaning as in clause (1) of Section 3 of the Indian Telegraph Act, 1885;

(g) "telegraph office" includes a Government telegraph office and a licensed telegraph office, but does not include a military field telegraph office;

(h) words and expressions used but not defined in this Act and defined in the Indian Post Office Act, 1898, shall have the same meanings as in that Act.

3. Levy of tax.— (1) Subject to the provisions of this Act, there shall be levied and collected on all postal articles transmitted by post or through any telegraph office in the territories to which this Act extends a tax at the rate of five paise for each such article.

(2) The tax levied under sub-sec. (1) on any postal article shall be collected, as an addition to the postage, fees or charges payable in respect of such article, by the authority empowered under the Indian Post

Office Act, 1898 or, as the case may be, the Indian Telegraph Act, 1885 to collect such postage, fees or charges:

Provided that where the postage, fees or charges payable in respect of a postal article is collected by means of postage stamps, the tax levied under sub-sec. (1) on such postal article shall be paid and such payment shall be indicated on such article by means of postage stamps issued under the Indian Post Office Act, 1898, and bearing the inscription "refugee relief" whether with or without any other design, picture or inscription.

(3) Save as otherwise expressly provided in sub-section (2) or in the rules—

(a) the provisions of the Indian Post Office Act, 1898 and the rules made thereunder shall so far as may be apply in relation to the tax levied under sub-sec. (1) on any postal article (not being a phonogram or telegram) as they apply in relation to the postage, fees or charges payable under that Act and those rules in respect of such postal article;

(b) the provisions of the Indian Telegraph Act, 1885 and the rules made thereunder shall, so far as may be, apply in relation to the tax levied under sub-sec. (1) on any postal article being a phonogram or telegram as they apply in relation to the postage, fees or charges payable under that Act and those rules in respect of such article.

4. Power to reduce or remit.— Where the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, reduce or remit, whether prospectively or retrospectively, and subject to such conditions, if any, as it may specify in the notification, the tax payable under this Act in respect of any such postal articles or class of postal articles as may be, specified in the notification.

5. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

6. Repeal and saving.— (1) The Tax on Postal Articles Ordinance, 1971, is hereby repealed.

*Received the assent of the President on 9-12-1971. Act published in Gaz. of India; 10-12-1971, Pt. II-S. 1, Ext. P. 597.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

INLAND AIR TRAVEL TAX ACT, 1971 (Act No. 48 of 1971)*

(9th December, 1971)

An Act to provide for the levy of a tax on inland air travel.

BE it enacted by Parliament in the Twenty-second year of the Republic of India as follows:—

1. Short title, extent and commencement.— (1) This Act may be called THE INLAND AIR TRAVEL TAX ACT, 1971.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall be deemed to have come into force on the 30th day of October, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "aircraft" means any aircraft as defined in Section 2 of the Aircraft Act, 1934 (22 of 1934), which is used (whether exclusively or not) for the carriage of passengers;

(b) "carrier" means a corporation, company or other person undertaking the carriage of a passenger on an inland journey;

(c) "fare" means the total amount of all charges of whatever nature (including charges, if any, for provision of food or accommodation) payable to the carrier by or on behalf of a passenger in respect of his inland journey;

(d) "inland journey", in relation to a passenger, means—

(i) his journey from any place within the territories to which this Act extends to any other place within the said territories; or

(ii) if his journey is from or to any place in the territories to which this Act extends to or from a place in the State of Jammu and Kashmir, so much of his journey as falls within the said territories,

but does not include, in either case, a journey which is performed on a through international ticket and which precedes, or forms part of a series of journeys proceeding, or follows, or forms part of a series of journeys following, a journey to or from a place outside India on the same ticket.

Explanation:— For the purpose of determining the portion of journey referred to in sub-clause (ii) falling within the terri-

ties to which this Act extends, the journey referred to therein shall be deemed to terminate at, or, as the case may be, commence from, Amritsar irrespective of whether the aircraft by which the passenger is travelling overflies or halts at Amritsar;

(e) "passenger" means any person travelling on board an aircraft on an inland journey on payment of his fare whether at full rates or concessional rates.

3. Inland air travel tax:— (1) Subject to the provisions of this Act, there shall be levied and paid to the Central Government in respect of every inland journey by a passenger, a tax (hereinafter referred to as the inland air travel tax) at the rate of five per cent, of the fare for such journey:

Provided that no such tax shall be levied under this sub-section in respect of any journey commencing on or before the 14th day of November, 1971.

(2) In accordance with rules made under this Act, the inland air travel tax shall be collected by the carrier undertaking the carriage of the passengers, or, where the tickets or other relevant documents for such carriage are not issued by such carrier by the carrier to whom such tickets or other documents relate, as an addition to the fares payable by such passengers and shall be paid to the Central Government.

4. Rules for computing inland air travel tax.— In computing the tax leviable under this Act, the following rules shall apply, namely:—

Rule 1.— The tax leviable shall, wherever necessary, be rounded off to the nearest rupee, fifty paise and over being counted as one rupee and less than fifty paise being disregarded.

Rule 2.— In the case of a journey by a passenger from a place in the territories to which this Act extends to a place in the State of Jammu and Kashmir, the tax leviable shall be computed as if such journey were up to Amritsar.

Rule 3.— In the case of a journey by a passenger from a place in the State of Jammu and Kashmir to a place in the territories to which this Act extends, the tax leviable shall be computed as if such journey were from Amritsar.

5. Power to exempt.— Where the Central Government is of opinion that it is necessary or expedient in the public interest so to do, it may, by notification in the Official Gazette, exempt, either in whole or in part, and either absolutely or subject to such conditions as it may specify in the notification, any passengers or class of passengers from the tax leviable under this Act.

6. Penalty.— Any person contravening the provisions of this Act or of any rule made under this Act shall be liable to a penalty not exceeding one thousand rupees for every such contravention and such penalty may be adjudged by such

*Received the assent of the President on 9-12-1971.

authority and in such manner as may be specified in the rules made under this Act.

7. Protection of action taken in good faith.— No suit or other legal proceeding shall lie against the Central Government and no suit, prosecution or other legal proceeding shall lie against any officer or authority of that Government for anything in good faith done or intended to be done in pursuance of this Act or the rules made thereunder.

8. Power to make rules.—(1) The Central Government may, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for—

(a) the returns and other particulars and information which carriers shall furnish, the authorities to whom, and the intervals at which, such returns, particulars and information shall be furnished;

(b) the assessment and collection of the inland air travel tax including the charges for collection payable to carriers, the authorities by whom adjudication of penalty and other functions under this Act are to be discharged, the issue of notices requiring payment of such tax, the manner in which such tax shall be payable, the recovery of any such tax due to the Central Government in the same manner as an arrear of land revenue or in any other manner, and the procedure for claiming refund of any amount paid under this Act;

(c) the powers of authorities referred to in clause (b) to enter, inspect and search any aircraft or any premises of a carrier and to examine any tickets, books of account, returns or other documents for the purpose of carrying out any duty imposed on any such authority by or under this Act;

Provided that the provisions of the Code of Criminal Procedure, 1898 (5 of 1898), relating to searches shall, so far they are applicable, apply in relation to searches under rules made under this clause;

(d) the procedure for adjudication of penalty;

(e) appeal and revision in the case of any order made under this Act, the manner in which and the time within which appeal may be preferred or application for revision may be made and the fees payable herefor;

(f) any other matter which is to be, or may be, provided for by rules under this Act.

(3) Every rule made under this Act shall be laid as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which

it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

9. Repeal and saving.—(1) The Inland Air Travel Tax Ordinance, 1971 (Ord. 19 of 1971), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provisions of this Act.

THE AIR CORPORATIONS (AMENDMENT) ACT, 1971

(Act No. 49 of 1971)*

An Act further to amend the Air Corporations Act, 1953.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE AIR CORPORATIONS (AMENDMENT) ACT, 1971.

(2) The provisions of this Act, except clause (iii) of Section 4 which shall be deemed to have come into force on the 19th day of May, 1971, shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 4.— In the Air Corporations Act, 1953 (hereinafter referred to as the principal Act), in Sec. 4,—

(i) for sub-section (1), the following sub-sections shall be substituted, namely:—

“(1) The general superintendence, direction and management of the affairs and business of each of the Corporations shall vest in a Board of directors which may exercise all such powers and do all such acts and things as may be exercised or done by the Corporation under this Act.

(1-A) The Board of directors shall consist of a Chairman to be appointed by the Central Government, and not less than eight and not more than fourteen other directors to be appointed by the Central Government and the Chairman or any other director may be required to render whole-time or part-time service as the Central Government may direct:

*For Statement of Objects and Reasons, see Gaz. of India, 22-7-1971, Pt. II-S. 2, Extra. P. 447.

Provided that—

(a) the same person may be appointed to be the Chairman of both the Corporations or Chairman of one and director of the other;

(b) the same persons may be appointed to be directors of both the Corporations;

(ii) in sub-sections (2), (3) and (4), for the word "member" wherever it occurs, the word "director" shall be substituted;

(iii) in sub-section (5), for the words "General Manager", the words "managing director" and for the word "member", the word "director" shall be substituted.

3. Amendment of Section 5.— In Section 5 of the principal Act,—

(i) in sub-section (1), for the word "members", the word "directors" and in the proviso thereto, for the word "member", the word "director" shall be substituted;

(ii) in sub-section (2),—

(a) for the word "member", in both the places where it occurs, the word "director" shall be substituted;

(b) for the words "such remuneration by way of allowances", the words "such remuneration by way of salary, allowances" shall be substituted.

4. Amendment of Section 7.— In Section 7 of the principal Act, in sub-sec. (2),—

(i) after clause (i), the following clause shall be inserted, namely:—

"(ii) to make such grants as it thinks fit as contribution or donation, in furtherance of the interests of the Corporation, to any fund established for a benevolent or charitable purpose;

Provided that nothing in this clause shall be construed as empowering the Corporation to make any such grant to any political party or for any political purpose to any individual or body;

(ii) in clause (k), for the words "including provision of catering, rest-rooms", the words "including provision of catering, hotels, restaurants, rest-rooms" shall be substituted;

(iii) before clause (1), the following clause shall be inserted, namely:—

"(kk) to form one or more companies under the Companies Act, 1956 to further the efficient performance of its duties and the exercise of its powers under this Act;

Provided that the paid up share capital of every company so formed shall be held exclusively by the Corporation;"

5. Amendment of Section 8.— In Section 8 of the principal Act, for the words "General Manager", wherever they occur, the words "managing director" shall be substituted.

6. Amendment of Section 12.— In Section 12 of the principal Act, in sub-section (2), for the words "current account", the word "account" shall be substituted.

7. Insertion of new Section 15-A.— After Section 15 of the principal Act and

before Chapter IV, the following section shall be inserted, namely:—

"15A. Audit of accounts of companies formed by Corporations.— (1) Notwithstanding anything contained in the Companies Act, 1956, the auditor of any company formed by either of the Corporations under clause (kk) of sub-section (2) of Section 7 shall be appointed or re-appointed by the Corporation concerned on the advice of the Comptroller and Auditor General of India.

(2) Save as otherwise provided in sub-section (1), in addition to the provisions contained in the Companies Act, 1956, relating to the audit of the accounts of any company, the following provisions shall apply to the audit of the accounts of any company referred to in sub-section (1), namely:—

(i) the Comptroller and Auditor General of India shall have power to conduct a supplementary or test audit of the company's accounts by such person or persons as he may authorise in this behalf; and for the purposes of such audit to require information to be furnished to any person or persons so authorised, on such matters by such person or persons and in such form as the Comptroller and Auditor General may, by general or special order, direct;

(ii) the auditor appointed or re-appointed under sub-section (1) shall submit a copy of his audit report to the Comptroller and Auditor General of India who shall have the right to comment upon, or supplement, the audit report in such manner as he may think fit;

(iii) any such comments upon, or supplement to, the audit report shall be placed before the annual general meeting of the company at the same time and in the same manner as the audit report."

8. Amendment of Section 35.— In Section 35 of the principal Act,—

(i) in clause (a), for the words "fifteen lakhs", the words "forty lakhs" shall be substituted.

(ii) in clause (b), for words "five years", the words "ten years" shall be substituted.

9. Amendment of Section 40.— In Section 40 of the principal Act, in sub-section (1), for the word "members", the word "directors" shall be substituted.

10. Amendment of Section 41.— In Section 41 of the principal Act,—

(a) sub-section (1) shall be omitted;

and (b) the brackets and figure "(2)" shall be omitted.

11. Amendment of Section 42.— In Section 42 of the principal Act,—

(i) in sub-section (2), for the word "members" the word "directors" shall be substituted;

(ii) in sub-section (3), for the word "members", the word "directors" and for the

word "member" the word "director" shall be substituted.

12. Amendment of Section 44.— In Section 44 of the principal Act, in sub-section (2),—

(i) in clause (a), for the words "General Managers", the words "managing directors" shall be substituted;

(ii) in clause (f), the word "depreciation" shall be omitted.

13. Amendment of Section 45.— In Section 45 of the principal Act,—

(i) in sub-section (1), for the words "Each of the Corporations may, with the previous approval of the Central Government", the words, brackets and figure "Subject to the provisions of sub-section (3), each of the Corporations may" shall be substituted;

(ii) in sub-section (2), in clause (t), for the words "General Manager", the words "managing director" shall be substituted and after that sub-section, as so amended, the following sub-section shall be inserted, namely:—

"(3) No regulation under clause (3) of sub-section (2) shall be made except with the previous approval of the Central Government."

THE EMERGENCY RISKS (GOODS)

INSURANCE ACT, 1971

(Act No. 50 of 1971)*

(10th Dec. 1971)

An Act to make certain provisions for the insurance of goods in India against damage arising from emergency risks and matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and duration.—

(1) This Act may be called THE EMERGENCY RISKS (GOODS) INSURANCE ACT, 1971.

(2) It extends to the whole of India.

(3) It shall remain in force during the period of operation of the Proclamation of Emergency issued by the President under clause (1) of Article 352 of the Constitution of India on the 3rd day of December, 1971, and for such further period as the Central Government may, by notification in the Official Gazette, declare to be the period of emergency for the purposes of this Act, but its expiry shall not affect anything done or omitted to be done before

*Received the assent of the President on 10-12-1971. Act published in Gaz. of India, 10-12-1971, Pt. II-S. 1, Ext. P. 609. For Statement of Objects and Reasons, see Gaz. of India, 8-12-1971, Pt. II-S. 2, Ext. P. 937.

such expiry and Section 6 of the General Clauses Act, 1897, shall, apply upon the expiry of this Act as if it had been repealed by a Central Act.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "emergency risks" means such risks arising from,—

(i) action taken by an enemy or action taken in combating an enemy or in repelling an imagined attack by an enemy;

(ii) any explosion or fire which involves explosives or munitions or other dangerous things required for the purposes of defence against any action of an enemy and which happens or is caused by, through, or in connection with, the manufacture, storage or transportation of any such explosives, munitions or other dangerous things;

(iii) measures taken under proper authority to avoid the spreading of or otherwise to mitigate, the consequences of damage occurring (whether accidentally or not) as a direct result of any such action as is described in sub-clause (i) or of any such explosion or fire as is described in sub-clause (ii);

(iv) precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by an enemy, being measures involving a substantial degree of risk to property;

(v) precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action, being measures involving a substantial degree of risk to property;

(vi) precautionary or preparatory measures taken under proper authority with a view to denying facilities to an enemy being measures involving a substantial degree of damage to or diminution of value of property;

(b) "enemy" means—

(i) any person or country committing external aggression against India;

(ii) any person belonging to a country committing such aggression;

(iii) such other country as may be declared by the Central Government to be assisting the country committing such aggression;

(iv) any person belonging to such other country;

(c) "Fund" means the Emergency Risks (Goods) Insurance Fund constituted under Section 10;

(d) "goods" means any materials, commodities or articles and includes materials, commodities or articles used in or for the construction or repair of any ship up to the time at which the ship after completion of construction, or repair, is launched;

(e) "insurable value" means the value of goods as ascertained for the purposes of insurance under this Act;

(f) "policy" or "policy of insurance" means a contract of insurance issued under the Scheme and includes a policy of insurance and renewal endorsement;

(g) "quarter" means a period of three months commencing on the first day of January, April, July or October;

(h) "Scheme" means the Emergency Risks (Goods) Insurance Scheme made under this Act;

(i) "seller of goods" includes a seller of goods acting as an agent;

(j) "supplier of goods" means a person carrying on a business in the course of which he supplies goods for the purpose of, or in pursuance of, contracts made by him for work, labour, or materials.

CHAPTER II INSURABLE GOODS AND INSURANCE SCHEME

3. Goods insurable under this Act.—

(1) Subject to the provisions of this section, the following goods shall, in relation to any person carrying on business in India as a seller or supplier of goods of any description, be deemed to be goods insurable under this Act, that is to say, all goods situated in India or, consigned from one place in India to another place in India and in transit, being either—

(i) goods of that description, or

(ii) goods used as material from which goods of that description are produced or as ingredients or component parts of goods of that description:

Provided that no goods shall be deemed to be insurable under this Act—

(a) in relation to any person, being the owner of the goods, who carries on business as a seller of goods, unless they are owned by him with a view to being sold, or to being used as material for the production of goods to be sold, or as ingredients or component parts of goods to be sold;

(b) in relation to any person, being the owner of the goods, who carries on business as a supplier of goods, unless they are owned by him with a view to being supplied for the purpose of, or in pursuance of, a contract made by him for work, labour or materials or to being used as material for the production of goods to be supplied as aforesaid, or as ingredients or component parts of goods to be supplied;

(c) in respect of a period in relation to any person carrying on business in India as a seller or supplier of goods of any description, if such goods are, before payment has been made of the premium under this Act for that period, in the custody, control or possession of the enemy.

(2) The Central Government may, by notification in the Official Gazette, direct that goods of any description specified in the notification shall, notwithstanding anything contained in this section, be deemed

not to be goods insurable under this Act and a copy of such notification shall be laid after it is made, on the Table of each House of Parliament when such House is in session for a period of thirty days or for the duration of the session in which it is laid, whichever period is less.

(3) Nothing in sub-section (1) shall apply in relation to goods which are owned by Government or in respect of which the Government is the seller or supplier.

4. Ownership.—(1) Save in so far as is otherwise expressly provided in this Act, any goods shall, subject to the provisions of this section, be deemed, for the purposes of this Act, to be owned,—

(a) if the property in the goods is for the time being vested in a person in relation to whom they are insurable under this Act, by that person;

(b) if the property in the goods is not so vested, by any person in relation to whom the goods are insurable under this Act and who is for the time being entitled, either unconditionally or conditionally, to have the property in the goods vested in him:

Provided that where—

(i) any goods would, under the foregoing provisions of this section, be deemed to be owned by a person in whom the property therein is vested otherwise than in the course of a business carried on by him in India, or who is entitled to have the property therein vested in him otherwise than in the course of such business, and

(ii) any person carrying on business in India is for the time being entitled to sell the goods as agent, the goods shall be deemed to be owned by the last mentioned person.

(2) Where in the course of any business a ship is being, or has been, constructed under contract, and the ship or any part thereof or any goods appropriated for the construction thereof—

(a) would, apart from the provisions of this sub-section, have been deemed for the purposes of this Act to be owned at any time by the person from time to time carrying on the business, or

(b) have at any time been accepted, in pursuance of a contract made with him, by the person from time to time carrying on the business, then, notwithstanding that they would not, apart from the said provisions, be deemed for the said purposes to be owned by the person from time to time carrying on the business, the ship and any part thereof and any goods so appropriated as aforesaid shall, subject to the provisions of sub-section (3), be deemed, in a case to which clause (a) of this sub-section applies, to continue to be owned by the person from time to time carrying on the business until the acceptance of the ship, in pursuance of the contract in question, by the person for

whom it is being or has been, constructed, and in a case to which clause (b) of this sub-section applies, to be owned by the person from time to time carrying on the business at all times between the acceptance referred to in the said clause (b) and the acceptance of the ship as aforesaid by the person for whom it is being, or has been, constructed.

(3) The provisions of sub-section (2) shall apply in relation to the construction under contract in the course of a business of part of a ship, not being part of a ship which is being, or has been, constructed by the person from time to time carrying on the business, as they apply in relation to the construction of a ship—

(a) with the substitution for references to a ship or references to part of a ship;

(b) where the contract for the part of the ship is with the person for whom the ship is being constructed, with the substitution for references to the acceptance of the ship under the contract in question of references to the acceptance of the ship under the contract for the construction thereof;

(c) where the contract for the part of the ship is with any other person, with the substitution for references to the acceptance of the ship under the contract in question of references to the acceptance of the part of the ship under the contract for the construction of the part by the person for whom it is being, or has been, constructed.

(4) Where the person from time to time carrying on a business receives any money, under a policy issued in pursuance of the Scheme, in respect of the loss of or damage to a ship, part of a ship or goods which are deemed to be owned by him by virtue of sub-section (2) or sub-section (3), the money shall be held by him on trust for the person who, apart from the provisions of those sub-sections, would be deemed for the purposes of this Act to be the owner of the ship, part or goods, subject, however, to any lien or charge which would otherwise be enforceable against the ship, part or goods and subject also to the right to retain out of the money the amount of any expenses reasonably incurred by the first mentioned person in making good any part of the loss or damage which he is liable to make good.

5. Emergency Risks (Goods) Insurance Scheme.—(1) The Central Government may, by notification in the Official Gazette, put into operation a scheme to be called the Emergency Risks (Goods) Insurance Scheme,† whereby the Central Government undertakes in relation to persons carrying on business in India as sellers or suppliers of goods, the liability of insur-

ance of such persons against emergency risks, to the extent provided by or under this Act, in respect of goods insurable under this Act which are from time to time owned by such persons in the course of such business.

(2) The Scheme may also extend—

(a) to the undertaking by the Central Government, in relation to any person carrying on business in India as seller or supplier of goods, of the liability of insuring such a person against emergency risks in respect of goods insurable under this Act which are not owned by him but in which he has an interest arising in the course of that business;

(b) without prejudice to the provisions of clause (a) of this sub-section, to the undertaking by the Central Government, in relation to a person carrying on any business in India, of the liability of insuring such a person against emergency risks in respect of—

(i) any goods situated in India which are in his possession, otherwise than under a hire-purchase agreement, for the purposes of that business;

(ii) any goods situated in India which are subject to a mortgage, pledge or charge in his favour held by him in the course of that business, being in either case goods which are not owned by him but which are insurable under this Act in relation to the person by whom they are owned;

(c) to the undertaking by the Central Government, in relation to a person carrying on any business in India, of the liability of insuring such person against emergency risks in respect of any goods situated in India, which having been sold in India, for export from India, are in his possession for the purpose of such export and are goods which were prior to such sale insurable under this Act in relation to the person by whom they were then owned;

(d) to the undertaking by the Central Government, in relation to any person carrying on any business in India as a seller or supplier of goods, of the liability of insuring such a person against emergency risks in respect of goods imported into India through any port of India, while such goods are situated at such port or are in transit to a place in India.

(3) The Scheme shall be such as to secure—

(a) that the liability of the Central Government as insurer shall not extend to more than eighty per cent. of the insurable value of the property insurable;

(b) that any liability of the Central Government as insurer under the Scheme is determined by a policy of insurance issued, in the form and in respect of a period not exceeding the period specified in the Scheme, by a person acting on behalf of the Central Government;

†For Emergency Risks (Goods) Insurance Scheme—See Gaz. of India, 10-12-1971, Pt. II-S. 3 (ii), Ext. P. 3317.

Provided that the form of policy may be such as to limit the extent and nature of the indemnity provided by the Central Government and to impose conditions subject to which the indemnity is provided:

Provided further that the form of policy shall be such as to provide that no liability shall arise thereunder unless the premium in relation to the period in which any loss or damage occurs has been paid before the occurrence of such loss or damage;

(c) that any premium under a policy so issued is payable at a rate not exceeding three per cent. per annum of the sum insured as may be specified in the Scheme; and

(d) that the amount of any one premium payable under a policy so issued is not less than such sum as may be specified in the Scheme.

(4) Different forms of policies may be specified under sub-section (3) in relation to different descriptions of goods.

(5) The Central Government may, by notification in the Official Gazette, add to, amend or vary any Scheme made under this Act.

(6) Every Scheme shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the Scheme or both Houses agree that the Scheme should not be made, the Scheme shall thereafter have effect only in such modified form or be of no effect as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the Scheme.

6. Employment of agents by Central Government.—The Central Government may, by notification in the Official Gazette, employ or authorise the employment of any person to act as its agent for the issue of policies, and making recommendations for the settlement of claims, under the Scheme, and may pay to the person so employed such remuneration as it may think fit.

CHAPTER III

COMPULSORY INSURANCE

7. Power to make insurance compulsory.—(1) While the Scheme is in operation, no person shall, after such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, carry on any business in India as a seller or supplier of goods, unless, in respect of any goods insurable under this Act which are for the time being owned by him in the course of that business, there is in force a policy of insurance against emer-

gency risks issued in accordance with the Scheme, whereby he is insured in respect of such goods for a sum not less than the value thereof for the time being;

Provided that the Scheme shall not restrict the carrying on of business as aforesaid by any person, if and so long as the value of all goods insurable under this Act which are for the time being owned by him within one and the same Presidency town or district in the course of that business does not exceed fifty thousand rupees.

(2) Whoever contravenes the provisions of this section shall be punishable with fine which may extend to one thousand rupees and with further fine which may extend to five hundred rupees for every day after the first on which the contravention continues.

8. Omission to insure or to insure up to the full amount.—(1) Where any person has failed to insure as, or to the full amount, required by this Act, and has thereby evaded the payment by way of premium of any money which he would have had to pay but for such failure, an officer authorised in this behalf by the Central Government may determine the amount of payment of which has been so evaded, and thereupon such person shall be liable, without prejudice to any other action that may be taken against him under this Act, to pay to the Central Government, as a penalty, an amount equal to the amount so determined, and if no such payment is made on demand by the authorised officer, the amount of the penalty shall be recoverable from such person as an arrear of land revenue.

(2) A person against whom a determination is made under sub-section (1) may, within the period specified in the Scheme, appeal against such determination to the Central Government whose decision thereon shall be final.

9. Restrictions on carrying on of certain insurance business.—(1) After the date on which the Scheme is put into operation, no person shall, except as a person authorised by the Central Government as its agent to issue policies in pursuance of the Scheme, carry on any business of insuring persons carrying on business in India as sellers or suppliers of goods against emergency risks in respect of goods insurable under this Act which are from time to time owned by such persons in the course of such business as is last mentioned.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to five thousand rupees and with further fine which may extend to one thousand rupees for every day after the first on which the contravention continues.

10. Emergency Risks (Goods) Insurance Fund.—(1) The Central Government may, after due appropriation made by Parliament by law in this behalf, transfer in each financial year to a fund to be called the Emergency Risks (Goods) Insurance

Fund such sums, as may be considered necessary, not exceeding the sums received by the Central Government by way of insurance premiums under the Scheme, or by way of payment made on composition of offences under Section 15 or by way of expenses or compensation awarded by a Court, under Section 545 of the Code of Criminal Procedure, 1898, out of any fine imposed in any prosecution under this Act.

(2) There shall be paid from out of the Fund all sums required for the discharge by the Central Government of any of its liabilities under the Scheme or for the payment by the Central Government of the remuneration and expenses of agents employed for the purposes of the Scheme.

(3) If at any time when a payment is to be made out of the Fund, the sum standing to the credit of the Fund is less than the sum required for the making of that payment, an amount equal to the deficiency shall, after due appropriation made by Parliament by law, be paid into the Fund as an advance out of the Consolidated Fund of India.

(4) If at any time the amount standing to the credit of the Fund exceeds the sum which, in the opinion of the Central Government, is likely to be required for the making of payments out of the Fund, the excess shall be disposed of in such manner as the Central Government may think fit.

(5) The Central Government shall prepare, in such form and manner as may be specified in the Scheme and shall publish either annually or at such shorter intervals as may be specified therein, an account of all sums received into and paid out of the Fund.

CHAPTER IV

MISCELLANEOUS

11. Power of Central Government to obtain information.—(1) Any person authorised in this behalf by the Central Government may, for the purpose of ascertaining whether or not the requirements of this Act have been complied with,—

(a) require any person carrying on in India the business of fire insurance or of a seller or supplier of goods to submit to him such accounts, books or other documents or to furnish to him such information as he may reasonably think necessary, or

(b) at any reasonable time, enter any premises occupied by any person carrying on in India the business of a seller or supplier of goods for the purposes of that business and may inspect the premises and require any person found therein who is for the time being in charge thereof, or in control of the business carried on therein, to produce to him and allow him to examine such accounts, books or other documents as may relate to the business carried on

in the premises and to furnish to him such other information as he may reasonably require for the purpose of ascertaining whether or not and, if so, to what extent, the person carrying on the business is insured under the Scheme in respect of goods owned by him in the course of that business, and of ascertaining the value of any goods insurable under the Scheme which are, or were at any relevant time, owned by him in the course of that business and the maximum amount which would be recoverable in respect of any such goods under a policy issued under this Act.

(2) Whoever wilfully obstructs any person in the exercise of his powers under this section or fails without any reasonable excuse to comply with a demand made thereunder, shall, in respect of each occasion on which any such obstruction or failure takes place, be punishable with fine which may extend to five hundred rupees.

(3) Whoever, in purporting to comply with his obligations under this section, knowingly or recklessly makes a statement which is false in a material particular, shall be punishable with fine which may extend to one thousand rupees.

(4) Where in any proceedings in respect of a contravention of Section 7 in relation to any business, it is proved, in relation to that business,—

(a) that a demand for the production of a policy of insurance issued in accordance with the Scheme insuring the person carrying on the business was duly made under this section and was not complied with, and

(b) that the person making the demand was not satisfied that there was such a policy in existence,

it shall be presumed, except in so far as the contrary is proved, that the said Section 7 was being contravened in relation to that business at the time when the demand was made and continued to be contravened in relation to that business at all times thereafter.

12. Punishment for giving false information.— If any person, for the purpose of obtaining for himself or any other person any payment in respect of any damage due to the action of the enemy or under a policy issued in pursuance of the Scheme,—

(a) furnishes any information which he knows to be false in a material particular, or recklessly furnishes any information which is false in a material particular, or

(b) with intent to deceive, produces, furnishes, sends or otherwise makes use of any book, account or other document which is false in a material particular, or

(c) with intent to deceive, withholds any material information, he shall be punishable with fine which may extend to five thousand rupees, or with imprisonment for a term not exceeding three months, or with both.

13. Refund of premiums in certain cases.— (1) Where goods of any description have been insured by a seller or supplier of goods for any period, and before that period has elapsed the goods of that description have ceased, by virtue of a notification under sub-section (2) of Section 3 to be goods insurable under this Act, the person who has insured such goods shall be entitled to a proportionate refund of the premium.

(2) Where a policy of insurance has been taken out in relation to goods which are not insurable under this Act and premium has been paid in relation to such policy, or where any premium has been paid in respect of goods which have ceased to be insurable under this Act, or where, in relation to goods insurable under this Act, premium has been made in excess of the amount due under the policy, the person making such payment or excess payment, as the case may be, shall be entitled to a refund of the whole of the amount so paid or paid in excess, as the case may be.

(3) If it is established to the satisfaction of the Central Government that a policy of insurance under the Scheme has been taken out separately by two or more persons in respect of the same goods, the policy taken out by any one such person may, on an application made by him and after such inquiry as the Central Government may think fit, be cancelled and thereupon the premium paid on such policy shall be refunded to the person by whom it was paid unless such person has recovered the premium from any other person, in which case, the refund shall be made to that other person:

Provided that no refund shall be made under this section unless the application for the refund is made before the expiry of six months from the date when the premium was paid.

(4) No suit shall be maintainable in any civil Court against the Central Government or any person acting as the agent of the Central Government under Section 6 for the refund of money paid or purporting to have been paid as premium in respect of any policy issued or purporting to have been issued under this Act.

14. Limitation on prosecution.— No prosecution for any offence punishable under this Act shall be instituted against any person except by, or with the consent of, the Central Government or an authority authorised in this behalf by the Central Government.

15. Composition of offences.— Any offence punishable under sub-section (2) of Section 7, or sub-section (2) of Section 9 may, either before or after the institution of the prosecution, be compounded by the Central Government or by any authority authorised in this behalf by the Central Government, on payment for credit to the Fund of such sum as the Central Govern-

ment or such authority, as the case may be, thinks fit.

16. Bar of legal proceedings.— No suit, prosecution or other legal proceeding shall lie against the Central Government or against any person for anything which is in good faith done or intended to be done under this Act.

17. Removal of doubts.— If any doubt arises as to whether a person is insurable in respect of any goods under this Act, the Central Government may, by order, make such provision or give such direction, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of such doubt.

THE EMERGENCY RISKS (UNDERTAKINGS) INSURANCE ACT, 1971

(Act No. 51 of 1971)*

(10th December, 1971).

An Act to make certain provisions for the insurance of certain property in India against damage arising from emergency risks and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title, extent and duration.—

(1) This Act may be called the Emergency Risks (Undertakings) Insurance Act, 1971.

(2) It extends to the whole of India.

(3) It shall remain in force during the period of operation of the Proclamation of Emergency issued by the President under clause (1) of Article 352 of the Constitution on the 3rd day of December, 1971, and for such further period as the Central Government may, by notification in the Official Gazette, declare to be the period of emergency for the purposes of this Act, but its expiry shall not affect anything done or omitted to be done before such expiry and Section 6 of the General Clauses Act, 1897, shall apply upon the expiry of this Act as if it had been repealed by a Central Act.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "building" includes foundations, plinths, floors, staircases, tanks, engine and boiler beds, chimneys, flues and boundary walls;

*Received the assent of the President on 10-12-1971. Act published in Gaz. of India; 10-12-1971, Pt. II-S. 1, Ext. P. 619.

For Statement of Objects and Reasons, see Gaz. of India; 8-12-1971, Pt. II-S. 2, Ext. P. 954.

(b) "emergency risks" means such risks arising from—

(i) action taken by an enemy or action taken in combating an enemy or in repelling an imagined attack by an enemy;

(ii) any explosion or fire which involves any explosives or munitions or other dangerous things required for the purposes of defence against any action of an enemy and which happens or is caused by, through, or in connection with, the manufacture, storage or transportation of any such explosives, munitions or other dangerous things;

(iii) measures taken under proper authority to avoid the spreading of, or otherwise to mitigate, the consequences of damage occurring (whether accidentally or not) as the direct result of any such action as is described in sub-clause (i) or of any such explosion or fire as is described in sub-clause (ii);

(iv) precautionary or preparatory measures taken under proper authority with a view to preventing or hindering the carrying out of any attack by an enemy, being measures involving risk to property;

(v) precautionary or preparatory measures involving the doing of work on land and taken under proper authority in any way in anticipation of enemy action, being measures involving risk to property;

(vi) precautionary or preparatory measures taken under proper authority with a view to denying facilities to an enemy, being measures involving damage to or diminution of the value of property;

(c) "enemy" means—

(i) any person or country committing external aggression against India;

(ii) any person belonging to a country committing such aggression;

(iii) such other country as may be declared by the Central Government to be assisting the country committing such aggression;

(iv) any person belonging to such other country;

(d) "factory" means a factory as defined in clause (m) of Section 2 of the Factories Act, 1948;

(e) "factory building" includes all buildings comprised in the factory, and such other buildings (including residential buildings for staff and workmen, hospitals and welfare centres) within a radius of three kilometres from the main factory building as are in the same ownership or occupation as the factory and are used for the purposes of the factory;

(f) "Fund" means the Emergency Risks (Undertakings) Insurance Fund constituted under Section 7;

(g) "inland vessel" means a vessel not ordinarily plying outside the limits of the territorial waters surrounding India;

(h) "insurable value" means the value of the property as ascertained for the purposes of insurance under this Act;

(i) "occupier" of a factory has the meaning assigned to it in clause (n) of Section 2 of the Factories Act, 1948;

(j) "owner", in relation to property insurable under this Act, means the owner of such property and includes, when parts of such property in relation to an undertaking to which this Act applies are owned by different persons, each such person in respect of the part owned by him;

(k) "policy or policy of insurance" means a contract of insurance issued under the Scheme and includes a policy of insurance or renewal endorsement;

(l) "property insurable under this Act" means—

(i) in relation to any factory, factory buildings, and, except where they are for the time being goods insurable under the Emergency Risks (Goods) Insurance Act, 1971, all plant and machinery in the factory, all materials in the factory for use in the production or transmission of motive power, or in the maintenance of plant and machinery (including lubricants) or in the maintenance of factory buildings;

(ii) in relation to Electric Supply Undertakings, the stations, sub-stations switch houses and transformer houses, in addition to the insurable property referred to in sub-clause (i) of this clause;

(iii) in relation to hydro-electric supply undertakings, the whole of sluice houses, valve houses, water-pipe lines, penstocks and any other plant or machinery appertaining to the intake of hydraulic power;

(iv) in relation to mines as defined in the Mines Act, 1952, plant and machinery, whether above or below ground, buildings including inclines and situated within a radius of three kilometres from the mine excavation and in relation to such plant, machinery and buildings and materials above ground as would, if the mine were a factory, be included in property insurable under this Act under sub-clause (i) of this clause;

(v) in relation to gas supply undertakings, the whole of distribution systems, in addition to the insurable property referred to in sub-clause (i) of this clause;

(vi) in relation to any trading Corporation or any body of Port Trustees or Commissioners, or any other person specified in this behalf by the Central Government, owning inland vessels, and all inland vessels (including the hull, machinery and fittings thereof), fuel carried thereon and stores carried therein for the use of the crew, owned by it or him, as the case may be, where such vessels, fuel and stores, are not for the time being plant or materials insurable in relation to a factory under this Act and the Scheme thereunder, or goods insurable under the

Emergency Risks (Goods) Insurance Scheme made under the Emergency Risks (Goods) Insurance Act, 1971;

(vii) in relation to oil mines and oil refineries, in addition to properties referred to in sub-clause (i) or sub-clause (iv) of this clause, as the case may be, derricks, drills and rigs and group gathering stations and storage tanks of oil mines; plant and machinery required for pumping, refining or processing any mineral oil, and pipe lines and all buildings of such installations within a radius of three kilometres thereof;

(viii) in relation to tea estates, in addition to the properties referred to in sub-clause (i) of this clause, standing tea crops in any garden belonging to the owner of any factory;

Provided that no property shall be deemed to be insurable under this Act in respect of a period if such property is, before payment has been made of the premium under this Act for that period, in the custody, control or possession of the enemy;

(m) "quarter" means a period of three months commencing on the first day of January, April, July or October;

(n) "Scheme" means the Emergency Risks (Undertakings) Insurance Scheme made under this Act;

(o) "undertaking to which this Act applies" includes—

(i) factories,

(ii) electric supply undertakings, hydro-electric supply undertakings and State Electricity Boards constituted under the Electricity (Supply) Act, 1948,

(iii) mines, as defined in the Mines Act, 1952,

(iv) gas supply undertakings,

(v) oil mines and oil refineries,

(vi) tea estates,

(vii) any trading Corporation or any body of Port Trustees or Commissioners or any other person specified in this behalf by the Central Government, owning inland vessel,

but does not include any undertaking which is owned and departmentally run by Government or any undertaking which is exempted under Section 15 from the provisions of this Act;

(p) "vessel" means a vessel the value of which including the hull, machinery and fittings but excluding cargo, fuel and stores carried for the use of the crew, as ascertained for the purpose of insurance under the Scheme, exceeds two thousand and five hundred rupees, propelled wholly or in part by steam, electrical or mechanical power, or adapted for towing by a vessel so propelled, and includes any such vessel while used as a place of habitation or for storage of goods but does not include a vessel of the type commonly called country craft.

CHAPTER II

EMERGENCY RISKS (UNDERTAKINGS) INSURANCE SCHEME

3. Emergency Risks (Undertakings) Insurance Scheme.— (1) The Central Government may, by notification in the Official Gazette put into operation a scheme to be called the Emergency Risks (Undertakings) Insurance Scheme,† whereby the Central Government undertakes the liability of insuring property insurable under this Act against emergency risks, to the extent provided by or under this Act.

(2) The Scheme may extend to the undertaking by the Central Government in relation to any person in India of the liability of insuring such person against emergency risks in respect of any property insurable under this Act which is not owned by him but in which he has an interest, up to the extent of such interest.

(3) The Scheme shall be such as to secure—

(a) that the liability of the Central Government as insurer shall not extend to more than eighty per cent. of the insurable value of the property insurable;

(b) that any liability of the Central Government as insurer under the Scheme is determined by a policy of insurance issued, in the form and in respect of a period not exceeding the period specified in the Scheme, by a person acting on behalf of the Central Government;

Provided that the form of policy may be such as to limit the extent and nature of the indemnity provided by the Central Government and to impose conditions subject to which the indemnity is provided;

Provided further that the form of policy shall be such as to provide that no liability shall arise thereunder unless the premium in relation to the period in which any loss or damage occurs has been paid before the occurrence of such loss or damage;

(c) that any premium under a policy so issued is payable at a rate not exceeding three per cent. per annum of the sum insured as may be specified in the Scheme;

Provided that nothing in this clause shall prevent the securing by the Scheme of different rates of premium in relation to properties of different descriptions insurable under this Act owned by any undertaking to which this Act applies;

(d) that the amount of any one premium payable under a policy so issued is not less than such sum as may be specified in the Scheme.

(4) The Scheme may provide —

(a) for undertaking in relation to works in course of construction which, when completed, will become properties insurable under the Act and such plant and machinery

†For Emergency Risks (Undertakings) Scheme, see Gaz. of India, 10-12-1971, Pt. II-S. 3 (ii), Ext. P. 3335.

appertaining to such works as may be specified in the Scheme, the same liabilities as are undertaken by the Scheme in relation to the undertakings;

(b) that the payments due under a policy of insurance issued under the Scheme, may at the option of the Central Government, take either of the following forms, namely:—

(i) payment, within the limits of the liability assumed by the Central Government and in such manner and by such instalments as the Central Government may think fit, of the cost necessary to restore the property as far as practicable to the condition in which it existed before the occurrence of the damage, or

(ii) compensation, within the aforesaid limits, for the loss in value, ascertained on the basis of values and prices ruling at the time at which the policy of insurance was taken out, or at which the loss occurred, whichever is less, suffered by the property as a result of the damage, after due allowance has been made for depreciation during the period of insurance cover;

(c) that payments due under a policy of insurance under the Scheme may be postponed to any time before the expiry of one year from the date on which this Act ceases to be in force, or, subject to payment of interest at the rate of two per cent. per annum from the expiry of the said year, to any later date;

(d) for making it an express or implied condition of any policy of insurance issued under the Scheme—

(i) that the owner or occupier of a factory or owner of other undertakings mentioned in sub-section (1), as the case may be, shall comply with all regulations or instructions made or issued under the authority of Government for safeguarding the property against damage from emergency risks, or

(ii) that, where the Central Government exercises its option to pay the cost necessary to restore the property to its original condition the owner of the undertaking shall if so required by the Central Government, reconstruct the property or remove the property to and reconstruct it in another locality.

(5) Different forms of policies may be specified in the Scheme under sub-section (3) in relation to different classes of undertakings.

(6) The Central Government may, by notification in the Official Gazette, add to, amend or vary any Scheme made under this Act.

(7) Every Scheme shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which it is so laid or the

session immediately following, both Houses agree in making any modification in the Scheme or both Houses agree that the Scheme should not be made, the Scheme shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under the Scheme.

4. **Employment of agents by the Central Government.**—The Central Government may, by notification in the Official Gazette, employ or authorise the employment of any person to act as its agent for the issue of policies and making recommendations for the settlement of claims under the Scheme, and may pay to the person so employed such remuneration as it may think fit.

5. **Duty of owners of undertakings to insure against emergency risks.**—(1) While the Scheme is in operation, every owner of an undertaking to which this Act applies, shall,—

(a) by such date as may be specified in this behalf by the Central Government by notification in the Official Gazette, or

(b) in respect of property becoming property insurable under this Act after the date specified under clause (a), or in a case to which sub-section (2) refers, before the commencement of the quarter next following that in which,—

(i) the property becomes insurable under this Act, or

(ii) the reconstruction of the property is completed, take out a policy of insurance against emergency risks issued in accordance with the Scheme whereby he is insured in respect of all property insurable under this Act which appertains to the undertaking for a sum which is not less than the insurable value of such property;

Provided that where the undertaking is a factory and the owner thereof is not himself the occupier of the factory, the occupier of the factory shall, unless the owner has already taken out a policy of insurance as required by this sub-section, himself take out the policy, and in such a case the occupier shall be deemed to act as the agent of the owner and shall be entitled to receive from the owner all sums paid as premiums on the policy;

Provided further that in the case of a trading Corporation or body of Port Trustees or Commissioners or any other person whose inland vessels become insurable under this Act, the policy of insurance taken out shall be for a sum not less than the insurable value of such vessels, fuel and stores; and this obligation shall in the case of a trading Corporation incorporated outside India rest upon the manager of the principal place of business in India of the Corporation.

(2) The obligation imposed by sub-section (1) includes, when the owner of the undertaking is required by the Central Government to reconstruct the property which has suffered damage, an obligation to take out an additional policy of insurance as required by the sub-section in respect of the reconstructed property.

(3) When an undertaking in respect of which a policy of insurance against emergency risks has been taken out as required by this section is transferred from one owner to another or there is a change of occupier of an undertaking which is a factory, the policy may be transferred to the new owner or occupier and such new owner or occupier shall succeed to all rights and liabilities under and in relation to the policy as if the policy had been in the first instance taken out by him.

(4) Whoever contravenes the provisions of sub-section (1) or the proviso thereto, or, having taken out a policy of insurance as required by that sub-section, fails to pay any premium which is due thereon, shall be punishable with fine which may extend to two thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first on which the contravention or failure continues, and such punishment shall be without prejudice to any other penalty or liability incurred in consequence of such contravention or failure.

(5) Where any offence under sub-section (4) is tried by a Presidency Magistrate or a magistrate of the first class, then, notwithstanding anything contained in the Code of Criminal Procedure, 1898, the magistrate trying the offence may pass any sentence authorised by that sub-section.

6. Restrictions on carrying on certain insurance business.— (1) After the date on which the Scheme is put into operation, no person shall, except as a person authorised by the Central Government as its agent to issue policies in pursuance of the Scheme, carry on the business of insuring undertakings to which this Act applies in India against emergency risks in respect of property insurable under this Act.

(2) Whoever contravenes the provisions of sub-section (1) shall be punishable with fine which may extend to five thousand rupees and with a further fine which may extend to one thousand rupees for every day after the first on which the contravention continues.

7. Emergency Risks (Undertakings) Insurance Fund.— (1) The Central Government may, after due appropriation made by Parliament by law in this behalf, transfer in each financial year, to a fund to be called the Emergency Risks (Undertakings) Insurance Fund such sums, as may be considered necessary, not exceeding the sums received by the Central Government by way of insurance premiums under the Scheme, or by way of payments made on composition of

offences under Section 13 or by way of expenses or compensation awarded by a Court, under Section 545 of the Code of Criminal Procedure, 1898, out of any fine imposed in any prosecution under this Act.

(2) There shall be paid from out of the Fund all sums required for the discharge by the Central Government of any of its liabilities under the Scheme, or for payments by the Central Government under S. 10, or for the payment by the Central Government of the remuneration and expenses of agents employed for the purposes of the Scheme.

(3) If at any time when a payment is to be made out of the Fund the sum standing to the credit of the Fund is less than the sum required for the making of that payment, an amount equal to the deficiency shall, after due appropriation made by Parliament by law, be paid into the Fund as an advance out of the Consolidated Fund of India.

(4) If at any time the amount standing to the credit of the Fund exceeds the sum which, in the opinion of the Central Government, is likely to be required for the making of payments out of the Fund, the excess shall be disposed of in such manner as the Central Government may think fit.

(5) The Central Government shall prepare in such form and manner as may be specified in the Scheme and shall publish either annually or at such shorter intervals as may be specified therein, an account of all sums received into and paid out of the Fund.

CHAPTER III

MISCELLANEOUS

8. Power of Central Government to obtain information.— (1) Any person authorised in this behalf by the Central Government may, for the purpose of ascertaining whether or not the owner or occupier of any property required to be insured under this Act has taken out a policy of insurance as required by this Act in respect of such property, or for the purpose of investigating the insurable value of any property insured, or required to be insured, or proposed for insurance under this Act, or for the purpose of estimating the damage suffered by any property insured under this Act,—

(a) require the owner or occupier of the property, or any person carrying on in India the business of fire insurance in respect of the property, to submit to him such accounts, books or other documents or to furnish to him such information as he may reasonably think necessary, or

(b) at any reasonable time, enter any premises comprising or containing the property, inspect such premises or property, and require any person found on such premises, who is for the time being in charge thereof, or in control thereof, or whom he believes to be in possession of information relevant to his investigation, to produce to him and allow him to examine such ac-

counts, books or other documents as he may think necessary, or to furnish to him such other information as he may reasonably think necessary.

(2) Whoever wilfully obstructs any person in the exercise of his powers under this section or fails without reasonable excuse to comply with any demand made thereunder shall, in respect of each occasion on which any such obstruction or failure takes place, be punishable with fine which may extend to one thousand rupees.

(3) Whoever, in purporting to comply with his obligations under this section, knowingly or recklessly makes a statement false in a material particular shall be punishable with fine which may extend to one thousand rupees.

(4) Where in any proceedings in respect of a contravention of Section 5 in relation to any undertaking, it is proved, in relation to that undertaking—

(a) that a demand for the production of a policy of insurance issued in accordance with the Scheme, insuring the owner or occupier of the insurable property was duly made under this section and was not complied with, and

(b) that the person making the demand was not satisfied that there was such a policy in existence, it shall be presumed, except in so far as the contrary is proved, that the said Section 5 was being contravened in relation to that undertaking at the time when the demand was made and continued to be contravened in relation to that undertaking at all times thereafter.

9. Punishment for giving false information.— If any person, for the purpose of obtaining for himself or any other person any payment in respect of any damage due to any action of the enemy, or under a policy issued in pursuance of the Scheme,—

(a) furnishes any information which he knows to be false in a material particular, or recklessly furnishes any information which is false in a material particular, or

(b) with intent to deceive, procures, furnishes, sends or otherwise makes use of any book, account or other document which is false in a material particular, or

(c) with intent to deceive, withholds any material information, he shall be punishable with fine which may extend to five thousand rupees, or with imprisonment for a term not exceeding three months, or with both.

10. Payment towards cost of removal and reconstruction of insurable property.— Where the Central Government requires the owner of an undertaking to remove the insurable property and to reconstruct it in another locality, the Central Government shall make to such owner, out of the Fund, such payments, in addition to any sum payable under policy of insurance, as it considers sufficient to defray the cost of the removal and, if necessary, the replacement

of any part of the property in respect of which no compensation is payable.

11. Determination of premiums unpaid.— (1) Where any person has failed to insure as, or to the full amount, required by this Act, and has thereby evaded the payment by way of premium of any money which he would have had to pay but for such failure, an officer authorised in this behalf by the Central Government may determine the amount, payment of which has been so evaded, and thereupon such person shall be liable, without prejudice to any other action that may be taken against him under this Act, to pay to the Central Government, as penalty, an amount equal to the amount so determined, and if no such payment is made on demand by the authorised officer, the amount of the penalty shall be recoverable from such person as an arrear of land revenue.

(2) A person against whom a determination is made under sub-section (1) may, within the period specified in the Scheme, appeal against such determination to the Central Government whose decision thereon shall be final.

12. Limitation on prosecutions.— No prosecution for any offence punishable under this Act shall be instituted against any person except by, or with the consent of, the Central Government or an authority authorised in this behalf by the Central Government.

13. Composition of offences.— Any offence punishable under sub-section (4) of Section 5 may, either before or after the institution of the prosecution, be compounded by the Central Government, or by any authority authorised in this behalf by the Central Government, on payment for credit to the Fund of such sum as the Central Government or such authority, as the case may be, thinks fit.

14. Bar of legal proceedings.— (1) No suit, prosecution or other legal proceedings shall lie against any person for anything which is in good faith done or intended to be done under this Act.

(2) No suit shall be maintainable in any civil court against the Central Government, or a person acting as its agent under Section 4, for the refund of any money paid or purporting to have been paid as premium on a policy of insurance taken out or purporting to have been taken out under this Act.

15. Power to exempt undertakings.— (1) The Central Government may, by notification in the Official Gazette, exempt any class or description of undertakings from the provisions of this Act requiring properties insurable in relation to such undertakings to be insured or to continue to be insured under this Act; but such exemption shall not prejudice the infliction of any penalty or the accrual of any liability incurred before the date on which the exemption takes effect.

(2) In granting any exemption under this section the Central Government may direct that the exemption shall take effect or be deemed to have taken effect on a specified date after or before the date of the notification.

16. Refund of premiums in certain cases.— (1) Where any property has been insured by any owner or occupier thereof for any period, and before that period has elapsed the property or the property of that description has ceased, by virtue of a notification under sub-section (1) of Section 15, to be insurable under this Act, the person who has insured the property shall be entitled to a proportionate refund of the premium.

(2) Where a policy of insurance has been taken out in relation to a property which is not insurable under this Act and premium has been paid in relation to such policy, or where any premium has been paid in respect of a property which has ceased to be insurable under this Act, or where, in relation to a property insurable under this Act, premium has been paid in excess of the amount due under the policy, the person making such payment, or, excess payment, as the case may be, shall be entitled to a refund of the whole of the amount so paid or paid in excess as the case may be.

(3) If it is established to the satisfaction of the Central Government that a policy of insurance under the Scheme has been taken out separately by two or more persons in respect of the same property, the policy taken out by any one such person may, on an application made by him and after such inquiry as the Central Government may think fit, be cancelled and thereupon the premium paid on such policy shall be refunded to the person by whom it was paid unless such person has recovered the premium from any other person, in which case, the refund shall be made to that other person.

Provided that no refund shall be made under this section unless the application for the refund is made before the expiry of six months from the date when the premium was paid.

17. Removal of doubts.— If any doubt arises as to whether a person is insurable in respect of any property insurable under this Act, the Central Government may, by order, make such directions, not inconsistent with the provisions of this Act, as appear to it to be necessary or expedient for the removal of such doubt.

18. Notification under section 15 to be laid before Parliament.— A copy of every notification made by the Central Government under Section 15 shall be laid after it has been made, on the Table of each House of Parliament when such House is in session for a period of thirty days or for the duration of the session in which it is so laid, whichever period is less.

THE SMALL COINS (OFFENCES) ACT, 1971

(Act No. 52 of 1971)*

(11th December, 1971)

An Act to provide for the prevention of melting or destruction of small coins, hoarding of small coins for the purpose of melting or destruction thereof, and for matters connected therewith or incidental thereto.

WHEREAS an acute shortage of small coins has been felt in the country and it is necessary, in the interests of the general public, to take steps to relieve such shortage;

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and duration.— (1) This Act may be called THE SMALL COINS (OFFENCES) ACT, 1971.

(2) It shall remain in force for a period of three years.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) “mint” means a mint of the Government of India;

(b) “small coin” means any coin of the value of less than one rupee, which is legal tender under the Indian Coinage Act, 1906.

3. Prohibition on melting or destruction of small coins.— (1) No person shall—

(a) melt or destroy any small coin, or
(b) have in his possession, custody or control—

(i) any melted coin, whether in the molten state or in a solid state, or

(ii) any small coin in a destroyed or mutilated state, or

(iii) small coins substantially in excess of his reasonable requirements in such circumstances as to indicate that he is having the possession, custody or control of such small coins for the purpose of melting or destroying such small coins.

Explanation.— For the purpose of determining the reasonable requirements of small coins of a person, due regard shall be had to—

(i) his total daily requirements of small coins,

(ii) the nature of his business, occupation or profession,

(iii) the mode of his acquisition of small coins, and

(iv) the manner in which, and the place at which, such small coins are being possessed, held or controlled by him.

(2) Whoever is found to be in the possession of any metal, which contain alloys

*Received the assent of the President on 11-12-1971. Act published in Gaz. of India, 11-12-1971, Pt. II-S. 1, Ext. P. 681.

in the same proportions in which they have been used in the manufacture of any small coin, shall be presumed, until the contrary is proved, to have contravened the provisions of sub-section (1).

(3) Nothing contained in sub-section (1) or sub-section (2) shall apply to the mint.

4. **Penalty for contravention of Section 3.**—Whoever contravenes any provision of sub-section (1) of Section 3 without any reasonable excuse, the burden of proving of which shall lie on such person, shall be punishable with imprisonment for a term of not less than three months but not more than five years.

5. **Offences by companies.**—(1) Where an offence against this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of its business, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any person liable to punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.—For the purposes of this section,—

(a) “company” means any body corporate and includes a firm, society or other association of individuals; and

(b) “director”,—

(i) in relation to a firm, means a partner in the firm,

(ii) in relation to a society or other association of individuals, means the person who is entrusted, under the rules of the society or other association, with the management of the affairs of the society or other association, as the case may be.

6. **Offences to be cognizable, bailable and not compoundable.**—Notwithstanding anything contained in the Code of Criminal Procedure, 1898, offences against this Act shall be cognizable and bailable but shall not be compoundable.

7. **Offences may be tried summarily.**—Notwithstanding anything contained in Section 260 of the Code of Criminal Procedure, 1898, offences against this Act may be tried summarily by a Presidency Magistrate or a Magistrate of the first class.

8. **Forfeiture.**—Any small coin or metal in relation to which any offence against this Act has been committed shall be forfeited to Government.

9. **Provisions of Act 20 of 1958 not to apply to offences under this Act.**—Nothing in the Probation of Offenders Act, 1958 shall apply to any offence against this Act.

10. **Repeal.**—The Small Coins (Offences) Ordinance, 1971, is hereby repealed.

THE FORWARD CONTRACTS (REGULATION) AMENDMENT ACT, 1971

(Act No. 53 of 1971)*

(11th December, 1971)

An Act further to amend the Forward Contracts (Regulation) Act, 1952.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. **Short title and commencement.**—

(1) This Act may be called THE FORWARD CONTRACTS (REGULATION) AMENDMENT ACT, 1971.

(2) It shall be deemed to have come into force on the 11th day of October, 1971.

2. **Amendment of Section 2.**—In Section 2 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) (hereinafter referred to as the principal Act),—

(a) in clause (c), the words “at a future date” shall be omitted;

(b) to clause (i), the following proviso and Explanation shall be added, namely:—

“Provided that where any such contract is performed either wholly or in part,—

(1) by tendering of the documents of title to the goods covered by the contract by any party thereto (not being a commission agent or a bank) who has acquired ownership of the said documents by purchase, exchange or otherwise, to any other person (including a commission agent but not including a bank); or

(2) by the realisation of any sum of money, being the difference between the contract rate and the settlement rate or clearing rate or the rate of any offsetting contract; or

(3) by any other means whatsoever, and as a result of which the actual tendering of the goods covered by the contract or the payment of the full price therefor is dispensed with, then, such contract shall not be deemed to be a ready delivery contract.

*Received the assent of the President on 11-12-1971. Act published in Gaz. of India; 18-12-1971 Pt. II-S. 1, Ext. P. 639. For Statement of Objects and Reasons, see Gaz. of India; 18-11-1971 Pt. II-S. 2, Ext. P. 671.

Explanation.— For the purposes of this clause,—

(i) “bank” includes any banking company as defined in the Banking Regulation Act, 1949 (110 of 1949), a co-operative bank as defined in the Reserve Bank of India Act, 1934 (2 of 1934), the State Bank of India and any of its subsidiaries and any corresponding new bank constituted under Section 3 of the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970 (5 of 1970);

(ii) “commission agent” means a person who, in the ordinary course of business, makes contract for the sale or purchase of goods for others for a remuneration (whether known as commission or otherwise) which is determined in the contract itself or determinable from the terms of the contract, in either case, only with reference to the quantity of goods or to the price therefor as stipulated in the contract.

3. Repeal and saving.— (1) The Forward Contracts (Regulation) Amendment Ordinance, 1971 (11 of 1971) is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the said Ordinance, shall be deemed to have been done or taken under the principal Act as amended by this Act.

THE COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) AMENDMENT AND VALIDATION ACT, 1971

(No. 54 of 1971)*

(11th December, 1971)

An Act further to amend the Coal Bearing Areas (Acquisition and Development) Act, 1957, and to validate certain acquisitions of land or rights in or over land under the said Act.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE COAL BEARING AREAS (ACQUISITION AND DEVELOPMENT) AMENDMENT AND VALIDATION ACT, 1971.

2. Amendment of Section 8.— In sub-section (2) of Section 8 of the Coal Bearing Areas (Acquisition and Development) Act, 1957 (hereinafter referred to as the principal Act), for the words “submit the case for the decision of the Central Government together with the record of the proceedings held by him and a report containing his recommendations on the objections”, the words, brack-

ets and figures “either make a report in respect of the land which has been notified under sub-section (1) of Section 7 or of rights in or over such land, or make different reports in respect of different parcels of such land or of rights in or over such land, to the Central Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government” shall be substituted.

3. Amendment of Section 9.— In Section 9 of the principal Act,—

(a) in sub-section (1),—

(i) after the words “made by it to that effect”, the following shall be inserted, namely:—

“and different declarations may be made from time to time in respect of different parcels of any land, or of rights in or over such land, covered by the same notification under sub-section (1) of Section 7, irrespective of whether one report or different reports has or have been made (wherever required) under sub-section (2) of Section 8”;

(ii) for the words “Provided that, where the declaration”, the following shall be substituted, namely:—

“Provided that no declaration in respect of any particular land, or rights in or over such land, covered by a notification under sub-section (1) of Section 7, issued after the commencement of the Coal Bearing Areas (Acquisition and Development) Amendment and Validation Act, 1971, shall be made after the expiry of three years from the date of the said notification:

Provided further that, where a declaration”;

(b) in sub-section (2), for the words “The declaration”, the words “Every declaration” shall be substituted.

4. Amendment of Section 13.— In Section 13 of the principal Act, after sub-section (5), the following sub-section shall be inserted, namely:—

“(5A) In determining the amount of compensation for any land acquired under Section 9, any increase to the value of the other land of the person interested, likely to accrue from the use to which the land acquired will be put shall not be taken into consideration.”

5. Amendment of Section 14.— In Section 14 of the principal Act, after sub-section (7), the following sub-section shall be inserted, namely:—

“(8) The Tribunal, in the proceedings before it, shall have all the powers which a civil court has while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(i) summoning and enforcing the attendance of any person and examining him on oath;

(ii) requiring the discovery and production of any document;

(iii) reception of evidence on affidavits;

*Received the assent of the President on 11-12-1971. Act published in Gaz. of India, 13-12-1971, Pt. II-S. 1, Ext. P. 835. For Statement of Objects and Reasons, see Gaz. of India, 2-8-1971, Pt. II-S. 2, Ext. P. 503.

(iv) requisitioning any public record from any court or office; and

(v) issuing commissions for examination of witnesses."

6. Amendment of Section 17.— In Section 17 of the principal Act, in sub-section (2), for the second proviso, the following provisos shall be substituted, namely:—

"Provided further that every person who claims to be an interested person (whether such person has been admitted to be interested or not) including the person referred to in the preceding proviso shall be entitled to prefer a claim for compensation before the Tribunal:

Provided also that no person who has received the amount otherwise than under protest shall be entitled to prefer any such claim before the Tribunal."

7. Insertion of new Section 18A.— After Section 18 of the principal Act, the following section shall be inserted, namely:—

"**18A. Payment to State Governments in lieu of royalty.**— Notwithstanding anything contained in this Act, where any land or any rights in or over land belonging to a State Government (other than the rights under a mining lease granted or deemed to have been granted by the State Government to any person) vest in the Central Government under S. 10 or in a Government Company under S. 11, the Central Government or the Company as the case may be, may pay to the State Government such sum of money as would have been payable as royalty by a lessee had such land or rights been under a mining lease granted by the State Government."

8. Validation of certain acquisitions.—

(1) Notwithstanding any judgment, decree or order of any court to the contrary,—

(a) no acquisition of land or of rights in or over land made or purporting to have been made under the principal Act before the commencement of this Act, and no action taken or thing done (including any order made, agreement entered into or notification published) in connection with such acquisition shall be deemed to be invalid or ever to have become invalid merely on the ground—

(i) that one or more competent authorities have performed the functions of competent authority under the principal Act in respect of the land covered by the same notification under sub-section (1) of Section 7 of the principal Act;

(ii) that one or more reports have been made under sub-section (2) of Section 8 of the principal Act, whether in respect of the entire land covered by the same notification under sub-section (1) of Section 7 of the principal Act or rights in or over such land,

or in respect of different parcels of such land or of rights in or over such land;

(iii) that one or more declarations have been made under Section 9 of the principal Act in respect of different parcels of the land covered by the same notification under sub-section (1) of Section 7 of the principal Act or in respect of rights in or over such land,

(b) any acquisition in pursuance of any notification issued under sub-section (1) of Section 7 of the principal Act before the commencement of this Act may be made after such commencement and no such acquisition and no action taken or thing done (including any order made, agreement entered into or notification published) whether before or after such commencement, in connection with such acquisition shall be deemed to be invalid merely on the grounds referred to in clause (a) or any of them.

(2) Notwithstanding anything contained in clause (b) of sub-section (1), no declaration under Section 9 of the principal Act in respect of any land, or rights in or over such land, which has been notified before the commencement of this Act, under sub-section (1) of Section 7 of the principal Act, shall be made after the expiry of two years from the commencement of this Act.

(3) Where acquisition of any particular land (not being acquisition of rights in or over such land) covered by a notification under sub-section (1) of Section 7 of the principal Act, issued before the commencement of this Act, is or has been made in pursuance of any declaration under Sec. 9 of the principal Act, whether made before or after such commencement, and such declaration is or has been made after the expiry of three years from the date of issue of such notification, there shall be paid simple interest, calculated at the rate of six per centum per annum on the market value of such land, as determined under sub-section (5) of Section 13 of the principal Act, from the date of expiry of the said period of three years to the date of tender of payment of compensation payable for the acquisition of such land:

Provided that no such interest shall be payable for any period during which the proceedings for the acquisition of any land were held up on account of stay or injunction by order of a Court:

Provided further that nothing in this sub-section shall apply to the acquisition of any land where the amount of compensation has been paid to the persons interested before the commencement of this Act.

THE ARMS (AMENDMENT) ACT, 1971
[ACT NO. 55 OF 1971]*

(13th December, 1971)

An Act to amend the Arms Act, 1959.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called **THE ARMS (AMENDMENT) ACT, 1971**.

2. Amendment of Section 2.—In Section 2 of the Arms Act, 1959, in sub-section (1), for clause (d), the following clause shall be substituted, namely:—

(d) "district magistrate", in relation to any area for which a Commissioner of Police has been appointed, means the Commissioner of Police thereof and includes any such Deputy Commissioner of Police, exercising jurisdiction over the whole or any part of such area, as may be specified by the State Government in this behalf in relation to such area or part;

*Received the assent of the President on 13-12-1971. Act published in Gaz. of India; 14-12-1971, Pt. II-S. 1, Ext. P. 641. For Statement of Objects and Reasons, see Gaz. of India; 23-7-1971, Pt. II-S. 2, Ext. P. 478.

THE COMPTROLLER AND AUDITOR-GENERAL'S (DUTIES, POWERS AND CONDITIONS OF SERVICE) ACT, 1971.

[ACT NO. 56 OF 1971]

CONTENTS

CHAPTER I

PRELIMINARY

1. Short title.

2. Definitions.

CHAPTER II

SALARY AND OTHER CONDITIONS OF SERVICE OF THE COMPTROLLER AND AUDITOR-GENERAL

3. Salary.

4. Term of office.

5. Leave.

6. Pension.

7. Commutation of pension.

8. Right to subscribe to General Provident Fund.

9. Other conditions of service.

CHAPTER III

DUTIES AND POWERS OF THE COMPTROLLER AND AUDITOR-GENERAL.

10. Comptroller and Auditor-General to compile accounts of Union and States.

11. Comptroller and Auditor-General to prepare and submit accounts to the President, Governors of States and Administrators of Union territories having Legislative Assemblies.

12. Comptroller and Auditor-General to give information and render assistance to the Union and States.

13. General provisions relating to audit.

14. Audit of receipts and expenditure of bodies or authorities substantially financed from Union or State Revenues.

15. Functions of Comptroller and Auditor-General in the case of grants or loans given to other authorities or bodies.

16. Audit of receipts of Union or of States.

17. Audit of accounts of stores and stock.

18. Powers of Comptroller and Auditor-General in connection with audit of accounts.

19. Audit of Government Companies and Corporations.

20. Audit of accounts of certain authorities or bodies.

CHAPTER IV

MISCELLANEOUS

21. Delegation of power of Comptroller and Auditor-General.

22. Power to make rules.

23. Power to make regulations.

24. Power to dispense with detailed audit.

25. Repeal.

26. Removal of doubts.

THE COMPTROLLER AND AUDITOR-GENERAL'S (DUTIES, POWERS AND CONDITIONS OF SERVICE) ACT, 1971

[NO. 56 OF 1971]*

(15th December, 1971)

An Act to determine the conditions of service of the Comptroller and Auditor-General of India and to prescribe his duties and powers and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title.— This Act may be called **THE COMPTROLLER AND AUDITOR-GENERAL'S (DUTIES, POWERS AND CONDITIONS OF SERVICE) ACT, 1971**.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "accounts", in relation to commercial undertakings of a Government, includes trading, manufacturing and profit and loss accounts and balance-sheets and other subsidiary accounts;

(b) "appropriation accounts" means accounts which relate the expenditure brought

*Received the assent of the President on 15-12-1971. Act published in Gaz. of India; 15-12-1971, Pt. II-S. 1, Ext. P. 651. For Statement of Objects and Reasons, see Gaz. of India; 11-8-1971, Pt. II-S. 2, Ext. P. 583.

during a financial year, to the several items specified in the law made in accordance with the provisions of the Constitution or of the Government of Union Territories Act, 1963, for the appropriation of moneys out of the Consolidated Fund of India or of a State, or of a Union territory having a Legislative Assembly, as the case may be;

(c) "Comptroller and Auditor-General" means the Comptroller and Auditor-General of India appointed under Article 148 of the Constitution;

(d) "State" means a State specified in the First Schedule to the Constitution;

(e) "Union" includes a Union territory, whether having a Legislative Assembly or not.

CHAPTER II

SALARY AND OTHER CONDITIONS OF SERVICE OF THE COMPTROLLER AND AUDITOR-GENERAL

3. Salary.— There shall be paid to the Comptroller and Auditor-General a salary which is equal to the salary of the Judge of the Supreme Court:

Provided that if a person who, immediately before the date of assuming office as the Comptroller and Auditor-General, was in receipt of, or, being eligible so to do, had elected to draw, a pension (other than a disability or wound pension) in respect of any previous service under the Government of the Union or any of its predecessor Governments, or under the Government of a State or any of its predecessor Governments, his salary in respect of service as Comptroller and Auditor-General shall be reduced—

(a) by the amount of that pension; and

(b) if he had, before assuming office, received, in lieu of a portion of the pension due to him in respect of such previous service, the commuted value thereof, by the amount of that portion of the pension; and

(c) if he had, before assuming office, received, or become eligible for receiving, a retirement gratuity in respect of such previous service, by the pension equivalent of that gratuity.

4. Term of office.— The Comptroller and Auditor-General shall hold office for a term of six years from the date on which he assumes such office:

Provided that where he attains the age of sixty-five years before the expiry of the said term of six years, he shall vacate such office on the date on which he attains the said age:

Provided further that he may, at any time, by writing under his hand addressed to the President, resign his office.

Explanation.— For the purpose of this section, the term of six years in respect of the Comptroller and Auditor-General holding office immediately before the commence-

ment of this Act, shall be computed from the date on which he had assumed office.

5. Leave.— (1) A person who, immediately before the date of assuming office as the Comptroller and Auditor-General, was in the service of Government may be granted during his tenure of office but not thereafter, leave in accordance with the rules for the time being applicable to the Service to which he belonged before such date and he shall be entitled to carry forward the amount of leave standing at his credit on such date, notwithstanding anything contained in Section 6.

(2) Any other person who is appointed as the Comptroller and Auditor-General may be granted leave in accordance with such rules as are for the time being applicable to a member of the Indian Administrative Service.

(3) The power to grant or refuse leave to the Comptroller and Auditor-General and to revoke or curtail leave granted to him, shall vest in the President:

6. Pension.— (1) A person who, immediately before the date of assuming office as the Comptroller and Auditor-General, was in the service of Government shall be deemed to have retired from service on the date on which he enters upon office as the Comptroller and Auditor-General but his service as the Comptroller and Auditor-General shall be reckoned as continuing approved service counting for pension in the Service to which he belonged.

(2) Every person who enters upon office as the Comptroller and Auditor-General shall, on demitting the said office, be eligible to a pension of a sum of fifteen thousand rupees per annum which sum shall include the aggregate of all pensions payable to him and the commuted portion, if any, of his pension, and the pension equivalent of the retirement gratuity, if any, which may have been admissible to him under the rules for the time being applicable to the Service to which he belonged:

Provided that if such a person is or becomes eligible, at any time, under the rules for the time being governing the Service to which he belonged, to a pension higher than the said sum of fifteen thousand rupees, he shall be eligible to draw, as pension, the said higher amount.

(3) A person who, immediately before the date of assuming office as the Comptroller and Auditor-General, was in receipt of, or, had become eligible for receiving, a pension in respect of any previous service under Government, shall, on demitting office as the Comptroller and Auditor-General, be eligible to a pension of fifteen thousand rupees per annum which sum shall include the aggregate of all pensions payable to him and the commuted portion, if any, of his pension, and the pension equivalent of the retirement gratuity, if any, which may

have been admissible to him under the rules for the time being applicable to the Service to which he belonged:

Provided that if such a person is or becomes eligible, at any time, under the rules for the time being governing the Service to which he belonged, to a pension higher than the said sum of fifteen thousand rupees, he shall be eligible to draw, as pension, the said higher amount.

(4) Any other person who is appointed as the Comptroller and Auditor-General shall, on demitting the said office, be eligible to a pension of fifteen thousand rupees per annum.

(5) The person holding office immediately before the commencement of this Act as the Comptroller and Auditor-General shall be eligible to draw, at his option, pension at the rate at which it would be admissible to him if this Act had not come into force or at the rate specified in this section.

(6) A person who demits office as the Comptroller and Auditor-General by resignation shall, on such demission, be eligible to a pension at the rate of two thousand rupees per annum for each completed year of his service as the Comptroller and Auditor-General:

Provided that in the case of a person referred to in sub-section (1) or sub-section (3), the aggregate amount of pension admissible under this sub-section together with the amount of pension including the commuted portion, if any, of his pension, and the pension equivalent of the retirement gratuity, if any, which may have been admissible to him under the rules for the time being applicable to the Service to which he belonged immediately before he assumed office as the Comptroller and Auditor-General, shall not exceed fifteen thousand rupees per annum or the higher pension referred to in proviso to sub-section (2) or sub-section (3), as the case may be.

(7) If a person who demits office as the Comptroller and Auditor-General is not eligible to any pension under this section but is eligible to a pension under the rules for the time being applicable to the Service to which he belonged immediately before he assumed office as the Comptroller and Auditor-General, he shall, notwithstanding anything contained in this section, be eligible to draw such pension as is admissible to him under the said rules.

(8) Except where he demits office by resignation, a person holding office of the Comptroller and Auditor-General shall be deemed, for the purposes of this Act, to have demitted such office as such if, and only if,—

(a) he has completed the term of office specified in Section 4, or

(b) he has attained the age of sixty-five years, or

(c) his demission of office is medically certified to be necessitated by ill health.

7. Commutation of pension.— The Civil Pensions (Commutation) Rules for the time being in force shall, with such adaptations as may be made therein by the President, apply to a person who had held office as the Comptroller and Auditor-General.

8. Right to subscribe to General Provident Fund.— Every person holding office as the Comptroller and Auditor-General shall be entitled to subscribe to the General Provident Fund (Central Services).

9. Other conditions of service.— Save as otherwise expressly provided in this Act, the other conditions of service of a person holding office as the Comptroller and Auditor-General including his emoluments during any period of duty out of India and his travelling allowance while travelling on duty, shall be determined by the rules for the time being applicable to a member of the Indian Administrative Service holding the rank of Secretary to the Government of India.

Provided that nothing in this section shall have effect so as to give a person, who immediately before the date of assuming office as the Comptroller and Auditor-General, was in the service of Government, less favourable terms in respect of any of the matters aforesaid, than those to which he would be entitled as a member of the Service to which he belonged, his service as Comptroller and Auditor-General being treated for the purpose of this proviso as continuing service in the Service to which he belonged.

CHAPTER III

DUTIES AND POWERS OF THE COMPTROLLER AND AUDITOR-GENERAL

10. Comptroller and Auditor-General to compile accounts of Union and States.—

(1) The Comptroller and Auditor-General shall be responsible—

(a) for compiling the accounts of the Union and of each State from the initial and subsidiary accounts rendered to the audit and accounts offices under his control by treasuries, offices or departments responsible for the keeping of such accounts; and

(b) for keeping such accounts in relation to any of the matters specified in clause (a) as may be necessary:

Provided that the President as respects the accounts of the Union, and the Governor of a State as respects the accounts of that State, may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for compiling the accounts of any particular service or department of the Union or of a State, as the case may be:

Provided further that the President may, after consultation with the Comptroller and Auditor-General, by order, relieve him from the responsibility for keeping the

accounts of any particular class or character.

(2) Where, under any arrangement, a person other than the Comptroller and Auditor-General has, before the commencement of this Act, been responsible—

(i) for compiling the accounts of any particular service or department of the Union or of a State, or

(ii) for keeping the accounts of any particular class or character,

such arrangement shall, notwithstanding anything contained in sub-section (1), continue to be in force unless, after consultation with the Comptroller and Auditor-General, it is revoked in the case referred to in clause (i), by an order of the President or the Governor of the State, as the case may be, and in the case referred to in clause (ii), by an order of the President.

11. Comptroller and Auditor-General to prepare and submit accounts to the President, Governors of States and Administrators of Union territories having Legislative Assemblies.—The Comptroller and Auditor-General shall, from the accounts compiled by him or by any other person responsible in that behalf, prepare in each year accounts (including, in the case of accounts compiled by him, appropriation accounts) showing under the respective heads the annual receipts and disbursements for the purpose of the Union, of each State and of each Union territory having a Legislative Assembly, and shall submit those accounts to the President or the Governor of a State or Administrator of the Union territory having a Legislative Assembly, as the case may be, on or before such dates as he may, with the concurrence of the Government concerned, determine.

12. Comptroller and Auditor-General to give information and render assistance to the Union and States.—The Comptroller and Auditor-General shall, in so far as the accounts, for the compilation or keeping of which he is responsible, enable him so to do, give to the Union Government, to the State Governments or to the Governments of Union territories having Legislative Assemblies, as the case may be, such information as they may, from time to time, require, and render such assistance in the preparation of their annual financial statements as they may reasonably ask for.

13. General provisions relating to audit.—It shall be the duty of the Comptroller and Auditor-General—

(a) to audit all expenditure from the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to ascertain whether the moneys shown in the accounts as having been disbursed were legally available for and applicable to the service or purpose to which they have been applied or charged and whether the expenditure conforms to the authority which governs it;

(b) to audit all transactions of the Union and of the States relating to Contingency Funds and Public Accounts;

(c) to audit all trading, manufacturing, profit and loss accounts and balance-sheets and other subsidiary accounts kept in any department of the Union or of a State; and in each case to report on the expenditure, transactions or accounts so audited by him.

14. Audit of receipts and expenditure of bodies or authorities substantially financed from Union or State Revenues.—Where any body or authority is substantially financed by grants or loans from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly, the Comptroller and Auditor-General shall, subject to the provisions of any law for the time being in force applicable to the body or authority, as the case may be, audit all receipts and expenditure of that body or authority and to report on the receipts and expenditure audited by him.

Explanation.—Where the grant or loan to a body or authority from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly in a financial year is not less than rupees five lakhs and the amount of such grant or loan is not less than seventy-five per cent. of the total expenditure of that body or authority, such body or authority shall be deemed, for the purposes of this section, to be substantially financed by such grants or loans, as the case may be.

15. Functions of Comptroller and Auditor-General in the case of grants or loans given to other authorities or bodies.—(1) Where any grant or loan is given for any specific purpose from the Consolidated Fund of India or of any State or of any Union territory having a Legislative Assembly to any authority or body not being a foreign State or international organisation, the Comptroller and Auditor-General shall scrutinise the procedures by which the sanctioning authority satisfies itself as to the fulfilment of the conditions subject to which such grants or loans were given and shall for this purpose have right of access, after giving reasonable previous notice, to the books and accounts of that authority or body:

Provided that the President, the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, may, where he is of opinion that it is necessary so to do in the public interest, by order, relieve the Comptroller and Auditor-General, after consultation with him, from making any such scrutiny in respect of any body or authority receiving such grant or loan.

(2) Except where he is authorised so to do by the President, the Governor of a State or the Administrator of a Union terri-

tory having a Legislative Assembly, as the case may be, the Comptroller and Auditor-General shall not have, while exercising the powers conferred on him by sub-section (1), right of access to the books and accounts of any corporation to which any such grant or loan as is referred to in sub-section (1) is given if the law by or under which such corporation has been established provides for the audit of the accounts of such corporation by an agency other than the Comptroller and Auditor-General.

Provided that no such authorisation shall be made except after consultation with Comptroller and Auditor-General and except after giving the concerned corporation a reasonable opportunity of making representations with regard to the proposal to give to the Comptroller and Auditor-General right of access to its books and accounts.

16. Audit of receipts of Union or of States.— It shall be the duty of the Comptroller and Auditor-General to audit all receipts which are payable into the Consolidated Fund of India and of each State and of each Union territory having a Legislative Assembly and to satisfy himself that the rules and procedures in that behalf are designed to secure an effective check on the assessment, collection and proper allocation of revenue and are being duly observed and to make for this purpose such examination of the accounts as he thinks fit and report thereon.

17. Audit of accounts of stores and stock.— The Comptroller and Auditor-General shall have authority to audit and report on the accounts of stores and stock kept in any office or department of the Union or of a State.

18. Powers of Comptroller and Auditor-General in connection with audit of accounts.— (1) The Comptroller and Auditor-General shall in connection with the performance of his duties under this Act, have authority—

(a) to inspect any office of accounts under the control of the Union or of a State, including treasuries and such offices responsible for the keeping of initial or subsidiary accounts, as submit accounts to him;

(b) to require that any accounts, books, papers and other documents which deal with or form the basis of or are otherwise relevant to the transactions to which his duties, in respect of audit extend, shall be sent to such place as he may appoint for his inspection;

(c) to put such questions or make such observations as he may consider necessary, to the person in charge of the office and to call for such information as he may require for the preparation of any account or report which it is his duty to prepare.

(2) The person in charge of any office or department, the accounts of which have to be inspected and audited by the Com-

troller and Auditor-General, shall afford all facilities for such inspection and comply with requests for information in as complete a form as possible and with all reasonable expedition.

19. Audit of Government companies and corporations.— (1) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of Government companies shall be performed and exercised by him in accordance with the provisions of the Companies Act, 1956.

(2) The duties and powers of the Comptroller and Auditor-General in relation to the audit of the accounts of corporations (not being companies) established by or under law made by Parliament shall be performed and exercised by him in accordance with the provisions of the respective legislations.

(3) The Governor of a State or the Administrator of a Union territory having a Legislative Assembly may, where he is of opinion that it is necessary in the public interest so to do, request the Comptroller and Auditor-General to audit the accounts of a corporation established by law made by the Legislative (sic) (Assembly?) of the State or of the Union territory, as the case may be, and where such request has been made, the Comptroller and Auditor-General shall audit the accounts of such corporation and shall have, for the purposes of such audit, right of access to the books and accounts of such corporation.

Provided that no such request shall be made except after consultation with the Comptroller and Auditor-General and except after giving reasonable opportunity to the corporation to make representations with regard to the proposal for such audit.

20. Audit of accounts of certain authorities or bodies.— (1) Save as otherwise provided in Section 19, where the audit of the accounts of any body or authority has not been entrusted to the Comptroller and Auditor-General by or under any law made by Parliament, he shall, if requested so to do by the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, undertake the audit of the accounts of such body or authority on such terms and conditions as may be agreed upon between him and the concerned Government and shall have, for the purposes of such audit, right of access to the books and accounts of that body or authority.

Provided that no such request shall be made except after consultation with the Comptroller and Auditor-General.

(2) The Comptroller and Auditor-General may propose to the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, that he may

be authorised to undertake the audit of the accounts of any body or authority, the audit of the accounts of which has not been entrusted to him by law, if he is of opinion that such audit is necessary, because a substantial amount has been invested in, or advanced to, such body or authority by the Central or State Government or by the Government of a Union territory having a Legislative Assembly, and on such request being made, the President or the Governor or the Administrator, as the case may be may empower the Comptroller and Auditor-General to undertake the audit of the accounts of such body or authority.

(3) The audit referred to in sub-section (1) or sub-section (2) shall not be entrusted to the Comptroller and Auditor-General except where the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be, is satisfied that it is expedient so to do in the public interest and except after giving a reasonable opportunity to the concerned body or authority to make representations with regard to the proposal for such audit.

CHAPTER IV

MISCELLANEOUS

21. Delegation of power of Comptroller and Auditor-General.— Any power exercisable by the Comptroller and Auditor-General under the provisions of this Act, or any other law may be exercised by such officer of his department as may be authorised by him in this behalf by general or special order:

Provided that except during the absence of the Comptroller and Auditor-General on leave or otherwise, no officer shall be authorised to submit on behalf of the Comptroller and Auditor-General any report which the Comptroller and Auditor-General is required by the Constitution or the Government of Union Territories Act, 1963 to submit to the President or the Governor of a State or the Administrator of a Union territory having a Legislative Assembly, as the case may be.

22. Power to make rules.— (1) The Central Government may, after consultation with the Comptroller and Auditor-General, by notification in the Official Gazette, make rules for carrying out the provisions of this Act in so far as they relate to the maintenance of accounts.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which initial and subsidiary accounts shall be kept by the treasuries, offices and departments rendering accounts to audit and accounts offices;

(b) the manner in which the accounts of any particular service or department or of any particular class or character, in respect of which the Comptroller and Auditor-General has been relieved from the responsibility of compiling or keeping the accounts, shall be compiled or kept;

(c) the manner in which the accounts of stores and stock shall be kept in any office or department of the Union or of a State, as the case may be;

(d) any other matter which is required to be, or may be, prescribed by rules.

(3) Every rule made under this section shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

23. Power to make regulations.— The Comptroller and Auditor-General is hereby authorised to make regulations for carrying into effect the provisions of this Act in so far as they relate to the scope and extent of audit, including laying down for the guidance of the Government Departments the general principles of Government accounting and the broad principles in regard to audit of receipts and expenditure.

24. Power to dispense with detailed audit.— The Comptroller and Auditor-General is hereby authorised to dispense with, when circumstances so warrant, any part of detailed audit of any accounts or class of transactions and to apply such limited check in relation to such accounts or transactions as he may determine.

25. Repeal.— The Comptroller and Auditor-General (Conditions of Service) Act, 1953, is hereby repealed.

26. Removal of doubts.— For the removal of doubts, it is hereby declared that on the commencement of this Act the Government of India (Audit and Accounts) Order, 1936, as adapted by the India (Provisional Constitution) Order, 1947, shall cease to be in force except as respects anything done or any action taken thereunder.

THE VISVA-BHARATI (AMENDMENT) ACT, 1971

[ACT NO. 57 OF 1971]*

(15th December, 1971)

An Act further to amend the Visva-Bharati Act, 1951.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE VISVA-BHARATI (AMENDMENT) ACT, 1971.

(2) It shall be deemed to have come into force on the 3rd day of November, 1971.

2. Act 29 of 1951 to be amended.—

The Visva-Bharati Act, 1951 (hereinafter referred to as the principal Act), and the Statutes thereunder shall have effect subject to the amendments specified in this Act.

3. Substitution of new section for Section 19.— For Section 19 of the principal Act, the following section shall be substituted, namely:—

“19. The Samsad (Court).— (1) The Samsad (Court) shall consist of the following members, namely:—

(a) the Acharya (Chancellor), ex officio;

(b) the Upacharya (Vice-Chancellor) and the other members of the Karma-Samiti (Executive Council), ex officio;

(c) the Artha-Sachiva (Treasurer), ex officio;

(d) two persons, being Professors of the University, to be nominated by the Paridarsaka (Visitor);

(e) two persons from among the teachers, other than the Professors, to be nominated by the Paridarsaka (Visitor);

(f) three representatives of Parliament, of which two to be nominated by the Speaker of the Lok Sabha from among the members thereof and one to be nominated by the Chairman of the Rajya Sabha from among the members thereof;

(g) ten persons to be nominated by the Paridarsaka (Visitor) from among persons who, in the opinion of the Paridarsaka (Visitor), are men of standing in public life or have special knowledge or practical experience in education or have rendered eminent services in the cause of education;

(h) two members of the Alumni Association to be nominated by the Paridarsaka (Visitor).

(2) Ten members, other than the ex officio members of the Samsad (Court), shall form the quorum for its meeting.

For Statement of Objects and Reasons, see Gaz. of India; 26-11-1971, Pt. II-S. 2, Ext. P. 781.

(3) Each member of the Samsad (Court), other than the ex officio members, shall hold office for a term of three years from the date on which he is nominated as its member.”

4. Substitution of new section for Section 21.— For Section 21 of the principal Act, the following section shall be substituted, namely:—

“21. Functions of the Samsad (Court).— The Samsad (Court) shall be an advisory body and shall—

(a) advise the Paridarsaka (Visitor) in respect of such matter as he may refer to it for advice;

(b) advise any authority of the University in respect of such matter as may be referred to it by such authority; and

(c) perform such other duties and exercise such other powers as may be assigned to it by or under this Act or the Statutes made thereunder or by the Paridarsaka (Visitor).”

5. Amendment of Section 22.— In Section 22 of the principal Act, for the words “The Karma-Samiti”, the words “Subject to the control of the Paridarsaka (Visitor), the Karma-Samiti” shall be substituted.

6. Amendment of Section 23.— In Section 23 of the principal Act,—

(i) for the words “The Karma-Samiti”, the words “Subject to the control of the Paridarsaka (Visitor), the Karma-Samiti” shall be substituted; and

(ii) after clause (i), the following clause shall be inserted, namely:—

“(ia) shall regulate and enforce discipline among members of the teaching, administrative and ministerial staff of the University in accordance with the Statutes and the Ordinances;”

7. Amendment of Section 28.— In Section 28 of the principal Act, for sub-sections (2) to (8) the following sub-sections shall be substituted, namely:—

“(2) The Statutes may be amended, repealed or added to by Statutes made by the Karma-Samiti (Executive Council).

(3) The Karma-Samiti (Executive Council) shall not propose the draft of any Statute affecting the status, powers or constitution of any authority of the University until such authority has been given an opportunity of expressing the opinion upon the proposal and any opinion so expressed shall be in writing and shall be submitted to the Paridarsaka (Visitor).

(4) Every new Statute or addition to a Statute or any amendment or repeal of a Statute shall be submitted to the Paridarsaka (Visitor) who may assent to it or withhold his assent therefrom or remit it to the Karma-Samiti (Executive Council) for further consideration.

(5) A Statute passed by the Karma-Samiti (Executive Council) shall have no validity until it has been assented to by the Paridarsaka (Visitor).”

8. Amendment of Section 30.— In Section 30 of the principal Act,—

(i) in sub-section (3), the words “and the Samsad (Court), and shall be considered by the Samsad (Court), at its next succeeding meeting” shall be omitted;

(ii) for sub-sections (4) to (7), the following sub-sections shall be substituted, namely:—

“(4) Where the Karma-Samiti (Executive Council) has rejected the draft of an Ordinance proposed by the Siksha-Samiti (Academic Council), the Siksha-Samiti (Academic Council) may appeal to the Paridarsaka (Visitor) who may pass such orders thereon as he thinks fit.

(5) All Ordinances made by the Karma-Samiti (Executive Council) shall be submitted, as soon as may be, to the Paridarsaka (Visitor) who may disallow any such Ordinance or remit it to the Karma-Samiti (Executive Council) for further consideration.

(6) The Paridarsaka (Visitor) may, by order, direct that the operation of any Ordinance shall be suspended until he has had an opportunity of exercising his power of disallowance, and any order of suspension under this sub-section shall cease to have effect on the expiration of one month from the date of such order.”

9. Substitution of new section for Section 35.— For Section 35 of the principal Act, the following section shall be substituted, namely:—

“35. Annual reports.— The annual report of the University shall be prepared under the direction of the Karma-Samiti (Executive Council) and shall be submitted to the Paridarsaka (Visitor) on or before such date as may be prescribed by the Statute.”

10. Amendment of Section 36.— In Section 36 of the principal Act,—

(i) in sub-section (3), the words “the Samsad (Court) and to” shall be omitted; and

(ii) for sub-section (4), the following sub-section shall be substituted, namely:—

“(4) The annual accounts and the financial estimates shall be considered by the Paridarsaka (Visitor) who may communicate his views to the Karma-Samiti (Executive Council) which shall take them into consideration and take such action thereon as it thinks fit or inform the Paridarsaka (Visitor) when no action is taken, of its reasons therefor.”

11. Substitution of new section for.— For Section 41 of the principal Act, the following section shall be substituted, namely:—

“41. Removal from membership of the University.— The Karma-Samiti (Executive Council) may, on the recommendation of not less than two-thirds of its members remove any person from the membership of any authority or board of the University if such a person is guilty of a serious offence

involving moral turpitude, or if he has been guilty of scandalous conduct and for the same reasons may withdraw any degree or diploma conferred on, or granted to, any person by the University:

Provided that no action shall be taken under this section against any person except after giving him a reasonable opportunity of being heard with regard to the proposed action.”

12. Amendment of Statutes.— Notwithstanding anything contained in the principal Act, the Statutes of the University shall stand amended as follows:—

(i) in Statute 3, after clause (2), the following clause shall be inserted, namely:—

“(2A) When the Upacharya (Vice-Chancellor) by reason of leave or absence or any other cause is unable to perform the duties of his office, the current duties of the Upacharya (Vice-Chancellor) shall be performed,—

(a) in the case of leave or absence for more than thirty days, by such Professor as the Karma-Samiti (Executive Council) may appoint for the purpose on the recommendation of the Upacharya (Vice-Chancellor);

(b) in the case of leave or absence for a period not exceeding thirty days, by such teacher or an officer as the Upacharya (Vice-Chancellor) may appoint for the purpose.”

(ii) in Statute 7, after item (2), the following item shall be inserted, namely:—

“(3) Dean of Student Welfare.”

(iii) after Statute 9, the following Statute shall be inserted, namely:—

“9A. Dean of Student Welfare.—

(1) The Dean of Student Welfare shall be appointed, from amongst the employees of the University who are or who have been teachers of the University, by the Karma-Samiti (Executive Council) on the recommendation of the Upacharya (Vice-Chancellor).

(2) The Dean of Student Welfare shall exercise such powers and perform such duties either whole-time, or, depending upon the need of the University, part-time, accordingly as the Karma-Samiti (Executive Council) may, on the recommendation of the Upacharya (Vice-Chancellor), direct.

(3) The period and terms of the appointment of the Dean of Student Welfare shall be determined by the Karma-Samiti (Executive Council).”;.

(iv) Statutes 10 and 11 shall be omitted;

(v) for Statute 13, the following Statute shall be substituted, namely:—

“13. The Karma-Samiti (Executive Council)

(1) The Karma-Samiti (Executive Council) shall consist of the following members, namely:—

(a) the Upacharya (Vice-Chancellor), ex officio;

(b) seven persons of whom not more than four shall be Professors of the Uni-

versity, to be nominated by the Paridarsaka (Visitor); and

(c) one person to be nominated by the Pradhana (Rector) of the University.

(2) Five members of the Karma-Samiti (Executive Council) shall form the quorum for its meeting.

(3) Each member of the Karma-Samiti (Executive Council), other than the Upacharya (Vice-Chancellor), shall hold office for a term of three years from the date on which he is nominated as its member;

(vi) for Statute 14, the following Statute shall be substituted, namely:—

"14. The Siksha-Samiti (Academic Council) (1) The Siksha-Samiti (Academic Council) shall consist of the following members, namely:—

(a) the Upacharya (Vice-Chancellor), ex officio;

(b) Chatra-Parichalaka (Proctor), ex officio;

(c) Granthagarika (Librarian), ex officio;

(d) Head of the Palli-Samgathan Vibhaga, ex officio;

(e) fifteen teachers of the University to be nominated by the Paridarsaka (Visitor); and

(f) two persons, not being employees of the University, to be nominated by the Paridarsaka (Visitor) for their specialised knowledge.

(2) Eight members of the Siksha-Samiti (Academic Council) shall form the quorum for its meeting.

(3) Each member of the Siksha-Samiti (Academic Council), other than the ex officio members, shall hold office for a term of three years from the date on which he is nominated as its member;

(vii) for Statute 16, the following Statute shall be substituted, namely:—

"16. The Artha-Samiti (Standing Finance Committee)

(1) The Artha-Samiti (Standing Finance Committee) shall consist of the following members, namely:—

(a) the Upacharya (Vice-Chancellor), ex officio;

(b) two persons to be nominated by the Paridarsaka (Visitor);

(c) one Professor of the University to be nominated by the Karma-Samiti (Executive Council); and

(d) the Artha-Sachiva (Treasurer), who shall be the Secretary thereof.

(2) Four members of the Artha-Samiti (Standing Finance Committee) shall form the quorum for its meeting.

(3) Each member of the Artha-Samiti (Standing Finance Committee), other than the Upacharya (Vice-Chancellor), shall hold office for a period of three years from the date on which he is nominated as its member;

(viii) for Statute 19, the following Statute shall be substituted, namely:—

"19. Patha-Samiti (Boards of Studies)

(1) There shall be separate Patha-Samiti (Boards of Studies) for each of the following, namely:—

(i) school studies;

(ii) each subject of the—

(a) under-graduate studies, and

(b) post-graduate studies.

(2) The constitution of such Patha-Samiti (Boards of Studies) shall be such as may be prescribed by Ordinances.

(3) It shall be the duty of each patha-Samiti (Board of Studies) to make recommendations to the Siksha-Samiti (Academic Council) regarding—

(i) courses and syllabi of studies and text-books for its subject or subjects with which it is concerned;

(ii) fellowships, scholarships, medals and prizes in the subject or subjects with which it is concerned;

(iii) combination of subjects permitted in the various courses; and

(iv) the names of examiners;

(ix) after Statute 19, the following Statute shall be inserted, namely:—

"19A. Adhyakshas (Principals) of Colleges

(1) There shall be an Adhyaksha (Principal) for each College.

(2) Each Professor within the College shall, by rotation according to seniority, act as the Adhyaksha (Principal) of the College for a period of two years.

Provided that if there is no Professor in the College, a senior teacher shall be asked by the Upacharya (Vice-Chancellor) to act as the Adhyaksha (Principal) till such time as a Professor is appointed.

Provided further that the Upacharya (Vice-Chancellor) may on the written request of the Professor or senior teacher, as the case may be, exempt such Professor or teacher from having to work as the Adhyaksha (Principal) or accept the resignation of an Adhyaksha (Principal) during the tenure of his office as such, if the Upacharya (Vice-Chancellor) is satisfied with the reasons given by him for such resignation.

Explanation.—For the purpose of this Statute, a Professor shall be senior to a Reader and Reader shall be senior to a Lecturer.

(3) For the purpose of this Statute, there shall be maintained separate common seniority lists, respectively, in relation to the Professors, Readers and Lecturers working in the various colleges of the University.

(4) If a question arises as to the seniority of any Professor, Reader or Lecturer, as the case may be, the same shall be determined by the Karma-Samiti (Executive Council);

(x) in Statute 21, in clause (2), sub-clause (d) shall be omitted;

(xi) in Statute 22, in clause (2), the words "approval of two-thirds of the mem-

bers present at any meeting of the Samsad (Court) and the shall be omitted;

(xii) after Statute 46, the following Statute shall be inserted, namely:—

"47. Maintenance of discipline amongst students of the University

(1) All powers relating to discipline and disciplinary action in relation to students of the University shall vest in the Upacharya (Vice-Chancellor).

(2) The Upacharya (Vice-Chancellor) may delegate such of his powers as he deems proper to the Chatra-Parichalaka (Proctor) and to such other persons as he may specify in this behalf and the powers so delegated shall be exercised under the direction, supervision and control of the Upacharya (Vice-Chancellor).

(3) Without prejudice to the generality of his powers relating to the maintenance of discipline and the taking of such action in the interests of maintenance of discipline as may seem to him appropriate the Upacharya (Vice-Chancellor) may, in the exercise of his powers aforesaid order or direct that any student or students be expelled, or be, for a stated period, rusticated, or be not, for a stated period, admitted to a course or courses of study or be fined in a sum of rupees that may be specified or be debarred from taking examination or examinations for one or more years or that the results of student or students concerned in the examination or examinations in which he or they have appeared, be cancelled.

(4) Without prejudice to the powers of the Upacharya (Vice-Chancellor) and the Chatra-Parichalaka (Proctor) as aforesaid, detailed rules of discipline and proper conduct shall be framed by the University."

13. Transitional provisions.—

(1) Every person holding office as a member of the Samsad (Court), Karma-Samiti (Executive Council), Siksha-Samiti (Academic Council), Artha-Samiti (Standing Finance Committee) or a Patha-Samiti (Board of Studies), as the case may be, immediately before the commencement of this Act shall, on and from such commencement, cease to hold office as such:

Provided that where any such person held, immediately before such date, any other office in the University, nothing contained in this sub-section shall be construed as affecting his continuance in such other office.

(2) Until the Samsad (Court), Karma-Samiti (Executive Council), Siksha-Samiti (Academic Council), Artha-Samiti (Standing Finance Committee) or a Patha-Samiti (Board of Studies), as the case may be, is constituted in accordance with the provisions of the principal Act as amended by this Act or the Statutes as modified by this Act, the Paridarsaka (Visitor) may, by general or special order, direct any officer of the University to exercise the powers and perform the duties conferred or imposed by or under

the principal Act as so amended or the Statutes as so modified on the Samsad (Court), Karma-Samiti (Executive Council), Siksha-Samiti (Academic Council), Artha-Samiti (Standing Finance Committee) or the Patha-Samiti (Board of Studies), as the case may be.

14. Repeal and savings.— (1) The Visva-Bharati (Amendment) Ordinance, 1971 (Ord. 22 of 1971), is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the principal Act, as amended by the Ordinance so repealed, shall be deemed to have been done or taken under the corresponding provisions of the principal Act as amended by this Act.

**THE APPROPRIATION (RAILWAYS)
NO. 3 ACT, 1971**

(Act No. 58 of 1971)*

(15th December, 1971)

An Act to authorise payment and appropriation of certain further sums from and out of the Consolidated Fund of India for the service of the financial year 1971-72 for the purposes of Railways.

(Text of the Act is not printed.)

*Received the assent of the President on 15-12-1971. Act published in Gaz. of India; 16-12-1971, Pt. II-S. 1, Ext. P. 669.

**THE NAVAL AND AIRCRAFT PRIZE
ACT, 1971**

(Act No. 59 of 1971)*

(16th December, 1971.)

An Act to provide for the establishment and procedure of Prize Courts and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE NAVAL AND AIRCRAFT PRIZE ACT, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "aircraft" has the meaning assigned to it in clause (ii) of Section 4 of the Air Force Act, 1950;

(b) "aircraft papers" includes all books, passes, charter parties, bills of lading, customs receipts, manifests, certificates, licences, lists, tickets, notes, letters and other

*Received the assent of the President on 16-12-1971. Act published in Gaz. of India; 16-12-1971, Pt. II-S. 1, Ext. P. 671.

documents and writings delivered up or found on board a captured aircraft;

(c) "Armed Forces" means the Army, Navy and Air Force or any part of any one or more of them and includes any other armed force in the service of, or employed with, the Army, Navy or Air Force during hostilities;

(d) "goods" includes all such things as may be subject to adjudication as prize, but in the case of a naval prize does not include any aircraft or boat unless the aircraft or boat is a part of the cargo of a ship;

(e) "Prize Court" means a prize court established under Section 3;

(f) "Indian citizen" includes a company registered in India and having its principal place of business in India;

(g) "military aircraft" means any aircraft belonging to the Armed Forces and includes any armed aircraft in the service of the Armed Forces and any other aircraft used as a transport or auxiliary or in any other way for the purpose of prosecuting or aiding hostilities;

(h) "prize" means anything which, subject to this Act and the rules made thereunder, may be subjected to adjudication and includes a ship or an aircraft and goods carried therein, irrespective of whether the ship is captured at sea or seized in port or whether the aircraft is on or over land or sea at the time of capture or seizure;

(i) "ship" includes a vessel and a sea-faring craft with the tackle, furniture and apparel of the ship, vessel or boat;

(j) "ship-of-war" means any ship belonging to the Armed Forces and includes any armed ship in the service of the Armed Forces and any other ship used as transport or auxiliary or in any other way for the purpose of prosecuting or aiding hostilities;

(k) "ship papers" includes all books, passes, sea briefs, charter parties, bills of lading, customs receipts, manifests, certificates, licences, lists, tickets, notes, letters and other documents and writings delivered up or found on board a ship captured at sea or seized in port.

3. Establishment of Prize Courts.—

(1) The Central Government may, by notification in the Official Gazette, constitute from time to time as many Prize Courts as the Central Government may determine to exercise the powers and discharge the functions conferred on a Prize Court by this Act and every such Prize Court shall exercise jurisdiction within the local limits of such area or areas as may be specified by the Central Government in the said notification.

(2) Every Prize Court shall consist of such one or more than one member as the Central Government may from time to time deem it necessary to appoint.

(3) A person shall not be qualified for appointment as a member of a Prize Court unless he is a citizen of India and has been or is qualified to be appointed as a Judge of a High Court.

(4) Subject to the provisions of Section 18, the conditions of service of a member of a Prize Court shall be such as the Central Government may by order determine.

4. Jurisdiction of Prize Courts in prize cases.— (1) Notwithstanding anything contained in any other law for the time being in force, every Prize Court shall have exclusive jurisdiction in respect of each prize and each proceeding for the condemnation of property as prize, whether such prize is taken before or after the commencement of this Act, if the prize is—

(a) brought into or seized within the territory of India;

(b) brought into or seized within a locality in the temporary or permanent possession of, or occupied by, the Armed Forces of the Union; or

(c) appropriated for the use of the Central Government, and is brought within the territorial jurisdiction of that Prize Court.

Provided that in the case of a Naval prize, the Prize Court shall have jurisdiction only if the prize captured or seized is brought to a port or place lying within the territorial jurisdiction of that Prize Court.

(2) Every Prize Court shall also have exclusive jurisdiction in respect of a prize in which the prize property—

(a) is lost or entirely destroyed; or

(b) cannot be brought in for adjudication because of its nature and condition.

(3) Without prejudice to the generality of the powers conferred by sub-section (1), a Prize Court shall take cognizance of and judicially proceed upon all manners of captures, seizures, prizes and reprisals of all ships, vessels, aircrafts and goods that are captured or seized, and shall hear and determine the same, and in accordance with this Act and rules made thereunder, shall adjudge and condemn all such ships, vessels, aircrafts and goods belonging to any country or State or the national, citizens or subjects thereof, as may be captured or seized as prize during a war or as a measure of reprisal during an armed conflict or in the exercise of the right of self-defence.

(4) Notwithstanding anything contained in this section, the Prize Court may in respect of any matter for which no provision or insufficient provision is made, by or under this Act, apply the principles of the International Law regulating that matter.

5. Transfer of cases.— (1) Whether proceedings are pending in any Prize Court against any ship, aircraft or goods, the Prize Court may, at any stage of the proceedings, on application being made by the proper officer of the Central Government and upon being satisfied that the proceedings so far as they relate to the ship, aircraft or goods, or any part thereof, would be more conveniently conducted in another Prize Court, make an order remitting the proceedings or the proceedings so far as they

relate to the ship, aircraft or goods, or any part of the goods, as the case may be, to such other Prize Court.

(2) Where any proceedings have been so remitted to another Prize Court, that other Prize Court shall have the same jurisdiction to deal with the matter as if the subject matter of those proceedings had originally been seized within its jurisdiction or brought within its jurisdiction after capture or seizure, as the case may be, and any order made or action taken in those proceedings before the order of remission shall be deemed to have been made or taken by or in that Court.

6. Appeals.—(1) Any person aggrieved by an order or decree of the Prize Court may prefer an appeal to the Central Government within a period of ninety days from the date on which such order or decree has been made.

(2) The provisions of Sections 5 and 12 of the Limitation Act, 1963, shall so far as may be, apply for computation of the period specified, in sub-section (1).

7. General powers of Prize Courts.—(1) A Prize Court shall, for the purposes of this Act, have the same powers as are vested in a Civil Court while trying a suit under the Code of Civil Procedure, 1908, in respect of the following matters, namely:—

(a) summoning and enforcing the attendance of persons and examining them on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) requisitioning any public record or copies thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed by rules.

(2) Without prejudice to the provisions of sub-section (1), every Prize Court shall have the power to enforce—

(a) any order or decree of another Prize Court passed in a prize proceeding under this Act;

(b) any order of the Central Government passed in a prize appeal under Sec 6.

8. Procedure on capture of prize.—(1) Every ship and every aircraft taken as prize and brought into port or to a place within the jurisdiction of a Prize Court shall forthwith and without bulk broken, be delivered to the Marshal of the Court.

(2) If there is no such Marshal, then the ship or aircraft shall be in like manner delivered to such person as the Central Government may appoint in this behalf.

(3) The ship or aircraft shall, subject to the orders of the Court, remain in the custody of the Marshal, or the person appointed under sub-section (2).

1971 Acts/8

9. Ship and aircraft papers to be brought in Registry.—(1) The captors shall with all convenient speed after the ship or aircraft is brought into port or to a place within the jurisdiction of a Prize Court bring the ship papers or the aircraft papers, as the case may be, into the Registry of the Prize Court.

(2) The commanding officer or the captain of the capturing ship or aircraft or the commanding officer of the capturing force, or any other officer or person seizing the ship or aircraft at any port or aerodrome or any officer designated by the commanding officer or his superior authority as a Prize Officer or such other officer or person who was present at the capture and saw the ship papers or aircraft papers delivered up or found on board shall make oath that they are brought in as they were taken without fraud, addition, or subduction or alteration or else shall account on oath to the satisfaction of the Prize Court for the absence or altered condition of the ship papers or aircraft papers or any of them.

(3) Where no ship papers or aircraft papers are delivered up or found on board the captured ship or captured aircraft, the commanding officer or the captain of the capturing ship or aircraft or the commanding officer of the capturing force or any other officer or person seizing the ship or aircraft or the Prize Officer or such other officer or person who was present at the capture shall make an oath to that effect.

10. Goods.—The provisions of Sections 8 and 9 relating to ships and aircraft shall, so far as may be, extend and apply to goods taken as prize on board a ship or aircraft and the Prize Court may direct such goods to be unladen, inventoried and warehoused.

11. Pre-emption.—Where a ship of a foreign State passing the seas or an aircraft of a foreign State, laden with military or victualling stores intended to be carried to any place under the control of an enemy is taken in circumstances making it subject to adjudication as prize, and is brought under the control of the Government of India, and the purchase of such stores for the service of the Central Government appears to the said Government expedient without the condemnation thereof in a Prize Court, then the Central Government may purchase on account or for the service of the Central Government all or any of such stores.

12. Prize proceedings not to apply to enemy warships and military aircraft.—Nothing in this Act shall apply to a ship-of-war or military aircraft of the enemy or any other ship or aircraft owned by the enemy whether or not registered in the territory of the enemy or goods carried therein and no proceedings of prize shall be necessary for the condemnation of such ship-of-war or military aircraft or other ship or aircraft or goods carried therein.

13. Capture to belong to Central Government.— (1) Subject to the provisions of sub-section (2), all prizes captured by the Armed Forces of the Union and condemned where necessary in the Prize Court shall be the exclusive property of the Central Government.

(2) The Central Government may, at its discretion, out of the proceeds of the prize, make a grant of such sum of money as it deems fit to the benevolent funds of the Armed Forces of the Union.

14. Prize salvage.— (1) Where any ship or goods or aircraft belonging to an Indian citizen, after being taken as prize by the enemy is or are retaken from the enemy, the same shall be restored by decree of a Prize Court to the owner on his paying to the Central Government as prize salvage one-eighth part of the value of the prize to be decreed and ascertained by the Prize Court or such sum not exceeding one-eighth part of the estimated value of the prize as may be agreed upon between the owner and the Central Government and approved by the order of the Prize Court:

Provided that where the recapture is made in the circumstances of special difficulty or danger, the Prize Court may if it thinks fit award to the Central Government as prize salvage a larger part than one-eighth but not exceeding in any case one-fourth part of the value of the prize:

Provided further that where a ship or aircraft after being so taken is set forth or used by the enemy as a ship-of-war or military aircraft, the aforesaid provision for restitution shall not apply and subject to such compensation to the owner as the Prize Court may determine, the ownership of such ship or aircraft shall vest in the Central Government.

(2) Where a ship belonging to any Indian Citizen, after being taken as prize, is retaken from the enemy, such ship may, with the consent of the recaptors, prosecute her voyage and it will not be necessary for the Central Government to proceed to adjudication till her return to a port in India.

(3) The master or owner of the ship or his agent may, with the consent of the Central Government, unload and dispose of the goods on board the ship before adjudication.

(4) In case the ship does not return within six months to a port in India, the Central Government may nevertheless institute proceedings against the ship or goods in a Prize Court and the Prize Court may thereupon award prize salvage as aforesaid and may enforce payment thereof.

(5) The provisions of sub-sections (2), (3) and (4) shall mutatis mutandis apply also to an aircraft belonging to any Indian citizen which, after being taken as prize, is retaken from the enemy.

15. Offences in respect of prize.— Every person who is guilty of a prize

offence, that is to say, an offence which if committed by a person subject to naval law would be punishable under Section 63, Section 64, Section 65, Section 66 or Section 67 of the Navy Act, 1957, shall be punished with imprisonment which may extend to two years or with fine or both.

16. Indemnity against legal proceedings.— (1) Notwithstanding anything contained in any other law for the time being in force, no suit, prosecution or other legal proceedings shall lie against any officer of the Armed Forces of the Union or any other person for anything which is in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

(2) Save as otherwise expressly provided under this Act, no suit or other legal proceedings shall lie against the Central Government for any damage caused or likely to be caused by anything in good faith done or intended to be done in pursuance of this Act or any rules made thereunder.

17. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette make rules for regulating the practice and procedure of a Prize Court and for generally carrying out the purposes of this Act.

(2) Without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the institution of cases, issue and service of writs, summons and other processes, and entering appearance and making of claims;

(b) affidavits concerning ship papers or aircraft papers and other affidavits to be or which may be made in a Prize Court or for the purpose of proceedings in a Prize Court;

(c) pleadings, particulars, discovery and inspection of documents and facts, evidence and hearing;

(d) issue of warrants for arrest of prize, and detention of prize;

(e) sale, appraisement, safe custody and inspection of prize;

(f) bail and release;

(g) requisition by Central Government of ships, aircraft or goods in the custody of a Prize Court;

(h) appointment of assessors and their fees;

(i) enforcement and execution of decrees and orders;

(j) stay of proceedings;

(k) costs of or incidental to any proceedings in the Prize Court and as to the fees to be charged in respect of proceedings therein and as to the taking of security of costs;

(l) procedure for hearing appeals and other matters pertaining to appeals;

(m) appointment, duties and conduct of the officers of a Prize Court and costs, charges and expenses to be allowed to petitioners therein;

(n) the manner in which and the conditions subject to which the right of visit, search, detention or capture of any ship or aircraft or goods thereon may be exercised and the penalty for impeding the exercise of any such right;

(o) the manner in which any such ship or aircraft or goods seized by or under the authority of any officer of the Armed Forces of the Union shall be kept in custody or disposed of;

(p) the conditions for declaring any ship or aircraft or cargo thereon as hostile and for condemnation thereof;

(q) the manner in which a ship or aircraft recaptured from the enemy may be disposed of;

(r) the conditions subject to which a right of unhindered passage may be allowed to a ship or aircraft within the territory of India on the outbreak of hostilities or an armed conflict on the basis of reciprocity;

(s) any other matter which may be, or is required to be, prescribed by rules

(3) All rules made under this section shall be laid, as soon as may be, after they are made, before each House of Parliament while it is in session for a total period of thirty days, which may be comprised in one session or in two successive sessions, and if before the expiry of the session in which they are so laid or the session immediately following, both Houses agree in making any modification in the rules or both Houses agree that the rules should not be made, the rules shall thereafter have effect only in such modified form or be of no effect, as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under those rules.

18. Dissolution of Prize Courts.—The Central Government may at any time when there is no prize proceeding pending before a Prize Court dissolve that Prize Court, and make such further orders as to the custody of the records of that Court as may be considered necessary.

19. Repeals.—The Naval Prize Act, 1864, the Naval Agency and Distribution Act, 1864, the Prize Courts Act, 1894, the Prize Courts Procedure Act, 1914, the Prize Courts Act, 1915, the Naval Prize Act, 1918, the Prize Act, 1939, in so far as they apply in India are hereby repealed.

20. Savings.—Nothing in this Act shall—

(a) give to the officers and seamen of the Indian Naval ships or officers and airmen of the Indian Military aircraft or to any other person concerned in the capture of the prize any right or claim in or to any ships, aircraft or goods taken as prize or the proceeds thereof; or

(b) affect the operation of any existing treaty or convention with any foreign State; or

(c) take away or abridge the powers of the Central Government to enter into any treaty or convention with any foreign State containing any stipulation that the Central Government may deem appropriate concerning any matter to which this Act relates.

[Act Nos. 60 and 61 Not Received.]

THE COMPANIES (SURCHARGE ON INCOME-TAX) ACT, 1971

(Act No. 62 of 1971)*

(23rd December, 1971.)

An Act to provide for the levy of a surcharge on income-tax payable in advance by companies during the financial year 1971-72 under the Income-tax Act, 1961.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.—This Act may be called THE COMPANIES (SURCHARGE ON INCOME-TAX) ACT, 1971.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "Income-tax Act" means the Income-tax Act, 1961;

(b) all words and expressions used in this Act shall have the meanings respectively assigned to them in the Income-tax Act.

3. Levy of surcharge on income-tax payable by companies during 1971-72.—

(1) Every company which is liable to pay advance tax under Section 210 or Section 212 of the Income-tax Act during the financial year commencing on the 1st day of April, 1971, shall, in addition to the advance tax so payable, pay to the credit of the Central Government on or before the 15th day of March, 1972, a further sum, by way of surcharge on income-tax, calculated at the rate of two and one-half per cent, of the amount specified in sub-section (2).

(2) The amount referred to in sub-section (1) shall be—

(i) in a case where advance tax is required to be paid by an order under sub-section (1) or sub-section (3) of Section 210 of the Income-tax Act, the amount specified in such order;

(ii) in a case where advance tax is payable under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (3A) of Section 212 of the Income-tax Act on the basis of the estimate furnished by the company, the amount of advance tax so payable.

(3) Any sum required to be paid by a company as surcharge on income-tax under sub-section (1) shall be paid without any

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1, Ext. P. 701.

notice of demand to the company in that behalf from the Income-tax Officer.

4. **Mode of recovery.**— If the sum required to be paid under sub-section (1) of Section 3 is not paid on or before the 15th day of March, 1972, the company shall be deemed to be an assessee in default and—

(a) the company shall be liable to pay simple interest at nine per cent. per annum from the 16th day of March, 1972;

(b) all the provisions of Sections 221 to 227, Section 229, Section 231 and Section 232 of the Income-tax Act and the Second and Third Schedules to that Act and any rules made thereunder shall, so far as may be, apply as if the said provisions were the provisions of this Act and referred to surcharge on income-tax and sums imposed by way of penalty and interest under this Act instead of to income-tax and sums imposed by way of penalty and interest under that Act and as if references to sub-section (2) of Section 220 were references to clause (a) of this section.

5. **Credit for surcharge.**— Any sum paid by or recovered from a company as surcharge on income-tax in pursuance of this Act shall be treated as a payment of tax under the Income-tax Act in respect of the income of the period which would be the previous year for the assessment year commencing on the 1st day of April, 1972, and credit therefor shall be given to the company for the purposes of assessment under Section 140A, Section 141A, Section 143 or Section 144 of the Income-tax Act.

THE JAYANTI SHIPPING COMPANY (ACQUISITION OF SHARES) ACT, 1971 (Act No. 63 of 1971)*

(23rd December, 1971)

An Act to provide for the acquisition of shares of the Jayanti Shipping Company Limited in order to serve better the shipping needs of the nation and to facilitate the promotion and development, in the interests of the general public, of national shipping and for matters connected therewith or incidental thereto.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I PRELIMINARY

1. **Short title and commencement.**— (1) This Act may be called THE JAYANTI SHIPPING COMPANY (ACQUISITION OF SHARES) ACT, 1971.

(2) It shall be deemed to have come into force on the 17th day of October, 1971.

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1 Ext. P. 703. For Statement of Objects and Reasons, see Gaz. of India, 26-11-1970, Pt. II-S. 2, Ext. P. 789.

2. **Definitions.**— In this Act, unless the context otherwise requires,—

(a) “appointed day” means the date of commencement of this Act;

(b) “company” means the Jayanti Shipping Company Limited, being a company as defined in the Companies Act, 1956, having its registered office at Bombay;

(c) “shareholder” means a person, who, immediately before the appointed day, was registered as a shareholder in the capital of the company;

(d) “Shipping Corporation of India” means the Shipping Corporation of India Limited, being a Government company as defined in the Companies Act, 1956, having its registered office at Bombay;

(e) words and expressions used but not defined in this Act and defined in the Companies Act, 1956, shall have the meanings respectively assigned to them in that Act.

CHAPTER II ACQUISITION OF SHARES OF THE COMPANY

3. **Vesting of shares of company in Central Government and compensation therefor.**— (1) On the appointed day,—

(a) all shares in the capital of the company shall, by virtue of this Act, be deemed to be transferred to and vested in the Central Government free from all trusts, liabilities and encumbrances; and

(b) as compensation therefor the Central Government shall, in accordance with the provisions of Section 4, pay to the shareholders the sum of rupees four crores and fifty lakhs only in the aggregate.

(2) For the removal of doubts it is hereby declared that the transfer and vesting of shares effected under clause (a) of sub-section (1) shall not be deemed to affect any right of the company subsisting immediately before the appointed day against any shareholder to recover from him any sum of money on the ground that the shareholder has not paid or credited to the company the whole or any part of the value of the shares held by him or on any other ground whatsoever.

4. **Apportionment and manner of payment of compensation.**— (1) The amount of compensation payable under clause (b) of sub-section (1) of Section 3 to the shareholders shall be apportioned among the shareholders according to the number of shares held by such shareholders.

(2) The amount of compensation payable to a shareholder in accordance with the provisions of sub-section (1) shall be given to him, at his option—

(a) in cash (to be paid by cheque drawn on the Reserve Bank of India) in three equal annual instalments, the amount of each instalment carrying interests at the rate of four per cent. per annum from the appointed day, or

(b) in saleable or otherwise transferable promissory notes or stock certificates of the Central Government issued and repayable at par, and maturing at the end of—

(i) ten years from the appointed day and carrying interest from that day at the rate of four and a half per cent. per annum, or

(ii) thirty years from the appointed day and carrying interest from that day at the rate of five and a half per cent. per annum, or

(c) partly in cash (to be paid by cheque drawn on the Reserve Bank of India) and partly in such number of securities specified in sub-clause (i) or sub-clause (ii), or both, of clause (b), as may be required by the share-holder, or

(d) partly in such number of securities specified in sub-clause (i) of clause (b) and partly in such number of securities specified in sub-clause (ii) of that clause, as may be required by the share-holder.

(3) The first of the three equal annual instalments referred to in clause (a) of sub-section (2) shall be paid, and the securities referred to in clause (b) of that sub-section shall be issued, within sixty days from the date of receipt by the Central Government of the option referred to in that sub-section, or where no such option has been exercised, from the latest date before which such option ought to have been exercised.

(4) The option referred to in sub-section (2) shall be exercised by a share-holder before the expiry of a period of three months from the appointed day (or within such further time, not exceeding three months, as the Central Government may, on the application of the share-holder allow) and the option so exercised shall be final and shall not be altered or rescinded after it has been exercised.

(5) If a share-holder omits or fails to exercise the option referred to in sub-section (2), within the time specified in sub-section (4), he shall be deemed to have opted for payment in securities specified in sub-clause (i) of clause (b) of sub-section (2).

(6) Notwithstanding anything contained in this section, a share-holder may, before the expiry of three months from the appointed day (or within such further time, not exceeding three months, as the Central Government may, on the application of the share-holder, allow) make an application in writing to the Central Government for—

(a) the full payment of the compensation payable to him, if the compensation payable to him does not exceed rupees two lakhs; or

(b) an interim payment of an amount equal to seventy-five per cent. of the face value of the shares in respect of which compensation is payable to him, or rupees two lakhs, whichever is greater, if the compensation payable to him exceeds rupees two lakhs,

indicating in such application whether the payment is desired in cash or in securities specified in sub-section (2), or in both.

(7) The Central Government shall, within sixty days from the receipt of the application referred to in sub-section (6), make the full payment or, as the case may be, the interim payment to the share-holder in accordance with the option indicated in such application.

(8) The interim payment made to a share-holder under sub-section (7) shall be set off against the total amount of compensation payable to him under this Act and the balance of the compensation remaining outstanding after such payment shall be given to the share-holder in accordance with the option exercised, or deemed to have been exercised, under sub-section (4) or sub-section (5), as the case may be:

Provided that where any part of the interim payment is obtained by the share-holder in cash, the payment so obtained shall be set off, in the first instance, against the first instalment of the cash payment referred to in sub-section (2), and in case the payment so obtained exceeds the amount of the first instalment, the excess amount shall be adjusted against the second instalment and the balance of such excess amount, if any, against the third instalment of the cash payment.

(9) If any dispute arises as to the person entitled to receive the compensation payable in respect of any share, the Central Government shall deposit the amount of such compensation in the Court for being paid to the person or persons entitled to be paid.

CHAPTER III

MANAGEMENT OF COMPANY.

5. Allocation of shares to Shipping Corporation of India and certain other persons.—(1) All the shares of the company vested in the Central Government by virtue of this Act, except one hundred thereof, shall immediately after they have so vested, stand transferred to and vested in the Shipping Corporation of India.

(2) The Central Government may by order transfer the remaining shares to such persons as may be specified in the order to enable the company to function as a Government company.

(3) On the transfer of shares to the Shipping Corporation of India under sub-section (1) or to any person under sub-section (2), the company shall forthwith register each transferee as a member of the company.

(4) The amount paid by the Central Government for the acquisition of the shares which stand transferred to and vested in the Shipping Corporation of India under sub-section (1) shall be deemed to be the contribution by the Central Government to the equity capital of that Corporation and that Corporation shall issue (if necessary,

after amending its memorandum and articles of association) to the Central Government paid-up shares in its capital for a corresponding amount.

6. Amendment of memorandum and articles of association of company.— For the purpose of enabling the company to function as a Government company, the Central Government may, by notification published in the Official Gazette, make such amendments in the memorandum and articles of association of the company as it may consider necessary.

7. Interim management of company.—

(1) Notwithstanding anything contained in the Companies Act, 1956, or in the memorandum or articles of association of the company, on and from the appointed day and till a new Board of directors of the company is duly constituted, the persons specified in the Schedule shall be the directors of the company and shall constitute the Board of Directors of the company.

(2) If any vacancy arises in the Board of directors specified in the Schedule, it shall be filled by the Central Government in such manner as it thinks fit and thereupon the Schedule shall be deemed to be amended accordingly.

(3) No act or proceeding of the Board of directors specified in the Schedule shall be invalid merely by reason of the existence of any vacancy in the membership of the Board.

CHAPTER IV

MISCELLANEOUS

8. Directors, etc., not entitled to compensation.— Notwithstanding anything contained in any law for the time being in force, no director or managerial personnel specified in Sec. 197A of the Companies Act, 1956, or other person entitled to manage the whole or a substantial part of the business and affairs of the company under a special agreement or otherwise shall be entitled to any compensation against the company or the Central Government for the loss of office or for the premature termination of any contract of management entered into by him with the company whether such loss or termination was due to the provisions of the Jayanti Shipping Company (Taking Over of Management) Act, 1966 or this Act.

9. Contracts in bad faith, etc., may be cancelled or varied.— The company may, within three years from the appointed day, make an application to any court having jurisdiction in this behalf for the purpose of cancelling or varying any contract or agreement entered into, at any time before the issue of the notified order under sub-sec. (1) of Section 3 of the Jayanti Shipping Company (Taking Over of Management) Act, 1966, between the company and any other person and the court may, if satisfied after

due inquiry that such contract or agreement had been entered into in bad faith and is detrimental to the interests of the company, make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) that contract or agreement, and the contract or agreement shall have effect accordingly.

10. Duty to deliver possession of property of company and documents relating to company.— Any person who has in his possession, custody or under his control any property of, or any books, documents or other papers relating to the property and assets of, the company, including any letters, memoranda, notes or other communications between him and the company, shall be liable to account for the said property, books, documents and other papers (including such letters, memoranda, notes or other communications) to the company and shall deliver them up to the company or to such other person as may be authorised for the purpose by the company.

11. Powers of inspection.— (1) For the purpose of ascertaining whether any property is the property of the company or for any other purpose mentioned in this Act or the rules made thereunder, any person authorised by the Central Government in this behalf shall have the right to—

- (a) enter and inspect any premises;
- (b) require any person having the possession, custody or control of any register or record of the company to produce such register or record;
- (c) require the occupier of any property belonging to, or claimed to be the property of, the company, to submit to the person so authorised such accounts, books or other documents or to furnish to him such information as he may reasonably think necessary; and

(d) examine any person having the control of, or employed in connection with, the company and require him to make any statement touching the affairs of the company.

(2) Any person authorised by the Central Government under sub-section (1) shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code.

12. Penalty for false statements.— (1) If any person,—

(a) when required by this Act or by any order under this Act to make any statement or furnish any information, makes any statement or furnishes any information which is false in any material particular and which he knows or believes to be false or does not believe to be true; or

(b) makes any such statement as aforesaid in any book, account, record, return or other document which he is required by any order made under this Act to submit, he shall be punishable with imprisonment for a term which may extend to two years,

or with fine which may extend to two thousand rupees, or with both.

(2) Any person, who—

(a) having in his possession, custody or control any property forming part of the assets of the company, wrongfully withholds such property from the company, or any person authorised by the company, or

(b) wrongfully obtains possession of any property forming part of the assets of the company, or

(c) wilfully withholds or fails to produce to any person authorised under this Act, any register, record or other document which may be in his possession, custody or control, or

(d) fails, without any reasonable cause, to submit any accounts, books or other documents, when required to do so, shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to two thousand rupees, or with both.

13. Limitation on prosecution.— No Court shall take cognizance of an offence under this Act except with the previous sanction of the Central Government or of an officer authorised by that Government in this behalf.

14. Act to have overriding effect.— The provisions of this Act or any notification, order or rule made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any law other than this Act or in any instrument having effect by virtue of any law other than this Act or in any order made by a civil court.

15. Protection of action taken under this Act.— No suit, prosecution or other legal proceeding shall lie against the Central Government or the Shipping Corporation of India or any officer or other employee serving in connection with the affairs of the company for anything which is in

good faith done or intended to be done under this Act.

16. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the purposes of this Act.

(2) Every rule made by the Central Government under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

17. Power to remove difficulties.— If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order as occasion requires, do anything (not inconsistent with the provisions of this Act) which appears to it to be necessary for the purpose of removing the difficulty:

Provided that no such order shall be issued after the expiration of two years from the appointed day.

18. Repeals and saving.— (1) The Jayanti Shipping Company (Taking Over of Management) Act, 1966, is hereby repealed.

(2) The Jayanti Shipping Company (Acquisition of Shares) Ordinance, 1971, is hereby repealed:

Provided that notwithstanding such repeal, anything done or any action taken under the said Ordinance shall be deemed to have been done or taken under the corresponding provision of this Act.

THE SCHEDULE

[See section 7(1)]

Name (1)	Designation and address (2)
Chairman of the Board of Directors and Managing Director of the Company Shri C. P. Srivastava Directors of the Company Shri P. N. Jain	Chairman, Shipping Corporation of India Ltd., Bombay. Joint Secretary, Ministry of Finance, New Delhi.
Shri P. N. Mathur	General Manager, Central Railway, Bombay.
Shri J. A. Dave	Managing Director, Food Corporation of India, New Delhi.
Shri Jasjit Singh	Member, Central Board of Excise and Customs, Ministry of Finance (Depart- ment of Revenue), New Delhi.
Shri Kamaljit Singh	Managing Director, Indian Oil Corpora- tion Ltd., Bombay.
Shri B. P. Srivastava	Director (Projects), Ministry of Shipping and Transport, New Delhi.

THE COKING COAL MINES (EMERGENCY PROVISIONS) ACT, 1971
(ACT NO. 64 OF 1971)

CONTENTS

CHAPTER I

PRELIMINARY

1. Short title and commencement.
2. Definitions.

CHAPTER II

MANAGEMENT OF COKING COAL MINES

3. Management of coking coal mines to vest in Central Government on the appointed day.
4. Management of coking coal mines pending the appointment of Custodian.
5. Power of Central Government to appoint Custodians to take over the management of coking coal mines.
6. Payment of amount.

CHAPTER III

MANAGEMENT OF COKE OVEN PLANTS

7. Management of coke oven plants to vest in the Central Government on the specified date.
8. Payment of amount.
9. Provisions of Sections 4, 5 and Sections 10 to 20 to apply to this Chapter.

CHAPTER IV

MISCELLANEOUS

10. Penalties.
11. Offences by companies.
12. Mining companies not to be wound up by Court.
13. Exclusion of period of operation of the Act for computing period of limitation.
14. Effect of Act on other laws.
15. Delegation of Powers.
16. Protection of action taken in good faith.
17. Contracts, etc., in bad faith may be cancelled or varied.
18. Power to terminate Contract of employment.
19. Power to make rules.
20. Coking coal mines to which the Act shall not apply.
21. Power to remove difficulties.
22. Repeal and savings.

THE FIRST SCHEDULE

(See Section 3 (2))

THE SECOND SCHEDULE

(See Section 7)

THE COKING COAL MINES (EMERGENCY PROVISIONS) ACT, 1971
[ACT NO. 64 OF 1971]*

(23rd December, 1971)

An Act to provide for the taking over, in the public interest, of the management of coking coal mines and coke oven plants, pending nationalisation of such mines and plants.

WHEREAS it is expedient in the public interest that the coking coal mines and coke oven plants should be nationalised with a view to reorganising and reconstructing the coking coal mines and coke oven plants for the purpose of protecting, conserving and promoting scientific development of the resources of coking coal needed to meet the growing requirements of the iron and steel industry;

AND WHEREAS it is expedient, in the public interest, to take over the management of coking coal mines and coke oven plants pending nationalisation thereof;

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and commencement.—

(1) This Act may be called THE COKING COAL MINES (EMERGENCY PROVISIONS) ACT, 1971.

(2) It shall be deemed to have come into force on the 16th day of October, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "appointed day" means the 17th day of October, 1971;

(b) "coke oven plant" means the plant and equipment with which the manufacture of hard coke has been, or is being, carried on and includes—

(i) all lands, buildings, works, machinery and equipment, vehicles, railways, tramways and sidings, adjacent to, and belonging to, or in, the coke oven plant,

(ii) all workshops belonging to the coke oven plant including buildings, machinery, instruments, stores, equipment of such workshops and the lands on which such workshops stand,

(iii) all hard coke in stock or in transit or under production, and other stores, stocks and instruments, belonging to the coke oven plant,

(iv) all power stations belonging to the coke oven plant or operated for supplying electricity for the purpose of working the coke oven plant,

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1, Ext. P. 711.

(v) all lands, buildings and equipment adjacent to or belonging to, the coke oven plant where the washing of coal is carried on,

(vi) all other assets, movable or immovable, belonging to a coke oven plant, whether within its premises or outside, including cash balances, reserve funds and investments in so far as they relate to the coke oven plant and also any money lawfully due to the coke oven plant in relation to any period prior to the specified date;

(c) "coking coal mine" means a coal mine in which there exists one or more seams of coking coal, whether exclusively or in addition to any seam of other coal;

(d) "company" means a company as defined in Section 3 of the Companies Act, 1956, and includes a foreign company within the meaning of Section 591 of that Act;

(e) "Custodian" means the person appointed under Section 5 to take over the management of the coking coal mine;

(f) "Government company" has the meaning assigned to it by Section 617 of the Companies Act, 1956;

(g) "managing contractor" means the person or body of persons, who with the previous consent in writing of the State Government, has entered into an arrangement, contract or understanding, with the owner of the mine under which the operations of the mine are substantially controlled by such person or body of persons;

(h) "mine" means any excavation where any operation for the purpose of searching for or obtaining minerals has been or is being carried on and includes—

(i) all borings and bore holes;

(ii) all shafts adjacent to, and belonging to, or in, a mine, whether in the course of being sunk or not;

(iii) all levels and inclined planes in the course of being driven;

(iv) all open cast working;

(v) all conveyors or aerial ropeways provided for the bringing into or removal from a mine of minerals or other articles or for the removal of refuse therefrom;

(vi) all lands, buildings, works, adits, levels, planes, machinery and equipment, vehicles, railways, tramways and sidings adjacent to, and belonging to, or in, a mine;

(vii) all workshops belonging to, or in, a mine including buildings, machinery, instruments, stores, equipment of such workshops and the lands on which such workshops stand;

(viii) all coal in stock or in transit or under production and other stores, stocks and instruments belonging to, or in, a mine;

(ix) all power stations belonging to, or in, a mine or operated for supplying electricity for the purpose of working the mine or a number of mines under the same management;

(x) all lands, buildings and equipment adjacent to, or belonging to, or in, a mine

where the washing of coal or manufacture of coke is carried on;

(xi) all other assets, movable or immovable, belonging to a mine, whether within its premises or outside, including cash balances, reserve funds and investments in so far as they relate to the coking coal mine and also any money lawfully due to the coking coal mine in relation to any period prior to the appointed day;

(i) "mining company" means a company owning a coking coal mine, and in relation to a foreign company within the meaning of Section 591 of the Companies Act, 1956, the undertaking of that company in India;

(j) "notified order" means an order notified in the Official Gazette;

(k) words and expressions used herein and not defined but defined in the Coal Mines (Conservation, Safety and Development) Act, 1952, have the meanings respectively assigned to them in that Act;

(l) words and expressions used herein and not defined in this Act or in the Coal Mines (Conservation, Safety and Development) Act, 1952, but defined in the Mines Act, 1952, have the meanings respectively assigned to them in the Mines Act, 1952.

CHAPTER II

MANAGEMENT OF COKING COAL MINES

3. Management of coking coal mines to vest in Central Government on the appointed day.— (1) On and from the appointed day, the management of all coking coal mines shall vest in the Central Government.

(2) The coking coal mines specified in the First Schedule shall be deemed, for the purposes of this Act, to be the coking coal mines the management of which shall vest, under sub-section (1), in the Central Government:

Provided that if, after the appointed day, any other coal mine is found, after an investigation made by the Coal Board, to contain coking coal, that Board shall make a declaration to that effect and on and from the date of such declaration, such mine shall be deemed, for the purposes of this Act,—

(i) to vest in the Central Government; and

(ii) to be included in the First Schedule and thereupon the provisions of this Act shall become applicable thereto subject to the modification that for the words "appointed day", wherever they occur, the words "the date of the declaration made by the Coal Board under sub-section (2) of Section 3" shall be substituted.

4. Management of coking coal mines pending the appointment of Custodian.— (1) Pending the appointment of a Custodian under Section 5 for any coking coal mine, the person in charge of the management of such mine immediately before the appoint-

ed day shall, on and from the appointed day, be in charge of the management of such mine for and on behalf of the Central Government; and the management of such mine shall be carried on by such person subject to the provisions contained in sub-sections (3) and (5) and such directions, if any, as the Central Government may give to him and no other person including the owner, shall, so long as such management continues, exercise any powers of management in relation to the coking coal mine.

(2) Any contract, whether express or implied, providing for the management of any coking coal mine, made before the appointed day between the owner of such mine and any person in charge of the management of such mine immediately before the appointed day, shall be deemed to have terminated on the appointed day.

(3) No person in charge of the management of a coking coal mine shall without the previous approval of the person specified by the Central Government in this behalf in respect of that mine (hereinafter referred to as the "authorised person")—

(a) incur any expenditure from the assets appertaining to the coking coal mine otherwise than for the purpose of making routine payments of salaries or commissions to employees agents or for the purpose of meeting the routine day to day expenditure;

(b) transfer or otherwise dispose of any such assets or create any charge, hypothecation, lien or other incumbrance thereon;

(c) invest in any manner any monies forming part of such assets;

(d) acquire any immovable property out of the monies forming part of such assets;

(e) enter into any contract of service or agency, whether expressly or by implication, for purposes connected wholly or partly with the coking coal mine or vary the terms and conditions of any contract relating to any such transaction subsisting on the appointed day.

(4) The approval of the authorised person may be given either generally in relation to certain classes of transactions relating to the coking coal mine or specially in relation to any of its transactions.

(5) Every person in charge of the management of a coking coal mine shall deposit all securities and documents of title to any assets appertaining to such mine in any Scheduled Bank or Nationalised Bank in which the owner or agent had an account immediately before the appointed day or in any branch of the State Bank in the place where the head office or the principal office of the coking coal mine is situated or, where there is no branch of the State Bank in such place, the nearest branch of the State Bank; and no such security or document shall be withdrawn from the Scheduled Bank, the Nationalised Bank or

the State Bank, as the case may be, except with the permission of the authorised person:

Provided that nothing contained in this sub-section shall apply to any security or document of title kept in trust with an Official Trustee in pursuance of the articles of association of any mining company unless the Central Government, by notified order, otherwise directs.

Explanation.— In this sub-section,—

(a) "Scheduled Bank" means a bank included for the time being in the Second Schedule to the Reserve Bank of India Act, 1934;

(b) "State Bank" means the State Bank of India constituted under the State Bank of India Act, 1955;

(c) "Nationalised Bank" means a corresponding new bank as defined in the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970.

(6) Every person in charge of the management of a coking coal mine shall deliver forthwith to the person specified in this behalf by the Central Government in respect of that coking coal mine, the following documents, namely:—

(a) the minutes book or any other book in India containing all resolutions up to the appointed day of the persons in charge of the management of the coking coal mine before the appointed day;

(b) the current cheque books relating to the coking coal mine which are at the head office or the principal office of the coking coal mine;

(c) all registers or other books containing particulars relating to the investment of any monies appertaining to the coking coal mine including investments on mortgaged properties and all loans granted or advances made.

(7) Without prejudice to the generality of the powers conferred by sub-section (1) and the provisions contained in sub-sections (3), (5) and (6) any direction issued under sub-section (1) may require the persons in charge of the management of the coking coal mine under this Act to furnish to the Central Government or to the authorised person such returns, statements and other information relating to the coking coal mine as may be mentioned in the direction.

(8) The persons in charge of the management of the coking coal mine under this Act shall be entitled to such remuneration, whether by way of allowance or salary or perquisites as the Central Government may fix; and any such person may, by giving one month's notice in writing to the Central Government of his intention so to do, relinquish charge of the management of the coking coal mine.

5. Power of Central Government to appoint Custodians to take over the management of coking coal mines.— (1) The Central Government may, as soon as it is convenient administratively so to do, appoint

any person as Custodian for the purpose of taking over the management of the coking coal mine and the person so appointed shall carry on the management of such mine for and on behalf of the Central Government.

(2) (a) The Central Government may also appoint a person as the Custodian-General for exercising supervision and control over all the coking coal mines the management of which is taken over under this Act, and on such appointment, every Custodian, appointed under sub-section (1), shall act under the guidance, control and supervision of the Custodian-General.

(b) The Central Government may also appoint one or more persons as Additional Custodian-General or Deputy Custodian-General for assisting the Custodian-General in the exercise of his powers and duties under this Act and the Custodian-General may delegate all or such of his powers as he may think fit, to the Additional or Deputy Custodian-General.

(c) Every Additional or Deputy Custodian-General shall exercise the powers delegated to him under the control and supervision of the Custodian-General.

(3) On the appointment of a Custodian under sub-section (1), the charge of management of the coking coal mine shall vest in him and all persons in charge of the management of such mine immediately before such appointment shall cease to be in charge of such management and shall be bound to deliver to the Custodian all assets, books of account, registers or other documents in their custody relating to the coking coal mine and any contract, whether express or implied, providing for the management of any coking coal mine, made before the appointed day between the owner of such mine and such persons, shall be deemed to have terminated on the date on which the Custodian is appointed.

(4) Nothing contained in Section 4 shall apply to any coking coal mine the management of which has been taken over by the Custodian, but the Central Government may issue such directions to the Custodian as to his powers and duties as it deems desirable in the circumstances of the case, and the Custodian may apply to the Central Government at any time for instructions as to the manner in which he shall conduct the management of the coking coal mine or in relation to any matter arising in the course of such management.

(5) The Custodian shall receive from the funds of the coking coal mine for the charge of management of which he is appointed under sub-section (1) such remuneration as the Central Government may fix.

(6) The Custodian, the Custodian-General, Additional Custodian-General and Deputy Custodian-General shall hold office during the pleasure of the Central Government.

(7) The Central Government may, if it is of opinion that it is necessary so to do for the proper management of the coking coal mines, the management of which has vested in it under Section 3, appoint a Government company† whether in existence at the commencement of this Act or incorporated after such commencement, as the Custodian of all the coking coal mines specified in the First Schedule, and all coke oven plants specified in the Second Schedule, and on such appointment, every person appointed as Custodian or the Custodian-General or Additional or Deputy Custodian-General under sub-section (1) or sub-section (2), as the case may be, shall vacate his office as such and deliver to the Government company, so appointed, all assets, books of account, registers or other documents in his custody relating to the coking coal mine or the coke oven plant, as the case may be.

(8) On the appointment of a Government company as Custodian, the provisions of sub-sections (3), (4) and (5) shall apply to it as they apply to a Custodian appointed under sub-section (1).

6. Payment of amount.— (1) Every owner of a coking coal mine shall be given by the Central Government an amount, in cash, for vesting in it, under Section 3, the management of such mine.

(2) For every month during which the management of the coking coal mine remains vested in the Central Government, the amount referred to in sub-section (1) shall be computed at the rate of twenty-five paise per tonne of coal on the highest monthly production of coal from such mine during any month in the years 1968, 1969, 1970 and 1971:

Provided that if in relation to any such coking coal mine, there was no production of coal during the said years, the amount referred to in sub-section (1) shall be computed at the rate of five paise per tonne of such highest monthly coal producing capacity of the coking coal mine, before the appointed day, as may be assessed and declared by the Coal Board:

Provided further that in relation to a coking coal mine, the operations of which were immediately before the appointed day under the control of a managing contractor, the amount, as computed under this sub-section, shall be apportioned between the owner of the coking coal mine and such managing contractor in such proportions as may be agreed upon by or between the owner and such contractor, and in the event of there being no such agreement, in such proportions as may be determined by the principal civil court of original juris-

†Bharat Coking Coal Pr. Ltd., Dhanbad, a Govt. Company appointed as Custodian — See G.S.R. 27 (E) D/- 12-1-1972 published in Gaz. of India; 14-1-1972, Pt. II-S. 3 (i), Ext. P. 91.

diction within the local limits of whose jurisdiction the head office of the coking coal mine is situated.

CHAPTER III MANAGEMENT OF COKE OVEN PLANTS

7. Management of coke oven plants to vest in the Central Government on the specified date.— On and from such date as the Central Government may, by notified order, specify in this behalf (hereafter, in this Chapter, referred to as the "specified date"), the management of the coke oven plants specified in the Second Schedule shall vest in the Central Government.

8. Payment of amount.— (1) Every owner of a coke oven plant specified in the Second Schedule and every owner of a coke oven plant which falls within the definition of coking coal mine, shall be given by the Central Government an amount, in cash, for vesting in it, under Section 7 or Section 3, as the case may be, the management of such coke oven plant.

(2) For every month during which the management of the coke oven plant remains vested in the Central Government, the amount referred to in sub-section (1) shall be computed at the rate of—

(a) seventy-five paise per tonne of by-product coke; and

(b) fifty-five paise per tonne of beehive coke,

on the highest monthly production of coke from such coke oven plant during any month in the years 1968, 1969, 1970 and 1971.

(3) For the avoidance of doubts, it is hereby declared that the owner of a coke oven plant, the management of which has vested in the Central Government under Section 3, shall be given, in addition to the amount payable under Section 6, such amount as is referred to in sub-section (1).

9. Provisions of Sections 4 and 5 and Sections 10 to 20 to apply to this Chapter.—The provisions of Sections 4 and 5 and Sections 10 to 20 (both inclusive) shall apply to a coke oven plant, the management of which has vested in the Central Government under Section 7, as they apply to a coking coal mine, and references therein to a coking coal mine and the appointed day shall be construed, unless the context otherwise requires, as references, respectively, to a coke oven plant and the specified date.

CHAPTER IV MISCELLANEOUS

10. Penalties.— If any person—

(a) fails to deliver to the Custodian any assets, books of account, registers or any other document in his custody relating to the coking coal mine in respect of the management of which the Custodian has been appointed, or

(b) retains any property of such coking coal mine or removes or destroys it, or

(c) fails to comply with the provisions contained in sub-section (3) or sub-section (5) or sub-section (6) of Section 4, or

(d) fails to comply with any directions issued under sub-section (1) or sub-section (4) of Section 5,

he shall be punishable with imprisonment for a term which may extend to two years, or with fine which may extend to ten thousand rupees, or with both.

11. Offences by companies.— (1) Where an offence under this Act has been committed by a company, every person who at the time the offence was committed was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment, if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to, any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer shall be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation.— For the purposes of this section,—

(a) "company" means any body corporate and includes a firm or other association of individuals; and

(b) "director", in relation to a firm, means a partner in the firm.

12. Mining companies not to be wound up by Court.— No proceeding for the winding up of a mining company, the management of whose coking coal mines has vested in the Central Government under this Act or for the appointment of a Receiver in respect of such business, shall lie in any Court except with the consent of the Central Government.

13. Exclusion of period of operation of the Act for computing period of limitation.— In computing the period of limitation prescribed by law for the time being in force for any suit or application against any person by a mining company in respect of any matter arising out of any transaction in relation to the coking coal mine, the time during which this Act is in force shall be excluded.

14. Effect of Act on other laws.— The provisions of this Act shall have effect

notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law other than this Act, or in any decree or order of any Court.

15. Delegation of powers.— (1) The Central Government may, by notified order, direct that all or any of the powers exercisable by it under this Act may also be exercised by any person or persons as may be specified in the order.

(2) Whenever any delegation of power is made under sub-section (1), the person to whom such power has been delegated shall act under the direction, control and supervision of the Central Government.

16. Protection of action taken in good faith.— (1) No suit, prosecution or other legal proceeding shall lie against the Custodian-General, Additional Custodian-General, Deputy Custodian-General, any Custodian or authorised person in respect of anything which is in good faith done or intended to be done under this Act.

(2) No suit or other legal proceeding shall lie against the Central Government or the Custodian-General, Additional Custodian-General, Deputy Custodian-General, any Custodian or authorised person for any damage caused or likely to be caused by anything which is in good faith done or intended to be done under this Act.

17. Contracts, etc., in bad faith may be cancelled or varied.— (1) If the Central Government is satisfied, after such inquiry as it may think fit, that any contract or agreement entered into, at any time within twelve months immediately preceding the appointed day, between the owner or agent of a coking coal mine and any other person, has been entered into in bad faith and is detrimental to the interests of the coking coal mine, make an order cancelling or varying (either unconditionally or subject to such conditions as it may think fit to impose) the contract or agreement and thereafter the contract or agreement shall have effect accordingly:

Provided that no contract or agreement shall be cancelled or varied except after giving to the parties to the contract or agreement a reasonable opportunity of being heard.

(2) Any person aggrieved by an order made under sub-section (1) may make an application to the principal court of civil jurisdiction within the local limits of whose jurisdiction the head office of the coking coal mine is situated for the variation or reversal of such order and thereupon such court may, confirm, modify or reverse such order.

18. Power to terminate contract of employment.— If the Custodian is of opinion that any contract of employment entered into by any owner or agent of a coking

coal mine, at any time before the appointed day, is unduly onerous, he may, by giving to the employee one month's notice in writing or the salary or wages for one month in lieu thereof, terminate such contract of employment.

19. Power to make rules.— (1) The Central Government may, by notification in the Official Gazette, make rules to carry out the provisions of this Act.

(2) In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely:—

(a) the manner in which the coking coal mines will be managed by the Custodians, under the control and supervision of the Custodian-General;

(b) the constitution of a Board of Management, by whatever name called, for advising the Custodian-General in the management of the coking coal mines;

(c) the form and manner in which accounts of the coking coal mines shall be maintained;

(d) any other matter in relation to which such rule is required to be, or may be, made.

(3) Every rule made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two successive sessions and if, before the expiry of the session in which it is so laid or the session immediately following, both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made, the rule shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

20. Coking coal mines to which the Act shall not apply.— Nothing in this Act shall apply to any coking coal mine—

(a) owned or managed by a Government company or corporation owned or controlled by Government;

(b) owned or managed by a company engaged in the production of iron or steel:

Provided that this section shall not extend to such mine or part thereof which, in the opinion of the Central Government, is in excess of the requirement for the production of iron and steel by that company.

21. Power to remove difficulties.— If any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order not inconsistent with the provisions of this Act, remove the difficulty:

Provided that no such order shall be made after the expiry of a period of two years from the commencement of this Act.

22. Repeal and savings.— (1) The Coking Coal Mines (Emergency Provisions) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done, any action taken or any appointment, declaration or order made under the Ordinance so repealed, shall be deemed to have been done, taken or made, as the case may be, under the corresponding provisions of this Act.

THE FIRST SCHEDULE

[See section 3 (2)]

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
A. EAST BOKARO COALFIELD			
1. Dhori		Post Office Bermo, District Hazaribagh.	Ownership under dispute.
2. Kalyani Selected Dhori.		Post Office Pichri, District Hazaribagh.	Gourishanker and Others Post Office Bermo, Hazaribagh.
3. Khas Dhori		Post Office Pichri, District Hazaribagh.	Khas Dhori Colliery Company, Post Office Katrasgarh, Dhanbad.
4. Pipradih		Post Office Gomia, District Hazaribagh.	Pacific Coal Company, Post Office Gomia, District Hazaribagh.
5. Pichri		Post Office Pichri, District Hazaribagh.	Pichri Coal Company Limited, Post Office Bermo, Hazaribagh.
6. Selected Dhori		Post Office Bermo, District Hazaribagh.	Selected Dhori Colliery, Post Office Katrasgarh, Dhanbad.
7. Turiyo		Post Office Turiyo, District Hazaribagh.	Bhuvanewar Singh and Sivdayal, Post Office Jharia, Dhanbad.
8. Tarmi		Post Office Turiyo, District Hazaribagh.	Tarmi Colliery Company, Industrial Bank Building, Post Office Jharia, Dhanbad.
B. JHARIA COALFIELD			
1. Albion		Post Office Karmatand	Albion Colliery Company, Post Office Karmatand, Dhanbad.
2. Bokaro Jharia		Post Office Karmatand.	Messrs. Agarwalla Brothers, Post Office Karmatand, Dhanbad.
3. North Damuda		Post Office Nudkhurkee.	Hazaribagh Coal Syndicate (Private) Limited, Post Office Jharia, Dhanbad.
4. Kesurgarh		Post Office Nudkhurkee.	Manbhoom Coal Syndicate Limited, Post Office Jharia, Dhanbad.
5. Madhriband		Post Office Nudkhurkee.	Oriental Coal Company Limited, 25, Brabourne Road, Calcutta.
6. Khas Benedih		Post Office Nawagarh.	K. C. Mukherjee and Others, Post Office Hirapur, Dhanbad.
7. Benedih		Post Office Nudkhurkee.	Benedih Coal Concern, Post Office Katras, Dhanbad.
8. Khas Ganeshpur		Post Office Nawagarh.	Khas Ganeshpur Coal Mines Limited, 135, Canning Street, Calcutta.
9. Ganeshpur		Post Office Nawagarh.	Ganeshpur Coal Company Limited, Post Office Ganeshpur Dhanbad.
10. Ashakuti Phularitand.		Post Office Kharharee.	Ashakuti Coal Company Limited, 1/1, Rowland Road, Calcutta-20.
11. Mohanpur		Post Office Kharharee.	Shrimati Parbati Devi, Post Office Kharharee, Dhanbad.
12. New Bansjora		Post Office Kharharee.	S. K. Sahana and Sons (Private) Limited, Post Office Kharharee, Dhanbad.
13. Khas Bhurungiya		Post Office Mohuda.	Khas Bhurungiya Coal Company, Post Office Jharia, Dhanbad.
14. Raneedih/Pipratand		Post Office Mohuda.	Sri K. K. Sablog, C/o Sudarsan Motors, Post Office Dhanbari, Dhanbad.
15. East Macheradih		Post Office Mohuda.	East Macheradih Coal Company Limited, Post Office Jharia, Dhanbad.
16. New Huntodih		Post Office Mohuda.	Doulatmal Routmal, 178, Mahatma Gandhi Road, Calcutta-1.
17. Murulidih		Post Office Mchuda.	Kalyanji Mavji and Company, 14, Netaji Subhas Road, Calcutta-1.
18. Murulidih 20 and 21 pits		Post Office Mchuda.	Bengal Coal Company Limited, 8, Clive Row, Calcutta-1.
19. Bhatdee		Post Office Mchuda.	Bengal Bhatdee Coal Company Limited, 14, Netaji Subhas Road, Calcutta.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
20.	Kharkharee .	Post Office Khar-kharee.	Bharat Mining Corporation Limited 91, Stephen House, Dalhousie Square East, Calcutta-1.
21.	New Sinidih .	Post Office Khar-kharee.	Messrs. Bamandiha Coal Company, 3, Synagogue Street, Calcutta.
22.	Dharmaband .	Post Office Katrasgarh.	H. M. Barat and M. C. Barat, Post Office Katrasgarh, Dhanbad.
23.	New Dharmaband .	Post Office Malkera.	Sethia Mining and Manufacturing Company Limited, 4, Bakul Bagan Road, Calcutta.
24.	Maheshpur .	Post Office Katrasgarh.	Messrs Sahu Minerals and Properties Limited, A-3, Prithviraj Road, Jaipur.
25.	Sinidih .	Post Office Katrasgarh.	Sinidih Colliery Concern (Private) Limited, Post Office Katrasgarh, Dhanbad.
26.	Tundoo Khas .	Post Office Tundoo.	J. P. Lalla and Sons Collieries (Private) Limited, Post Box No. 76, Dhanbad.
27.	Bilbera .	Post Office Katrasgarh.	B. N. Mondal and Company, 22, Canning Street, Calcutta.
28.	Jealgora Govindpur .	Post Office Sonardih.	Jealgora Govindpur Colliery Company Limited, Post Office Sonardih, Dhanbad.
29.	South Govindpur .	Post Office Katrasgarh.	H. I. Pathak, Post Office Katrasgarh Dhanbad.
30.	Diamond Tetturiya .	Closec.	Bihar Collieries Limited.
31.	Central Tenturiya .	Post Office Malkera.	Sri Tarapadah Lodha and Others, Post Office Katrasgarh, District Dhanbad.
32.	New Tentulia .	Post Office Malkera.	Tentulia Khas Colliery Company Limited, 25, Brabourne Road, Calcutta.
33.	Central Kooridih-Sonardih .	Post Office Katrasgarh.	Central Kooridih Colliery Company, Post Office Katrasgarh, Dhanbad.
34.	New Gobindpur .	Post Office Sonardih.	New Govindpur Coal Company Limited, 33, Canning Street, Calcutta-1.
35.	Khas Mehtadih .	Post office Katrasgarh.	Messrs. Khas Mehtadih Colliery Company, Post Office Katrasgarh, Dhanbad.
36.	Agardih .	Post Office Katrasgarh.	Agardih Colliery Company, Post Office Katrasgarh, District Dhanbad.
37.	Katras Choitodih .	Post Office Katrasgarh.	Burrakar Coal Company Limited, Chartered Bank Building, Calcutta.
38.	Lakurka .	Post Office Katrasgarh.	Lakurka Coal Company Limited, 3, Synagogue Street, Calcutta.
39.	Koiludih .	Post Office Katrasgarh.	East Katrasgarh Colliery Company (Private) Limited, Post Office Katrasgarh, Dhanbad.
40.	Khas Govindpur .	Post Office Katrasgarh.	Khas Govindpur Coal Company (Private) Limited, Post Office Katrasgarh, Dhanbad.
41.	East Katras .	Post Office Katrasgarh.	East Katrasgarh Colliery Company (Private) Limited, Post Office Katrasgarh, Dhanbad.
42.	East Salanpur .	Post Office Katrasgarh.	East Salanpur Colliery Company, Post Office Katrasgarh, Dhanbad.
43.	Joint Salanpur .	Post Office Katrasgarh.	Not available.
44.	Khas Salanpur .	Post Office Katrasgarh.	Not available.
45.	North Salanpur .	Post Office Katrasgarh.	Sahai Brothers (Receiver H. S. Sahai), Post Office Katrasgarh, Dhanbad.
46.	Selected Salanpur .	Post Office Katrasgarh.	Selected Salanpur Colliery Company, Post Office Katrasgarh, Dhanbad.
47.	Central Salanpur .	Post Office Katrasgarh.	Central Salanpur Coal Concern, Post Office Katrasgarh, Dhanbad.
48.	Lakurka Khas .	Post Office Katrasgarh.	Bharat's Debuttar Estate, Post Office Katrasgarh, Dhanbad.
49.	Salanpur .	Post Office Katrasgarh.	Shrimati Sarojini Devi, Post Office Katrasgarh, Dhanbad.
50.	New Lakurka .	Post Office Katrasgarh.	New Lakurka Colliery Company, Post Office Katrasgarh, Dhanbad.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
51.	National Angarpathra .	. Post Office Katrasgarh.	National Coal Company (Private) Limited, 48/I, Ram Tarun Bose Lane, Calcutta-6.
52.	Union Angarpathra .	. Post Office Sijua.	Union Coal Company Limited, 185, Biplabi Rash Behari Basu Road, Calcutta-I.
53.	Gaslitan . . .	. Post Office Sijua.	New Manbhumi Coal Company, 188, Biplabi Rash Behari Basu Road, Calcutta-I.
54.	Ramkanali . . .	. Post Office Katrasgarh.	Bijali Kanti Roy, Keshalpur House, Post Office Katrasgarh, Dhanbad.
55.	Trigmait Angarpathra	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
56.	Kanta Pahari . . .	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
57.	Khas Angarpathra . . .	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
58.	Jharia Khas . . .	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
59.	East Angarpathra . . .	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
60.	Mahabir Angarpathra	. Post Office Katrasgarh.	East Angarpathra Colliery Company Limited, Post Office Katrasgarh, Dhanbad.
61.	Diamond Angarpathra	. Post Office Katrasgarh.	Diamond Angarpathra Colliery Company, Post Office, Katrasgarh, Dhanbad.
62.	Mudidih . . .	. Post Office Sijua.	Burrakar Coal Company, Chartered Bank Building, Calcutta.
63.	Badrachuk . . .	. Post Office Sijua.	Burrakar Coal Company, Chartered Bank Building, Calcutta.
64.	Jogta . . .	. Post Office Sijua.	Jogta Coal Company Limited, Post Office Sijua, Dhanbad.
65.	Sendra . . .	. Post Office Bansjora.	Messrs. Hind Shippers Limited, 185, Biplabi Rash Behari Basu Road, Calcutta-I.
66.	Sendra Bansjora-Gopal Gararia.	Post Office Bansjora.	Sendra Bansjora Colliery Company (Private) Limited, 185, Canning Street, Calcutta-I.
67.	Kankanee . . .	. Post Office Bansjora.	Oriental Coal Company Limited, 25, Brabourne Road, Calcutta.
68.	Loyabad . . .	. Post Office Bansjora.	Burrakar Coal Company Limited, Chartered Bank Building, Calcutta-I.
69.	Pootkee . . .	. Post Office Kusunda.	Oriental Coal Company Limited, 25, Brabourne Road, Calcutta.
70.	Gupalichuck (West) . . .	. Post Office Kusunda.	Central Kirkend Coal Company Limited, 91, Stephen House, Dalhousie Square East Calcutta-I.
71.	Central Kirkend . . .	. Post Office Kusunda.	Central Kirkend Coal Company Limited, 91, Stephen House, Dalhousie Square East Calcutta-I.
72.	Motiram Kirkend . . .	. Post Office Kusunda.	Motiram Roshanlal Coal Company (Private) Limited, Kusunda, Dhanbad.
73.	Khas Kirkend . . .	. Post Office Kusunda.	Bhuramal Agarwal, Post Office Dhan-sar, Dhanbad.
74.	Roy Kirkend . . .	. Post Office Kusunda.	The New Marine Coal Company (Bengal) Limited, 111, Chittaranjan Avenue, Calcutta.
75.	New Marine . . .	. Post Office Kusunda.	The New Marine Coal Company (Bengal) Limited, 111, Chittaranjan Avenue Calcutta.
76.	Ekra Khas . . .	. Closed	Sahu Minerals and Properties.

Sl. No.	Name of the Mine	Location of the mine	Name and address of the owners of the mine.
1	2	3	4
77.	Bansdeopur . . .	Post Office Kusunda.	New Bansdeopur Coal Company Limited, 28-B, Netaji Subhas Road, Calcutta.
78.	North Ekra . . .	Post Office Bansjora.	North Ekra Coal Company, Post Office Bansjora, Dhanbad.
79.	Gararia . . .	Post Office Bansjora.	The Gararia Colliery Company (Private) Limited, Post Office Bansjora, Dhanbad.
80.	Central Gararia . . .	Post Office Bansjora.	Central Gararia Colliery Company, Post Office Bansjora, Dhanbad.
81.	Gararia . . .	Post Office Bansjora.	Tikmani and Company, Post Office Bansjora, Dhanbad.
82.	Chhota Bowa . . .	Post Office Bansjora.	Chhota Bowa Colliery Company Limited, Post Office Bansjora, Dhanbad.
83.	Busseriya . . .	Post Office Kusunda.	Busseriya Coal Company (Private) Limited, 13, Radhabazar Lane, Calcutta-I.
84.	East Ekra . . .	Post Office Bansjora.	East Ekra Coal Company, C/o. K. Worah, Jora Bungalow, Dhanbad.
85.	Busseria North & South	Post Office Bansjora.	Not available—Mine closed.
86.	North Busseriya . . .	Post Office Bansjora.	North Busseriya Colliery Company, Post Office Bansjora, Dhanbad.
87.	Surendra East Loyabad	Post Office Kirkend.	Surendra East Loyabad Colliery Company, Post Office Kusunda, Dhanbad.
88.	Gondudih . . .	Post Office Kusunda.	Central Alkusa Colliery Company, Post Office Kusunda, Dhanbad.
89.	Dhariajoba . . .	Post Office Kirkend.	Not available—Mine closed.
90.	West Godhur . . .	Post Office Kusunda	H. D. Agarwalla and Sons (P.) Ltd., Post Office Jharia, Dhanbad.
91.	Godhur . . .	Post Office Kusunda.	Godhur Colliery Company, Post Office Kusunda, Dhanbad
92.	Pure Kustore . . .	Post Office Kusunda.	Pure Kustore Colliery Company Limited, Post Office Kusunda, Dhanbad.
93.	Nayadee Kusunda . . .	Post Office Kusunda.	Kusunda Nayadee Colliery Company Private Limited, Post Office Kusunda, Dhanbad.
94.	Kusunda . . .	Post Office Kusunda.	Not available—Area on Fire—Closed.
95.	West Bhuggutdih . . .	Post Office Jharia	Amalgamated with West En (57).
96.	Industry . . .	Post Office Dhansar.	Kalyanji Mavji and Company, Post Office Dhansar, Dhanbad.
97.	West Ena . . .	Post Office Dhansar.	Kalyanji Mavji and Company, Post Office Dhansar, Dhanbad.
98.	Kendwadih . . .	Post Office Kusunda.	East India Coal Company Limited, Post Office Jealgora, Dhanbad.
99.	Balihari C. T. C. . .	Post Office Kusunda.	Not available.
100.	Kutchi Balihari . . .	Post Office Kusunda.	Balihari Colliery Company (Private) Ltd., 14, Netaji Subhas Road, Calcutta-I.
101.	South Bulliary . . .	Post Office Kusunda.	East India Coal Company Limited, Post Office Jealgora, Dhanbad.
102.	Bhagaband . . .	Post Office Bhagaband.	The Borrea Coal Company Limited, Chartered Bank Building, Calcutta-I.
103.	Kendwadih . . .	Post Office Bhaga.	Equitable Coal Company Limited, 2/1 Lord Sinha Road, Calcutta.
104.	Gonshadih . . .	Post Office Kusunda.	Shri Biswanath Roy, Ke, alpur House, Post Office Katrasgarh Dhanbad
105.	Alkusa South . . .	Post Office Kustore.	Raneegunge Coal Association Limited, 3-A, Chowringhee Place, Calcutta-13.
106.	Kustore . . .	Post Office Kustore.	Raneegunge Coal Association Limited, 3-A, Chowringhee Place, Calcutta-13.
107.	Burragarh . . .	Post Office Jharia.	Raneegunge Coal Association Limited, 3-A, Chowringhee Place, Calcutta-13.
108.	Pure Burragarh . . .	Post Office Jharia.	Raneegunge Coal Association Limited, 3-A, Chowringhee Place, Calcutta-13.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
109.	Bhutgoria . . .	Post Office Bhaga.	Equitable Coal Company Limited, 1/2, Lord Sinha Road, Calcutta-16.
110.	Hurriladih . . .	Post Office Bhaga.	Equitable Coal Company Limited, 1/2, Lord Sinha Road, Calcutta-16.
111.	Simlabahal . . .	Post Office Jharia.	Shri P. Roy, Director and nominated owner, Bhalgora Coal Company, 8, Synagogue Street, Calcutta.
112.	Bhuggatdih . . .	Post Office Dhansar.	Bengal Nagpur Coal Company 5, Synagogue Road, Calcutta-1.
113.	Ena . . .	Post Office Dhansar.	North West Coal Company, Limited, 5, Synagogue Road, Calcutta 1.
114.	East Bhalgora . . .	Post Office, Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
115.	Khas Jharia . . .	Post Office, Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
116.	East Ena . . .	Post Office, Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
117.	East Bhuggatdih . . .	Post Office, Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
118.	Selected Khas Jharia . . .	Post Office, Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
119.	Selected Jharia . . .	Post Office Jharia.	East Bhuggatdih Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
120.	Bhalgora . . .	Post Office Jharia.	Bhalgora Coal Company Limited, 8, Synagogue Street, Calcutta-1.
121.	Selected Model Jharia . . .	Post Office Jharia.	Amalgamated with East Bhuggatdih (117).
122.	New Khas Jharia . . .	Post Office Jharia.	Fularibad Colliery Company, Post Office Jharia, Dhanbad.
123.	Fularibad . . .	Post Office Jharia.	Fularibad Colliery Company, Post Office Jharia, Dhanbad.
124.	New Pure Jharia . . .	Post Office Jharia.	D. D. Thacker and Sons, Post Office Dhanbad. Closed. On fire.
125.	Rajapur . . .	Post Office Jharia.	The Rajapur Colliery Company (Private) Limited, Post Office Jharia, Dhanbad.
126.	Khas Bhuggatdih . . .	Post Office Jharia.	Khas Bhuggatdih Colliery Company, Post Office Jharia, Dhanbad.
127.	Pure Jharia . . .	Post Office Jharia.	D. D. Thacker and Sons, Post Office, Dhanbad. Closed. On fire.
128.	K. P. Dobari . . .	Post Office Jharia.	K. P. Dobari, Post Office Jharia.
129.	South Jharia . . .	Post Office Jharia.	J. K. Banerjee and Others, Post Box No. 46, Hirapur District Dhanbad.
130.	East Pure Jharia . . .	Post Office Jharia.	Not available.
131.	Dobari . . .	Post Office Jharia.	R. N. Bagchi and Brothers, 5/8, Middle Row, Calcutta.
132.	East Model Jharia . . .	Post Office, Jharia.	Not available.
133.	Model Jharia . . .	Post Office, Jharia.	J. K. Banerjee and Others, Post Box No. 46, Hirapur, District Dhanbad.
134.	Golden Jharia . . .	Post Office Jharia.	Bharat Fire Bricks and Pottery Works.
135.	Fatehpur . . .	Post Office Jharia.	Bharat Fire Bricks and Pottery Works, Jharia.
136.	Pure Durgapur . . .	Post Office Jharia.	Bharat Fire Bricks and Pottery Works, Jharia.
137.	Khas Jharia . . .	Post Office Jharia.	Fularibad Colliery Company, Post Office Jharia, Dhanbad.
138.	Sonalibad . . .	Post Office Jharia.	Fularibad Colliery Company, Post Office Jharia, Dhanbad.
139.	Ganhoodih . . .	Post Office, Jharia.	S. B. Banerjee and Sons, Post Office Jharia, Dhanbad.
140.	East Jharia . . .	Post Office Jharia.	Not available.
141.	K. P. Kujama . . .	Post Office Jharia.	Kujama Colliery Company, Post Office Jharia, Dhanbad.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
142.	Kujama	Post Office Jharia.	Kujama Colliery Company, Post Office Jharia, District Dhanbad.
143.	North Kujama	Post Office Jharia.	Ganji Dossa and Company, Post Office Jharia, Dhanbad.
144.	Central Kujama	Post Office Jharia.	Central Kujama Coal Concern, Post Office Jharia, Dhanbad.
145.	Nanji Kujama	Post Office Jharia.	Central Kujama Coal Concern, Post Office Jharia, Dhanbad.
146.	Pandebera	Post Office Jharia.	Central Kujama Coal Concern, Post Office Jharia, Dhanbad.
147.	Pure Kujama	Post Office Jharia.	Central Kujama Coal Concern, Post Office Jharia, Dhanbad.
148.	Kujama Pandabera	Post Office Jharia.	Central Kujama Coal Concern, Post Office Jharia, Dhanbad.
149.	South Kujama	Post Office Jharia.	Bagdigi Kujama Collieries Company (1948) Limited, Post Office Jharia, Dhanbad.
150.	Goluckdih	Post Office Jharia.	Goluckdih Colliery Company, 22, Burtolla Street, Calcutta.
151.	South Goluckdih	Post Office Jharia.	South Goluckdih Coal Company, Post Office Jharia, Dhanbad.
152.	Central Jharia	Post Office Jharia.	Messrs. Khimji Dossa and Sons, Post Office Jharia, Dhanbad.
153.	Indian Jharia	Post Office Jharia.	Messrs. Khimji Dossa and Sons, Post Office Jharia, Dhanbad.
154.	Lower Upper Jharia	Post Office Jharia.	Khimji Dossa and Sons, Post Office Jharia, Dhanbad.
155.	Central Tisra	Post Office Jharia.	Shri K. D. Singh, Post Office Jharia, Post Box No. III, Dhanbad.
156.	Tisra	Post Office Jharia.	Dhanji Devji and Sons, Post Office Jharia, Dhanbad.
157.	Tisra	Post Office Jharia.	The Diamond Coal Company (Private) Limited, Post Office Jharia, Dhanbad.
158.	Tisra	Post Office Jharia.	Amarsing Gowamal and Sons, Post Box No. 47, Jharia, Dhanbad.
159.	Sree Commercial	Post Office South Tisra.	Bengal Jharia Colliery Company (Private) Limited, Post Office South Tisra, Dhanbad.
160.	Bengal Jharia	Post Office South Tisra.	Bengal Jharia Colliery Company (Private) Limited, Post Office South Tisra, Dhanbad.
161.	East India	Post Office Jeenagora	Part of Khas Joyrampur.
162.	South Tisra	Post Office Tisra.	South Tisra Colliery Company Limited, Post Office Jharia, Dhanbad.
163.	Khas Joyrampur	Post Office Khas Jeenagora.	Khas Joyrampur Colliery Company, Post Office Khas Jeenagora, Dhanbad.
164.	Kalishthan Jeenagora	Post Office Khas Jeenagora.	K. B. Seal and Sons, 28, Raja K. L. Goswami Street, Post Office Serampur, District Hooghly (West Bengal).
165.	Lower Joyrampur	Post Office Jeenagora.	Part of Khas Joyrampur.
166.	New Jeenagora	Post Office Khas Jeenagora.	Khas Jeenagora Colliery Limited, 135, Biplabi Rash Behari Basu Road, Calcutta-I.
167.	Central Jeenagora	Post Office Khas Jeenagora.	Khas Jeenagora Colliery Limited, 135, Biplabi Rash Behari Basu Road, Calcutta-I.
168.	Bararee Joyrampur	Post Office Jeenagora.	Not available.
169.	Pure Joyrampur	Post Office Khas Jeenagora.	Amalgamated with Khas Joyrampur.
170.	North Bararee Jeenagora	Post Office Jeenagora.	Part of Central and New Jeenagoras.
171.	Khas Jeenagora	Post Office Khas Jeenagora.	Khas Jeenagora Colliery Limited, 135, Biplabi Rash Behari Basu Road, Calcutta-I.
172.	East Bararee	Post Office Khas Jeenagora.	Jeenagora East Bararee Colliery Company, Post Office Katrasgarh, Dhanbad.
173.	Sri Jeenagora	Post Office Khas Jeenagora.	Jeenagora East Bararee Colliery Company, Post Office Katrasgarh, Dhanbad.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
174.	New Suratand	• Post Office Jharia.	Not available.
175.	Kalithan Suratand	• Post Office Jharia.	K. B. Seal and Sons, Post Office Jharia, Dhanbad.
176.	Nilūri Patra	• Post Office Jharia.	Niluri Patra, Post Office Jharia, Dhanbad.
177.	North Burrakar Suratand	• Post Office Jharia.	The New Standard Coal Company (Private) Limited, 27, Palace Court, I, Kyd Street, Calcutta-16.
178.	North Burrakar Lodna	• Post Office Jharia.	The New Standard Coal Company (Private) Limited, 27, Palace Court, I, Kyd Street, Calcutta-16.
179.	Lodna	• Post Office Jharia.	The New Standard Coal Company (Private) Limited, 27, Palace Court, I, Kyd Street, Calcutta-16.
180.	Standard Bhaga	• Post Office Bhaga.	Standard Coal Company, Post Office Bhaga, Dhanbad.
181.	Lodna	• Post Office Jharia.	Lodna Colliery Company (1920) Limited, 6, Lyons Range, Calcutta.
182.	Madhuban Lodna	• Post Office Jharia.	Lodna Colliery Company (1920) Limited, 6, Lyons Range, Calcutta.
183.	Bagdigi	• Post Office Jharia.	Lodna Colliery Company (1920) Limited, Post Office Jharia, Dhanbad.
184.	Jealgora	• Post Office Jealgora.	East India Coal Company Limited, Post Office Jealgora, Dhanbad.
185.	Bararee	• Post Office Jealgora.	East India Coal Company Limited, Post Office Jealgora, Dhanbad.
186.	Bhulanbararee	• Post Office Patherdih.	Bhulanbararee Coal Company Limited, 4, Clive Road, Calcutta-I.
187.	Lachmi	• Post Office Patherdih.	Lachmi Coal Company, 31, Mullick Street, Calcutta.
188.	Amlabad	• Post Office Bhowrah.	Oriental Coal Company Limited, Thapar House, 25, Brabourne Road, Calcutta-I.
189.	Bhowrah North	• Post Office Bhowrah.	Oriental Coal Company Limited, 25, Brabourne Road, Calcutta-I.
190.	Bhowrah South	• Post Office Bhowrah.	Oriental Coal Company Limited, 25, Brabourne Road, Calcutta I.
191.	Mohalbani	• Post Office Bhowrah.	Oriental Coal Company Limited, 25 Brabourne Road, Calcutta-I.
192.	Central Bhowrah	• Post Office Bhowrah.	Central Bhowrah Coal Company, Post Office Jharia, Dhanbad.
193.	Sitanala	• Post Office Bhojudih.	Mohatta Brothers, 19, British Indian Street, Calcutta-I.
194.	East Bhowra	• Post Office Patherdih.	Shrimati Jyotsen Devi, Post Office Sitarampur, District Burdwan.
195.	East Sowardih	• Post Office Patherdih.	J. N. Supakar Brothers and Company, Post Office Patherdih, Dhanbad.
196.	Patherdih	• Post Office Patherdih.	Patherdih Sudamdih Colliery (Private) Limited, Post Office Patherdih Dhanbad.
197.	New Sudamdih	• Post Office Patherdih.	New Sudamdih Colliery Company, Post Office, Patherdih, Dhanbad.
198.	Selected Patherdih	• Post Office Patherdih.	Selected Patherdih Coal Company Limited, 12, Tarachand Dutta Street, Calcutta-I.
199.	New Chasnalla	• Post Office Jharia.	New Chasnalla Coal Concern, Post Office Jharia, Dhanbad.
200.	Pure Chasnalla	• Post Office Patherdih.	Pure Chasnalla Colliery Company, 192, Cross Street, Calcutta-7.

C. RANEEGUNGE COALFIELD

1.	Junkundar	• Post Office Chirkunda, District Dhanbad.	D. Mondal and Company Limited, Post Office Dishergarh, District Burdwan, West Bengal.
2.	Laikdih Deep	• Post Office Chirkunda, District Dhanbad.	Katras-Jharia Coal Company Limited, 8, Clive Row, Calcutta-I.

Sl. No.	Name of the mine	Location of the mine	Name and address of the owners of the mine
1	2	3	4
3. Chanch		Post Office Chirkunda, District Dhanbad.	Bengal Coal Company Limited, 8, Clive Row, Calcutta-1.
4. Victoria		Post Office Kulti, District Burdwan.	New Birbhoom Coal Company Limited, 8, Clive Row, Calcutta-1.
5. Victoria West		Post Office Kulti, District Burdwan.	New Birbhoom Coal Company Limited, 8, Clive Row, Calcutta-1.
6. Begunia		Post Office Barakar, District Burdwan.	Messrs. K. C. Thapar and Brothers (Private) Limited, 25, Brajourne Road, Calcutta.

THE SECOND SCHEDULE

(See section 7)

Sl. No.	Name of the coke oven plant	Location of the coke oven plant	Name and address of the owners of the coke oven plant
1	2	3	4
1. Bararee Coke Plant		South Balliary-Kenduwadih Colliery, Post Office Kusunla, District Dhanbad.	Bararee Coke Company Limited, 4 Clive Row, Calcutta-1.
2. Bhowra Coke Plant		Bhowra South Colliery, Post Office Bhowra, District Dhanbad.	Messrs. Bhowra Coke Company, Bhattacharya's House, Lub, Circular Road, Dhanbad.
3. Bhulanbararee		Bhulanbararee Colliery, Post Office Patherdih, District Dhanbad.	Bararee Coke Company Limited, 4, Clive Row, Calcutta-1.
4. Central Bhowra		Central Bhowra Colliery, Post Office Bhowra, District Dhanbad.	Central Bhowra Coal Company (Private) Limited, Post Office Jharia; and G. D. Kumar and Sons, Bastacolla, Post Office Dhansar, Dhanbad.
5. Central Kooridih		Central Kooridih-Sonardih Colliery, Post Office Katrasgarh, Dhanbad.	Shivram Singh and Company (Private) Limited, Post Office Katrasgarh, District Dhanbad.
6. Junkundar Valley Beehive Coke Plant.		Junkundar Colliery, Post Office Chirkunda, District Dhanbad.	D. Mondal and Company Limited, Panchayat Road, Post Office Chirkunda, District Dhanbad.
7. New Gobindpur		New Gobindpur Colliery, Post Office Sonardih, District Dhanbad.	Ghosh's Estate Private Limited, 33, Canning Street, Calcutta-1.
8. New Standard Lodna		New Standard Lodna Colliery, Post Office Jharia, District Dhanbad.	Messrs. Singh Sachdeva, Post Office Dhansar, Dhanbad.
9. New Sudamdih		New Sudamdih Colliery, Post Office Patherdih, District Dhanbad.	Sanjiv Coke Manufacturing Company, Care of H. D. Adjmera, Post Office Patherdih, District Dhanbad.
10. North Kujama		North Kujama Colliery, Post Office Jharia, Dhanbad.	Beehive Hard Coke Manufacturing Company, Chowra Construction Company (Private) Limited, 111, Central Avenue, Calcutta.
11. Ramkanaly		Ramkanaly Colliery, Post Office Katrasgarh, District Dhanbad.	Bijali Kanti Roy, Keshalpur House, Post Office Katrasgarh, Dhanbad; and M. C. Coal Company, Post Office Jharia, Dhanbad.
12. Union Angarpathra		Union Angarpathra Colliery, Post Office Katrasgarh, District Dhanbad.	Satyadeo Singh Coal Company (Private) Limited, 138 Birplabi Rash Behari Basu Road, Calcutta-1.

**THE ASIAN REFRACTORIES LIMITED
(ACQUISITION OF UNDERTAKING)
ACT, 1971**

[ACT NO. 65 OF 1971]*

(23rd December, 1971)

An Act to provide for the acquisition of the undertaking of the Asian Refractories Limited for the purpose of augmenting supplies of refractories to meet the essential requirements of the iron and steel industry.

WHEREAS the Asian Refractories Limited is in liquidation and has stopped its production;

AND WHEREAS the total production of refractories in India is inadequate and insufficient to meet the essential requirements of the iron and steel industry;

AND WHEREAS the supplies of refractories can be augmented by speedily bringing the Asian Refractories Limited into operation and expanding its capacity thereafter;

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and Commencement.—(1) This Act may be called THE ASIAN REFRACTORIES LIMITED (ACQUISITION OF UNDERTAKING) ACT, 1971.

(2) It shall be deemed to have come into force on the 17th day of October, 1971.

2. Definitions.— In this Act, unless the context otherwise requires,—

(a) "appointed day" means the 17th day of October, 1971;

(b) "company" means the Asian Refractories Limited, being a company as defined in the Companies Act, 1956, having its registered office in the State of West Bengal;

(c) words and expression used herein and not defined but defined in the Companies Act, 1956, have the meanings respectively assigned to them in that Act.

3. Undertaking of the company to vest in the Central Government.— On and from the appointed day, the undertaking of the company shall, by virtue of this Act, be transferred to, and shall vest in, the Central Government, free from all incumbrances.

4. General effect of vesting.—(1) The undertaking of the company shall be deemed to include all assets, rights, powers, authorities and privileges and all property, movable and immovable, cash balances, reserve funds, investments and all other rights and interests in, or arising out of, such property as were immediately before the ap-

pointed day in the ownership, possession, power or control of the company, whether within or outside India, and all books of accounts, registers and all other documents of whatever nature relating thereto.

(2) All property included as aforesaid in the undertaking which has vested in the Central Government under Section 3 shall, by force of such vesting, be freed and discharged from any trusts, obligations, mortgages, charges, liens and other incumbrances affecting it, and any attachment, injunction or any decree or order of any court restricting the use of such property in any manner shall be deemed to have been withdrawn.

(3) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any business of the undertaking of the company is pending by or against the company, the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the undertaking of the company or of any thing contained in this Act but the suit, appeal or other proceeding may be continued, prosecuted and enforced by or against the company.

5. Duty to deliver possession of the undertaking and documents relating thereto.

—(1) Notwithstanding any decree, judgment or order of any court or anything contained in any other law for the time being in force, the Official Liquidator of the company or any other person, in whose possession or custody or under whose control the undertaking of the company or any part thereof may be, shall deliver possession of the undertaking of the company or such part thereof, as the case may be, to the Central Government forthwith.

(2) The Official Liquidator or any other person who has, on the appointed day, in his possession or under his control any books, documents or other papers relating to the undertaking of the company which has vested, under Section 3, in the Central Government, shall be liable to account for the said books, documents or other papers to the Central Government and shall deliver them up to the Central Government or to such person as the Central Government may specify in this behalf.

(3) The Central Government may take, or cause to be taken, all necessary steps for securing possession of the undertaking which has vested in it under Section 3.

6. Duty to furnish particulars.— The company shall, within such period as the Central Government may allow in this behalf furnish to that Government a complete inventory of all the properties and assets of the company, as on the appointed day, pertaining to the undertaking which has vested in the Central Government under Section 3.

7. Payment of compensation.— (1) The Central Government shall deposit, in Court, in cash, to the credit of the com-

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1, Ext. P. 733.

pany a sum of rupees eighty-one lakhs as compensation in respect of the transfer, under Section 3, to the Central Government of the undertaking of the company.

(2) Out of the total amount of compensation referred to in sub-section (1),—

(a) a sum of rupees eight lakhs shall be deposited by the Central Government, within three months from the appointed day, to the credit of the company;

(b) the balance of the amount of compensation shall be deposited in Court by the Central Government in ten equal annual instalments, the first of which shall become due on the date on which a period of one year expires from the appointed day and the subsequent instalments shall become due accordingly; and

(c) each instalment of the compensation, referred to in clause (b), shall carry interest at the rate of seven per cent. per annum from the commencement of this Act.

(3) For the avoidance of doubts, it is hereby declared that the compensation referred to in sub-section (1) represents the realisable value of the assets of the undertaking, which has vested in the Central Government under Section 3, and the liabilities of the undertaking shall be met from the said amount of compensation.

(4) In meeting the liabilities of the undertaking which has vested in the Central Government under Section 3, the Court, by which the company owning such undertaking is being wound up, shall distribute, in due course of administration, the amount of the compensation amongst the creditors and, if there is any surplus left after such distribution, amongst the contributories of the company in accordance with their rights and interests.

8. Management and administration of the undertaking.— The undertaking, which has vested in the Central Government under Section 3, shall be managed on behalf of the Central Government by such person or body of persons as may be nominated by the Central Government in this behalf, and such person or body of persons shall carry on the management in accordance with such regulations as may be made by the Central Government.

9. Penalties.— (1) Any person who—

(a) having in his possession, custody or control any property forming part of the undertaking of the company, wrongfully withholds such property from the Central Government; or

(b) wrongfully obtains possession of any property forming part of the undertaking of the company which has vested in the Central Government under this Act; or

(c) wilfully withholds or fails to furnish to the Central Government or any person specified by that Government as required by sub-section (2) of Section 5 any document which may be in his possession, custody or control; or

(d) wilfully fails to furnish an inventory as required under Section 6; or

(e) when required to furnish such inventory, furnishes any particulars therein which are false and which he either knows or believes to be false or does not believe to be true,

shall be punishable with imprisonment for a term which may extend to two years, or with fine, or with both:

Provided that the court trying any offence under clause (a) or clause (b) or clause (c) of this sub-section may, at the time of convicting the accused person, order him to deliver up or refund within a time to be fixed by the court any property wrongfully withheld or wrongfully obtained or any document wilfully withheld or not furnished:

Provided further that nothing contained in this section or any other provision of this Act shall render any person liable to be convicted of an offence in respect of anything done or omitted to be done by him before the appointed day.

(2) No court shall take cognizance of an offence punishable under this section except with the previous sanction of the Central Government or of an officer authorised by that Government in this behalf.

10. Protection of action taken in good faith.— No suit, prosecution or other legal proceeding shall lie against the Central Government or an officer or other employee serving in connection with the affairs of the undertaking of the company which is in good faith done or intended to be done under this Act.

11. Repeal and savings.— (1) The Asian Refractories Limited (Acquisition of Undertaking) Ordinance, 1971, is hereby repealed.

(2) Notwithstanding such repeal, anything done or any action taken under the Ordinance so repealed shall be deemed to have been done or taken under the corresponding provisions of this Act.

THE ESSENTIAL COMMODITIES (AMENDMENT) ACT, 1971

[ACT NO. 66 OF 1971]*

(23rd December, 1971)

An Act further to amend the Essential Commodities Act, 1955.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE ESSENTIAL COMMODITIES (AMENDMENT) ACT, 1971.

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S.1, Ext. P. 743. For Statement of Objects and Reasons, see Gaz. of India; 14-12-1971, Pt. II-S. 2, Ext. P. 1103.

2. Amendment of Section 3.— In Section 3 of the Essential Commodities Act, 1955 (hereinafter referred to as the principal Act),—

(i) in sub-section (2), for clause (j), the following clause shall be substituted, namely:—

“(j) for any incidental and supplementary matters, including in particular, the entry, search or examination of premises, aircraft, vessels, vehicles or other conveyances and animals, and the seizure by a person authorised to make such entry, search, or examination,—

(i) of any articles in respect of which such person has reason to believe that a contravention of the order has been, is being, or is about to be, committed and any packages, coverings or receptacles in which such articles are found;

(ii) of any aircraft, vessel, vehicle or other conveyance or animal used in carrying such articles, if such person has reason to believe that such aircraft, vessel, vehicle or other conveyance or animal is liable to be forfeited under the provisions of this Act;

(iii) of any books of accounts and documents which in the opinion of such person would be useful, for, or relevant to, any proceedings under this Act and the return of such books of accounts and documents to the person from whom they were seized after copies thereof or extracts therefrom, as certified by that person in the manner specified in the order, have been taken.”;

(ii) in sub-section (3B),—

(a) in the opening portion, for the words “there shall be paid to that person such price for the foodgrains, edible oilseeds or edible oils as may be specified in that order having regard to—”, the words “there shall be paid as the price for the foodgrains, edible oilseeds or edible oils—” shall be substituted;

(b) in clause (i), for the word “and” occurring at the end, the word “or” shall be substituted;

(c) in clause (ii), for the words “the price”, the words “where no such price is fixed, the price” shall be substituted.

3. Amendment of Section 5.—In Section 5 of the principal Act, for the words and figure “the power to make orders under Section 3”, the words and figure “the power to make orders or issue notifications under Section 3” shall be substituted.

4. Act 47 of 1964 to be made permanent.— The Essential Commodities (Amendment) Act, 1964, the duration of which extends up to and including the 31st day of December, 1971, is hereby made permanent, and accordingly that Act shall have effect subject to the modification that in Section 1 of that Act, sub-section (3) shall be omitted.

5. Amendment of Section 12A.— In Section 12A of the principal Act (inserted therein by Section 2 of Act 47 of 1964), to

sub-section (1), the following provisos shall be added, namely:—

“Provided that—

(a) every such notification issued after the commencement of the Essential Commodities (Amendment) Act, 1971, shall, unless sooner rescinded, cease to operate at the expiration of two years after the publication of such notification in the Official Gazette;

(b) every such notification in force immediately before such commencement shall, unless sooner rescinded, cease to operate at the expiration of two years after such commencement;

Provided further that nothing in the foregoing proviso shall affect any case relating to the contravention of a special order specified in any such notification if proceedings by way of summary trial have commenced before that notification is rescinded or ceases to operate and the provisions of this section shall continue to apply to that case as if that notification had not been rescinded or had not ceased to operate.”.

THE INDIAN TARIFF (AMENDMENT) ACT, 1971

[ACT NO. 67 OF 1971]*

(23rd December, 1971)

An Act further to amend the Indian Tariff Act, 1934.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE INDIAN TARIFF (AMENDMENT) ACT, 1971.

(2) It shall come into force on the 1st day of January, 1972.

2. Amendment of First Schedule.— In the First Schedule to the Indian Tariff Act, 1934,—

(a) in Items Nos. 28 (35), 28 (36), 28 (37), 28 (38), 28 (39) and 28 (40), in the last column headed “Duration of protective rates of duty”, for the figures “1971”, wherever they occur, the figures “1972” shall be substituted;

(b) in Item No. 66 (a),—

(i) in the third column headed “Nature of duty”, for the word “Protective”, the word “Revenue” shall be substituted;

(ii) in the fourth column headed “Standard rate of duty”, for the figures “27½”, the figures “40” shall be substituted;

(iii) in the last column headed “Duration of protective rates of duty”, the entry “December 31st, 1971” shall be omitted;

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- (c) in Item No. 66 (1),—
 (i) in the third column headed "Nature of duty", for the word "Protective", the word "Revenue" shall be substituted;
 (ii) in the fourth column headed "Standard rate of duty", for the figures "20", the figures "40" shall be substituted;
 (iii) in the last column headed "Duration of protective rates of duty", the entry "December 31st, 1971" shall be omitted.

THE UTTAR PRADESH CANTONMENTS (CONTROL OF RENT AND EVICTION) (REPEAL) ACT, 1971

[ACT NO. 68 OF 1971]*

(23rd December, 1971)

An Act to provide for the repeal of the Uttar Pradesh Cantonments (Control of Rent and Eviction) Act, 1952.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE UTTAR PRADESH CANTONMENTS (CONTROL OF RENT AND EVICTION) (REPEAL) ACT, 1971.

2. Repeal of Act 10 of 1952.— On and from the date on which the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 is extended by notification under Section 3 of the Cantonments (Extension of Rent Control Laws) Act, 1957, to the cantonments in the State of Uttar Pradesh, the Uttar Pradesh Cantonments (Control of Rent and Eviction) Act, 1952 shall stand repealed.

3. Savings.— (1) The repeal of the Uttar Pradesh Cantonments (Control of Rent and Eviction) Act, 1952 by Section 2 shall not affect—

(a) the previous operation of the said Act or anything duly done or suffered thereunder; or

(b) any right, privilege, obligation or liability acquired, accrued or incurred under the said Act; or

(c) any penalty, forfeiture or punishment incurred in respect of any offence committed against the said Act; or

(d) any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced and any such penalty, forfeiture or punishment may be imposed as if the said Act had not been repealed.

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1, Ext. P. 739. For Statement of Objects and Reasons, see Gaz. of India; 12-8-1971, Pt. II-S. 2, Ext. P. 657.

(2) Subject to the provisions contained in sub-section (1), anything done or any action taken under the Act repealed by Section 2 shall be deemed to have been done or taken under the corresponding provisions of the United Provinces (Temporary) Control of Rent and Eviction Act, 1947 extended by notification as provided in that section to the cantonments in the State of Uttar Pradesh and shall continue to be in force accordingly unless and until superseded by anything done or any action taken under the Act so extended.

THE PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971

(Act No. 69 of 1971)*

(23rd December, 1971.)

An Act to Prevent Insults to National Honour.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and extent.— (1) This Act may be called THE PREVENTION OF INSULTS TO NATIONAL HONOUR ACT, 1971.

(2) It extends to the whole of India.

2. Insult to Indian National Flag and Constitution of India.— Whoever in any public place or in any other place within public view burns, mutilates, defaces, defiles, disfigures, destroys, tramples upon or otherwise brings into contempt (whether by words, either spoken or written, or by acts) the Indian National Flag or the Constitution of India or any part thereof, shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Explanation 1.— Comments expressing disapprobation or criticism of the Constitution or of the Indian National Flag or of any measures of the Government with a view to obtain an amendment of the Constitution of India or an alteration of the Indian National Flag by lawful means do not constitute an offence under this section.

Explanation 2.— The expression "Indian National Flag" includes any picture, painting, drawing or photograph, or other visible representation of the Indian National Flag, or of any part or parts thereof, made of any substance or represented on any substance.

Explanation 3.— The expression "public place" means any place intended for use by, or accessible to, the public and includes any public conveyance.

3. Prevention of singing of Indian National Anthem, etc.— Whoever inten-

*Received the assent of the President on 23-12-1971. Act published in Gaz. of India; 23-12-1971, Pt. II-S. 1, Ext. P. 741. For Statement of Objects and Reasons, see Gaz. of India; 31-8-1970, Pt. II-S. 2, Ext. P. 833.

tionally prevents the singing of the Indian National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

(Act Nos. 70 & 71 Not Received.)

**THE INDUSTRIES (DEVELOPMENT
AND REGULATION) AMENDMENT
ACT, 1971**

(Act No. 72 of 1971)*

(24th December, 1971)

An Act further to amend the Industries (Development and Regulation) Act, 1951.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE INDUSTRIES (DEVELOPMENT AND REGULATION) AMENDMENT ACT, 1971.

(2) It shall be deemed to have come into force on the 1st day of November, 1971.

2. Amendment of Section 3.— In the Industries (Development and Regulation) Act, 1951 (hereinafter referred to as the principal Act), in Section 3,—

(i) after clause (a), the following clauses shall be inserted, namely:—

‘(aa) “current assets” means bank balances and cash and includes such other assets or reserves as are expected to be realised in cash or sold or consumed within a period of not more than twelve months in the ordinary course of business, such as, stock-in-trade, amounts due from sundry debtors for sale of goods and for services rendered, advance tax payments and bills receivable, but does not include sums credited to a provident fund, a pension fund, a gratuity fund or any other fund for the welfare of the employees, maintained by a company owning an industrial undertaking;

(ab) “current liabilities” means liabilities which must be met on demand or within a period of twelve months from the date they are incurred; and includes any current liability which is suspended under Section 18FB;”;

(ii) after clause (c), the following clause shall be inserted, namely:—

‘(cc) “High Court” means the High Court having jurisdiction in relation to the place at which the registered office of a company is situate’;

(iii) after clause (i), the following clause shall be inserted, namely:—

‘(j) words and expressions used herein but not defined in this Act and defined in

the Companies Act, 1956, have the meanings respectively assigned to them in that Act.”.

3. Insertion of new Section 15A.—

After Section 15 of the principal Act, the following section shall be inserted, namely:—

“15A. Power to investigate into the affairs of a company in liquidation.—

(1) Where a company, owning an industrial undertaking is being wound up by or under the supervision of the High Court, and the business of such company is not being continued, the Central Government may, if it is of opinion that it is necessary, in the interests of the general public and, in particular, in the interests of production, supply or distribution of articles or class of articles relatable to the concerned scheduled industry, to investigate into the possibility of running or re-starting the industrial undertaking, make an application to the High Court praying for permission to make, or cause to be made, an investigation into such possibility by such person or body of persons as that Government may appoint for the purpose.

(2) Where an application is made by the Central Government under sub-section (1), the High Court shall, notwithstanding anything contained in the Companies Act, 1956, or in any other law for the time being in force, grant the permission prayed for.”.

4. In Section 18 of the principal Act in sub-section (1), after the word and figures “section 15”, the words, figures and letter “or Section 15A” shall be inserted.

5. Insertion of new Section 18AA.—

After Section 18A of the principal Act, the following section shall be inserted, namely:—

“18AA. Power to take over industrial undertakings without investigation under certain circumstances.— (1) Without prejudice to any other provision of this Act, if, from the documentary or other evidence in its possession, the Central Government is satisfied, in relation to an industrial undertaking, that—

(a) the persons in charge of such industrial undertaking have, by reckless investments or creation of incumbrances on the assets of the industrial undertaking, or by diversion of funds, brought about a situation which is likely to affect the production of articles manufactured or produced in the industrial undertaking, and that immediate action is necessary to prevent such a situation; or

(b) it has been closed for a period of not less than three months (whether by reason of the voluntary winding up of the company owning the industrial undertaking or for any other reason) and such closure is prejudicial to the concerned scheduled industry and that the financial condition of the company owning the industrial under-

*Received the assent of the President on 24-12-1971. Act published in Gaz. of India; 24-12-1971, Pt. II-S. 1, Ext. P. 745.

taking and the condition of the plant and machinery of such undertaking are such that it is possible to restart the undertaking and such re-starting is necessary in the interests of the general public, it may, by a notified order, authorise any person or body of persons (hereafter referred to as the "authorised person") to take over the management of the whole or any part of the industrial undertaking or to exercise in respect of the whole or any part of the undertaking such functions of control as may be specified in the order.

(2) The provisions of sub-section (2) of Section 18A shall, as far as may be apply to a notified order made under sub-section (1) as they apply to a notified order made under sub-section (1) of Section 18A.

(3) Nothing contained in sub-section (1) and sub-section (2) shall apply to an industrial undertaking owned by a company which is being wound up by or under the supervision of the Court.

(4) Where any notified order has been made under sub-section (1), the person or body of persons having, for the time being, charge of the management or control of the industrial undertaking, whether by or under the orders of any court or any contract, instrument or otherwise, shall, notwithstanding anything contained in such order, contract, instrument or other arrangement, forthwith make over the charge of management or control, as the case may be, of the industrial undertaking to the authorised person.

(5) The provisions of Sections 18B to 18E, (both inclusive) shall, as far as may be, apply to, or in relation to, the industrial undertaking in respect of which a notified order has been made under sub-section (1), as they apply to an industrial undertaking in relation to which a notified order has been issued under Section 18A.

6. Insertion of new Chapters IIIA, IIIAB and IIAC.— After Chapter IIIA of the principal Act, the following Chapters shall be inserted, namely:—

**'CHAPTER IIIA
MANAGEMENT OR CONTROL OF INDUSTRIAL UNDERTAKINGS OWNED
BY COMPANIES IN LIQUIDATION**

18FA. Power of Central Government to authorise, with the permission of the High Court, persons to take over management or control of industrial undertakings.—

(1) If the Central Government is of opinion that there are possibilities of running or re-starting an industrial undertaking, in relation to which an investigation has been made under Section 15A, and that such industrial undertaking should be run or re-started, as the case may be, for maintaining or increasing the production, supply or distribution of articles or class of articles relating to the Scheduled industry, needed by the general public, that Government may make an application to the High Court pray-

ing for permission to appoint any person or body of persons to take over the management of the industrial undertaking or to exercise in respect of the whole or any part of the industrial undertaking such functions of control as may be specified in the application.

(2) Where an application is made under sub-section (1), the High Court shall make an order empowering the Central Government to authorise any person or body of persons (hereinafter referred to as the "authorised persons") to take over the management of the industrial undertaking or to exercise functions of control in relation to the whole or any part of the industrial undertaking (hereinafter referred to as the "concerned part") for a period not exceeding five years:

Provided that if the Central Government is of opinion that it is expedient in the interests of the general public that the authorised person should continue to manage the industrial undertaking, or continue to exercise functions of control in relation to the concerned part, as the case may be, after the expiry of the period of five years aforesaid, it may make an application to the High Court for the continuance of such management or functions of control, for such period, not exceeding two years at a time, as may be specified in the application and thereupon the High Court may make an order permitting the authorised person to continue to manage the industrial undertaking or to exercise functions of control in relation to the concerned part:

Provided further that the total period of such continuance (after the expiry of the initial period of five years) shall not, in any case, be permitted to exceed ten years.

(3) Where an order has been made by the High Court under sub-section (2), the High Court shall direct the Official Liquidator or any other person having, for the time being, charge of the management or control of the industrial undertaking, whether by or under the orders of any court, or any contract or instrument or otherwise, to make over the management of such undertaking or the concerned part, as the case may be, to the authorised person and thereupon the authorised person shall be deemed to be the Official Liquidator in respect of the industrial undertaking or the concerned part, as the case may be.

(4) Before making over the possession of the industrial undertaking or the concerned part to the authorised person, the Official Liquidator shall make a complete inventory of all the assets and liabilities of the industrial undertaking or the concerned part, as the case may be, in the manner specified in Section 18FG and deliver a copy of such inventory to the authorised person, who shall, after verifying the correctness thereof, sign on the duplicate copy thereof as evidence of the receipt of the inventory by him.

(5) On taking over the management of the industrial undertaking, or on the commencement of the exercise of functions of control in relation to the concerned part, the authorised person shall take immediate steps to run the industrial undertaking or the concerned part as to ensure the maintenance of production.

(6) The authorised person may, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, raise any loan for the purpose of running the industrial undertaking or the concerned part, and may, for that purpose, create a floating charge on the current assets of the industrial undertaking or the concerned part, as the case may be.

(7) Where the authorised person is of opinion that the replacement or repair of any machinery of the industrial undertaking or the concerned part is necessary for the purpose of efficient running of the industrial undertaking or such part, he shall, on such terms and conditions and subject to such limitations or restrictions as may be prescribed, make such replacement or repair, as the case may be.

(8) The loan obtained by the authorised person shall be recovered from the assets of the industrial undertaking or the concerned part, in such manner and subject to such conditions as may be prescribed.

(9) For the purpose of running the industrial undertaking, or exercising functions of control in relation to the concerned part, the authorised person may employ such of the former employees of the industrial undertaking whose services became discharged by reason of the winding up of the company owning such undertaking and every such person employed by the authorised person shall be deemed to have entered into a fresh contract of service with the company.

(10) The proceedings in the winding up of the company in so far as they relate to—

(a) the industrial undertaking, the management of which has been taken over by the authorised person under this section, or

(b) the concerned part in relation to which any function of control is exercised by the authorised person under this section, shall, during the period of such management or control, remain stayed, and in computing the period of limitation for the enforcement of any right, privilege, obligation or liability in relation to such undertaking or the concerned part, the period during which such proceedings remained stayed shall be excluded.

CHAPTER IIIAB

POWER TO PROVIDE RELIEF TO CERTAIN INDUSTRIAL UNDERTAKINGS
18FB. Power of Central Government to make certain declarations in relation to industrial undertakings, the management or

control of which has been taken over under Section 18A, Section 18AA or Sec. 18FA.—

(1) The Central Government may, if it is satisfied, in relation to an industrial undertaking or any part thereof, the management or control of which has been taken over under Section 18A, whether before or after the commencement of the Industries (Development and Regulation) Amendment Act, 1971, or under Section 18AA or Section 18FA, that it is necessary so to do in the interests of the general public with a view to preventing fall in the volume of production of any scheduled industry, it may, by notified order, declare that—

(a) all or any of the enactments specified in the Third Schedule shall not apply or shall apply with such adaptations, whether by way of modification, addition or omission (which does not, however, affect the policy of the said enactments) to such industrial undertaking, as may be specified in such notified order, or

(b) the operation of all or any of the contracts, assurances of property, agreements, settlements, awards, standing orders or other instruments in force (to which such industrial undertaking or the company owning such undertaking is a party or which may be applicable to such industrial undertaking or company) immediately before the date of issue of such notified order shall remain suspended or that all or any of the rights, privileges, obligations and liabilities accruing or arising thereunder before the said date, shall remain suspended or shall be enforceable with such adaptations and in such manner as may be specified in the notified order.

(2) The notified order made under sub-section (1) shall remain in force, in the first instance, for a period of one year, but the duration of such notified order may be extended from time to time by a further notified order by a period not exceeding one year at a time;

Provided that no such notified order shall, in any case, remain in force—

(a) after the expiry of the period for which the management of the industrial undertaking was taken over under S. 18A, Section 18AA or Section 18FA, or

(b) for more than five years in the aggregate from the date of issue of the first notified order, whichever is earlier.

(3) Any notified order made under sub-section (1) shall have effect notwithstanding anything to the contrary contained in any other law, agreement or instrument or any decree or order of a court, tribunal, officer or other authority or of any submission, settlement or standing order.

(4) Any remedy for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1) and suspended or modified by a notified order made under that sub-section shall, in accordance with the terms of the notified

order, remain suspended or modified, and all proceedings relating thereto pending before any court, tribunal, officer or other authority shall accordingly remain stayed or be continued subject to such adaptations, so, however, that on the notified order ceasing to have effect—

(a) any right, privilege, obligation or liability so remaining suspended or modified shall become revived and enforceable as if the notified order had never been made;

(b) any proceeding so remaining stayed shall be proceeded with, subject to the provisions of any law which may then be in force, from the stage which had been reached when the proceedings became stayed.

(5) In computing the period of limitation for the enforcement of any right, privilege, obligation or liability referred to in clause (b) of sub-section (1), the period during which it or the remedy for the enforcement thereof remained suspended shall be excluded.

CHAPTER IIIAC

LIQUIDATION OR RECONSTRUCTION OF COMPANIES

18FC. Power of Central Government to call for report on the affairs and working of managed company.— Where the management or control of an industrial undertaking has been taken over under Section 18A, whether before or after the commencement of the Industries (Development and Regulation) Amendment Act, 1971, or under Section 18AA or Section 18FA, the Central Government may, at any time during the continuance of such management or control, call for a report from the authorised person on the affairs and working of the industrial undertaking and in submitting the report the authorised person shall take into account the inventory and the lists of members and creditors prepared under Section 18FG.

18FD. Decision of Central Government in relation to managed company.— (1) If, on receipt of the report submitted by the authorised person, the Central Government is satisfied,—

(a) in relation to the company owning the industrial undertaking, which is not being wound up by the High Court, that the financial condition and other circumstances of the company are such that it is not in a position to meet its current liabilities out of its current assets, that Government may, if it considers necessary or expedient in the interests of the general public so to do, by order, decide that the industrial undertaking should be sold as a running concern as provided in Section 18FE and proceedings should simultaneously be started for the winding up, by the High Court, of the company;

(b) in relation to the company, owning the industrial undertaking, which is being wound up by the High Court, that its assets

and liabilities are such that in the interests of its creditors and contributors the industrial undertaking should be sold as a running concern as provided in Section 18FE, it may, by order, decide accordingly.

(2) Notwithstanding anything contained in sub-section (1), if, on receipt of the report submitted by the authorised person, the Central Government is satisfied that—

(a) in the interests of the general public, or

(b) in the interests of the share-holders, or

(c) to secure the proper management of the company owning the industrial undertaking,

it is necessary so to do, that Government may, by order, decide to prepare a scheme for the reconstruction of the company owning the industrial undertaking:

Provided that no such scheme shall be prepared in relation to a company which is being wound up by or under the supervision of the High Court, except with the previous permission of that Court.

(3) The powers exercisable by the Central Government under Section 18F, in relation to an undertaking taken over under Section 18A, shall also be exercisable in relation to an undertaking taken over under Section 18AA or Section 18FA, but such powers shall not be exercised after the making of an order under sub-section (1) or, as the case may be, under sub-section (2) of this section.

18FE. Provisions where Government decides to follow the course of action specified in Section 18FD (1).— (1) The provisions hereinafter laid down shall apply where the Central Government decides that the course of action specified in sub-sec. (1) of Section 18FD should be followed, namely:—

(a) the decision of the Central Government that the course of action specified in clause (a) of sub-section (1) of Section 18FD should be followed in relation to a company owning an industrial undertaking shall be deemed to be a ground specified in Section 433 of the Companies Act, 1956, on which the company may be wound up by the High Court;

(b) the authorised person shall, as soon as may be, after the decision specified in clause (a) of sub-section (1) of Section 18FD has been taken by the Central Government, present an application to the High Court for the winding up of the company owning the industrial undertaking;

(c) when an application is made by the authorised person, under clause (b), for the winding up, by the High Court, of the company owning the industrial undertaking, the High Court shall order the winding up of the company and shall, notwithstanding anything contained in the Companies Act, 1956, appoint the authorised person as the Official Liquidator in relation to such undertaking;

(d) whenever the Central Government decides under clause (b) of sub-section (1) of Section 18FD that the industrial undertaking should be sold as a running concern, it shall cause a copy of its decision to be laid before the High Court;

(e) until the industrial undertaking referred to in clause (a) or clause (b) of sub-section (1) of Section 18FD is sold or purchased in pursuance of this section, the authorised person shall continue to function as the Official Liquidator in relation to the said undertaking in the winding up proceedings of the company, and, thereafter the Official Liquidator appointed by the Central Government under Section 448 of the Companies Act, 1956, shall take over and function as the Official Liquidator in the said proceedings.

(2) The authorised person shall make a report to the Central Government as to what should be the reserve price for the sale of the industrial undertaking as a running concern.

(3) In making a report under sub-section (2), the authorised person shall have regard to—

(a) the financial condition of the company owning the industrial undertaking or the date on which the order under Section 18FD is made—

(i) as disclosed in its books of account;

(ii) as disclosed in its balance-sheet and profit and loss account during a period of five years immediately preceding the said date;

(b) the condition and nature of the plant, machinery, instruments and other equipment from the point of view of their suitability for profitable use in the running of the industrial undertaking;

(c) the total amount of liability on account of secured and unsecured debts including overdrafts, if any, drawn on banks, liabilities on account of terminal benefits to the employees and other borrowings and other liabilities of the company; and

(d) other relevant factors including the factor that the industrial undertaking will be sold free from all incumbrances.

(4) Notice of the reserve price determined by the authorised person shall be given in such manner as may be prescribed to the members and creditors of the company owning such industrial undertaking to make representations within a specified time to the Central Government through the authorised person and the Central Government shall after considering the representations received and the report of the authorised person, determine the reserve price.

(5) The authorised person shall thereafter, with the permission of the High Court, invite tenders from the public in such manner as may be determined by the High Court for the sale of the industrial undertaking as a running concern subject to the condition that it will be sold to the person offering the highest price which shall

not be less than the reserve price determined under sub-section (4):

Provided that the High Court shall not refuse to grant such permission if it is satisfied that the company is not in a position to meet its current liabilities out of its current assets.

(6) The industrial undertaking shall be sold to the highest bidder, as a running concern, only if the price offered by him therefor is not less than the reserve price.

(7) Where no offer of price is equal to, or more than, the reserve price, the industrial undertaking shall be purchased by the Central Government at the reserve price.

(8) (a) The amount realised from the sale of the industrial undertaking as a running concern together with any other sum which may be realised from any contributory, purchaser or any other person from whom any money is due to the company shall be utilised in accordance with the provisions of the Companies Act, 1956, in discharging the liabilities of the company and distributing the balance, if any, amongst the members of the company.

(b) In other respects, the provisions of the Companies Act, 1956, relating to the winding up of a company by the High Court shall, as far as may be, apply.

(9) When an industrial undertaking is sold to any person under sub-section (6), or purchased by the Central Government under sub-section (7), there shall be transferred to and vested in the purchaser, free from all incumbrances, all such assets relating to the industrial undertaking as are referred to in sub-clause (i) of clause (a) of Section 18FG and existing at the time of the sale or purchase.

18FF. Provisions where Government decides to follow the course of action specified in Section 18FD (2).— (1) Where in any case the Central Government decides that the course of action specified in sub-section (2) of Section 18FD should be followed, it shall, subject to the provisions of that sub-section, cause to be prepared, by the authorised person, a scheme for the reconstruction of the company, owning the industrial undertaking, in accordance with the provisions hereinafter contained and the authorised person shall submit the same for the approval of that Government.

(2) The scheme for the reconstruction of the company owning the industrial undertaking may contain provisions for all or any of the following matters, namely:—

(a) the constitution, name and registered office, the capital, assets, powers, rights, interests, authorities and privileges, the liabilities, duties and obligations of the company on its reconstruction;

(b) any change in the Board of directors or the appointment of a new Board of directors of the company on its reconstruction and the authority by whom, the manner in which and the other terms and conditions on

which, such change or appointment shall be made and in the case of appointment of a new Board of directors or of any director, the period for which such appointment shall be made;

(c) the vesting of controlling interest, in the reconstructed company, in the Central Government either by the appointment of additional directors or by the allotment of additional shares;

(d) the alteration of the memorandum and articles of association of the company, on its reconstruction, to give effect to such reconstruction;

(e) subject to the provisions of the scheme, the continuation by or against the company, on its reconstruction, of any action or proceedings pending against the company immediately before the date of its reconstruction;

(f) the reduction of the interest or rights which the members and creditors have in or against the company before its reconstruction to such extent as the Central Government may consider necessary in the interests of the general public or in the interests of the members and creditors or for the maintenance of the business of the company;

Provided that nothing contained in this clause shall be deemed to authorise the reduction of the interest or rights of any creditor (including Government) in respect of any loan or advance made by that creditor to the company after the date on which the management of the industrial undertaking of the company has been taken over under Section 18A, Section 18AA, or Section 18FA;

(g) the payment in cash or otherwise to the creditors in full satisfaction of their claim—

(i) in respect of their interest or rights in or against the company before its reconstruction; or

(ii) where their interest or rights in or against the company has or have been reduced under clause (f), in respect of such interest, or rights as so reduced;

(h) the allotment to the members of the company for shares held by them therein before its reconstruction [whether their interest in such shares has been reduced under clause (f) or not], of shares in the company on its reconstruction and where it is not possible to allot shares to any members, the payment in cash to those members in full satisfaction of their claim—

(1) in respect of their interest in shares in the company before its reconstruction; or

(2) where such interest has been reduced under clause (f), in respect of their interest in shares as so reduced;

(i) the offer by the Central Government to acquire by negotiations with the members of the company their respective shares on payment in cash to those members who may volunteer to sell their shares to

the Central Government in full satisfaction of their claim—

(1) in respect of their interest in shares in the company before its reconstruction; or

(2) where such interest has been reduced under clause (f), in respect of their interest in shares as so reduced;

(j) the conversion of any debentures issued by the company after the taking over of the management of the company under Section 18A or Section 18AA or Sec. 18FA or of any loans obtained by the company after that date or of any part of such debentures or loans, into shares in the company and the allotment of those shares to such debenture-holders or creditors, as the case may be;

(k) the increase of the capital of the company by the issue of new shares and the allotment of such new shares to the Central Government;

(l) the continuance of the services of such of the employees of the company as the Central Government may specify in the scheme in the company itself, on its reconstruction, on such terms and conditions as the Central Government thinks fit;

(m) notwithstanding anything contained in clause (l), where any employees of the company whose services have been continued under clause (l) have, by notice in writing given to the company at any time before the expiry of one month next following the date on which the scheme is sanctioned by the High Court, intimated their intention of not becoming employees of the company, on its reconstruction, the payment to such employees and to other employees whose services have not been continued on the reconstruction of the company, of compensation, if any, to which they are entitled under the Industrial Disputes Act, 1947, and such pension, gratuity, provident fund and other retirement benefits ordinarily admissible to them under the rules or authorisations of the company immediately before the date of its reconstruction;

(n) any other terms and conditions for the reconstruction of the company;

(o) such incidental, consequential and supplemental matters as are necessary to secure that the reconstruction of the company shall be fully and effectively carried out.

(3) (a) A copy of the scheme, as approved by the Central Government, shall be sent in draft to the company, to the registered trade unions, if any, of which the employees of the company are members and to the creditors thereof for suggestions and objections, if any, within such period as the Central Government may specify for this purpose.

(b) The Central Government may make such modifications, if any, in the draft scheme as it may consider necessary in the light of the suggestions and objections received from the company, from the registered trade unions of which the employees of

the company are members and from any members or creditors of the company.

(4) The scheme shall thereafter be placed before the High Court for its sanction and the High Court, if satisfied that the scheme is in the interests of the general public or in the interests of the share-holders or for securing the proper management of the company and that the scheme is designed to be fair and reasonable to the members and creditors of the company, may, after giving a reasonable opportunity to the company and to its members and creditors of showing cause, sanction the scheme without any modification or with such modifications as it may consider necessary.

(5) The scheme, as so sanctioned by the High Court, shall come into force on such date as that Court may specify in this behalf.

Provided that different dates may be specified for different provisions of the scheme.

(6) The sanction accorded by the High Court under sub-section (4) shall be conclusive evidence that all the requirements of this section relating to the reconstruction of the company have been complied with, and a copy of the sanctioned scheme certified by the High Court to be a true copy thereof, shall, in all legal proceedings (whether original or in appeal or otherwise), be admitted as evidence to the same extent as the original scheme.

(7) On and from the date of the coming into operation of the scheme or any provision thereof, the scheme or such provision shall be binding on the company and also on all the members and other creditors and employees of the company and on any other person having any right or liability in relation to the company.

(8) On the coming into operation of the scheme or any provision thereof, the authorised person shall cease to function, and the management of the reconstructed company shall be assumed by the Board of directors as provided in the scheme.

(9) Copies of the scheme shall be laid before each House of Parliament, as soon as may be, after the scheme has been sanctioned by the Court.

(10) The provisions of this section and of any scheme made thereunder shall have effect notwithstanding anything contained in Sections 391 to 394A (both inclusive) of the Companies Act, 1956.

18FG. Preparation of inventory of assets and liabilities and list of members and creditors of managed company.— For the purposes of this Act, the authorised person shall, as soon as may be, after taking over the management of the industrial undertaking of a company under Section 18A or Section 18AA or Section 18FA,—

(a) prepare a complete inventory of—

(i) all properties, movable and immovable, including lands, buildings, works,

workshops, stores, instruments, plant, machinery, automobiles and other vehicles, stocks of materials in the course of production, storage or transit, raw materials, cash balances, cash in hand, deposits in bank or with any other person or body or on loan, reserve funds, investments and book debts and all other rights and interests arising out of such property as were immediately before the date of taking over of the industrial undertaking in the ownership, possession, power or control of the company, whether within or without India; and all books of account, registers, maps, plans, sections, drawings, records, documents or titles of ownership of property, and all other documents of whatever nature relating thereto; and

(ii) all borrowings, liabilities and obligations of whatever kind of the company including liability on account of terminal benefits to its employees subsisting immediately before the said date;

(b) prepare separately a list of members, and a list of creditors, of such company as on the date of taking over of the management of the industrial undertaking showing separately in the list of creditors, the secured creditors and the unsecured creditors;

Provided that where the management of the industrial undertaking of a company has been taken over under the said Section 18A before the commencement of the Industries (Development and Regulation) Amendment Act, 1971, the aforesaid functions shall be performed by the authorised person within six months from such commencement.

18FH. Stay of suits and other proceedings.— In the case of a company in respect of which an order under Sec. 18FD has been made, no suit or other legal proceeding shall be instituted or continued against the company except with the previous permission of the Central Government or any officer or authority authorised by that Government in this behalf.

7. Amendment of Section 25.— In sub-section (1) of Section 25 of the principal Act, for the word, figures and letter "and 18A", the word, figures and letters "18A, 18AA and 18FA" shall be substituted.

8. Insertion of new Section 29D.— After Section 29C of the principal Act, the following section shall be inserted, namely:—

29D. Debts incurred by the authorised person to have priority.— Every debt arising out of any loan obtained by the authorised person for carrying on the management of, or exercising functions of control in relation to, an industrial undertaking or part thereof, the management of which has been taken over under Section 18A or Section 18AA or Section 18FA,—

(a) shall have priority over all other debts, whether secured or unsecured, incur-

red before the management of such industrial undertaking was taken over;

(b) shall be a preferential debt within the meaning of Section 530 of the Companies Act, 1956,

and such debts shall rank equally among themselves and be paid in full out of the assets of the industrial undertaking unless such assets are insufficient to meet them, in which case they shall abate in equal proportions."

9. Amendment of Section 30.— In section 30 of the principal Act, in sub-section (2), after clause (p), the following clause shall be inserted, namely:—

"(pp) any matter which is to be or may be prescribed for giving effect to the provisions of Chapter IIIA or Chapter IIIC;"

10. Insertion of new Schedule.— In the principal Act, after the Second Schedule, the following Schedule shall be inserted, namely:—

"THE THIRD SCHEDULE

(See section 18FB)

1. The Industrial Employment (Standing Orders) Act, 1946.

2. The Industrial Disputes Act, 1947.

3. The Minimum Wages Act, 1948."

11. Repeal and savings.— (1) The Industries (Development and Regulation) Amendment Ordinance, 1971 and the Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Act, 1967 are hereby repealed.

(2) Notwithstanding such repeal,—

(a) anything done or any action taken under the principal Act as amended by the Ordinance so repealed, shall have effect as if it were done or taken under the corresponding provisions of the principal Act as amended by this Act;

(b) anything done or any action taken or any order, rule or appointment made, scheme prepared or reserve price fixed under the Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Act, 1967, before the commencement of the Ordinance so repealed shall, in so far as it is not inconsistent with the provisions of the Industries (Development and Regulation) Act, 1951, as amended by this Act, be deemed to have been done, taken, made, prepared or fixed under the corresponding provisions of the Industries (Development and Regulation) Act, 1951, as so amended, as if the said Act, as so amended, were in force on the date on which such thing was done, action was taken, order, rule or appointment was made, scheme was prepared and reserve price was fixed and any proceeding commenced under the Cotton Textile Companies (Management of Undertakings and Liquidation or Reconstruction) Act, 1967, which was pending immediately before the commencement of the Ordinance so repealed may be continued from the stage which was reached in such

proceeding immediately before such commencement as if such proceedings were commenced under the corresponding provisions of the Industries (Development and Regulation) Act, 1951, as amended by this Act.

THE UNION TERRITORIES TAXATION LAWS (AMENDMENT) ACT, 1971

[Act No. 73 of 1971]*

An Act further to amend certain taxation laws in the Union territories.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India, as follows:—

1. Short title, extent and commencement.— (1) This Act may be called THE UNION TERRITORIES TAXATION LAWS (AMENDMENT) ACT, 1971.

(2) It extends to all the Union Territories.

(3) It shall come into force on such date as the Central Government may, by notification in the official gazette, appoint.

2. Amendment of certain taxation laws.— The taxation laws as in force in each of the Union Territories, mentioned in the Schedule, shall have effect subject to the amendments specified therein:

Provided that any such amendment of a taxation law relating to the imposition of tax on the sale or purchase of goods declared to be of special importance under Section 14 of the Central Sales Tax Act, 1956, shall be subject to the condition that in no case the amount of tax together with surcharge payable in respect thereof under the said taxation law shall exceed the tax calculated at the maximum rate prescribed under clause (a) of S. 15 of the said Act.

3. Levy and collection of additional duty, tax or surcharge.— Save as otherwise provided, the additional duty or tax or surcharge leviable or chargeable under the relevant taxation law, amended as aforesaid, shall be levied and collected in the same manner as the duty or tax is levied and collected under the said taxation law and the provisions of that taxation law and the rules thereunder, as far as may be applicable in this behalf, shall apply accordingly.

THE SCHEDULE

(See Section 2)

I. DELHI

1. The Indian Stamp Act, 1899 (2 of 1899) After Section 8A, insert:—

3B. Instrument chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule 1A, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62 (a), shall, in addition to such duty be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under sub-section

*Act published in Gaz. of India; 24-12-71, Pt. II-S. 1, Ext. P. 761.

tion (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

2. The U. P. Entertainment and Betting Tax Act, 1937 (U. P. Act 8 of 1937)

(a) After Section 3, insert:—

"3A. Surcharge on payment for admission to entertainment.— Notwithstanding anything contained in Section 3, the amount of entertainment tax payable under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of ten paise for every ticket of admission to an entertainment (including a complimentary ticket):

Provided that where the proprietor is allowed to pay the entertainment tax in accordance with the provisions of sub-s. (2) of Section 4, the surcharge shall be levied and paid at the rate of five per cent of the amount of entertainment tax computed under sub-section (2) of the said sec. 4."

(b) After section 11, insert:—

"11A. Surcharge on totalisator.— Notwithstanding anything contained in Section 11, the amount of the totalisator tax computed at the rate specified in the said Section 11 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

(c) After section 14, insert:—

"14A. Surcharge on betting.— Notwithstanding anything contained in Sec. 14, the amount of betting tax computed at the rate specified in the said Section 14 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

(d) After section 17, insert:—

"17A. Proceeds of surcharge to be appropriated for purposes of the Union.— Notwithstanding anything contained in Sec. 184 of the Delhi Municipal Corporation Act, 1957, the whole proceeds of the surcharge on entertainment and betting taxes levied under Section 3A, Section 11A or Sec. 14A shall form part of the Consolidated Fund of India and be appropriated for purposes of the Union."

3. The Bengal Finance (Sales Tax) Act, 1941 (Bengal Act 6 of 1941)

After section 5A, insert:—

"5AA. Levy of surcharge on sales of goods.— The amount of tax payable by a dealer under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

4. The Delhi Motor Vehicles Taxation Act, 1962 (57 of 1962)

After section 3, insert:—

"3A. Levy of surcharge on certain motor vehicles.— (1) There shall also be levied and collected on all motor vehicles

mentioned at serial No. I, serial No. VII and serial No. VIII of Part A of Schedule I, which are used or kept for use in Delhi, a surcharge for purposes of the Union calculated at the rate of ten per centum of the amount of the tax specified against each.

(2) Notwithstanding anything contained in Section 20, the whole proceeds of the surcharge levied under sub-section (1) shall form part of the Consolidated Fund of India and be appropriated for purposes of the Union."

II. MANIPUR

1. The Indian Stamp Act, 1899 (2 of 1899)

After section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule I, not being an instrument mentioned in Art. No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under sub-s. (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

2. The Assam Motor Vehicles Taxation Act, 1936 (Assam Act IX of 1936)

After section 4, insert:—

"4A. Levy of surcharge on certain motor vehicles.— The amount of tax computed at the rate specified in the First Schedule to this Act in relation to motor vehicles mentioned at Article No. I and items (A) and (B) of Article No. II of Part A of the said Schedule shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

3. The Assam Amusements and Betting Tax Act, 1939 (Assam Act VI of 1939).

(a) After section 3A, insert:—

"3B. Surcharge on payment for admission to entertainment.— The amount of entertainment tax payable under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of ten paise for every ticket of admission to an entertainment (including a free or complimentary pass or ticket).

Provided that where the proprietor is allowed to pay the entertainment tax in accordance with the provisions of sub-section (3) of Section 3, the surcharge shall be levied and paid at the rate of five per centum of the amount of tax computed under sub-section (3) of the said Section 3."

(b) After section 15, insert:—

"15A. Surcharge on totalisator.— The amount of the totalisator tax computed at the rate specified in Section 15 shall be in-

creased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

(c) After section 13, insert:—

"18A. Surcharge on betting.— The amount of betting tax computed at the rate specified in Section 18 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

4. The Assam Sales Tax Act, 1947 (Assam Act XVII of 1947)

After section 5, insert:—

"5A. Levy of surcharge on sales of goods.— The amount of tax payable by a dealer under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

5. The Manipur (Sales of Motor Spirit and Lubricants) Taxation Act, 1962 (55 of 1962)

After section 3, insert:—

"3A. Levy of surcharge.— Notwithstanding anything contained in Section 3 the amount of tax payable by a dealer under the said section shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

III. TRIPURA

1. The Indian Stamp Act 1899 (2 of 1899)

After section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule I, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under sub-sec. (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

2. The Bengal Amusements Tax Act, 1922 (Bengal Act V of 1922)

(a) After section 3, insert:—

"3A. Surcharge on payment for admission to entertainment.— The amount of entertainment tax payable under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of ten paise for every ticket of admission to an entertainment (including a free or complimentary pass or ticket):

Provided that where the proprietor is allowed to pay the entertainment tax in accordance with the provisions of sub-s. (4) of Section 3, the surcharge shall be levied and paid at the rate of five per cent. of the amount of tax computed under sub-sec. (4) of the said Section 3."

(b) After section 15, insert:—

"15A. Surcharge on totalisator.— The amount of the totalisator tax computed at the rate specified in Section 15 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

(c) After Section 18, insert:—

"18A. Surcharge on betting.— The amount of betting tax computed at the rate specified in Section 18 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

IV. ANDAMAN AND NICOBAR ISLANDS

The Indian Stamp Act, 1899 (2 of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule IA, shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under subsection (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

V. LACCADIVE, MINICOY AND AMINDIVI ISLANDS

The Indian Stamp Act, 1899 (2 of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule I, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under subsection (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

VI. DADRA AND NAGAR HAVELI

The Indian Stamp Act, 1899 (2 of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule I, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under sub-

section (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

VII. GOA, DAMAN AND DIU

1. The Indian Stamp Act, 1899 (2 of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule IA, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under subsection (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

2. The Punjab Motor Vehicles Taxation

Act, 1924 (Punjab Act IV of 1924)

After Section 3, insert:—

"3A. Levy of surcharge on certain motor vehicles.— There shall also be levied and collected on all motor vehicles mentioned at Serial No. (I) and Serial No. (VI) under the heading "A Motor Vehicle fitted solely with pneumatic tyres" of the notification of the Government of Goa, Daman and Diu in the Home Department No. HD-22-11557/64, dated 30th December, 1964, a surcharge for purposes of the Union calculated at the rate of ten per centum of the amount of the tax specified against each in the said notification."

3. The Goa, Daman and Diu Entertainment Tax Act, 1964 (Goa Act 2 of 1964)

After Section 3A, insert:—

"3B. Surcharge on payment for admission to entertainment.— The amount of entertainment tax computed at the rate specified in Section 3 shall be increased by a surcharge for purposes of the Union calculated at the rate of ten paise for every ticket of admission to any entertainment (including a complimentary ticket):

Provided that where the proprietor is allowed to pay the entertainment tax in accordance with the provisions of sub-section (2) of Section 4, the surcharge shall be levied and paid at the rate of five per centum of the amount of entertainment tax computed under sub-section (2) of the said Section 4."

4. The Goa, Daman and Diu Sales Tax Act, 1964 (Goa Act 4 of 1964)

After Section 7, insert:—

"7A. Levy of surcharge on sales of goods.— The amount of tax payable by a dealer under this Act shall be increased by a surcharge for purposes of the Union

calculated at the rate of two paise per rupee of that amount."

VIII. PONDICHERRY

1. The Indian Stamp Act, 1899 (2 of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule I, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty, be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under subsection (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief" whether with or without any other design, picture or inscription."

2. The Pondicherry Motor Vehicles Taxation Act, 1967 (Pondicherry Act 5 of 1967)

After Section 4, insert:—

"4A. Levy of surcharge on certain motor vehicles.— The amount of tax computed at the rate specified by notification by the Government under Section 3 in relation to motor vehicles mentioned at Serial No. 1 and Serial No. 7 of Schedule I which are being used on any public road in Pondicherry, shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount, and likewise the amount of tax payable for a temporary licence for a period not exceeding thirty days at a time in respect of the aforesaid motor vehicles shall be increased by a surcharge for purposes of the Union calculated at the rate of ten per centum of that amount."

3. The Pondicherry General Sales Tax Act, 1967 (Pondicherry Act 6 of 1967)

After Section 8, insert:—

"8A. Levy of surcharge on sales of goods.— The amount of tax payable by a dealer under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

IX. CHANDIGARH

1. The Indian Stamp Act, 1899 (II of 1899)

After Section 3A, insert:—

"3B. Instruments chargeable with additional duty.— (1) Every instrument chargeable with duty under Section 3 read with Schedule IA, not being an instrument mentioned in Article No. 13, 14, 27, 37, 47, 49, 52, 53 or 62(a), shall, in addition to such duty be chargeable for purposes of the Union with a duty of ten paise.

(2) The additional duty with which any instrument is chargeable under subsection (1) shall be paid and such payment shall be indicated on such instrument by means of adhesive stamps bearing the inscription "refugee relief", whether with or

without any other design, picture or inscription."

2. The Punjab Motor Spirit (Taxation of Sales) Act, 1939 (Punjab Act I of 1939)

After Section 3, insert:—

"3A. Imposition of surcharge.— The amount of tax payable by a retail dealer under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

3. The Punjab General Sales Tax Act, 1948 (Punjab Act XLVI of 1948)

After Section 5, insert:—

"5A. Levy of surcharge on sales of goods.—The amount of tax payable by a dealer under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of two paise per rupee of that amount."

4. The Punjab Passengers and Goods Taxation Act, 1952 (Punjab Act XVI of 1952)

After Section 3, insert:—

"3A. Levy of surcharge.— The amount of tax payable in respect of all passengers carried by motor vehicles shall be increased by a surcharge for purposes of the Union calculated at the rate of five per centum of the value of the fare, if the value of the fare is one rupee or more, the amount of surcharge being calculated to the nearest multiple of five paise by ignoring two paise or less and counting more than two paise as five paise."

5. The Entertainment Duty Act, 1955 (Punjab Act XVI of 1955)

After Section 3, insert:—

"3A. Surcharge on payment for admission to entertainment.— Notwithstanding anything contained in Section 3, the amount of entertainment duty payable under this Act shall be increased by a surcharge for purposes of the Union calculated at the rate of ten paise for every ticket of admission to an entertainment (including a complimentary ticket):

Provided that where the proprietor is allowed to pay the entertainment tax in accordance with the provisions of sub-section (2) of Section 10, the surcharge shall be levied at the rate of five per centum of the amount of entertainment tax computed under sub-section (2) of the said Section 10."

THE PERSONAL INJURIES (EMERGENCY PROVISIONS) AMENDMENT ACT, 1971

[Act No. 74 of 1971]*

(25th December, 1971)

An Act to amend the Personal Injuries (Emergency Provisions) Act, 1962.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

*Received the assent of the President on 25-12-1971. Act published in Gaz. of India; 27-12-1971, Pt. II-S. 1, Ext. P. 798.

1. Short title.— This Act may be called THE PERSONAL INJURIES (EMERGENCY PROVISIONS) AMENDMENT ACT, 1971.

2. Amendment of Section 2.—In Section 2 of the Personal Injuries (Emergency Provisions) Act, 1962 (hereinafter referred to as the principal Act), for clause (5), the following clause shall be substituted, namely:—

"(5) 'period of emergency' means, in relation to the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution,—

(i) on the 26th day of October, 1962, the period beginning with the 26th day of October, 1962, and ending with the 10th day of January, 1968, that is to say, the date on which the said Emergency was declared, by notification of the Government of India in the Ministry of Home Affairs, No. G.S.R. 93, dated the 10th January, 1968, to have come to an end;

(ii) on the 3rd day of December, 1971, the period beginning with the 3rd day of December, 1971, and ending with such date as the Central Government may, by notification in the Official Gazette, declare to be the date on which the emergency shall come to an end."

3. Amendment of Section 3.—In Section 3 of the principal Act, to sub-section (1), the following proviso shall be added, namely:—

"Provided that different Schemes may be made in relation to different periods of emergency."

4. Removal of doubts.— For the avoidance of doubts, it is hereby declared that every Scheme made under the Personal Injuries (Emergency Provisions) Act, 1962, providing for relief in respect of personal injuries or personal service injuries sustained during the period of emergency beginning with the 26th day of October, 1962, and ending with the 10th day of January, 1968, shall continue to be in force and every person entitled to relief under the said Scheme shall continue to receive such relief in accordance with the provisions of such Scheme.

THE PERSONAL INJURIES (COMPENSATION INSURANCE) AMENDMENT ACT, 1971

[Act No. 75 of 1971]†

(25th December, 1971)

An Act further to amend the Personal Injuries (Compensation Insurance) Act, 1963.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title.— This Act may be called THE PERSONAL INJURIES (COM-

†Received the assent of the President on 25-12-1971. Act published in Gaz. of India; 27-12-1971, Pt. II-S. 1, Ext. P. 795.

PENSATION INSURANCE) AMENDMENT ACT, 1971.

2. Amendment of Section 2.—In Section 2 of the Personal Injuries (Compensation Insurance) Act, 1963 (hereinafter referred to as the principal Act), for clause (f), the following clause shall be substituted, namely:—

“(f) “period of emergency” means, in relation to the Proclamation of Emergency issued under clause (1) of Article 352 of the Constitution,—

(i) on the 26th day of October, 1962, the period beginning with the 26th day of October, 1962, and ending with the 10th day of January, 1968, that is to say, the date on which the said Emergency was declared, by notification of the Government of India in the Ministry of Home Affairs, No. G.S.R. 93, dated the 10th January, 1968, to have come to an end;

(ii) on the 3rd day of December, 1971, the period beginning with the 3rd day of December, 1971, and ending with such date as the Central Government may, by notification in the Official Gazette, declare to be the date on which the said emergency shall come to an end;’.

3. Amendment of Section 3.—In Section 3 of the principal Act, in clause (a), for the words and figures “Defence of India Rules, 1962;”, the words and figures “Defence of India Rules, 1962, or under Rule 119 of the Defence of India Rules, 1971;” shall be substituted.

4. Amendment of Section 8.—In Section 8 of the principal Act, to sub-section (1), the following proviso shall be added, namely:—

“Provided that different Schemes shall be put into operation in relation to different periods of emergency.”.

5. Removal of doubts.—For the avoidance of doubts, it is hereby declared that every Scheme made under the Personal Injuries (Compensation Insurance) Act, 1963, providing for compensation in respect of personal injuries sustained during the period of emergency beginning with the 26th day of October, 1962, and ending with the 10th day of January, 1968, shall continue to be in force and every person entitled to compensation under the said Scheme shall continue to receive such compensation in accordance with the provisions of such Scheme.

THE MANIPUR (HILL AREAS) DISTRICT COUNCILS ACT, 1971

[Act No. 76 of 1971]

CONTENTS

CHAPTER I

PRELIMINARY

SECTIONS

1. Short title and extent.
2. Definitions.

**CHAPTER II
CONSTITUTION OF DISTRICT COUNCILS**

3. Division of Hill Areas into autonomous districts.
4. Constitution of District Councils and their composition.
5. Delimitation of constituencies.
6. Power to alter or amend delimitation orders.
7. Qualifications for membership.
8. Disqualifications for membership.
9. Electors on electoral rolls.
10. Right to vote.
11. Election of members.
12. Notification of results of elections.
13. Term of office of members.
14. Disputes as to elections.
15. Relief that may be claimed by petitioner.
16. Grounds on which an election may be called in question.
17. Procedure to be followed by the District Judge.
18. Decision of the District Judge.
19. Procedure in case of equality of votes.
20. Finality of decisions.
21. Power to make rules regulating the election of members.
22. Incorporation of District Councils.
23. Chairman and Vice-Chairman.
24. Oath or affirmation by members.
25. Vacation of seats.
26. Allowances of members.
27. Liability of members.
28. Members to be deemed to be public servants.

**CHAPTER III
FUNCTIONS OF DISTRICT COUNCILS**

29. Functions of District Councils.

CHAPTER IV

PROCEDURE AND STAFF OF DISTRICT COUNCILS

30. Conduct of business.
31. Committees.
32. Officers and staff.

**CHAPTER V
FINANCE OF DISTRICT COUNCILS AND VESTING OF PROPERTY**

33. Powers of taxation.
34. Levy of fees.
35. Procedure for imposing taxes.
36. Abolition or reduction of taxes.
37. Recovery of taxes and fees.
38. Assessment and collection of taxes and fees.
39. Appeals.
40. Instalments of taxes and fees.
41. Power to exempt from taxation.
42. Recoveries of moneys claimable by the Council.
43. Council Fund.
44. Property vested in District Council.
45. Budget.

CHAPTER VI

CONTROL

46. Control.
47. Supersession of District Council.

48. Effect of certain provisions during the period when the Hill Areas Committee is not functioning.

CHAPTER VII

OFFENCES AND PENALTIES

49. Penalty for obstruction.
50. Penalty for entering into any contract with the Council.

CHAPTER VIII

RULES AND BYE-LAWS

51. Power of Administrator to make rules.
52. Power to make bye-laws.
53. Penalty for infringement of rules or bye-laws.

THE MANIPUR (HILL AREAS) DISTRICT COUNCILS ACT, 1971

[Act No. 76 of 1971]*

An Act to provide for the establishment of District Councils in the Hill Areas in the Union territory of Manipur.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

CHAPTER I

PRELIMINARY

1. Short title and extent.—(1) This Act may be called THE MANIPUR (HILL AREAS) DISTRICT COUNCILS ACT, 1971.

(2) It extends to the whole of the Union territory of Manipur.

2. Definitions.—In this Act, unless the context otherwise requires,—

(a) "Administrator" means the administrator of the Union territory of Manipur appointed under Art. 239 of the Constitution;

(b) "autonomous district" means an autonomous district referred to in sub-section (1) of Section 3;

(c) "building" includes a house, out-house, stable, latrine, urinal, shed, hut, wall (other than boundary wall) and any other structure (whether of masonry, bricks, wood, mud or other material) but does not include any portable or temporary shelter;

(d) "constituency" means a District Council constituency provided by order made under Section 5 for the purpose of elections to the District Council;

(e) "Deputy Commissioner", in relation to any District Council, means the officer appointed as such by the Administrator, by notification in the Official Gazette, to perform the functions of the Deputy Commissioner under this Act in the autonomous district for which such District Council has been constituted;

(f) "Hill Areas" means the Hill Areas determined by the President by any notification issued under sub-section (2) of Section 52 of the Government of Union Territories Act, 1963 (20 of 1963) and in force immediately before the commencement of this Act;

(g) "Hill Areas Committee" means the Standing Committee referred to in Section 52 of the Government of Union Territories Act, 1963 (20 of 1963);

(h) "market" includes any place where persons assemble for the sale of, or for the purpose of exposing for sale of, meat, fish, fruit, vegetables, animals intended for human food or any other articles of human food whatsoever with or without the consent of the owner of such place notwithstanding that there may be no common regulation for the concourse of buyers and sellers and whether or not any control is exercised over the business of, or the persons frequenting, the market by the owner of the place or by any other persons;

(i) "member" means a member of a District Council constituted under this Act;

(j) "Official Gazette" means the Gazette of the Union territory of Manipur;

(k) "person" does not include a body of persons;

(l) "prescribed" means prescribed by rules made under this Act;

(m) "Scheduled Tribes" has the same meaning assigned to it in clause (25) of Article 366 of the Constitution;

(n) "vehicle" includes a carriage, cart, hand-cart, bicycle, tricycle and every wheeled conveyance which is used or is capable of being used on a street but does not include a mechanically propelled vehicle.

CHAPTER II

CONSTITUTION OF DISTRICT COUNCILS

3. Division of Hill Areas into autonomous districts.—(1) As soon as may be after the commencement of this Act, the Administrator shall cause all the Hill Areas to be divided into not more than six autonomous districts.

(2) The Administrator may, by order notified in the Official Gazette,—

(a) declare that any area in any autonomous district which is, or is intended to be, included within the limits of any municipality, cantonment or town committee shall cease to be a part of such autonomous district;

(b) increase the area of any autonomous district;

(c) diminish the area of any autonomous district;

(d) unite two or more autonomous districts or parts thereof so as to form one autonomous district;

(e) define the boundaries of any autonomous district;

(f) alter the name of any autonomous district.

(3) No order under sub-section (2) shall be made by the Administrator except after consultation with the Hill Areas Committee.

(4) Any order made by the Administrator under sub-section (2) may contain such incidental and consequential provisions as appear to the Administrator to be

*Act published in Gaz. of India, 28-12-1971, Pt. II, S. 1, Ext.

necessary for giving effect to the provisions of the order.

4. Constitution of District Councils and their composition.—(1) For each autonomous district there shall be a District Council as from such date as the Administrator may, by notification in the Official Gazette, appoint in this behalf.

(2) The total number of seats in the District Council to be filled by persons chosen by direct election on the basis of adult suffrage from territorial constituencies shall be not more than eighteen.

(3) The Administrator may nominate not more than two persons, not being persons in the service of Government, to be members of any District Council.

5. Delimitation of constituencies.—The Administrator shall, by order, determine—

(a) the constituencies (which shall be single member constituencies) into which an autonomous district shall be divided for the purpose of election of members to the District Council of that district; and

(b) the extent of each constituency.

6. Power to alter or amend delimitation orders.—The Administrator may, from time to time, by order, alter or amend any order made under Section 5.

7. Qualifications for membership.—A person shall not be qualified to be chosen as a member of a District Council of any autonomous district unless he is an elector for any District Council constituency in that autonomous district.

8. Disqualifications for membership.—(1) A person shall be disqualified for being chosen as a member of a District Council if he is for the time being disqualified for being chosen as a member of either House of Parliament or holds any office of profit under any District Council.

(2) For the purposes of this section, a person shall not be deemed to hold an office of profit under a District Council by reason only that he is a member thereof.

9. Electors on electoral rolls.—(1) The persons entitled to vote at elections of members of a District Council shall be the persons entitled, by virtue of the provisions of the Constitution and the Representation of the People Act, 1950 (43 of 1950), to be registered as voters at elections to the House of the People.

(2) So much of the electoral roll for any parliamentary constituency for the time being in force as relates to the areas comprised within a constituency formed under Section 5 shall be deemed to be the electoral roll for that constituency for the purposes of this Act.

10. Right to vote.—(1) Every person whose name is, for the time being, entered in the electoral roll of a constituency shall be entitled to vote at the election of a member of the District Council from that constituency.

(2) Every person shall give one vote and no more to any one candidate at an election.

11. Election of members.—Election of members of a District Council shall be held in accordance with the rules made under Section 21 on such date or dates as the Administrator may, by notification in the Official Gazette, direct:

Provided that a casual vacancy shall be filled as soon as may be after the occurrence of the vacancy:

Provided further that no election shall be held to fill up a casual vacancy occurring within four months prior to the holding of a general election under this section.

12. Notification of results of elections.—The names of all persons elected or nominated to be members of a District Council shall be published by the Administrator in the Official Gazette.

13. Term of office of members.—(1) Save as otherwise provided in this section, the term of office of a member shall be five years and shall commence from the date of the notification of his election or nomination under Section 12 or from the date on which the vacancy in which he is elected or nominated has occurred, whichever date is later:

Provided that the Administrator may, when satisfied that it is necessary in order to avoid administrative difficulty, extend the term of office of all the members by such period not exceeding one year as he thinks fit.

(2) The term of office of a member elected to fill a casual vacancy shall commence from the date of the notification of his election and shall continue so long only as the member in whose place he is elected would have been entitled to hold office if the vacancy had not occurred.

14. Disputes as to elections.—(1) No election of a member shall be called in question except by an election petition presented to the court of the District Judge having jurisdiction in the area in which the constituency concerned is situated, within thirty days from the date of the notification of the result of the election under S. 12.

(2) An election petition calling in question any such election may be presented on one or more of the grounds specified in S. 16 by any candidate at such election or by any elector of the constituency.

(3) A petitioner shall join as respondents to his petition all the candidates at the election.

(4) An election petition—

(a) shall contain a concise statement of the material facts on which the petitioner relies;

(b) shall, with sufficient particulars, set forth the ground or grounds on which the election is called in question; and

(c) shall be signed by the petitioner and verified in the manner laid down in the

Code of Civil Procedure, 1908 (5 of 1908) for the verification of pleadings.

15. Relief that may be claimed by petitioner.— A petitioner may, in addition to claiming a declaration that the election of all or any of the returned candidates is void, claim a further declaration that he himself or any other candidate has been duly elected.

16. Grounds on which an election may be called in question.— The election of a returned candidate may be called in question on any one or more of the following grounds, namely:—

(a) that on the date of his election the returned candidate was not qualified to be elected, or he was disqualified for being elected, as a member under this Act; or

(b) that the nomination paper of any candidate at the election has been improperly rejected; or

(c) that the result of the election has been materially affected by the improper acceptance of a nomination paper or by the improper acceptance or refusal of a vote or by any other cause.

17. Procedure to be followed by the District Judge.— The procedure provided in the Code of Civil Procedure, 1908 (5 of 1908) in regard to suits shall be followed by the court of the District Judge, as far as it can be made applicable, in the trial and disposal of an election petition under this Act.

18. Decision of the District Judge.— (1) At the conclusion of the trial of an election petition, the court of the District Judge shall make an order—

(a) dismissing the election petition; or
(b) declaring the election of all or any of the returned candidates to be void; or
(c) declaring the election of all or any of the returned candidates to be void and the petitioner or any other candidate to have been duly elected.

(2) If any person who has filed an election petition has, in addition to calling in question the election of the returned candidate, claimed a declaration that he himself or any other candidate has been duly elected and the court of the District Judge is of opinion—

(a) that in fact the petitioner or such other candidate received a majority of the valid votes; or

(b) that but for the votes obtained by the returned candidate, the petitioner or such other candidate would have obtained a majority of the valid votes, the court of the District Judge shall, after declaring the election of the returned candidate to be void, declare the petitioner or such other candidate, as the case may be to have been duly elected.

19. Procedure in case of equality of votes.— If during the trial of an election petition it appears that there is equality of votes between any candidates at the elec-

tion and that the addition of a vote would entitle any of those candidates to be declared elected, then, the court of the District Judge shall decide between them by lot and proceed as if the one on whom the lot falls had received an additional vote.

20. Finality of decisions.— (1) An order of the court of the District Judge on an election petition shall be final and conclusive.

(2) An election of a member not called in question in accordance with the foregoing provisions shall be deemed to be a good and valid election.

21. Power to make rules regulating the election of members.— The Administrator may make rules to regulate all or any of the following matters for the purpose of the holding of elections of members under this Act, namely:—

(a) the manner of the splitting up of electoral rolls for parliamentary constituencies into parts for the purpose of constituting one or more of such parts into electoral roll for a constituency; and the officer or authority by whom such splitting up is to be carried out;

(b) the drawing up of the programme of election;

(c) the appointment of returning officers, presiding and polling officers for election;

(d) the nomination of candidates and the scrutiny of such nomination;

(e) the deposits to be made by candidates and the time and manner of making such deposits;

(f) the withdrawal of candidatures;

(g) the appointment of agents of candidates;

(h) the time and manner of holding elections;

(i) the general procedure at the elections including the time, place and hours of poll and the method by which votes shall be cast;

(j) the fee to be paid on an election petition;

(k) any other matter relating to elections or election disputes in respect of which the Administrator deems it necessary to make rules under this section or in respect of which this Act makes no provision or makes insufficient provision and provision is, in the opinion of the Administrator, necessary.

22. Incorporation of District Councils.— Each District Council shall be a body corporate by the name respectively of "the District Council of (name of autonomous district)" and shall have perpetual succession and a common seal with power to acquire, hold and dispose of property and to contract and may by the said name sue and be sued.

23. Chairman and Vice-Chairman.— (1) A District Council shall, as soon as may be, choose two members to be respectively

Chairman and Vice-Chairman thereof and, so often as the office of Chairman or Vice-Chairman becomes vacant, the Council shall choose another member to be Chairman or Vice-Chairman, as the case may be:

Provided that the Administrator may nominate the first Chairman who shall hold office for a period not exceeding one year.

(2) If a resolution for the removal of an elected Chairman is passed by not less than two-thirds of the total membership of the Council at a meeting convened in accordance with the provisions of sub-section (3), such resolution shall have the effect of removing the Chairman from his office as from the date on which the resolution is so passed and if such resolution is passed by less than two-thirds but not less than one-half of the total membership of the Council, the Administrator may, by order in writing, remove, for reasons to be recorded, the Chairman from his office as from such date as may be specified in the order:

Provided that no such resolution shall be brought within one year from the date of election of the Chairman:

Provided further that if the resolution is not passed by not less than two-thirds of the total membership of the Council, no other resolution for the removal of the Chairman shall be allowed to be considered within one year from the date on which such resolution was considered.

(3) A notice in writing of the intention to move a resolution referred to in sub-s. (2) signed by not less than one-third of the total membership of the Council together with a copy of the proposed resolution shall be delivered to the Deputy Commissioner in accordance with the rules made by the Deputy Commissioner in this behalf and the Deputy Commissioner shall, after giving not less than fifteen days' notice thereon, convene for consideration of the resolution a meeting of the Council to be held in the office of the Council on a date not later than thirty days from the date on which the notice was delivered to him and he shall preside over the meeting.

(4) The Chairman of the Council shall be a whole-time functionary and shall be entitled to such salary or allowances as may be fixed by the Administrator.

24. Oath or affirmation by members.—Every member shall, before taking his seat, make and subscribe at a meeting of the District Council, an oath or affirmation in the prescribed form.

25. Vacation of seats.—(1) No person shall be a member both of the Legislative Assembly of the Union territory of Manipur and of a District Council and if a person is chosen a member both of the Legislative Assembly and of a District Council, then, at the expiration of fourteen days from the date of publication in the Official Gazette that he has been so chosen,

that person's seat in the District Council shall become vacant unless he has previously resigned his seat in the Legislative Assembly.

(2) If a member—

(a) becomes subject to any of the disqualifications mentioned in Section 8; or

(b) resigns his seat by writing under his hand addressed to the Chairman of the District Council,

his seat shall thereupon become vacant.

(3) If during the six successive months a member is, without the permission of the District Council, absent from all meetings thereof, the Council may declare his seat vacant:

(4) If any question arises as to whether a member has become subject to any of the disqualifications mentioned in Section 8, it shall be referred to the District Judge having jurisdiction in the area in which the constituency concerned is situated and his decision shall be final.

26. Allowances of members.—Subject to the provisions of sub-section (4) of Section 23, every member shall be entitled to receive such allowances as may be determined by the Administrator.

27. Liability of members.—Every person shall be liable for the loss, waste or misappropriation of any money or other property belonging to a District Council, if such loss, waste or misappropriation is a direct consequence of his neglect or misconduct while a member of the District Council and a suit for compensation may be instituted against him by the Council with the previous sanction of the Deputy Commissioner or by the Deputy Commissioner with the previous sanction of the Administrator.

28. Members to be deemed to be public servants.—Every member shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

CHAPTER III

Functions of District Councils

29. Functions of District Councils.—

(-) Subject to such exceptions and conditions as the Administrator may make and impose, the following matters shall be under the control and administration of a District Council, namely:—

(i) the maintenance and management of such property, moveable or immovable, and institutions as may be transferred to that Council by the Administrator;

(ii) the construction, repair and maintenance of such of the roads, bridges, channels and buildings as may be transferred to that Council by the Administrator;

(iii) the establishment, maintenance and management of primary schools and the construction and repair of all buildings connected with these institutions and institution of scholarships;

(iv) the establishment, maintenance and management of dispensaries;

(v) the establishment and maintenance of cattle pounds including such functions under the Cattle Trespass Act, 1871 (1 of 1871) as may be transferred to that Council by the Administrator;

(vi) the establishment, maintenance and management of markets and fairs and the construction, repair and maintenance of all buildings connected therewith;

(vii) the supply, storage and prevention from pollution of water for drinking, cooking and bathing purposes;

(viii) the construction, repair and maintenance of embankments and the supply, storage and control of water for agricultural purposes;

(ix) the preservation and reclamation of soil;

(x) the preservation, protection and improvement of live-stock and prevention of animal diseases;

(xi) public health and sanitation;

(xii) the management of such ferries as may be entrusted to the charge of that Council by the Administrator;

(xiii) the initiation, inspection and control of relief works;

(xiv) the allotment, occupation or use, or the setting apart of land, other than land acquired for any public purpose or land which is a reserved forest, for the purpose of agriculture or grazing or for residential or other non-agricultural purposes or for any other purposes likely to promote the interests of the inhabitants of any village or town situated within the autonomous district for which that council is constituted;

(xv) the management of any forest not being a reserved forest;

(xvi) the regulation of the practice of Thum or other form of shifting cultivation; and

(xvii) any other matter which the Administrator may, in consultation with the Hill Areas Committee, entrust to the District Council in the field of agriculture, animal husbandry, community development, social and tribal welfare, village planning or any other matter referred to in Section 52 of the Government of Union Territories Act, 1963 (20 of 1963).

(2) It shall be competent for a District Council to recommend to the Government of the Union territory of Manipur legislation relating to the following matters in so far as they concern members of the Scheduled Tribes, namely—

(a) appointment or succession of Chiefs;

(b) inheritance of property;

(c) marriage and divorce; and

(d) social customs.

CHAPTER IV

PROCEDURE AND STAFF OF DISTRICT COUNCILS

30. **Conduct of business.**—A District Council shall conduct its business in such manner and in accordance with such procedure as may be prescribed.

31. **Committees.**—A District Council may, from time to time, appoint out of its own body such and so many committees for the efficient discharge of its duties as may be necessary.

32. **Officers and staff.**—(1) For every District Council there shall be a Chief Executive Officer, who shall be appointed by the Administrator.

(2) If a resolution for removal of the Chief Executive Officer is passed at a meeting of the District Council by a majority of not less than two-thirds of the total membership of the Council, the Administrator shall remove him forthwith.

(3) The District Council shall appoint such officers and staff as may be necessary for the proper and efficient execution of its duties and make regulations for their conditions of service.

(4) The power of appointing officers and staff (whether temporary or permanent) shall be exercised in accordance with the rules framed for the purpose by the Administrator.

(5) The conditions of service applicable to a person immediately before his appointment to a post under a District Council shall not be varied to his disadvantage except with the previous approval of the Administrator.

(6) Every officer or member of staff of a District Council shall be deemed to be a public servant within the meaning of Section 21 of the Indian Penal Code (45 of 1860).

CHAPTER V

FINANCE OF DISTRICT COUNCILS AND VESTING OF PROPERTY

33. **Powers of taxation.**—Notwithstanding anything to the contrary contained in any other law for the time being in force, a District Council shall have the power to levy all or any of the following taxes within the autonomous district for which the Council is constituted, that is to say—

(a) taxes on professions, trades, callings and employments;

(b) taxes on animals, vehicles (other than mechanically propelled vehicles) and boats;

(c) taxes on entry of goods into a market for sale therein and tolls on passengers and goods carried in ferries;

(d) taxes for the maintenance of schools, dispensaries or roads; and

(e) any other tax falling under List II of the Seventh Schedule to the Constitution which the Legislature of the Union territory of Manipur may, by law, empower the District Council to levy.

34. **Levy of fees.**—A District Council may fix and levy—

(a) school fees; and

(b) fees for the use of, or benefits derived from, any of the works done or services rendered under Section 29.

35. Procedure for imposing taxes.—

(1) A District Council may resolve at a meeting specially convened for the purpose to propose the imposition of any of the taxes mentioned in Section 33.

(2) When a resolution has been passed, the Council shall publish a notice in the Official Gazette and also in the prescribed manner, defining the class of persons or description of property proposed to be taxed, the amount or rate of tax to be imposed and the system of assessment to be adopted.

(3) Any person, directly or indirectly affected by the proposed tax and objecting to it, may, within thirty days from the publication of the notice, send his objections in writing to the Council and the Council shall, at a specially convened meeting take all such objections into consideration.

(4) If no objection is sent within the said period of thirty days or if the objections received are deemed insufficient, the Council may submit its proposals to the Administrator with the objections, if any, and its decision thereon.

(5) The Administrator may then sanction the proposals or refuse to sanction them or return them to the Council for further consideration.

(6) When the proposal in respect of a tax has been sanctioned, the Administrator shall notify its imposition in the Official Gazette and specify a date not later than three months from the date of notification on which the tax shall come into force.

36. Abolition or reduction of taxes.—

The Administrator may, by notification in the Official Gazette, and a District Council may with the previous approval of the Administrator by a resolution passed at a meeting specially convened for the purpose abolish or reduce any tax imposed under Section 33.

37. Recovery of taxes and fees.—All arrears of taxes and fees levied under this Act may be recovered under the law for the time being in force for the recovery of public dues as if such arrears were public dues.

38. Assessment and collection of taxes and fees.—A District Council may, by notification in the Official Gazette, determine the person by whom any tax or fee shall be assessed and collected and make rules for the assessment and collection of such tax or fee and direct in what manner persons employed in the assessment or collection shall be remunerated.

39. Appeals.—(1) In matters connected with the assessment and collection of any tax or fee levied under this Act, and appeal shall lie from the order of any person authorised to make assessment or collections to such person as the Administrator may appoint or designate for the purpose.

(2) An appeal under sub-section (1) shall be presented within thirty days from the date of the order.

(3) The order passed on the appeal shall be final.

40. Instalments of taxes and fees.—A District Council may, by notification in the Official Gazette and with the previous approval of the Deputy Commissioner, prescribe by what instalments and at what times any tax or fee shall be payable.

41. Power to exempt from taxation.—A District Council may, with the previous approval of the Administrator, by notification in the Official Gazette remit or reduce any tax or fee or exempt any persons or class of persons or any description of property, wholly or in part, from liability to any tax or fee and cancel any such remission, reduction or exemption.

42. Recoveries of moneys claimable by the Council.—(1) Save as provided by Section 37, all moneys claimable by a District Council may be recovered on an application to a Magistrate having jurisdiction in the area where the person from whom the money is claimable may, for the time being be resident, by the distress and sale of any movable property or by the attachment and sale of any immovable property, within the limits of his jurisdiction belonging to such person and the cost of such proceedings shall be recoverable in the same manner as the said moneys.

(2) An application for recovery of money shall be in writing and shall be signed by an officer authorised in this behalf by order of the Chairman of the Council.

43. Council Fund.—(1) All moneys received by or on behalf of a District Council under the provisions of this Act or any other law for the time being in force shall be credited to a fund which shall be called the "Council Fund" and it shall be held by the District Council in trust for the purposes of this Act.

(2) All expenditure of the Council shall be defrayed out of the Council Fund.

(3) The Administrator may make rules for the management of the Council Fund and for the procedure to be followed in respect of payment of money into the said Fund, the withdrawal of moneys therefrom, the custody of moneys therein and any other matter connected with or ancillary to the matters aforesaid.

(4) The accounts of a District Council shall be kept in such form as may be prescribed.

(5) The accounts of a District Council shall be audited in such manner as may be prescribed.

44. Property vested in District Council.—Subject to any order of the Administrator, all property of the nature specified below and situated in the autonomous district shall vest in and belong to the District Council for which it is constituted and shall, with all other property which may become

vested in the Council, be under its direction, management and control and shall be held and applied for the purposes of this Act—

(a) all public buildings, constructed or maintained out of the Council Fund;

(b) all public roads which have been constructed or are maintained out of the Council Fund and the stores and other materials thereof and also all trees, erections, materials, implements and things provided for such roads;

(c) all land or other property transferred to the District Council by the Administrator or by gift, sale or otherwise for public purposes.

45. Budget.— (1) A District Council shall, on or before a prescribed day in each year submit to the Administrator an estimate of the income and expenditure of the Council for the next financial year in such form as may be prescribed.

(2) The Administrator may, on or before a prescribed day, return the estimate of the Council with or without modifications.

(3) When a budget is returned with modifications under sub-section (2), the Council shall consider the proposed modifications, take a decision thereon and report the same to the Administrator.

(4) The budget estimate finally adopted by the Council shall be the budget of the District Council.

(5) Any subsequent alteration in the budget or reappropriation or transfer of provision within the estimate shall be made with the approval of the Administrator.

CHAPTER VI CONTROL

46. Control.— (1) It shall be the duty of the Chairman of a District Council to furnish to the Deputy Commissioner a copy of the proceedings of the meetings of the Council and such other information as the Deputy Commissioner may require.

(2) The Deputy Commissioner shall have the power to give to any District Council all such directions as he may, consider necessary in respect of subjects, curricula, text books and standards of teaching in schools vested wholly or partly in the Council and in schools wholly or partly maintained by grants payable from the Council Fund and the Council shall comply with such directions.

(3) The Deputy Commissioner may, by order, and for reasons to be recorded, suspend the execution of any resolution or order of any District Council or prohibit the doing of any act which is about to be done, or is being done, in pursuance of or under cover of any provision of the law relating to the constitution or functions of the District Council, if, in his opinion, the resolution, order or act is in excess of the powers conferred by law or the execution of the resolution or order or the doing of the act is likely to lead to a breach of the peace, or

to cause annoyance or injury to the public or to any class or body of persons:

Provided that the Council may, within fifteen days of the date of the order of the Deputy Commissioner offer such explanation as it deems fit in relation to the execution of the resolution or order which has been suspended or the doing of the act has been prohibited.

(4) When the Deputy Commissioner makes any order as aforesaid, he shall forthwith send a copy of it to the Administrator with a statement of the reasons for making it and forward in due course to the Administrator the explanation, if any, offered by the Council and the Administrator may, thereupon, confirm, modify or rescind the order of the Deputy Commissioner.

47. Supersession of the District Council.— (1) If, on receipt of a report from the Deputy Commissioner or otherwise, the Administrator is of opinion that—

(a) any District Council is not competent to perform, or persistently makes default in the performance of, the duties imposed on it by or under this Act or any other law; or

(b) any District Council exceeds or abuses its powers; or

(c) the financial position and credit position of any District Council is seriously threatened; or

(d) a situation has arisen in which the administration of any District Council cannot be carried on in accordance with the provisions of this Act, the Administrator may, by an order published, together with a statement of reasons therefor, in the Official Gazette, supersede such Council for such period, not exceeding one year, as may be specified in the order:

Provided that before making an order of supersession as aforesaid under clause (a) or clause (b) or clause (c), reasonable opportunity shall be given to such Council to show cause why such order of supersession should not be made:

Provided further that the period of supersession may be extended for any further period or periods not exceeding six months at a time in consultation with the Hill Areas Committee.

(2) When any District Council is superseded by an order under sub-section (1),—

(a) all the members of the Council (including the Chairman and Vice-Chairman thereof) shall, on such date as may be specified in the order, vacate their offices as such members without prejudice to their eligibility for election or nomination under clause (d).

(b) during the period of supersession of the Council, all powers and duties conferred and imposed upon the Council by or under this Act or any other law shall be exercised and performed by such officer or

authority as the Administrator may appoint in this behalf;

(c) all property vested in the Council shall, until it is reconstituted vest in the Central Government;

(d) before the expiry of the period of supersession, election or nomination, as the case may be, of members to the Council shall be held or made for the purpose of re-constituting the Council.

48. Effect of certain provisions during the period when the Hill Areas Committee is not functioning.— Where at any time, consequent on the dissolution of the Legislative Assembly of the Union territory of Manipur, the Hill Areas Committee is not functioning, then, during the period when such Committee is not functioning,—

(i) Section 3 shall have effect as if sub-sec. (3) thereof had been omitted;

(ii) clause (xvii) of Section 29 and the second proviso to sub-section (1) of Sec. 47 have effect as if the words "in consultation with the Hill Areas Committee" had been omitted therefrom.

CHAPTER VII

OFFENCES AND PENALTIES

49. Penalty for obstruction.— If any person wilfully obstructs a District Council or any officer or servant of a District Council or any person authorised by the District Council in the exercise of its powers, he shall be punishable with fine which may extend to fifty rupees.

50. Penalty for entering into any contract with the Council.— If any member, officer or other employee of a District Council enters into any contract with the Council, he shall be deemed to have committed an offence under Section 163 of the Indian Penal Code (45 of 1860).

CHAPTER VIII

RULES AND BYE-LAWS

51. Power of Administrator to make rules.— (1) Without prejudice to the power to make rules under any other provision of this Act, the Administrator may, after previous publication, make, by notification in the Official Gazette, rules for the purpose of carrying out the provisions of this Act.

(2) In particular and without prejudice to the generality of the foregoing power, such rules may—

(i) regulate the conduct of business of a District Council;

(ii) prescribe the forms in which the budget estimate is to be prepared and the dates for the various stages of its completion;

(iii) determine the language in which the business of a District Council will be transacted;

(iv) regulate the powers of a District Council to transfer property;

(v) regulate the powers of a District Council to contract and do other things

necessary for the purposes of its constitution and the mode of executing contracts;

(vi) regulate the employment, payment suspension and removal of officers and staff of a District Council;

(vii) protect the terms and conditions of service of Government servants transferred to a District Council;

(viii) prescribe the forms for statements, registers, estimates and accounts of a District Council and regulate the keeping, checking and publication of such accounts;

(ix) prescribe the authority by whom and the manner in which the accounts of a District Council shall be audited; and

(x) provide for any other matter for which rules have to be made under this Act.

52. Power to make bye-laws.— (1) Subject to the provisions of this Act and of the rules made thereunder, a District Council may make bye-laws to provide for all or any of the following matters in the autonomous district for which it is constituted or in any part thereof, namely—

(a) the maintenance and management of schools and grants of stipends and scholarships;

(b) control and administration of dispensaries, their construction and repairs, the supply of medicines and the measures to be taken during the prevalence of diseases;

(c) the protection from pollution of such tanks, springs, well or parts of rivers, streams, channels or water courses as are set apart for drinking or culinary purposes;

(d) any other matter which is necessary for carrying out all or any of the provisions of this Act and the rules made thereunder.

(2) A bye-law made under sub-section (1) shall not have effect until it has been confirmed by the Administrator and published in such manner as he may direct.

(3) The Administrator, in confirming a bye-law, may make any change therein which appears to him to be necessary.

53. Penalty for infringement of rules or bye-laws.— (1) In making any rule, the Administrator, and in making any bye-law, a District Council, may direct that the breach of the same shall be punishable with fine which may extend to one hundred rupees and in the case of a continuing breach with a further fine which may extend to ten rupees of every day during which breach is continued after the offender has been convicted of such breach.

(2) In default of payment of any fine, the defaulter shall be punishable with imprisonment for a term which may extend to fifteen days.

THE CONSTITUTION (TWENTY-SIXTH AMENDMENT) ACT, 1971*

(28th December, 1971)

An Act further to amend the Constitution of India.

BE it enacted by Parliament in the Twenty-second year of the Republic of India as follows:—

1. Short title.—This Act may be called THE CONSTITUTION (TWENTY-SIXTH AMENDMENT) Act, 1971.

2. Omission of Articles 291 and 362.—Articles 291 and 362 of the Constitution shall be omitted.

3. Insertion of new Article 363A.—After Article 363 of the Constitution, the following article shall be inserted, namely:—

“363A. Recognition granted to Rulers of Indian States to cease and privy purses to be abolished.—Notwithstanding anything in this Constitution or in any law for the time being in force:—

(a) the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler shall, on and from such commencement, cease to be recognised as such Ruler or the successor of such Ruler;

(b) on and from the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, privy purse is abolished and all rights, liabilities and obligations in respect of privy purse are extinguished and accordingly the Ruler or, as the case may be, the successor of such Ruler, referred to in cl. (a) or any other person shall not be paid any sum as privy purse.”

4. Amendment of Article 366.—In Article 366 of the Constitution, for cl. (22), the following clause shall be substituted, namely:—

“(2) “Ruler” means the Prince, Chief or other person who, at any time before the commencement of the Constitution (Twenty-sixth Amendment) Act, 1971, was recognised by the President as the Ruler of an Indian State or any person who, at any time before such commencement, was recognised by the President as the successor of such Ruler;”

*Received the assent of the President on 28-12-1971. Act published in Gaz. of India; 29-12-1971, Pt. II-S. 1, Ext. P. 513. For Statement of Objects and Reasons, see Gaz. of India; 9-8-1971; Pt. II-S. 2, Ext. P. 569.

THE SUPREME COURT JUDGES (CONDITIONS OF SERVICE) AMENDMENT ACT, 1971

(Act No. 77 of 1971)*

(30th December, 1971.)

An Act to amend the Supreme Court Judges (Conditions of Service) Act, 1958.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—(1) This Act may be called THE SUPREME COURT JUDGES (CONDITIONS OF SERVICE) AMENDMENT ACT, 1971.

(2) Section 3 shall be deemed to have come into force on the 1st day of May, 1958, clauses (a) and (b) of Section 4 shall be deemed to have come into force on the 17th day of October, 1958 and the other provisions of this Act shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 3.—In Section 3 of the Supreme Court Judges (Conditions of Service) Act, 1958 (hereinafter referred to as the principal Act), in sub-section (1), for clause (a), the following clause shall be substituted, namely:—

“(a) leave on full allowances (including commuted leave on half allowances into leave on full allowances on medical certificate); or”

3. Amendment of Section 5.—In Section 5 of the Principal Act, in sub-sec. (3), for the words “The maximum period of leave which may be granted”, the words, brackets, figures and letter “Subject to the provisions of sub-section (2) of Section 5A, the maximum period of leave which may be granted” shall be substituted.

4. Insertion of new Section 5A.—After section 5 of the principal Act, the following section shall be inserted, namely:—

“5A. Commutation of leave on half allowances into leave on full allowances.—

(1) Notwithstanding anything contained in sub-section (2) of Section 5, a Judge may be permitted to commute leave on half allowances into leave on full allowances on medical certificate upto a maximum of three months during the whole period of his service as a Judge.

(2) In computing the maximum period of leave on full allowances which may be granted at one time to a Judge under sub-section (3) of Section 5, the amount of commuted leave permitted to him under this section shall not be taken into account.”

*Received the assent of the President on 30-12-1971. Act published in Gaz. of India; 31-12-1971, Pt. II-S. 1, Ext. P. 819. For Statement of Objects and Reasons, see Gaz. of India; 31-8-1970; Pt. II-S. 2, Ext. P. 836.

THE HIGH COURT JUDGES (CONDITIONS OF SERVICE) AMENDMENT ACT, 1971

(Act No. 78 of 1971)*

(30th December, 1971.)

An Act further to amend the High Court Judges (Conditions of Service) Act, 1954.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE HIGH COURT JUDGES (CONDITIONS OF SERVICE) AMENDMENT ACT, 1971.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Amendment of Section 2.— In Section 2 of the High Court Judges (Conditions of Service) Act, 1954 (hereinafter referred to as the principal Act), in sub-section (1), in sub-clause (ii) of clause (h), for the words "one month", the words "forty-five days" shall be substituted.

3. Amendment of Section 3.— In Section 3 of the principal Act, in sub-sec. (1), for clause (a), the following clause shall be substituted, namely:—

"(a) leave on full allowances (including commuted leave on half allowances into leave on full allowances on medical certificate); or".

4. Amendment of Section 5.— In Section 5 of the principal Act, in sub-section (3), for the words "The maximum period of leave which may be granted", the words, brackets, figures and letter "Subject to the provisions of sub-section (2) of Section 5A, the maximum period of leave which may be granted" shall be substituted.

5. Insertion of new Section 5A.— After S. 5 of the principal Act, the following section shall be inserted, namely:—

"5A. Commutation of leave on half allowances into leave on full allowances.—

(1) Notwithstanding anything contained in sub-section (2) of Section 5, a Judge may be permitted to commute leave on half allowances into leave on full allowances on medical certificate upto a maximum of three months during the whole period of his service as a Judge.

*Received the assent of the President on 30-12-1971. Act published in Gaz. of India; 31-12-1971, Pt. II-S. 1, Ext. P. 822. For Statement of Objects and Reasons, see Gaz. of India; 28-8-1970, Pt. II-S. 2, Ext. P. 759.

(2) In computing the maximum period of leave on full allowances which may be granted at one time to a Judge under sub-section (3) of Section 5, the amount of commuted leave permitted to him under this section shall not be taken into account."

6. Amendment of Section 9.— In Section 9 of the principal Act, in sub-sec. (1), for the words "for the first month of such leave", the words "for the first forty-five days of such leave" shall be substituted.

[Act No. 79 Not received.]

THE COMPANIES (AMENDMENT) ACT, 1971

(No. 80 of 1971)*

(30th December, 1971.)

An Act further to amend the Companies Act, 1956.

BE it enacted by Parliament in the Twenty-second Year of the Republic of India as follows:—

1. Short title and commencement.—

(1) This Act may be called THE COMPANIES (AMENDMENT) ACT, 1971.

(2) It shall be deemed to have come into force on the 3rd day of December, 1971.

2. Insertion of new Section 293B.— In the Companies Act, 1956, after S. 293A, the following section shall be inserted, namely:—

"293B. Power of Board and other persons to make contributions to the National Defence Fund, etc.— (1) The Board of directors of any company or any person or authority exercising the powers of the Board of directors of a company, or of the company in general meeting, may, notwithstanding anything contained in Ss. 293 and 293A or any other provision of this Act or in the memorandum, articles or any other instrument relating to the company, contribute such amount as it thinks fit to the National Defence Fund or any other Fund approved by the Central Government for the purpose of national defence.

(2) Every company shall disclose in its profits and loss account the total amount or amounts contributed by it to the Fund referred to in sub-section (1) during the financial year to which the amount relates."

*Received the assent of the President on 30-12-1971. Act published in Gaz. of India; 31-12-1971, Pt. II-S. 1, Ext. P. 831.

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INDEX OF ARTICLES IN THE A. I. R. AND OTHER JOURNALS

ARTICLES

Accounts

- Cost audit as a service to the Nation
—By Shyamal Banerjee
—VHI Comp N & N (Nos. 16, 17)

Administrative Law

- Anisimic and jurisdictional review
By B. C. Gould —1970 Public Law 358
- Delegation and Estoppel in Administrative Law—A note by J. M. Evans
—38 Mod L R 335
- The problems of Administrative Justice—By S. K. Das Gupta
—1971—Vol. I S C C (Jour) 63
- Problems of Administrative Justice.
—By V. G. Ramchandran —1971 Law, p. 124
- Reviewability of compulsory retirement order—By Mohammed Inam
—(1970) 12 J I L I 633

Advertisements

- Control of advertising in the United States and Germany: Volkswagen has a better idea—By Warren S. Geimes
—84 Har L R 1789

Advocacy

- Adversary system in administration of justice—By D. M. Chandrasekhar (J.)
—1 Maha B L J 3 (Pt 4)

Advocates

- Can a Minister be enrolled as an Advocate? By R. C. Bhadekar —1 M B C J 52
- Lawasia—By Jagdish Chandra Sharma
—1 International L R Pt II, p. 55

Aircraft

- Aeronautics and the Constitution—
by Colin H. McNairn —49 Can B E 292
- Air Hijacking and the law—By Shariful Hasan Barriquir —1971 Int L R 205

Arbitration

- Arbitration Act, 1940, Ss. 31 & 34—
By Balmokand Vohra —(1971) I S C C (Jour) 70;
—(1971) 1 An W R (Jour) 7

Army

- Selective Services and Conscientious Objectors—By Curtiss W. Tarr —57 A B A 1 976

Bonus

- Bonus: A historical resume—By Sharad Chandra Srivastav
—51 Lab Gaz 207

Children

- The problems of custody of the Child Psychiatric aspects—By Dr. J. C. Marfatia
—Vol. I, Pt. 3, Maha B C J 78

Civil Services

- Strikes by Government employees Problems and Solutions—By Edward R. Lev
—57 A B A 1 771
- Where public service and self-interest meet—By Donald J. Horowitz
—57 A B A 1 783

Commissions of Inquiry

- Commissions of Inquiry—Editorial Note
—78 C W N (Jour) 25

Companies

- Administrative powers of investigation into companies—By R. D. Fraser
—84 Mod L R 260
- Appointment of Directors—Requirement of Central Government's prior approval under S. 25 (1) of the Monopolies and Restrictive Trade Practices

Companies (contd.)

- Act, 1969—By K. V. Narayanswamy
—(1970) 2 Comp L J (Jour) 39
- Capital Issues 1969-70
—VIII Comp N & N (Nos. 16, 17)
- Concept of "Public Interest" under Company Law—By M. C. Bhandari
—IX Comp N & N (June Pt.) 36
- Disclosure of interests—V. N. Singh
—1971 M L R 73
- The doctrine of "bona vacantia" in Company Law—By V. N. Singh
—1970 M L R (Jour) 75
- The effect of corporate structure on corporation control—By Melvin Aron Eisenberg
—84 Har L R 1577
- The equitable doctrine of undue influence as applicable to Company law—By V. N. Singh
—(1971) II An W R (Jour) 26
- Liability of a director for offence by Company—
—(1971) S C A (Jour) 1
- Petitioners for compulsory winding up of companies (S. 489 of the Companies Act, 1956)—A comparative and critical approach—By Hati Prasad Verma
—(1971) II M L J (Jour) 11
- Pre-incorporation contracts—By Joseph H. Gross
—87 L Q R 367
- Protecting share-holder's interests through Company Law—By M. C. Bhandari
—1971 Comp N & N (Nos. 3, 4), p. 8
- Proxy Rule 14a-8: Omission of share-holder proposals
—84 Har L R 700
- The Secretary—By E. D. Nathan
—1971 M L R (Jour) 61
- Suggestions for amendment of certain provisions of the Companies Act, 1956—By Dr. M. J. Sethne
—1 M B C J 19
- Super-tax on an investment company—By K. K. Koticha
—31 Tax 317 (S. II)
- Constitutional Law
—Abolition of Privy Purse—Court has jurisdiction to hear princes—By P. K. Ravindranath Menon
—1971 K L R (Jour) 1
- Amendment of fundamental rights—By P. K. Ravindranath Menon
—1971 K L T (Jour) 35
- Amendment of fundamental rights—By J. M. Sood
—1971 M P L J (Jour) 85;
—1971 Maha L J (Jour) 79
- Appeals in the Supreme Court in civil matters—(The S. C. Enhancement of Valuation for Civil Appellate Jurisdiction (Bill, 1970)—By J. H. Dalal
—Vol. I, Pt. 3, Maha B C J 99
- Attendance of M. L. A's under detention—Editorial Note
—(1971) 76 C W N (Jour) 5;
—(1971) II S C A (Jour) 1
- The Australian State and the doctrine of extra-territorial Legislative Jurisdiction—By F. A. Trindade
—(1971) 23 A L J 233
- Borubari—Editorial Note
—78 C W N (Jour) 73
- Canadian Bill of Rights—By E. D. Gopalkrishnan
—V J C P S 212
- Ceiling of urban property—Some constitutional aspects—By K. Narasimha Rao
—(1971) II An W R (Jour) 10

Constitutional law (contd.)

- Cession of territory and Arbitral award—By Iqbal Muzaffar —1971 Int L R 139
- Constituent power—By V. G. Ramchandran —(1971) II S C C (Jour) 41
- Constitutional changes in Yugoslavia —By Dragoljub Djurovic —V J C P S 134
- The Constitutional powers of the Commonwealth to regulate the securities market—By Colin Howard —(1971) 45 A L J 388
- The constitutionality of the 24th and 25th Amendment—By V. G. Ramchandran —1971 Law, p. 1198
- The Constitution and the common man—By N. A. Ralkhiwala —1971 Law, p. 37, 1971 M B C J (II) 55
- The Constitution 24th Amendment Act and 25th Amendment Bill —By V. G. Ramchandran —(1971) 2 S C C (Jour) 11
- The 24th and 25th Constitutional Amendments —By N. T. Vanamamalai —1971 Law, p. 195
- Constitution (25th Amendment) Bill 1971 —The March to serfdom —By Soli P. Sorabjee —1 Maha. B C J 59 (Pt IV)
- Constitution 25th Amendment Bill vis-a-vis the power of judicial review —By I. P. Massey —(1971)-II S C C (Jour) 37
- Constitutions of Liberty—By V. G. Haemstra —88 S A L J 57
- Coalition politics and Constitutional Heads in India —By Amal Roy —V J C P S 238
- Democracy and Civil Disobedience —By Mark R. MacGuigan —49 Can B R 222
- Democracy and the Constitution —By Chinnappa Reddi J. —(1971) I A P L J (Jour) 27
- Depoliticizing Indian Speaker —By Dalip Singh —(1971) V J C P S 106
- De-recognition—Editorial Note —(1971)-II S C A (Jour) 29
- Direct Election v. Vox Populi, —By Thomas F. Eagleton —56 A B L J 543
- Directive principles of State policy in the Constitution of India—By K. S. Hegde —V J C P S 129
- Dissolution of Lok Sabha & Ministerial advice—By A. P. Jain —(1971) V J C P S 298
- Dissolution of Lok Sabha : Need for evolution of conventions—By K. Subba Rao —(1971)-V J C P S 295
- Dissolution of Lok Sabha : Some constitutional questions —(1971)-V J C P S 320
- Dissolution of Parliament—Editorial —(1971)-75 C W N (Jour) 33
- The doctrine of protective discrimination—By Santosh Kumar —1971 Law, p. 62
- Economic justice and the Indian Constitution—By D. C. Jain —(1971) 2 S C J (Jour) 23
- Elite and Democracy —Their compatibility—Rt. Hon'ble Quintin Hogg —(1971) V J C P S 1
- Employment, discrimination and Title VII of the Civil Rights Act of 1964—Editorial survey —84 Har L R 1108 et seq
- Ending Rulership and its rights—By Dr. Mohammed Imam —1971 (I) S C C (Jour) 57
- Enemies of Liberty —Need for a modern Bill of Rights —Reproduction from the times —1971 K L R (Jour) 7

Constitutional law (contd.)

- Equality before the law —By J C Smith —49 Can B R 163
- Exclusionary zoning and equal protection —84 Har L R 1645
- Exercise of discretionary power & interference under Art. 226 of the Constitution—By B. R. Hansaria —1971 A L R (Jour) 3
- Fundamental Right of accused in custody to consult lawyer —By R. A. Kulkarni —1971 M B C J (II) 41
- Fundamental Rights —By K. Subba Rao —1971, p. 6
- Fundamental Rights in the Constitution of India—By R. K. Pandey —1971 M P L J (Jour) 69
- Government whether bound by assurance given by unauthorised official Editorial Note —75 C W N (Jour) 117
- The Governor-Dictator or Titular Head—By Dr. S. M. Sayeed —(1971) II An W R (Jour) 1
- The Governor's Power to Remove Chief Minister —By G. H. Guttal Judge, City Civil & Sessions Court Bombay —(Feb) 19
- Grapppling between the Governor and the Ministry —By Dr. S. M. Sayeed —1971 Law, p. 57
- Impeachment of India's President : A study of the procedure—By B. C. Das —V J C P S 245
- Inaccurate search warrant affidavits as a ground for suppressing evidence —By Steven M. Kipperman —84 Har L R 825
- India and the Commonwealth : A study in Parliamentary opinion—By W. T. Roy —(1971) V J C P S 65
- The Indian Prime Minister—A plea for institutionalization of powers—By Harish Khare —(1971) V J C P S 22
- Inter-State Relations in West Asia—By Saeed Hindavi —2 Int L R 179
- Is right to property not fundamental? —Two views—By A. G. Noorani & A. G. Moolgaonkar —1971 M L R (Jour) 55
- Judicial review, Right to Property, and Constitutional Amendment —By Shiviah —(1971) V J C P S 77
- The 'Judiciary' and the 'Reign of Law' in America —1971 K L R (Jour) 20
- Judiciary in Democracy —By Prof. Alphens T Mason —1971 Mah L J (Jour) 51
- Language rights in multicultural States : a comparative study —By Jerome K. Paradis —48 Can B R 651
- Local Emergency—Editorial —(1971) II S C A (Jour) 27
- Ministerial responsibility, civil servants and Ombudsman —(1971) S C A (Jour) 25
- Need for an Advisory Body for dissolution of Lok Sabha —By K. Rangachari —(1971) V J C P S 315
- Neo-Nigerian human rights in Zambia, A comparative study with some countries in Africa and West Indies—By D. O. Ahie —(1970) 12 J I L I 609
- Obstruction of policemen in discharge of their duties —(1971) 1 S C A (Jour) 3
- Parliament and Delegated Legislation —By B. R. Atre —Vol I, Pt 3, Maha B-C-J-60

Constitutional law (contd.)

- Parliament, Parasites and the Principles of Natural Justice—By Amicus Curiae —88 S A L J 37
 - The politics of 'advice and consent' —By William F. Swindler —56 A B A J 583
 - The President and Governors in the Indian Constitution —By Mr. Justice M. M. Ismail —84 L W (Jour) 7
 - Presumption of innocence in Continental law —By Joseph Minattur —1971 Law p. 1
 - The problem of delegated legislation —By V. G. Ramchandran —1971 Law, p. 212
 - Propriety of dissolution of Lok Sabha —By M. P. Jain —(1971) V J C P S 302
 - Racial discrimination —Editorial —76 C W N (Jour) 21
—(1971) 2 S C A (Jour) 35
 - Relation between Arts. 29 and 30 of the Indian Constitution —A recent change —By Santosh Kumar Gaur —1971 Law, p. 47
 - Reform in House of Commons Procedure (II) Minor reform in Legislative procedure —Editorial —(1971) 1 S C A (Jour) 29
 - Removal of difficulties orders —Editorial Note —(1971) V S C A (Jour) 13
 - The requirements of statehood re-examined —By D. J. Devine —34 Mod L R 410
 - Right to be heard in licensing cases —By Laxmi Swaminathan —(1970) 12 J I L I 657
 - Right to property in the whirlwind of time —By Joseph Minattur —1971 Law p. 53
 - Right to property: Permanent or Evasive? —By Joseph Minattur —(1971) 37 C L T (Jour) 48
 - Role of Governor in the emerging pattern of Centre-State relations —By Asoke S. Sen —(1971) V J C P S (Jour) 251
 - The Rule of law restated —By P. B. Mukharji —75 C W N (Jour) 65
 - Secularism and the Constitution —Double existence —By H. S. Ursekar —1 M B C J 28
 - Secularism under the Indian Constitution —By R. C. Nagpal —1971 Law, p. 112
 - Sex discrimination and equal protection: Do we need a constitutional amendment? —84 Har L R 1499
 - Social economic and political objectives of the Indian Constitution and Interpretation of Statutes —M. S. Vaidya —1 M B C J 35
 - Successive State and Federal Prosecutions for the same offence —62 J C L Crim P. S 29
 - Summary judgment in administrative adjudication —By E. Cellhorn & W. F. Robinson Jr. —84 Har L R 612
 - The Supreme Court and Art. 132 of the Constitution —By H. M. Seervai —78 Bom L R (Jour) 54
 - S. C. of India on natural justice and domestic and administrative tribunals —By Bakshish Singh —29 K L R (Jour) 105
 - Waiver of Constitutional Right —By Michael Tigan —84 Har L R 1
- Contempt of Court
- A cloistered virtue —By J. R. L. Milton —87 S A L 424

Contempt of Court (contd.)

- Supreme Court and Contempt of Court —By H. M. Seervai —1971 L K R (Jour) 29
- Contracts
- Agreements which defer 'essential' terms —By M. P. Ellinghans —(1971) 45 A L J 472
 - Causes and enforceability of contracts —By Joseph Minattur —1971 Law, p. 203
 - Contract, tort and crime: The forms of legal thought —By Tom Haden —87 L Q R 240
 - Contractual actions for damages against 'unincorporated bodies' —By J. F. Keeler —34 Mod L R 615
 - Error in personam —By Philip K. Thayil —(1971) 2 S C J (Jour) 15
 - The insurance of land and buildings the subject of a contract of sale —By D. L. Cassidy —(1971) 45 A L J 30
 - Making time of the essence —By Stanley Robinson —(1971) 45 A L J 242
 - Misrepresentation and sale of goods —By D. W. Greig —87 L Q R 173
 - Need for amending the law relating to consideration —By S. Shanud Hasnat Azmi —(1971) II Mad L J (Jour) 23
 - Restrictive covenants as property interests —By D. J. Hayton —87 L Q R 539
 - Some second thoughts on damages for breach of a drilling commitment —By John B. Ballen —48 Can B R 648
 - Tracing assets: A case for the fusion of Common Law and Equity in English Law —By F. O. B. Babafemi —(1971) 34 Mod L R 12
- Co-operative Societies
- Anatomy of a co-operative embezzlement —By Dr. S. C. Mehta —1971 Co-op L J (Jour) 28
 - Arbitration by layman —Need for substitution by Judicial Officers —By P. Seshadri —VII Co-op L J (Jour) 70
 - Co-operative Credit Societies —By Sir Denzil Ibbeston —VII Co-op L J (Jour) 78
 - Co-operative disputes —By Bastichand R. Bhansali —VII Co-op L J (Jour) 74
 - Co-operative Societies and Income-tax —By A. G. Angundi —(1971) VI Co-op L J (Jour) 78
 - Justice in Co-operative law —By B. D. Sharma —(1971) VI Co-op L J (Jour) 90
 - Pointers for Co-operative Legislation of tomorrow —By P. R. Weeraman —VII Co-op L J (Jour) 1
 - Procedural aspects in the settlement of disputes and execution —By S. P. Padhi —VII Co-op L J (Jour) 87
 - Promotional and Organisational role of Co-operative Department —By Syed Hashim Ali —VII Co-op L J (Jour) 11
 - Statutory powers of Registrar of Co-operative Societies —By S. Chandra —(1971) VII Co-op L J (Jour) 56
 - The statutory power vested with the Co-operative Departmental Officers —By P. K. Borpatra Gohani —(1971) VII Co-op L J (Jour) 62
 - Why Central Legislation for Co-operatives? —By B. K. Sinha —(1971) VII Co-op L J (Jour) 5

Copyrights

- The uneasy case of copyright—A study of copyrights in Books, Photographs, and computer Programmes—By Stephen Breyer —84 Har L R 281

Corruption

- The discretionary provisions of the Parliamentary Commissioner Act 1967—By David Foulkes —34 Mod L R 377
- Ombudsman and what it does—By P. Narayan —(1971) I S C J (Jour) 7
- The proposed ombudsman system for India—By Donald C. Rowat —(1971) V J C P S 205

Court-fees

- Suits for cancellation of a document—Interpretation of S. 40 of the T. N. Court-fees and Suits Valuation Act—By R. S. Venkatachari —84 L W (Jour) 31

Courts

- Collegiate Courts: Diminution of personal equation—By Joseph Minattur —(1971) 1 An W R (Jour) 3
- The Court of Claims: The Nation's Conscience—By Edwin J. McDermott —57 A B A J 594
- S. 17 (1), Provincial Small Cause Courts Act—By P. T. Doraiswamy —(1971) 1 M L J (Jour) 31

Criminal Law

- Abortion: A question of right or wrong—By Robert W. Fox —57 A B A J 687
- Animus injuriandi and mistake—By P. Q. R. Bobergs —88 S A L J 57
- Arrest on suspicion and subsequent discharge for insufficiency of evidence—(1971) I S C A (Jour) 11
- The challenge of a modern Federal Criminal Code—By John L. McClellan —57 A B A J 585
- Compensation to victims of crime—By Mohemad Akram —1971 Mad L J (Cri) (Jour) 5
- The doctrine of common purpose in Criminal law—By M. A. Rabie —88 S A L J 227
- Excusable loss of self-control in homicide cases—By Alec Samuels —(1971) 34 Mod L R 163
- For a meaningful right to counsel on sentencing—By Richard H. Kuh —57 A B A J 1036
- Police Practices and the threatened destruction of tangible evidence—A Note —84 Har L R 1435
- Public participation in the prevention of crime—By J. H. Steyn —88 S A L J 210
- Reasonable mistake of fact as a defence in statutory offences—By J. R. L. Milton —88 S A L J 70
- Recent trends in Criminal Law —62 J C L Crly P S 56
- Statutory restrictions on the privilege against self-incrimination—By J. D. Heydon —87 L Q R 214
- Vicarious liability in statutory offences—By Dennis Rose —(1971) 45 A L J 252
- What is the remedy?—By R. B. Kantavala —1 M B C J 26
- Young offenders before the Courts—By Brian A. Grossman —(1971) 2 Can B A J (May 71) 7

Criminal Procedure

- The admissibility of self-incriminatory evidence—By McClellens, J. —(1971) 45 A L J 57
 - A note on the Code of Criminal Procedure Bill of 1970—By B. G. Thakore —Vol I, Pt 3, Maha B C J 36
 - A note on the Criminal Procedure Bill, 1970—By S. M. Daud —1971 M B C J (II) 67
 - A note on S. 207A, Criminal P. C.—By T. Krishnamurthy —(1971) 1 A L T (Jour) 5
 - Bail: an examination—By Douglas Brown —(1971) 45 A L J 193
 - Counsel's duty in criminal trial and plea-bargaining —1971 K L R 47
 - Decision in 1971 K L T 80—A comment—By K. Jagadishchandran Nair —1971 K L T (Jour) 21
 - Doctrine of common purpose in criminal law—By M. A. Rabie —88 S A L J 245, 334
 - Impeachment with unconstitutionally obtained evidence. Coming to grips with the perjurious defendant—By Jeffrey Cole —62 J Cr L, Crly & P S 1
 - Is S. 562 of Criminal P. C., still applicable to First Offenders?—By P. U. Aiyappan —1971 K L T (Jour) 13
 - Justice in West Germany: Prohibition of Reformatio in Peius—By Joseph Minattu —1971 Law, p. 23
 - On bail—Editorial —(1971) I S C A (Jour) 37
 - Preliminary hearing in Homicide cases—A hearing delayed is hearing denied—By Wm. H. Theigs —62 J C L Crly P S 17
 - Proposed amendments of the Code of Criminal Procedure—By R. B. Kantawala —Vol I, Pt 3, Maha B C J 29
 - Protection against arbitrary search of the premises of the accused—By S. P. Dwivedi —1971 Law, p. 107
 - Relaxation of order under S. 144, Criminal P. C.—Editorial note —75 C W N (Jour) 81
 - Remand of accused to custody—Editorial —(1971) I S C A (Jour) 9
 - 75 C W N (Jour) 125
- Custody**
- The paramount interest of child in law and psychiatry—By Finlay & Gold —(1971) 45 A L J 82
- Damages**
- Fundamental breach: The aftermath of Harbut's "plasticine"—By Legh-Jones & Pickering —87 L Q R 515
 - Punitive damages in torts—By G. H. L. Fridman —48 Can B R 373
- Divorce**
- A Sole ground for divorce: An examination of recent divorce reform in England in anticipation of reform in Australia—By C. M. Butler —(1971) 45 A L J 168
 - Divorce law reform—By June D. Peterson —88 S A L J 478
- Drugs**
- Drug: Indian, American & English Law—By Sri & Smt. V. B. Ganatra —1971 Mh L J (Jour) 1, 21

Easement

- Privacy and the public—By G. D. S. Taylor —34 Mod L R 305

Education

- Legal Education in England—By John Henderson McNeill —57 A B A J 673
—Reforming Legal Education in England—By Sir Roger Ormrod —57 A B A J 676
—Relations between Universities and Governments in Canada—By Donald C. Rowat —(1971) V J C F S 8

Elections

- Death of a candidate and fresh election—Editorial note —(1971) 75 Cal W N (Jour) 53
—Election and Slogans —(1971) 1 S C A (Jour) 17
—Election and Slogans —75 C W N (Jour) 57
—Electoral Rolls in General Elections—By P. S. Subramanian —(1971) 1 M L J (Jour) 35
—Postponement of election —75 C W N (Jour) 55

Equity

- Ratification in Equity—By Leonard Bromley —87 L Q R 532

Essential Supplies

- Whether breach of conditions of licence is breach of Control Order? —By B. Radhakrishnamurthy —(1971) 11 An W R (Jour) 11

Evidence

- Attorney-Client privilege for corporate clients the control group test—Editorial note —84 Har L E 424
—Effect of kind of question and atmosphere of interrogation on accuracy and completeness of testimony—By James Marshall, Kent Marquis & Stuart Oskamp —84 Har L R 1620
—The legal value of evidence of finger prints, palm impression & foot prints—By M. J. Selthna —1 Maha B C J 67 (Et IV)
—Modification of the hearsay rule—By D. E. Harding —(1971) 45 A L J 531

External Affairs

- Congress approach to International Affairs—By S. D. Sharma —1 Int L R (Pt. II), p. 71
—Foreign policy and Diplomacy—By V. L. Pandit —1 Int L R (Part II), p. 89

Extradition

- Extradition of Fugitive Offenders under the Indian Law—By M. L. Vohra —1 Int L R (Pt. II), p. 1

Forgery

- Detection of forgery—Revenue Stamps—By P. H. Patel —1971 M P L J (Jour) 3

Fundamental Rights

- Discrimination and Bill of Rights—Editorial Note —(1971) 11 S C A (Jour) 5
—Freedom of expression in Canada—By L. H. Powe Jr. —48 Can B R 410

Habeas Corpus

- Habeas Corpus in family law—By Ram Singh —(1970) 12 J I L I 545

Health

- Abortion law: An analysis of the proposed reforms—By M. Zakaria Siddiqui —(1971) 11 M L J (Jour) 35
—Acquittal Erroneous (A note on 1971 Cr. L. J. 431)—By Mrs. L. V. Ganatra and V. B. Ganatra —1971 K L T (Jour) 27
—Contamination of food and liability of third party—Editorial Note —75 C W N (Jour) 85
—Did the Courts err?—Sugar v. Saccharin—By Mrs. L. V. and V. B. Ganatra —Vol I, Pt 3, Maha B C J 39
—Food adulteration—Law and Science—By Mrs. Lajwanti Ganatra and Sri V. B. Ganatra —1971 M P L J (Jour) 11
—“Sale” under Prevention of Food Adulteration Act, 1954—By Mrs. L. V. and Sri V. B. Ganatra —1971 Maha L J (Jour) 77
—S. 13, the kingpin in the Prevention of Food Adulteration Act, 1954—Right of Cross-Examination of the Public Analyst—By Mrs. L. V. Ganatra and V. B. Ganatra —1971 Ker L J (Jour) 3
—Some aspects of the Prevention of Food Adulteration Act, 1954—By Smt. Lajwanti Ganatra —1 Maha B L J 24 (Pt. IV)
—Supreme Court erred in holding sugar sample adulterated (1971 K. L. T. 472 (S. C.))—S. C. erred in holding that High Court held it adulterated (A. I. R. 1969 Ker. 179)—By Smt. L. V. Ganatra and V. B. Ganatra —1971 K L T (Jour) 45

Hindu Law

- Adoption and relation, back: the position in 1971—By J. D. M. Derret —73 Bom L R (Jour) 81
—A Hindu Law Miscellany, 1971—By J. D. M. Duncan Derret —73 Bom L R 78
—A note on Kunji Thorman v. Meenakshi, A. I. R. 1970 Ker 284—By J. D. M. Derret —1971 K L T (Jour) 25
—Divorce under the Hindu Marriage Act—A conflict of Principles—By Justice V. S. Deshpande, (Nagpur) Judge, Delhi High Court —(Aug) 113
—Effect of S. 14 of Hindu Succession Act, 1956, on rights of trespasser in adverse possession against female Hindu—By C. R. Ravi —(1971) 1 M L J (Jour) 5
—Pious obligation of Hindu son—By K. T. Harindranath —1971 K L T (Jour) 7
—S. 14 of the Hindu Succession Act, 1956—A recent Supreme Court decision—By J. D. M. Derret —73 Bom L R (Jour) 50
—S. 22 of the Hindu Succession Act: A plea for its amendment—By M. S. Vaidya —73 Bom L R (Jour) 41
—The Supreme Court and acquisition of joint family property—By J. D. M. Derret —(1971) 1 S C W R (Jour) 7
—Theory of Blending and an Empty H. U. F. Hotchpot—By Sri V. Setu Raman —(June) 68

Houses and Rents

- Discrimination in Rent Control Legislation in Maharashtra—By M. B. Mor —1 Maha B C J 72 (Pt. IV)

Houses and Rents (contd.)

- Ratilal Balabhai Nazar v. Ranchhodhbhai Patel and others (IX C.L.R. 48)—A comment—By V. J. Desai
—XII C.L.R. (Jour) 1
 - Rent increases—By Paul Robertshaw
—1970 Public Law 330
 - S. 5 (ii) (c) of the Bombay Rents and Hotels and Lodging House Rates (Control) Act, 1947—By H. Suresh
—1 Maha B.C.J 10 (Pt. IV)
 - Shortage of housing accommodation and law reforms—By M. V. Paranjape
—Vol I, Pt 3, Maha B.C.J 32
- Immigration**
- Immigration and the criminal Courts—By F. O. Shylton
—1971 (34) Mod L R 135
- Income Tax**
- Allowability of expenditure on criminal proceedings—By Dinesh Vyasa
—1971 Taxation, S. 2, p. 60
 - Assessment of a Hindu undivided family and the amendments made by the Taxation Laws (Am.) Act, 1970—By A. R. Agarwal
—1971 Taxation, S. 2, p. 1
 - Burden of proof in Income Tax Proceedings—By V. K. Mahajan
—1971 Taxation, S. 2, p. 157
 - Can 'Fair Rental Value' under Income Tax Law exceed 'Standard Rent' under Rent Control Law?—By Jugal Kishore Shah
—1971 Taxation, S. 2, p. 126
 - Computation of total income of trade, professional or similar Associations—By A. R. Shah
—31 Tax, S. II, p. 246
 - Current repairs—By L. C. Goyle
—(1971) I I T J (Jour) 69
 - Current repairs under the Income-tax Law—By L. C. Goyle
—31 Tax, S. II, p. 257
 - Depreciation under Income-tax Act—By N. L. Jain
—1971 Taxation, S. 2, p. 109
 - Double taxation avoidance & relief—By Raj. K. Tandon
—31 Tax (Sec. II), p. 285
 - Development rebate under Income-tax Act—By N. L. Jain
—1971 Taxation, S. 1, p. 33
 - Federal Income-tax Reforms: The varied apparatuses necessary to replace tax expenditures with direct Governmental action—By Stanley S. Surrey
—84 Har L R 35
 - "Goodwill" in taxation—By R. Santhanam
—31 Tax, (S. II), p. 271
 - Grossing up of dividend under S. 2 (22) (e) of the Act—By P. G. Gupta
—1971 Taxation, S. 2, p. 148
 - Income of other persons liable to be included in assessee's total income—By B. S. Kothari
—1971 Taxation, S. 2, p. 99
 - Is a penalty under S. 221 (1) exigible for defaults in payment of advance tax—By P. C. Goyal
—31 Tax, S. II, p. 279
 - Multiple assessments under Income-Tax Act, 1961—By G. C. Sharma
—1972 Taxation, S. 2, p. 41
 - New procedure of I-T. Assessments—By B. K. Bagchi
—(1971) VII C.T.B. 574
 - Order of priority for deduction of losses and allowances in computation of total taxable income of a company illustrated—By Shrivax Mistry
—1971 Taxation, S. 2, p. 22

Income Tax (contd.)

- Separate property of an individual thrown into the common-stock of H. U. F. and Taxation Laws (Am.) Act, 1970—By V. P. Pandit
—1971 Taxation, S. 2, p. 143
 - Some dangerous provisions of Income-tax Act and precautions for Tax payers—Part I—By H. K. Bhargava
—1971 Taxation, S. 2, p. 165
 - Taxation Laws (Amendment) Act, 1970—Amendments and charges examined—By S. R. Bhargava
—1971 Taxation, S. 2, p. 68
 - Tax clearance certificates—By C. R. Thiag Raja Varma
—31 Tax (Sec. II) 293
 - Tax considerations for capital expenditure—By P. N. Vepati
—1971 Taxation, S. 2, p. 58
 - Tax planning of salary income—By Premjus Roy
—1971 Taxation, (S. 2), p. 9
 - Unexplained cash credits and additions on account of rejection of Books of Accounts—By J. M. Kalra
—31 Tax (Sec. II), p. 297
- Industrial Development**
- Budget and Industrial Development—By R. N. Lakhota
—(1971) VII C.T.B. 576
- Industrial disputes**
- Disputes between workers and a Co-operative Society
—VII D.C.I.L.L. (Pt. II) p. 46
 - Exercise of administrative discretion under S. 10 of Industrial Disputes Act, 1947—By R. S. Kulkarni
—1971 M.B.C.J (II) 45
 - "The Industry" under the Industrial Disputes Act, 1947—By R. S. Kulkarni
—1 M.B.C.J 6
 - Retrenchment on closure of company or its branch—Editorial Note
—VI D.C.I.L.L. 379
 - Scope of S. 33-C (1) of Industrial Disputes Act, 1947 (14 of 1947)—By S. P. Sehgal
—(1971) I L L J (Jour) 18
 - Section 33 (2) (b) of the Industrial Disputes Act, 1947—By Govind Bhavathan
—1971 K.L.T. (Jour) 62
 - Transfer of employee—Editorial Note
—VI D.C.I.L.L. 382
- Industrial Relations**
- Role of Personnel Managers in industrial relations—By R. K. Verma
—51 Lab Gaz 218
- Industries**
- Compulsory unionism returns—By D. R. Hall
—(1971) 45 A.L.J 415
 - Discipline in industry—By Mohan Das
—50 Lab Gaz 417
 - Industrial safety—By K. N. Parakha
—50 Lab Gaz 1220
 - Justiciability of closure of undertakings—By R. S. Kulkarni
—1 Maha B.C.J 37 (Pt. IV)
 - Problem of absenteeism in industry—By Cyril H. Khisti
—50 Lab Gaz 648
 - Role of Trade Unions in promoting safety and health of industrial workers—By J. R. Ovalekar
—50 Lab Gaz 279
- Insolvency**
- Provincial Insolvency Act (1920), S. 4—Exact import and scope of the expression 'subject to the provisions of this Act'—By V. Bh. Chemulu
—1971 (1) A.P.L.J (Jour) 14

Insurance

- The "Basis of the contract clause" in insurance law—By R. A. Hasson —1971 (34) Mod L R 29
- Nationalisation of General Insurance—A general analysis—By S. N. Gupta —1971 M L R (Jour) 67

International Law

- The aliens and Administrative Justice: The Dutschke case—By B. A. Hepple —35 Mod L E 501
 - Bangla Desh in the Eye of International Law—By Dr. Debi Prasad Pal, Advocate —(July) 102
 - Freedom of Scientific Research in the High Seas—By Dr. R. K. Dixit —1971 Int L R (Pt D) 113
 - Hijacking an international crime—K. C. Joshi —1971 (1) S C C (Jour) 36
 - Human Rights in Juridical Matrix—By A. Lakshmi Nath —1971 Int L R (Pt I) p. 33
 - The impact of super-power detente on the United Nations—By V. Lakshman Rao —(1971) 2 Int L R 44
 - The impact of super-powers on the United Nations—By G. V. Krishna-murthy —1971 Int L R (Part I) p. 17
 - The impact of super-power detente on the United Nations—By B. N. S. Murthi —1971 (2) Int L R 133
 - India and European Economic Community—By Prof. Ralph Dahrendorf —1971 Int L R (Pt D) 121
 - India and International Legislation under the United Nations Organization—A study in indifference and collaboration—By Dinkar A Meghe —1971 2 Int L R 52
 - International Torts—Problems and Prospects—By O. P. Tiwari —1971 Int L R (Articles-Feb) 9
 - The Law of the Sea: Some recent development—By Bhimsen Rao —1971 Int L R (Pt I) 78
 - Law of Treaties—Editorial Note —75 C W N (Jour) 69
—(1971) 1 S C A (Jour) 23
 - Recent developments in the law relating to the sea-bed—By D. A. Kamat —1971 Int L R (Pt I) 102
 - Salient Features of Indus Water treaty—By Krishna Lal Chopra —(1970) 1 Int L R (Pt II), p. 13
 - Should Law of War be changed?—By William H. Forman Jr. —57 A B A J 987
 - Sovereignty and International Law—By M. Gurunath —1971 Int L R (Pt I) 125
 - Soviet attitude towards international law—By K. Venkatramiah —1971 (2) Int L R 143
 - Special position of refugees in the law of asylum—By Yudhisthir —1971 Int L R (Articles Jan) 7
 - U. N. General Assembly resolution, binding nature —76 C W N (Jour) 17
—1971 (2) S C A (Jour) 33
- Interpretation of Statutes**
- Ouster clause in Statutes—Editorial —(1971) II S C A (Jour) 15
- Judiciary**
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Judiciary (contd.)

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 - The Judicial process, positivism and civil liberty—By John Dugard —88 S A L J 181
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—1971 Mh L J (Jour) 69
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- Jurisdiction**
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- Jurisprudence**
- Space jurisprudence—A new challenge—By B. A. Masodkar —I M B C J 13
- Justice**
- Administration of Justice—By Hemendra K. Shah —I M B C J 45
- Labour**
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 - Labour relations in a Hospital—By N. Harinath —1971 (2) An W R (Jour) 17
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- Transfer (of workman) — VI D C I L L (Pt II) 97
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Law (General)

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- Law in Changing Society — By A. Chandrasekheran —1971 K L R (Jour) 75
- The laws sometimes sleep. Never die — By G. N. Vaidya —1971 M B C J (II) 6
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Law (General) (contd.)

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Law Reporting

- The case against electronic courtroom reporting — By Edgar Paul Boyko —57 A B A J 1008

Legal Aid

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Legal Practitioner

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- Lawyers and Law Firms look ahead —1971 to 2000 — By William J. Fuchs —57 A B A J 971
- Legal Ethics Part I — By Bali N. Sarkar —Vol I, Pt. 3, Maha B L J 86
- Right of an Advocate of one State to plead in the Court of other State — By D. R. Dhanuka —1971 M B C J (II) 99
- Self-discipline of the Bar: Theory or Fact? — By Edward L. Wright —57 A B A J 757

- Lawyers and Law Firms look ahead —1971 to 2000 — By William J. Fuchs —57 A B A J 971

- Legal Ethics Part I — By Bali N. Sarkar —Vol I, Pt. 3, Maha B L J 86

- Right of an Advocate of one State to plead in the Court of other State — By D. R. Dhanuka —1971 M B C J (II) 99

- Self-discipline of the Bar: Theory or Fact? — By Edward L. Wright —57 A B A J 757

Legal System

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Legislatures

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Local Self-Governments

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Lokpal

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Maintenance

- Maintenance and property — By Gareth Miller —87 L Q R 66

Maritime Law

- Rights of a Coastal State in the territorial sea — By S. S. Ahluwalia —1971 I L R 235

Marriage

- Can a civil Court issue an injunction restraining a husband from entering into a bigamous marriage? — By B. N. Sampath — (1971) 11 M.L.J. (Jour) 3
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- Whither Monogamy? — By M. B. Mor & A. M. Gordey — 1 Maha B.C.J. 42 (Pt IV)

Master & Servant

- Restraint against employment — Editorial note — 75 C.W.N. (Jour) 95 = (1971) 11 S.C.A. (Jour) 3
- Vicarious liability — By Joseph Minattur — 1971 Law p. 81

Mercantile Law

- Law of the European Communities and Municipal Law — By Gerhard Bebr — 34 Mod.L.R. 481
- Negotiable Instruments Act, 1881 and Private International Law — A restatement as to choice of law — By V. S. Mani — (1971) 37 C.L.T. (Jour) 19

Monopolies

- Check on concentration through National budget — By Sheo Narain Singh — 1971 M.E.R. 71
- Monopolies Commission — Procedure relating to enquiries — By C. S. Vidya Sankar — 1971 Law p. 91
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Motor Vehicles

- Massachusetts tries 'No fault' — By John G. Ryan — 57 A.B.A.J. 431

Natural Justice

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Negotiable Instruments

- Hardship caused by S. 20 — Negotiable Instruments Act — By T. S. Subramaniam — (1971) 11 M.L.J. (Jour) 33
- Negotiable Instruments Act, 1881 and Private International Law — A restatement as to choice of law — By S. V. Mani — 1971 S.C.D. (Jour) 17

Obscenity

- Control of Obscenity — Editorial Note — (1971) 75 C.W.N. (Jour) 69 = 1971 S.C.A. (Jour) 21
- The Oz trial — Editorial — (1971) 11 S.C.A. (Jour) 31

Partition

- A sale under a Partition Act whether governed by C.P. Code or T.P. Act? — By B. M. Bhalkikar — 1 Maha B.C.J. 51 (Pt IV)

Partnership

- Agency of partners — By D. N. Karla — 1971 Law p. 94

Patents

- Definition of "invention" in the Patent Act, 1970 — By S. B. Shah — 73 Bom.L.R. (Jour) 1
- Legal doctrine in passing off actions — By S. B. Shah — 73 Bom.L.R. (Jour) 35

Personal Law

- Compulsory blood tests in family law cases — By J. R. Forbes — (1971) 45 A.L.J. 247
- The teaching of Family Laws in India — By R. Jaganmohan Rao — (1971) 1 M.L.J. (Jour) 15

Pollution

- Pollution and Conservation — By S. B. Hart — (1971) 45 A.L.J. 473

Practice and Procedure

- Amendment of plaint exceeding the pecuniary jurisdiction of the Court — By B. Venkatratnam — (1971) 11 An.V.R. (Jour) 22
 - A note on State of Madras v. Ramlinga Reddiar, (1967) 2 M.L.J. 131 and S. 80 of C.P. Code — By M. Padmanabhan — (1971) 1 M.L.J. (Jour) 23
 - Appeals to Supreme Court — By B. R. Agarwala — 1971 M.B.C.J. (II) 73
 - Changes ahead in the Federal Court Rules — By George M. Vetter — 56 A.B.A.J. 568
 - Changes in the Original Side Rules of the High Court of Judicature at Bombay — By Hemen B. Shah — Vol. I, Pt. 3 Maha B.L.J. 8
 - Injunctions before judgment in cases of defamation — By Robert A. Hayes — (1971) 45 A.L.J. 125, 181
 - Issue estoppel in South Africa — By D. Zeffert — 88 S.A.L.J. 312
 - Powers of Court to authorise illegal detention — Editorial note — 76 C.W.N. (Jour) 29
 - Proceedings for provisional relief in France — By Joseph Minattur — 1971 Law p. 209
 - Promissory estoppel in English & South African Law — By Pierre J. Olivier — 88 S.A.L.J. 321
 - Suggestions in respect of amendments to the Code of Civil Procedure, 1908 — By D. R. Dhanuka — 1971 M.B.C.J. (II) 83
 - Suggestions on amendments to the Code of Civil Procedure, 1908 — By D. R. Dhanuka — 1 M.B.C.J. 41
 - Too many appeals — By J. L. Nain (J.) — 1 Maha B.C.J. 9 (Pt IV)
 - The use of blood tests in the pursuit of truth — By Mary Hayes — 87 L.Q.R. 86
 - The use of full courts in the appellate process — By L. J. Blom-Cooper & Gavin Drewry — 34 Mod.L.R. 364
- # Precedents
- Doctrine of precedents and unreported judgment — By B. G. Thakore — 1 Maha E.C.J. 44 (Pt IV)
 - The doctrine of "stare decisis", an appraisal — By R. Mazumdar — XII Guj.L.R. (Jour) 1
- # Preventive Detention
- The French Experience with Preventive Detention — By W. Laurence Craig & William A. Dabrovir — 57 A.B.A.J. 565
 - Power of court to authorise illegal detention — Editorial — 76 C.W.N. (Jour) 13

Prisoner

- Prisoner correspondence : An Appraisal of the judicial refusal to abolish banishment as a form of punishment —62 J C L Crly P'S 40

Profession

- Superannuation and the professional man —By P. R. Jordan —(1971) 45 A L J 523

Provident Fund

- Provident fund and tax laws — By C. R. Thiag Raja Verma —31 Tax (S. II), p. 325
- On making an Index —By Rowland L. Young —57 A B A J 570

Restrictive Trade Practices

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Sales Tax

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Sentencing

- Imprisonment and deterrence — By Stanley W. Johnson —(1971) 45 A L J 305
- Imprisonment by judicial hunch — By Alan M. Dershowitz —57 A B A J 560

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Taxation

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- Exemptions under the Wealth Tax Act —By M. G. Agarwal —(1971) Tax Consultants (Jour) 55
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- The Limit of Taxing power — By K. Veeraswami J. —(1971) 1 I T J (Jour) 3
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- Note on some anomalies of Income-tax and Gift-tax —By Laxmi N. Modi —(1971) VII C T B 653
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Taxation (contd.)

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- Searches and Seizures — By K. Srinivasan —(1971) 1 I T J (Jour) 59
- Tax considerations in mergers including amalgamations — By Shiavax Mistry —31 Tax 319 (S. II)
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- Tax-free benefits and gifts in U. K. —By L. Osborne —(1971) VII C T B 745
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Torts

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- Rescuers and good samaritans — By Allen M. Linden —34 Mod L R 241
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Torts/Damages

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Trade Unions

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Tribunals

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Tribunals (contd.)

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Trusts

- Trust, power and duty —By J. W. Harris —87 L Q R 31

War

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Wills

- Contracts to make will —By W. A. Lee —87 L Q R 358

Zilla Parishads

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- The Law of Accounts (Oct) 131

Administrative Law

- Administrative Law (April) 43
—Administrative Law for Surveying Students Concise College Text (Oct) 135
—Administrative Law in India (Feb) 29
—The Administrative Reforms Commission and its Work, A Brief Survey, 1970 (June) 87
—The Proposed Indian Ombudsmen (A Comparative Study of the Lokpal and Lokayuktas Bill, 1968) (Aug) 122

Arbitration

- Russell on The Law of Arbitration (July) 108

Bonus

- Commentaries on The Payment of Bonus Act, 1965 (Jan) 7

Carriers

- The Carriers Act (Act 3 of 1865) (April) 39

Citizenship

- Citizenship of India (Dual Nationality and the Constitution) (May) 63

Companies

- Secretarial Practice in India (Oct) 142
—The Secretarial Primer, 1971, 1st Indian Edition (Oct) 137

Company Law

- A Concise Treatise on Company Law (April) 40
—A Dictionary of Company Law, 1968 (June) 83
—Company Meetings and Resolutions (July) 108
—The Indian Company Law (with the Indian Companies Act, 1956) (April) 45
—Lectures on Company Law (Dec) 158
—The New Frontiers of Company Law (Oct) 138

Conflict of Laws

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Constitutional Law

- Basu's Shorter Constitution of India (Jan) 12
—Can the State kill its citizen? (June) 93
—Commentaries on the Constitution of India (Oct) 143
—Commentary on the Constitution of India, Vol. 5, (Arts. 300-End) Fifth Edition (Revised, Rewritten and Enlarged.), 1970 (Feb) 32
—The Evolution of the Indian Constitution. (Sri Chimanlal Setalvad Law Lectures) (June) 76
—Indian Constitutional Law (June) 73
—The law of Parliamentary privileges in U. K. and in India (Oct) 141
—The Law Relating to Government Control over private Enterprise (Cases and Materials) (Jan) 7
—Secularism and the Constitution of India (Dec) 159
—Some constitutional problems (April) 44
—State and Rights of Men (June) 95
—Studies in Indian Legal History and Indian Constitutional History (June) 78

Contracts

- A Hand book on the General Principles of the law of contract (April) 38
—Contracts of Employment (May) 62
—The Law of Contract (July) 109

Copyrights

- Patents, Trade Marks, Copyright and Industrial Designs (April) 37

Court-fees

- The West Bengal Court Fees Act, 1970 (with Suits Valuation Act, 1887) (Feb) 28

Criminal Law

- Criminal Responsibility (L. S. E. Research Monographs No. 8) (Dec) 157
—Homicide (May) 62
—Probation and Parole (Jan) 5
—Sentencing Offenders in Magistrates' Courts (Aug) 127
—Society and the criminal (July) 111

Estate Duty

- Estate Duty Changes, 1969 (Feb) 25
—Law Relating to Estate Duty, Gift Tax and Wealth Tax (Feb) 31

Evidence

- Cockle's cases and statutes on Evidence 11th Edition (Jan) 8
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—Handwriting Evidence (A Guide in Disputed Documents Trial) 1971 (Dec) 158
—Identification of Handwriting and Cross-Examination of Experts (Feb) 30
—Law and Practice of Evidence (Civil and Criminal) (April) 43

Excise

- Central Excise Law and Practice in India (June) 79
—Law of Central Excise in India (in 2 Volumes) (Feb) 26

Foreign Law

- A First Book of English Law (Aug) 128

Foreign Law (contd.)

- The Choice of Law in Ex-British Africa (Oct) 183
- Criminal Procedure in Uganda and Kenya (Law in Africa No. 13) (Aug) 121
- The Development of the Constitution of the Somali Republic (Feb) 27
- European Business Law (Aug) 119
- Family Law (Concise College Texts) (Oct) 185
- Soviet Legal System (Civil and Military Law Journal Special Number, Vol. 4, Nos. 3-4, 1968, D-1/24, Rajouri Garden, New Delhi 27) (Jan) 10
- Sweet & Maxwell's Family Law Statutes 1970 (July) 111

General

- My Life: Law and other things (June) 88
- Reminiscences of a Judge (June) 77

Gift Tax

- Law Relating to Estate Duty Gift Tax and Wealth Tax (Feb) 31

Government servants

- Contracts of Employment (May) 62
- Disciplinary action against Government servants and its Remedies (June) 90

Hindu Law

- A critique of Modern Hindu Law (June) 93
- Hindu Law of Adoption Maintenance, Minority and Guardianship (Feb) 24

Houses and Rents

- The Rent Acts by Sir Robert Megarry, LL.D., Vol. 3, Permanent Supplement (July) 108

Income Tax

- How Are Losses Treated under Income Tax Act, 1961 (June) 83
- Income Tax (Jan) 13
- Income Tax Guide, 1969-70 (on Corporate and Personal Taxation) (Jan) 11
- The Law of Income Tax, Sur Tax & Capital Gains Tax (In a nutshell) (Aug) 124

Industrial Designs

- Patents, Trade Marks, Copyright and Industrial Designs (April) 37

Industrial Disputes

- The Industrial Disputes Act, 1947 (April) 42

Industrial Law

- Misconduct in Employment (In Public and Private Sector) (April) 40

Insurance

- General Principles of Insurance Law (Feb) 24
- The Law of Insurance (July) 110
- Life Assurance and Tax Planning (Aug) 120

International Law

- Extradition in International Law (Nov) 180
- International Law through the cases (Aug) 124
- The Legal Status of the Arabian Gulf States (A study of their treaty relations and their International problems) (Feb) 22

International Law (contd.)

- Public International Law (Aug) 119

Judiciary

- The Position of the Judiciary under the Constitution of India (April) 41

Jurisprudence

- Jurisprudence (Dec) 154
- Lectures on Jurisprudence (According to Meerut University Syllabus), 1971 (Nov) 151
- The New Jurisprudence (The Grammar of Modern Law) (Oct) 138
- Shingue's Summary of Salmond's Jurisprudence (Feb) 29
- Simplified Text Book of Medical Jurisprudence and Toxicology (For Classrooms and Courtrooms) with 174 Illustrations (Jan) 15

Labour Laws

- A Guide to Disciplinary Proceedings for the Executive in Industry (June) 80
- Labour Law (June) 74

Land Laws

- Land Law (Concise College Texts) (July) 112

Law (General)

- Annual Survey of Commonwealth Law, 1968 (June) 96
- Annual Survey of Commonwealth Law, 1969 (Oct) 138
- Building Society Law (Cases and Materials) (Jan) 9
- The Common Law in India (June) 84
- Current Legal Problems, 1968 (Jan) 10
- Development of Judicial System in India under the East India Company from 1833 to 1858 (Nov) 151
- Introduction to Legal Theory (Oct) 131
- Law in A changing society (June) 92
- The Metrics of Legal Philosophy (Oct) 139
- Public Law (Concise College Texts) (Aug) 125
- Veterinarian and the Law (Oct) 132

Legal Practitioners

- Advocates' Handbook, 1970 (June) 87
- IX Congress of the International Association of Democratic Lawyers (Dec) 157

Mercantile Law

- Stevens and Borrie's Elements of Mercantile Law (Jan) 6

Natural Justice

- Law of Bias and Mala Fides (Judicial and Administrative) (June) 89

Negotiable Instruments

- Promissory Notes (Law, Practice and Procedure) (May) 61

Offenders

- Massachusetts Court Clinic (April) 37
- Probation and Parole (June) 81

Partnership

- Law of Partnership in India and Pakistan (June) 85

- Passports**
—Law Relating to Entry into and exit from India (May) 61E
- Patents**
—Patent, Trade Marks, Copyright and Industrial Designs (April) 37
- Periodicals**
—Jammu and Kashmir Law Reporter, December 1970, Vol. 1, Part I (Oct) 133
—The Law College Magazine, Ernakulam, 1969-70 (Feb) 22
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- Practice and Procedure**
—The Calcutta City Civil and Sessions Courts Acts 1953 (Feb) 23
- Press Council**
—The Press Council of India Fifth Annual Report, 1970 (Dec) 160
- Public Safety**
—Riots: Prevention and Control (June) 76
- Revenue Law**
—Digest of Reported and Unreported Decisions on Revenue Law 1964-68 (Dec) 153
—Revenue Law (Aug) 121
- Sales Tax**
—Best Judgment Assessment and Penalty under Sales Tax Law (with Particular reference to Andhra Pradesh) (Dec) 155
—The Bombay Sales Tax Act, 1959 (Aug) 127
—Digested Analysis of Sales Tax Law (June) 91
—General Sales Tax Law in Madhya Pradesh (in two volumes) (Apr) 38
—Law and Practice of Sales Tax in Rajasthan (June) 91
—The Law of Central Sales Tax (June) 94
- Specific relief**
—Sarkar's Specific Relief Act (June) 85
- Torts**
—Cracknell's Law Student's Companion No. 2 Torts (June) 75
—The Law of Torts (Dec) 153
- Trade and Commerce**
—Commercial law (June) 74; 82
—Dictionary of Economic Terms (June) 77
—The Export Trade (The Law and Practice of International Trade) (Oct) 134
—The Law of International Trade (Nutshell Series) (Aug) 118
- Trade Mark**
—Patents, Trade marks, Copyright and Industrial Designs (Apr) 37
- Trade Unions**
—Trade Union Laws (Jan) 13
- Trusts**
—The Bombay Public Trusts Act, 1950 (June) 81
- United Nations**
—The United Nations in changing World (Jan) 14
- Valuation**
—Principles and Practice of Valuations (Land and Houses) (May) 64
- Wealth Tax**
—Law Relating to Estate Duty, Gift Tax and Wealth Tax (Feb) 31
- EDITORIAL**
—New Year Greetings (Jan) 1
—Mr. Chitale as I knew him (May) 52
—Retirement of Hon'ble Mr. Hidayatullah, C. J. (Feb) 21
- LAW COMMISSION**
—Appellate Jurisdiction of the Supreme Court in regard to Civil Matters under Art. 133 of the Constitution—Note—By the Law Commission of India (July) 97
- OBITUARY**
—The Late Mr. T. L. Venkatarama Ayyar (Feb) 21
—Late Mr. V. V. Chitale, founder, All-India Reporter Ltd. (Apr) 34
- PHOTOGRAPHS**
—The Hon'ble Mr. Justice Amal Krishna De, Judge, Calcutta High Court (May) 51
—The Hon'ble Mr. Justice P. N. Bakshi Judge, Allahabad High Court (Nov) 146
—The Hon'ble Mr. Justice M. H. Beg Chief Justice, Himachal Pradesh High Court (May) 50
—The Hon'ble Mr. Justice Chet Ram Thakur Judge, Himachal Pradesh High Court (May) 50
—The Hon'ble Mr. Justice H. B. Datar, Judge Mysore High Court (Apr) 48
—The Hon'ble Mr. Justice K. K. Dubey Judge Madhya Pradesh High Court (Feb) 18
—The Hon'ble Mr. Justice N. C. Dwivedi Judge Madhya Pradesh, High Court (Apr) 48
—The Hon'ble Mr. Justice Gopi Nath Judge, Allahabad High Court (June) 65
—The Hon'ble Mr. Justice K. Jagannath Shetty Judge Mysore High Court (Apr) 47
—The Hon'ble Mr. Justice Jagdish Prasad Jais Judge Rajasthan High Court (June) 66
—The Hon'ble Mr. Justice Jagmohan Lal Sinha Judge Allahabad High Court (Nov) 147
—The Hon'ble Mr. Justice Jitendra Narayan Judge, Patna High Court (Nov) 143
—The Hon'ble Mr. Justice Kumar Jyoti Sen Gupta Judge Calcutta High Court (May) 51

Photographs (contd.)

- The Hon'ble Mr. Justice D. B. Lal
Judge, Himachal Pradesh High Court (May) 50
- The Hon'ble Mr. Justice B. N. Lokur
Judge Allahabad High Court (Nov) 146
- The Hon'ble Mr. Justice Madan
Mohan Prasad, Judge Patna High
Court (Nov) 148
- The Hon'ble Mr. Justice V. S. Mali-
math Judge Mysore High Court (Feb) 17
- The Hon'ble Mr. Justice Mufti Baha-
ud-Din Farooqi, Judge Jammu and
Kashmir High Court (Oct) 130
- The Hon'ble Mr. Justice A. Nara-
yana Pai, Chief Justice of Mysore High
Court (Jan) 16
- The Hon'ble Mr. Justice M. S.
Nesargi, Judge Mysore High Court (Apr) 47
- The Hon'ble Mr. Justice D. Noronha
Judge Mysore High Court (Feb) 17
- The Hon'ble Mr. Justice N. D. Ojha,
Judge Allahabad High Court (Nov) 147
- The Hon'ble Mr. Justice D. G.
Palekar, Judge Supreme Court (Oct) 129
- The Hon'ble Mr. Justice V. V.
Raghavan, Judge Madras High Court (Feb) 18
- The Hon'ble Mr. Justice N. S.
Ramaswami, Judge Madras High
Court (Apr) 46
- The Hon'ble Mr. Justice V. Rama-
swami, Judge Madras High Court (Apr) 46
- The Hon'ble Mr. Justice S. R. Range-
Gowda, Judge Mysore High Court (May) 51
- The Hon'ble Mr. Justice S. C. Roy,
Judge, Supreme Court of India (Nov) 145

Photographs (contd.)

- The Hon'ble Mr. Justice Salil Kumar
Ray Chowdhury, Barister-at-law,
Judge, Calcutta High Court (June) 66
- The Hon'ble Mr. Justice K. N. Seth,
Judge, Allahabad High Court (Nov) 147
- The Hon'ble Mr. Justice Shiveshwar
Prasad Sinha, Judge, Patna High Court (Nov) 149
- The Hon'ble Mr. Justice S. M. Sikri,
Chief Justice, Supreme Court of India
(May) 49
- The Hon'ble Mr. Justice C. S. P.
Singh, Judge, Allahabad High Court (Feb) 18
- The Hon'ble Mr. Justice U. N. Sinha,
Chief Justice, Patna High Court (May) 49
- The Hon'ble Mr. Justice Syed Akbar
Hussein, Judge, Patna High Court (Nov) 149
- The Hon'ble Mr. Justice E. S. Ven-
kataramiah, Judge, Mysore High Court (Feb) 17
- The Hon'ble Mr. Justice K. Venkata
Rathnam Additional Judicial Commis-
sioner of Tripura (June) 67
- The Late Shri V. V. Chitaley,
B.A., LL.B., Senior Advocate, Supreme
Court of India, (Founder of The All
India Reporter, Ltd.) (1885-1971) (Apr) 33

SPEECHES

- Speech of The Hon'ble Mr. M. H.
Beg, Chief Justice of the High Court
of Himachal Pradesh, at the first Refe-
rence of the Court Held on the 15th
March 1971 (May) 56

THE
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1971
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THE NEW YEAR GREETINGS

On the occasion of entering on the forty-ninth year of its career the All India Reporter sends its warm greetings to all the members of the Bench and the Bar in India and to all its subscribers and readers, conveying, at the same time, to them its grateful thanks for their generous support and its best wishes for a Bright, Happy and Prosperous New Year.

Fourth Commonwealth Law Conference in India

By DR. L. M. SINGHVI, Senior Advocate, Secretary-General, Fourth Commonwealth

Law Conference, Organising Committee of the Bar Association of India

20, Supreme Court Building, Tilak Marg, New Delhi-1.

Perhaps the most enduring common links among the countries of the Commonwealth are those enshrined in the legal and judicial systems and the values of freedom and fairness underlying them. There is no doubt a wide variety and vast diversity in the laws of different Commonwealth countries but there is a common thread of shared approaches which runs through most of them.

2. The commonwealth concept emerged as a sequel to the end of the era of colonialism and with a new and awakened awareness of common ground. Pandit Jawaharlal Nehru, Prime Minister of India, was one of the principal architects of the new commonwealth concept. The political fortunes of the Commonwealth ties have tended to fluctuate from time to time but the collaboration in professional and academic fields has proceeded on an even keel. Apart from past associations, the English language has provided facilities for mutual communication and continuing contact. An Indian lawyer is naturally more at home with English, Australian, Canadian, Ceylonese, Malaysian or Pakistani statutes and reports of decided cases than he would be with continental European, Latin American or other Asian laws or judicial decisions.

3. The Fourth Commonwealth Law Conference which is going to be held in New Delhi from the 6th of January to the 13th of January, 1971, is an expression of the common identity of the legal and judicial systems in the countries of the Commonwealth.

4. The Commonwealth Law Conference is a quinquennial event. The First Commonwealth Law Conference was held in London fifteen years ago. The two successive conferences were held in Ottawa and Sydney in 1960 and 1965. At the Sydney Conference there was a sizeable Indian delegation which included, among others, the Chief Justice of India, the Law Minister of India, the Attorney-General for India and the President of the Bar Association of India. Mr. M. C. Setalvad, as President of the Bar Association of India, and Mr. C. K. Daphtary, the then Attorney-General for India, extended on behalf of India an invitation to hold the Fourth Commonwealth Law Conference in New Delhi. Notwithstanding competing claims of some other mem-

bers of the Commonwealth, the Indian invitation was accepted.

5. The Fourth Commonwealth Law Conference will bring to India many distinguished jurists, judges, practising lawyers, law teachers and law officers from all over the Commonwealth. In conjunction with the Fourth Commonwealth Law Conference, there would also be a conference of Commonwealth Chief Justices, a Conference of Ministers of Law and Justice and Attorneys-General. For the first time, as a result of an Indian initiative, a Commonwealth Legal Education Conference would also be held as a part of the main conference.

6. The Conference will deliberate on five principal themes, namely, Law and the Common Man, Commonwealth and the Law, Contemporary Problems of Legal Education and Research in the Commonwealth, Social Legislation at the Cross Roads and the Profession of Law and its Development in the Commonwealth. Some 23 specific topics will be discussed in committee sessions at the Conference. These topics include Ombudsman Proposals, Legal Aid, Enforceability of Basic Human Rights, Law's Delays and Costs of Litigation, Law Reform in the Commonwealth, Governmental Liability in Civil Law, Federalism and Parliamentary System, Copyrights, Trade Marks and Patents, Family Law, Trade Union and the Law, Problems of Administrative Justice, Censorship Laws, Inter-Commonwealth Arbitration, Training of New Entrants in the Legal Profession, Professional Ethics, Methods of Increasing Efficiency in the Legal Profession, Lawyers' Partnerships, Reciprocity and the Right of Commonwealth Lawyers to appear in Courts in Commonwealth countries, Teaching Methods, Curricula and Contents of Legal Education, Law Schools and the Development of Law and Law and Technology: Jurimetrics. There would be a plenary session of the Conference every morning to discuss the theme of the day. Short open sessions of the Conference would be followed by committee discussions which would be topicwise. A volume of papers submitted by eminent specialists on each topic is being published on the eve of the Conference. The proceedings of the Conference will be recorded and reports of proceedings are proposed to be published separately. If the

wide range of topics chosen for the Conference and the excellent contributions received from all over the world are any index, the Conference promises a rich and varied intellectual fare.

7. The Conference would be inaugurated on the 6th of January 1971 by the President of India in the Ashoka Convention Hall. The President and the Prime Minister of India will also be meeting the delegates at various receptions and social events. Cultural and entertainment events of the highest quality representing the heritage of our country at its best are being planned. Apart from the Conference Banquet, there would be several receptions by different High Commissions in New Delhi. Many delegates will also visit other parts of the country before and after the Conference.

8. India has a sizeable lawyer population which is estimated to be well over one lakh. Law and lawyers occupy a place of pride and prominence in our country. A Conference, such as the Fourth Commonwealth Law Conference is an event of momentous and enduring

importance. As Mr. M. C. Setalval, the doyen of the Indian Bar once put it, it is the duty of the Members of the Bar throughout the country to make the forthcoming Commonwealth Law Conference a memorable success in every possible way. The Conference needs the active involvement of lawyers in different parts of the country. They should register themselves as Members of the Reception Committee and its delegates in as large a number as possible. They should help in receiving and looking after the visiting delegates and they should extend to our visitors from all over the Commonwealth the traditional warmth and the customary hospitality of our country in a spirit of fellowship and fraternity. Indeed, the Commonwealth Law Conference is not merely an event confined to the Practitioner and Teachers of Law and to Judges and Law Officers; citizens generally and fraternal professions as well as the public and private enterprises too have an important role to play in making the Conference a success. The Conference is above all an opportunity to project the image of India to the decisively influential community of lawyers from different parts of the world.

SUBORDINATE JUDICIARY IN INDIA—RECRUITMENT AND TRAINING

(By Justice S. BARMAN, *Retired Chief Justice of the Orissa High Court, and Chairman, Railway Rates Tribunal, Madras 28*).

1. In my last talk I have given a picture of the set-up, nature and conditions of work of our judicial officers spread over the far-flung outlying stations from one end of Orissa to the other—extending from the Andhra/Madhya Pradesh border on one side to the Bengal, Bihar border on the other—each with problems of its own according to the varying local conditions. It must be clear that the tasks assigned to them call for not only a high degree of judicial talents but also administrative ability of a high order to deal with problems arising from day to day in the various stations to which they are posted requiring—apart from judicial ability—tact, imagination, resourcefulness and general alertness.

2. Naturally, the question arises: How do we recruit our judicial officers? Usually, the practice has been to insist upon a minimum period of three years' practice at the Bar for recruitment to posts of Munsifs and seven years' practice at the Bar for direct recruitment as District Judges. From experience I personally feel that if a fresh law graduate be recruited by competitive examination and be subjected to a carefully drawn scheme of training which would include practical working of the Courts, there is no reason why he should not make a successful judicial officer. Three years' experience at the Bar is supposed to be only a manner of training

but better training as necessary for the making of an ideal judicial officer with some administrative flair may be given by the adoption of other methods.

3. Indeed, the planned and systematic training, as I propose to suggest presently, will be more useful than three years at the Bar, if there is, from the very beginning, no intention of sticking to the profession after graduation in law. My personal view is that the best way of attracting talents to the service is to create an All-India Judicial Service like its counterpart the Indian Administrative Service as recommended by the Law Commission and also by the Chief Justices' Conference. But for several reasons this proposal could not be implemented. In my opinion, such a Service, with an All-India outlook, would alone provide the right type of personnel.

4. But we are so short of hands in Orissa, that we have to make the best use of the existing situation. Since direct recruitment from the Bar with three years' practice has not proved satisfactory, I suggest that recruitment should be by competitive examination from fresh law graduates, followed by intensive and specialised training for about two years during their probationary periods in various fields. This would assure for the Judiciary a set of

well trained officers to man the posts at all levels.

5. The first stage of training would be to depute the young probationer judicial officers to the Administrative Officers' Training School at Hiraikud for say 3 or 4 months. A course of training along with the Indian Administrative Service Officers would foster in them a spirit of brotherhood and help them in the later stages of their career to secure their assistance and co-operation in many administrative matters. The training as suggested by me will shape and in fact mould the probationers to develop a dignified poise, confidence and composure which they, as part of their general character, can retain throughout life. In my opinion training of our judicial officers on these lines will not only widen their general outlook on life but also help them in their work—judicial and administrative—throughout their career in every field. It is not necessary that the subject-matter of teaching of our young officers in Hiraikud Administrative Officers' Training School should be the same; since our young men are law graduates, teaching of only those branches of the law—which they had not studied at College—may be included in the course of training such as in Company Law, Insolvency, Banking, Insurance, etc. It is however essential that the young judicial officers along with the Indian Administrative Service Officers should receive instructions on Rural Economics and General Administration, which would give them ample opportunities to move into the villages and observe men and things at close quarters; they would thus get an insight into the manners and customs of the rural people which would help them in their work.

6. Training in survey and settlement is a 'must' for every judicial officer. He should have this training with particular emphasis on the local land systems, after the course of instruction at the Administrative Training School at Hiraikud. Questions relating to survey and settlement—Parchas and Record of Rights—arise in some form or other before a Judicial officer both in Civil and Criminal cases. The importance of land survey and settlement training is more urgent in Orissa because of the different land tenure systems prevailing in different parts of the State.

7. Training in accounts is another branch. The Presiding Officers of Courts have, in the course of their administrative work, to remain in charge of the accounts of Civil and Criminal Courts. And unless they are themselves fully conversant with these matters, they cannot maintain effective supervision. And many of

the defects noticed in the maintenance of accounts can be eliminated if the Presiding Officers themselves are familiar and can give personal guidance and instruction. I would, therefore, suggest that this training should be given in the Accounts Training School at Bhubaneswar for about two months, so that they may be acquainted with the Orissa Service Code, the Travelling Allowance Rules, Fundamental Rules, General Provident Fund Rules; two weeks out of this period may be spent in training in treasuries which will enable them to know how bills are dealt with and how the connected registers are maintained.

8. This should be followed by six weeks' training in the Collectorate in its different branches. This will give them an idea about maintenance of Revenue registers and disposal of complaints; for practical experience, the probationer may himself be entrusted with enquiries in one or two cases of complaints. During this period, the officer may acquaint himself with the rules, practice and procedure of the Revenue Department relating to (i) land registration and certificate proceedings, (ii) partition, (iii) cess and revaluation, (iv) touzi and land revenue sales and (v) treasury (judicial transactions only).

9. The probationer should then be posted to work under a senior District and Sessions Judge for training in civil and criminal work. The probationer may first sit with a Munsif, take down evidence, and with reference to the records write certain judgments himself which will be vetted by the District and Sessions Judge who should point out to him the defects, if any, in his appreciation of evidence or in his general approach to questions of law and also instruct him in the art of writing judgments. During this period, the young trainee should also acquire a practical knowledge of the working of the office of the Munsif especially in the maintenance of registers. He should work in the Nizarat to see how processes are received, served and entered in the relevant registers, how they are distributed and what sort of supervision and check are exercised over the process-servers. With a view to get acquainted with all branches of work in the Civil Court, he may be given a programme of work. He may also be deputed to the Courts of the Subordinate Judge and the District Judge for training; he should know how diaries are prepared in advance and how the work is adjusted.

10. During this period, he should also for one or two months work with an Inspector of Police to study the working of the Police Department with special reference to investi-

gation of crimes, filing of chargesheets and launching of prosecutions, etc. He should acquire a full knowledge of the Regulations dealing with maintenance of public order and tranquillity. This early training with the police will give the young officer some idea of the practical difficulties which the police experience in collecting evidence for production in Courts in certain cases so that when, later on, as Presiding Officer, he tries cases, he would be in a better position to independently make a fair assessment of the standard of proof expected from the police in different circumstances.

11. That apart, occasional visits to jails will also prove useful and give some idea of the administration of prisons and about execution of warrants of commitment.

12. It is also necessary that he should receive some training in the High Court which should include a period to be spent as a sort of Legal Assistant under a High Court Judge. This will enable him to acquaint himself with the High Court procedure by making notes of cases heard by the Judge; this will also enable him to familiarise himself with the approach to legal problems made by the highest Court in the State. He may also be acquainted with the methods by which the work of subordinate Courts is reviewed by the High Court. This necessarily implies that he should be fully conversant with all the General Rules and Circular Orders issued by the High Court from time to time.

13. I should here like to add one word on liberal education as essential for every branch of public service, judicial or administrative. During the course of about two years' training, the young judicial officer will have time and opportunity for study of—apart from some special branches of the law at Hiralakud—literature, history, current affairs and other subjects of general interest which will help him to acquire zest for his work and enjoy life itself wherever he may be. The spirit of service with a broad outlook flowing from such liberal education is essential for an ideal public servant, judicial or executive. For this, the young trainee can make full use of his spare time, while on probation, for such general study. In this context, I should suggest that in the course of his training

in the High Court he can utilize the growing High Court Library where he will find general literature on law and thus develop a broad outlook in his approach to law itself.

14. In my opinion, a freshly-recruited law graduate with such intensive general training and opportunity for liberal education—having scope for developing broad outlook on life, men and things—will be a more effective and efficient instrument than a half-hearted lawyer with three years' practice.

15. It is only after undergoing training and liberal education on the aforesaid lines that the young probationer should be vested with powers of a Third Class Magistrate and entrusted with simple cases of trial.

16. It will be a source of encouragement to these young officers if, before being posted at the outlying station at far-off places, they are given an opportunity to meet the Chief Justice and the Judges of the High Court as used to be done in the old British days, when young Civilians (members of the Indian Civil Service) before being posted to distant lands in far-flung outposts of the Empire, used to be received by the Secretary of State for India and high officers of the India Office in Whitehall. Here in Orissa also, officers have to be posted in areas—far away from their homes and at stations situated in the midst of Adivasi population—with special problems of their own; properly trained officers with a broad outlook will alone be able to adjust themselves to the set-up of these areas.

17. In spite of the difficulties and in spite of the scope for improvement in many directions, I have no doubt that by and large our judicial officers have been able to give a good account of themselves and I feel proud of them. Bright, sincere officers can always hope for elevation to the highest judicial post in the State including a seat in the High Court Bench. The Orissa High Court, as I have already said in my previous talks, has been built on traditions dating back over half a century. It should therefore be a matter of pride for our young judicial officers—whose independence after the completion of separation is now completely assured—that they should be receiving guidance, inspiration and central direction from the High Court.

REVIEWS

PROBATION AND PAROLE: By I. S. Saharyia with a Foreword by Mr. Justice S. K. Verma of the Allahabad High Court. Published by Messrs. Mukat Publications, 5/14, Roop Nagar, Delhi 7. In 4 parts—Part I Pp. 47,

Par II Pp. 130, Part III Pp. 101 and Part IV Pp. 151. Price Rs. 12.50.

Crime is as old as humanity itself. The first crime ever committed was by Cain, the son of Adam, the father of the human race. Ever since, the human society is being confronted

with the problem of increasing incidence of crime and the consequent necessity of devising the ways of combating that trend. Prevention of crimes is now-a-days sought through the deterrent effect of a threatened suffering, a punishment, which is to be inflicted upon the transgressor after the accusation against him has been investigated in legal proceedings of a special kind and after the guilt of the accused person has been decided in those proceedings. Normally, when there is a conviction a sentence must follow the conviction, as a matter of law, in each and every case.

The objects of punishment are said to be fourfold, namely, (1) to serve as a deterrent to other persons who may be similarly inclined, (2) to be preventive, (3) to be reformative, and (4) to be retributive. Amongst them, the all important one is the first, the others being merely accessory.

Even so there has been of late a great social pressure for the reformative aspect of treatment to the convicts.

The penal philosophy now looks upon the criminal as a sickman needing individual treatment. Individuals are normally law-abiding and they deviate from the path of rectitude by accident or sheer force of circumstances beyond their control. Both the State and the society owe a duty to these unfortunate people to wean them away from a life of crime by removing the social causes of crime and by creating conditions which would ensure them a happy domestic life. Therefore, the State Governments have enacted legislation on probation of offenders, childrens' welfare, prisoners' premature release, etc., aiming at the individualised treatment of prisoners. The Government of India have also enacted the Probation of Offenders Act, 1958, which emphasises the reclamation and rehabilitation of the convict as a useful and self-reliant member of the society.

In the book under review, the probation and parole procedures, presently in force, along with other relevant information on the subject, have been compiled under one cover. The book has been divided into four parts. The first part deals with bail and also the rules which regulate interviews by the prisoners serving sentence, with their relatives and friends. The second part deals with the provisions which may enable a prisoner to secure release or leave under the various measures sponsored by the Government. Part III deals with juvenile delinquency. In this part, the author has referred to the causes of juvenile delinquency and the several theories relating to the subject and the various measures applied to prevent juvenile delinquency. There is also a chapter in this part on

open prison camps system, which is being tried in several parts of this country. The information contained in this part is both instructive and interesting. In Part IV, the relevant Acts and rules with the latest amendments have been given. Notes with case law have been added wherever necessary. There can be no doubt that this book would prove immensely useful to the Bench, Bar, probation officers and students of law and their teachers.

M.K.S.

STEVENS AND BORRIE'S ELEMENTS OF MERCANTILE LAW. 15th Edition. By Gordon J. Borrie, LL.M., Bar-at Law. Butterworths, London. 1969. (Sole selling Agents: Eastern Law House Pvt. Ltd. Calcutta). pp. xlvii & 557 Price 20s.

Published originally in 1890, the present work has now run into the fifteenth edition. In his Foreword to the first edition, Mr. T. M. Stevens, M.A., B.C.L., observed: "Few mercantile men are unwise enough to deal with any legal matter of serious importance without the aid of their solicitors. Yet in the affairs of everyday life it will frequently happen that a knowledge of Mercantile Law is almost a necessity....." That statement is as true today as ever before. In the present edition the work of revision and rewriting has continued and there have been changes in the text as well as in the presentation, but its main purpose continues to be that of providing a wide ranging survey of the whole subject of Mercantile Law in one volume so as to serve as a real guide for people in industry and commerce. The author has tried to view the book as a whole and to reshape it so that every topic is developed as clearly as possible.

2. The book consists of Six Parts, the first part taking a general view of the Law of Contracts, and the next two explain agency and partnership, and the principal types of mercantile contracts like sale of good; hire-purchase; bills of exchange and other negotiable instruments; cheques, promissory notes, and bank notes; insurance; carriage of goods by land, air and sea; suretyship and guarantees; money-lenders and their contracts; bailment, mortgage, pledge, and lien; shipping and contracts of employment. Bankruptcy, arbitrations, and the protection of commerce are the topics of the last three parts, the final part focussing attention on monopolies and restrictive trade practices, patents and designs, trade marks and trade libel, trade descriptions, and copyright. The law is given as it stood on 1st December 1968.

Mention should be made of the table of statutes, the table of cases, and index.

3. Mercantile Law is a compendious name given to several branches of the law affecting commerce, trade and industry, and the basic foundation is the Law of Contract in all its ramifications as applied with adaptations to the different fields mentioned, and Indian Mercantile Law is largely based upon the corresponding English Law, which the present volume makes it easy to understand and appreciate. The book should be useful also to students, whether they are studying to be lawyers or concerning themselves with Mercantile Law as part of the professional courses of the various accountancy, secretarial and insurance bodies. R.S.S.

COMMENTARIES ON THE PAYMENT OF BONUS ACT, 1965. By K. D. Srivastava, Advocate. Eastern Book Company, 34th Lal Bagh, Lucknow, 3rd Edition. 1970. Pp. xlv and 447. Price, Rs. 25.

Considering that the Payment of Bonus Act is an enactment that takes one nearer to the goal of social justice as laid down in Part IV of the Indian Constitution, it is perhaps not surprising that commentaries on the Act should be coming out in plenty (See P. Berarwalla, and D. N. Vohra). The Bonus Commission construed the concept of bonus as sharing by the workers in the prosperity of the concern in which they are employed. In order to compute bonus, a reference to the various provisions of the Companies Act and Income tax Act has been made in the Act, and the author of the present volume has tried to incorporate all such provisions and to explain their relations with the provisions of this Act. Subsequent to the passing of the Act, the Supreme Court had occasion to examine the Act as a whole in the *Jalan Trading Company's* case, and its judgment overrides the principle that bonus could be paid on the net profit and could not be claimed otherwise. The policy regarding the payment of minimum bonus, even if there are no profits, has been held *intra vires* the Constitution. However, a recent judgment of the Supreme Court has laid down that a claim for bonus relating to an establishment not being a factory, employing less than twenty workers, cannot be subject matter of an industrial dispute as it does not come within the four corners of the Act, and has negatived the contention that the preamble or S. 32 (class of employee to whom the Act does not apply) or S. 39 (application of Industrial Disputes Act) would lead to any other interpretation as to the scope of the Act. Another important decision of the Allahabad High Court holds

that the phrase "whether there are profits in accounting year or not" in S. 10 of the Act does not envisage payment of bonus in case of loss.

2. According to the Supreme Court, the scheme of the Act, broadly stated, is to impose statutory liability on the employer to pay bonus to employees; to define the principle of payment of bonus according to the prescribed formula; to provide for payment of minimum and maximum bonus and linking it with the scheme of 'set-off' and 'set on'; and to provide machinery for the enforcement of the liability to pay bonus. The Act provides for the computation and payment of bonus on unit-wise basis in accordance with the formula laid down under it. To arrive at surplus available for payment of bonus, deductions will be made from gross profits for depreciation, development rebate, direct taxes, and other items.

3. The work under review opens with an introduction in which are considered the historical approach to bonus, industrial truce resolution, committee on profit-sharing, Bonus formula, Bonus Commission, and summary of conclusions and recommendations. The Payment of Bonus Act has 39 sections and 4 Schedules, each section followed by commentary, synopsis, and, where necessary, notes and illustrations. Sections 4-8 deal *inter alia* with computation of gross profits and available surplus, eligibility and disqualification for bonus, and three of the Sections cover time limit for payment of bonus, recovery of bonus due from an employer, and reference of disputes under the Act. Sections 28-37 are concerned with penalty, offences by companies, cognisance of offences, power of exemption, and power to remove difficulties.

4. The author has tried to bring the case-law up to date. Some of the recent court pronouncements and a note on the Report of the National Labour Commission have been included. In the concluding pages are the Schedules to the Act and a useful subject-index; the table of cases comes earlier. All who are concerned with the claim for, and settlement of bonus, should find the volume eminently useful. R.S.S.

THE LAW RELATING TO GOVERNMENT CONTROL OVER PRIVATE ENTERPRISE. (Cases and Materials). By Dr. N. R. Madhava Menon, LL. M., Ph. D., and Narasimhaswamy G. Mysore, LL. M., (Dallas, Texas, and Harvard). Eastern Book Company, 34 Lalbagh, Lucknow. Pp. xxiii and 463. Price, Rs. 20.

What is the nature of the right of business under the Indian Constitution? What are the

powers of the State in regard to control over this right of the citizen? What is the nature and scope of the law on monopolies and restrictive trade practices? Any other forms of control? What is the mechanism of controls and how is it administered? These and other related questions the present publication attempts to answer with the help of cases and statutory materials. It gives a comprehensive picture of the scope and extent of the law relating to Government control of business with particular emphasis on the constitutional and legal framework in which controls operate and their organisational and administrative structure.

2. Article 39 of the Constitution lays down the control and regulation of business in the interests of the general public as a principle 'fundamental in the governance of the country'. Articles 38, 41, 42 and 43 impose duties upon the State which affect its economic policies, and Art. 19 (1) (g) states that all citizens shall have the right to practise any profession, or to carry on any occupation, trade or business'. The Articles raise issues such as: Who has the right to do business and what is business or occupation? Who can control it and what is 'restriction'? Should a State monopoly be created by a 'reasonable' law? What is 'reasonable'? What is the place of Article 301 in the area of public control over private business? These questions are presented in the first chapter of the book with appropriate cases. An essay has been included on the case method as against the lecture method, by John H. Jackson, Visiting Professor at the Delhi University. In the context of the declared objectives of the Constitution and in the context of the country's socio-economic realities, the authors examine the nature, scope and extent of the control. The second chapter considers the Monopolies and Restrictive Trade Practices Bill, which incorporates controls of a far-reaching character on private enterprise in India, and in the third chapter the authors look briefly into the salient provisions of some of the most important economic regulatory laws with a view to appraising their place in the scheme of control. The concentration of economic power is discussed under the heads of the effects and causes of such concentration, legislative and non-legislative methods of dealing with it, and what legislation in other countries has done to tackle it. Among the statutes included in the third chapter are the Industries (Development and Regulation) Act 1951; the Capital Issues Control Act 1947; the Essential Commodities Act 1955; the Companies Act 1956; the Foreign Exchange Regulation Act 1947; the Imports and Exports Control Act 1947, and the Tax Laws and Private Enterprise. It includes a

list of the all-India control orders in an appendix. In the fourth chapter on the administration and enforcement of controls, the authors try to identify some of the basic problems and to suggest possible alternatives with a view to suggesting an effective scheme of enforcement of controls. The final chapter gives the text of the Monopolies and Restrictive Trade Practices Act, which received the President's assent on 27th December 1969.

3. The book contains a table of cases and a subject index. The authors, who are members of the Faculty of Law, University of Delhi, have tried to avoid opinions and generalisations and have placed before the reader materials which outline the problem, analyse the issues and suggest problem-solving techniques. Their work should be of topical interest at a time like the present when the octopus-like tentacles of the public sector are by slow degrees closing in on more and more fields of industrial and commercial activity in the country. Lawyers, law students, businessmen and others interested in the administration of economic regulations should find it useful.

R.S.S.

COCKLE'S CASES AND STATUTES ON EVIDENCE. 11th Edition by G.D. Nokes, LL.D., Bar-at-law, Sweet and Maxwell, London, 1970. (N. M. Tripathi Private Ltd., Bombay), Pp. xxvii & 590, Price Rs. 70.20.

Of the three parts in the latest edition of this well-known book, Part I contains a number of decisions of the House of Lords given since the last edition, and Part II reflects the considerable recent legislation affecting the law of Evidence. Several statutes have been repealed and numerous additions made, including the Civil Evidence Act, 1968, the Rules made in pursuance of which will be found among the revised Rules of the Supreme Court in Part III, which also contains a number of Rules on other matters made since the last edition.

2. The first three of the fifteen sections in the book deal with the functions of the judge and jury, matters of which proof is not required, and relevance. In the case of trial by jury, one should distinguish the respective functions of the judge and jury, as they both have to deal with the evidence tendered, although in a different manner. Matters which are considered too notorious to require proof are judicially noticed, without any evidence being required thereof. A convenient classification of matters judicially noticed is that of Law and Custom, Public Administration, and common knowledge. Evidence may be given

on facts in issue, facts relevant to the facts in issue, and facts relevant to the admissibility or weight of evidence, and cases are given to illustrate some common situations in which the relevance of facts is considered.

3. Sections 4 to 11 cover inadmissibility, oral evidence, and hearsay. Even though facts are relevant, they may be excluded as inadmissible, because they do not comply with a rule affecting admissibility. Such rules are mainly rules of inadmissibility or exclusion, though there are many exceptions to them. In this and the following two sections seven rules affecting admissibility are illustrated. The rule against hearsay is also a rule of inadmissibility or exclusion but subject to many exceptions. The Civil Evidence Act, 1968 has made material inroads on the rule. The cases included in these sections are applicable to criminal proceedings; they illustrate the general rule against oral and documentary hearsay and are followed by decisions on the principal exceptions to the rule. A further group of exceptions to the rule against hearsay consists of declarations by deceased persons. There are six types of such declaration, each of which is illustrated in this section, which also considers another group of actual or apparent exceptions consisting of the repetition or production of statements by persons absent from the trial. The law allows three modes of proof and evidence viz., oral or parol evidence, documentary, and real evidence. The cases presented also deal with the cross-examination of opposing witnesses and the re-examination of witnesses by counsel who called them.

4. Sections 12 to 15 consider documentary evidence, real evidence, burden and standard of proof, and the effect of evidence. The decisions in this section illustrate the rules concerning primary and secondary evidence and the modes by which the execution of documents may be established. The weight of the evidence adduced depends partly on rules of law or practice, and some of them are mentioned under the heading of cogency, and they are followed by the rules relating to corroboration.

5. In Part II are given extracts from Acts of Parliament from 1609 to 1969, arranged in chronological order, and in Part III, on the Rules of Evidence, extracts appear from the Rules of the Supreme Court, the Matrimonial Causes Rules, County Court Rules, Magistrates' Courts Rules, Coroner's Rules and Judges' Rules. The table of cases, the table of Statutes, the table of books cited, and index, are useful appurtenances to the volume

R.S.S.

BUILDING SOCIETY LAW (CASES AND MATERIALS). By C. E. Thornton, F. Inst. L. Ex., A.B.S., Solicitor of the Supreme Court, and J. P. McErien, A.B.S., Solicitor of the Supreme Court. Sweet and Maxwell, London. 1970. (N. M. Tripathi Private Ltd., Bombay). Pp. xix and 151. Price, Rs. 36.

The present statutory basis for building societies in England is the Building Societies Act, 1962. Under the Act a building society may be established for raising, by the subscription of the members, a stock or fund for making advances to members out of the funds of the Society upon security by way of mortgage of freehold or leasehold estate. A companion volume to Wurtzburg and Mills' Building Society Law, the present publication, prepared under the auspices of the Building Societies Institute, London, gives particular attention to the judgments of courts called upon to apply the provisions of the statute to specific circumstances, for, a more comprehensive understanding of case law is essential to the examination student. The cases included in this volume have been selected from the many reported which have either directly involved building societies or have had an important effect on the activities of building societies. They have been grouped together with relevant sections or extracts from legislation and linked by commentaries and notes.

2. The book contains four chapters, of which the first deals with the objects of building societies, membership, commencement of business, rules and directors and officers. The next one covers investments, capacity to invest, rights and liabilities of investors, withdrawals, interest calculation, transfer of shares, intestacy of member, pass books and deposits. Chapter III is concerned with advances by societies, capacity of the borrower, creation of a mortgage, rights of a mortgagee on default by a mortgagor, interest, the borrower's covenants, redemption of the mortgage, form of receipt, effect of misrepresentation or ignorance of contents of a mortgage and fraudulent completion of mortgage application form. The position of the Chief Registrar of Friendly Societies, amalgamations, and investment of surplus funds are tackled in the fourth and last chapter.

3. There is also a table of cases, a table of statutes, a table of statutory instruments, and an index.

4. The book is an attempt to present a more comprehensive statement of the law than would have been possible from the cases alone. Practitioners in this branch of law would find useful the co-ordination in one volume of leading cases affecting building society prac-

tice. While primarily intended for the student who prepares for the examinations of the Building Societies Institute, these publications should also be able to give those interested a practical knowledge of building society techniques. R.S.S.

CURRENT LEGAL PROBLEMS 1968.

Edited by George W. Keeton and Georg Schwarzenberger. Volume 21. Stevens & Sons Ltd., 11 New Fetter Lane, London. (In India: N. M. Tripathi Private Ltd., Bombay). Pp. vii & 267. Price, Rs. 81.

This is the twenty-first volume of Current Legal Problems. It contains, together with the Bentham Club Presidential address of Lord MacDermott, Lord Chief Justice of Northern Ireland, on "the Interrogation of suspects in custody", the public lectures delivered in the Faculty of Laws of University College, London, by members of the staff and of the London Institute of International affairs as well as members of the staff of the Universities of Oxford, London, and Virginia. These lectures dwell at length on selected topics of branches of criminal law and procedure, administrative law, maritime law, air law, space law, labour law and tax law.

2. In his Presidential address, Lord MacDermott discusses the question whether the police or others in authority should be at liberty to interrogate a person suspected of having committed a criminal offence while that person is in custody, either *de jure* or *de facto*. The question is bound up with associated subjects to which the noble Lord refers, viz., protection against self-incrimination; the admissibility of the voluntary confession; the inherent discretion of the Courts to promote a fair trial; and the Judge's Rules. The lecturer arrives at conclusions of a wide and tentative nature in the hope that they may stimulate discussion and promote something really good.

3. In the second lecture, on social defence and control of the dangerous offender, Professor J.L.J. Edwards, of Toronto, covers the topics of conflicting penal philosophies, the parole system, the role of medical practitioners, recent developments in the U. K. society interests and the individual offender. When it comes to the moment of sentencing of a convicted offender, the lecturer would seem to advocate the association of non-legal assessors with the strictly judicial personnel.

4. Speaking on the Ombudsman and the Parliamentary Commissioner for Administration, Lord Lloyd concludes that for the present these institutions hold a more practical

prospect of help to the ordinary citizen than a complex administrative Court with all the attendant technicalities and expense, and in the next lecture Prof. H. W. R. Wade examines whether the present system of English administrative law is the right one and whether it can cope with the great growth of governmental power. Is the traditional common law technique the right one, he asks, or would it be better to make a new start with a special administrative jurisdiction of the French type? What are the weaknesses and dangers in the present system and how can they best be remedied?

5. The wreck of the oil tanker Torrey Canyon has given Prof. G. W. Keeton an opportunity of examining the inadequacies of the existing law applicable to oil pollution and the carriage of oil by sea in its English law aspects, and E. D. Brown has tried to examine many of the rules and principles of the international law of the sea, of which the present case is an interesting study. Prof. Bin Cheng, on the other hand, speaks about the role played by analogies and fictions in developing air law and space law. In his lecture on collective labour agreements in U. S. A., Prof. Gregory points out how the U. S. Supreme Court decisions have placed in the hands of labour unions the sole power of administering and enforcing them, and how that Court has undertaken to create an effective body of law to fill legislative lacunae in this sphere. The attitude of the Courts and the Legislatures to tax avoidance is the subject of M. O. Flesch's lecture; he would define tax avoidance "as the lawful carrying out of a transaction which was either entered into, or took a particular form, for the purpose of minimising taxation," or, in other words, tax planning, rather than as "the art of dodging tax without actually breaking the law."

6. The subjects of the other lectures are "Town and County Planning" and "From the Laws of War to the Law of armed Conflict." The volume contains a table of cases, a table of statutes, a table of treatises and an index.

R.S.S.

SOVIET LEGAL SYSTEM. (Civil & Military Law Journal Special Number, Vol. 4, Nos. 3-4, 1968) D-1/24, Rajouri Garden, New Delhi 27. Founder-Editor: H. S. Bhatia. Price Rs. 8.

This special number of the Civil and Military Law Journal presents the Soviet legal system in its historical, analytical, and philosophical aspects, and it should promote greater understanding and goodwill between India and U. S. S. R. The 1917 Decree abolished

all pre-revolutionary legal institutions and shattered the whole legal order, and new revolutionary decrees were issued outlining the new socialist State. The apotheosis of the State—that would seem to be the end and aim of all Soviet law and legal procedure. Fundamentally a creation of the Constitution, everything done to subserve the ends laid down in that constitution is legal. Offences against the State are considered heinous and punishment is severe.

2. The striking features of the Soviet legal system are its socialist legality, persuasive and coercive methods, elective judiciary, procuracy, and rigorous legislative activity, and it is designed to promote and consolidate its social order and economic progress. Statutory law is the main source of law, and customs, precedents, traditions, ethics, and natural law do not play any significant part in the making of laws. In the law schools 'case method' is not followed, and students study only the codes and statutes and their proper application and interpretation as exemplified in Court practice.

3. Legal aid in the Soviet Union is rendered by the Legal Adviser's Office, and lawyers are associated in collectives or collegiums, which organise legal aid to individuals and organisations. The lawyer in the Legal Aid Office gives the requisite legal advice and represents his client in civil and criminal cases. The fees, which are fixed, are paid to the Legal Aid Office; about a fourth is deducted for expenses, vacations and free legal aid, and balance is returned to the lawyer who earned them.

4. The Constituent Assembly and the Constitution of the U. S. S. R. are dealt with under the heads of social and State structure, Organs of State power and organisation, the Courts, fundamental rights, the electoral system and procedure for amending the Constitution. Another article describes the working of the Presidium of the Supreme Soviet of the U. S. S. R., the highest body of State power in the country, while the constitution, structure, and functions of the Supreme Court of the U. S. S. R. are covered in another. Law in the U. S. S. R. has two characters—persuasion and coercion. The Editor's contribution on "comradely justice" canvasses the former, while the coercive aspect of Soviet military laws, and their deterrent nature are brought out in the article on "Military Crimes and Punishment." Two other articles in the issue provide a lot of information on how the existing standard of military discipline is being maintained in the military forces by means of military laws. Even in U. S. S. R. labour disputes still occur and the procedure of their settlement is detailed in one of the contribu-

tions. Two of the articles trace Russian legal history upto 1917 and examine the reforms introduced in the reign of Tsar Alexander II (1855-81). Other articles dwell on the supervisory power vested in the Soviet Procurator's Office, agricultural progress as a result of the enforcement of the law of collective farming, Soviet family law, and the Militia which is employed for the maintenance of Public order.

R.S.S.

INCOME TAX GUIDE, 1969-70. (On corporate and personal taxation). By A. G. Venkataraman, A. C. A. 1 Cart Track Road, T'Nagar, Madras 17. 2nd Edition (Revised and enlarged) Pp. ix and 287. Price Rs. 18/-.

Important among the direct taxes in India are the tax on income under the Income Tax Act 1961 and the surtax on companies under the Companies (Profits) Surtax Act 1964. The levy of super-profits tax on companies introduced in 1963 was discontinued from the assessment year 1964-65, and a new surtax on companies was introduced in its place. Other direct taxes are the Estate Duty introduced in 1953, the Wealth Tax in 1957, and the Gift Tax in 1958. The annual Finance Acts passed by the Indian Parliament give effect to the financial proposals of the Government of India each year and make necessary changes in the rates of various direct and indirect taxes applicable to different types of assesseees in each assessment year. The Finance Act also amends a number of sections of the direct and indirect tax laws of the country. The changes and amendments made every year are so numerous that it will be difficult for assesseees, accountants, business executives and tax advisers, to discharge their duties in a proper manner unless an up-to-date book, explaining the provisions of the Act clearly and concisely, is available as a practical 'Guide' for ready reference. For the assessment year, 1971-72, for example, the latest Finance Act raises the maximum amount of total income exempt from the income-tax to Rs. 5,000 per annum.

2. While revising the present 'Guide' for its latest edition, all amendments made in the direct tax laws until the presentation of the 1969, Finance Act have been taken into account. The Finance Act, 1968 and the Finance Act, 1969 introduced amendments and changes in tax rates effective from different assessment years. In Part I of this Guide these amendments and changes, exemptions and incentives, have been discussed under the heads of changes effective from the assessment year 1968-69, those effective from the assessment year 1969-70 and 1970-71. The provi-

sions of the Income Tax Act 1961, Companies Profits (Surtax) Act 1964 and other direct tax laws, as amended by the Finance Act 1969, with special reference to their applicability to corporate bodies and individuals, have been discussed under appropriate heads in the subsequent parts.

3. Part II, on the principles of tax law, describes assessable persons and assessable incomes, computation of taxable income, allowable deductions, tax deduction at source, assessment procedure and administration, penalties and double taxation relief. Part III, on tax exemptions and incentives to industries, discusses depreciation allowance, development rebate, tax holiday and tax credit certificates. The rates of taxation, capital gains tax, taxation of closely controlled domestic companies, concessions to foreign companies, and tax aspects of foreign collaboration arrangements, are examined in Part IV, and Surtax on corporate bodies is the subject of the next part. In Part VI, on income tax on individuals, the author analyses the general principles, deductible incomes, rates of tax, capital gains tax, annuity deposits, and scheme of Public Provident Funds, while Part VII explains briefly the essential provisions of the Wealth Tax, Gift Tax and Estate Duty.

4. As the book is intended as a practical guide for the benefit of accountants, tax advisers and business executives the tax laws have been analysed with an emphasis on their practical aspects, with reference, where necessary, to the income-tax rules and notifications of the Central Board of Direct Taxes. These rules and notifications, as well as the First Schedule to the Finance Act 1969 have been included in the appendices at the end of the book. This is a useful handbook for ready reference not only to Indian companies but also to foreign businessmen and industrialists.

R.S.S.

BASU'S SHORTER CONSTITUTION OF INDIA. By Justice Durga Das Basu, Judge, Calcutta High Court, and Tagore Law Professor, Calcutta University. S. C. Sarkar & Sons (Private) Ltd., 1-C College Square, Calcutta, 12. 6th Edition, 1970. Pp. iv & 544. Price, Rs. 40.

The Union of India is a sovereign democratic republic whose aim is to secure for its citizens justice, liberty, and equality, and to promote fraternity among them. Parts I and II of its Constitution (Arts. 1-11) deal with the Union and its territory and citizenship, Parts III and IV, with the fundamental rights (Arts. 12-35) and directive principles of State

policy (Arts. 36-51); Part V covers the Union Executive, Legislature and Judiciary (Arts. 52-151), and Part VI, the State Executive, Legislature and Judiciary (Arts. 152-226).

2. Part III concerns equality before law; prohibition of discrimination on grounds of religion, race, caste, sex, or place of birth; equality of opportunity in matters of employment; abolition of untouchability and of titles; protection of certain rights regarding freedom of speech, assembly, association, movement and residence, and freedom to hold property and to practise any profession. It considers also protection in respect of conviction for offences, protection of life and property and against arrest and detention in certain cases, prohibition of traffic in human beings, freedom of conscience and religion, protection of minorities, compulsory acquisition of property, and remedies for the enforcement of rights conferred by this Part.

3. Part IV lays down that the State shall secure a social order for the promotion of the welfare of the people, take steps for the organisation of village panchayats, and provide for securing the right to work and to education, effective humane conditions of work, living wage for the worker, uniform civil code for the citizens, free and compulsory education of children, promotion of the educational and economic interests of the weaker classes, organisation of agriculture and animal husbandry, protection of monuments, and separation of judiciary and executive. When there is a conflict between the provisions of Part III and those of Part IV, those of Part III shall prevail.

4. The provisions regarding the Union Judiciary and the State Judiciary are included in Parts V and VI. The former Part (Arts. 124-147) dwells on the establishment and constitution of the Supreme Court, Salaries etc., of judges; appointment of acting Chief Justice and appointment of ad hoc judges; Supreme Court to be a Court of record; appellate jurisdiction of the Supreme Court in appeals from High Courts in civil and criminal cases; special leave to appeal by the Supreme Court; review of judgments or orders; conferment of powers to issue certain writs; enforcement of decrees and orders; its consultative functions; its officers and servants, and expenses. Part VI (Arts. 215-226) considers the constitution of State High Courts; appointment and conditions of the office of a High Court Judge; restriction in practice after being a permanent judge; salaries etc.; transfers from one High Court to another; appointment of acting Chief Justice and power of the High Courts to issue certain writs.

5. For the volume for Art. 227 to the end, table of cases and index, a 'Due Slip' has been

inserted at the close of the publication. The latest edition has been revised and enlarged under each Article and the arrangement has been improved. The text of the Constitution has been corrected upto the Twenty-third Amendment (1969), and case law upto the end of 1969 as well as several unreported decisions have been incorporated in the book.

R.S.S.

TRADE UNION LAW. By J. N. Mallik, M. A., LL.B., Advocate. S. C. Sarkar & Sons, Private Ltd., Calcutta 12. 1st Edition, 1970. Pp. xxii & 247. Price, Rs. 17.50.

The industrial worker in India considers the trade union essential for economic gains, job security, and protection against unfairness, and the Government, which carefully fostered the growth of trade unionism in its infancy, is now having to regulate and control it in the wider interests of the community and the individuals who compose it. The present work discusses this aspect historically and analytically through the changing laws and judicial decisions in India and abroad. The Courts too are assuming wider jurisdiction, issuing declarations regarding union rules, even when the party concerned is a non-unionist or employer, and not a contracting party with the union; the book deals elaborately with the question of individual rights vis-à-vis the union (For English Court decisions see R. S. S. M.: Case-book on Industrial Law 1969.)

2. The National Commission on Labour, whose report was published in August 1969, makes three important points on how to tackle intra-union rivalry and promote recognition, how the trade unions should undertake social responsibilities, and how wasteful strikes should be controlled (see Mrs. P. Chakraborty: *Strikes & Morale in Industry*, 1969). The Commission also recommended the setting up of an Industrial Relations Commission for the settlement of disputes, and the present volume discusses their recommendations in detail, as well as relevant English and American laws touching trade unions, along with the provisions in the Indian law. The inadequacies in the law are pin-pointed and recent trends in trade union legislation noted.

3. The introductory chapters in Part I of the book deal with the history of trade union legislation, different classes of union and their powers and functions and the Code of Discipline and the Code of Conduct. The relationship of trade unions in respect of the constitution and of the laws of contract, torts, and crimes, and the Industrial Disputes Act, 1947 are then examined. The Calcutta High Court

decisions in *Jay Engineering Works v. State* (AIR 1969 Cal 407) and *Reserve Bank v. Aahis* (73 CWN 388) on the question of immunity of trade unions from civil and criminal liability are duly noticed. Apart from the topics of Government employees and trade unions, and vicarious litigation and trade unions, compulsory unionism, and unions and the law of meetings, are considered at length. Compulsory registration of unions has been mooted in order to obviate the inconvenience felt by unincorporated associations, although recognised but lacking in legal personality, in matters of litigation. Another recent judicial decision is important from the point of view of the law governing trade union meetings. The book also contains general discussions of the Trade Unions Act, 1926 with reference to the general law and allied matters.

4. Part II contains the text with commentary on the Indian Trade Unions Act, 1926. Registration and recognition, Union Rule Book and enforcement of rules, expulsion of members, and election and jurisdiction of Courts are covered. Both the parts contain discussions about enforcement of agreements, strikes, picketing and collective bargaining. The appendix reproduces the inchoate Indian Trade Unions (Amendment) Act, 1947, the State Amendments, the Central and West Bengal Regulations, and the English enactments on the subject.

5. The book should be of value to lawyers and Judges, scholars working in the field of labour relations, trade unionists, and employers and officials connected with trade union activities. The standpoint of the author has been that of a man of law and he has dwelt on those aspects of trade unionism which fall within the scope of the existing laws governing trade unions.

6. An index of cases and a subject index are useful features of the Book. R.S.S.

INCOME TAX. By Sukumar Mitra, M.A. (Cantab), Bar-at-Law. S. C. Sarkar & Sons (P.) Ltd., 1-C College Square, Calcutta 12. 1970. Pp. xiv & 332. Price, Rs. 28.

The Income Tax Act, 1961 came into effect from 1st April 1962 and the annual Finance Acts passed by the Indian Parliament give effect to the financial proposals of Government each year. The fundamental thing about Income Tax is the principle that "taxation is entirely a creature of statute, and there is no common law applicable to it." In determining whether a tax is payable by a person, the only guide is the clear wording of the statute, and the author of the present book has therefore, stated fully the effect of the cases on the

construction of the statute. He has discussed cases cited in the United Kingdom which still apply with regard to the broad principles and cases under the Income-tax Act, 1922, whenever the provision in the older Act is more or less identical. The idea of income-tax has come to India from the United Kingdom and some of the principles laid down by the Courts in that country have also been followed in India. The author has appended a fairly elaborate index of subjects, indicating against each item the relevant sections of the 1961 Act, so that the reader may readily find an answer to any of his doubts.

2. The Income Tax Act, 1961 describes the sources of income for the purposes of the Act and prescribes methods of computing the income. Tax is charged on the total income of a person earned in the previous year, and a 'person' includes an individual, a Hindu undivided family, a company, a firm, an association of persons, a local authority, and every artificial, juridical person. The 'total income' is the aggregate of all income under the heads of salaries, interest on securities, income from house property, profits and gains of business or profession, capital gains, and income from other sources. It is the duty of every person whose total income exceeds the maximum amount which is not chargeable to income-tax to make a return in the prescribed form, furnishing all prescribed particulars and duly verified. If, on an examination of the return, the Income Tax Officer feels satisfied about its correctness, he makes an assessment of the total income and computes the tax payable on the basis of such return. A person may become entitled to refund of tax collected from him by deduction at source. There is a provision barring civil suits to set aside or modify any assessment and any prosecution or other proceeding against any Government officer.

3. Apart from the introductory chapter, which traces the history of income-tax in India and its administration, there are eleven chapters in the book under review. The nature of the tax, exemptions and exclusions, basis of charge, determination of total income, assessment, appeals and revisions, and civil Courts and their jurisdiction, are described in some of them, while the others deal with tax avoidance, penalty, recovery of tax, and refund.

4. In the present book, which contains a table of cases, the endeavour has been to state the general principles governing the law of income-tax simply and clearly. R.S.S.

THE UNITED NATIONS IN A CHANGING WORLD. By J. A. C. Gutteridge, M. A., (Oxon). Manchester University Press, 316-334 Oxford Road, Manchester. (In India: N. M. Tripathi (Private) Limited, Princess Street, Bombay 2) 1969. Pp. vii & 111. Price, Rs. 32.40.

The handy volume under review embodies the lectures delivered by Miss Gutteridge as a Melland Schill Endowment International Law lectures at the University of Manchester. After an introductory chapter discussing the United Nations Charter as a living document, the book examines in great detail the legal capacity of the U. N. in relation to the maintenance of international peace and security, the problems of non-self-governing territories, and developments in the field of economic co-operation. It sums up in broad lines the present state of the U. N., its developments and the practical results of its working. In the twenty-five years that have elapsed since the drawing up of the U. N. Charter, many problems and situations have arisen not specifically foreseen at the time, and the present book considers how far the Charter has been able to meet the needs of the greatly expanded international community today, and takes into account the new procedures which have been devised to meet them in the light of the Purposes and Principles of the U. N.

2. The learned lecturer discusses three main problems. The first concerns situations within the boundaries of States which, because of their international implications, are potentially explosive. The second is the desire of States, which have themselves recently emerged from a colonial or dependent status, to bring colonialism in all its forms to an end and to envisage independence as the ultimate objective. The third problem is economic; the concern of the new States for the use and development of their natural resources and for the existing imbalance between themselves and the more developed countries. The three recent developments in the field of international trade and development are the establishment of the UNCTAD, UNIDO, and UNICITRAL (the last standing for the United Nations Commission on International Trade Law). The lecturer gives some account of the structure of these bodies and the purposes for which they were set up, considering in each case on what provisions of the Charter they are based. Important in itself, Unicitral is development of particular interest to lawyers, and the lecturer considers how it came into being, what its objectives are and what its constitutional basis is under the Charter. The establishment of Unicitral is an important stage in the evolution of international law and the

Commission itself will have an important part to play in the progressive development of international law, and its codification in the field of international trade, as well as its unification.

3. The appendices include the Preamble, Purposes and Principles of the U. N. Charter and the Dumbarton Oaks proposals, which contained in embryo the proposals that subsequently materialised, and the index includes detailed references to the Charter clauses and General Assembly resolutions.

4. Having spent most of her working life in the legal branch of the U. K. Foreign Service, Miss Gutteridge was legal adviser to the U. K. Permanent Delegation to the United Nations at New York, where she had unique opportunities for seeing the day-to-day working of the U. N. Her present publication should be of interest to all serious readers and to students of international law and affairs.

R.S.S.

SIMPLIFIED TEXT BOOK OF MEDICAL JURISPRUDENCE AND TOXICOLOGY. (For classrooms and courtrooms). With 174 illustrations. By C. K. Parikh, Hon. Professor of Medical Jurisprudence and Toxicology, Seth G. S. Medical College, Bombay. With Forewords by Dr. Keith Simpson (University of London), Dr. D. J. Reddy (Sri Venkateswara University, Tirupathi), and Mr. Justice S. P. Kotval, Chief Justice, High Court of Maharashtra, Bombay. Medical Publications, D/12 York House, Colaba Causeway, Bombay 1. 1st Edition, 1970. Price, Rs. 36.

Medical jurisprudence and forensic medicine are closely related subjects; medical jurisprudence deals with the legal aspects of medicine and forensic medicine deals with the medical aspects of law. Toxicology is that branch of medical science which deals with the character and properties of poisons, the symptoms they produce, the nature of the total results and the methods of their detection. And here is a compact and authoritative piece of work which deals clearly and comprehensively with the entire subject, from the view-point as much of the medical student and medical practitioner as of the criminal lawyer and police surgeon. The introductory chapter opens with a description of the legal procedure at an inquest, the difficulties in the detection of crimes, procedure in court, medical evidence, kinds of witnesses, and the duties of a doctor in the witness box. The paragraphs in Section 1, on post-mortem examination, detail the precautions to be taken which are commonly missed

and the procedure to be followed in order to bring about results that will later stand the test of cross-examination. In the succeeding Section is a discussion of problems relating to hanging, drowning, drug addiction, and poisoning, with due emphasis on Indian conditions, laws, and practices. As Justice Kotval observes, in criminal cases, easily noticeable is the want of experience or carelessness of the doctor, who should not be content with merely finding the cause of death but should make a fair and accurate report of the condition of the body as a whole. Equally glaring is the lack of knowledge of the legal requirements for proof of an offence. The problem of transplantation of human parts, the latest development in science, has been covered in this volume. The crux of the problem lies in determining when death takes place, and this can be decided upon only by the courts on the evidence of medical men and their definition of death. Section 5 gives the bare texts of the relevant sections of the Indian Evidence Act, Criminal Procedure Code and the Indian Penal Code immediately after the chapter dealing with the law governing the medical profession.

2. The other Sections in this part cover, inter alia, the Medico-legal aspects of injuries, regional injuries, thermal injuries; traffic accidents, virginity, pregnancy, sexual offences and perversions, abortion and infanticide. Sections 6, 7 and 8 consider common household poisons and acid poisons; non-metallic, metallic and vegetable poisons, animal poisons, somniferous and inebriant poisons, and a number of other varieties as well as asphyxiants.

3. The Appendix contains useful tables of measures, data of organs, certificates, medico-legal documents and pro formas and labels; especially noteworthy are the formulae for the estimation of stature, alphabetical poison table and Spot Diagnosis, a miniature forensic atlas. The illustrations are realistic and reflect graphically the situation and scene of crime, and there is a comprehensive index at the end of the book.

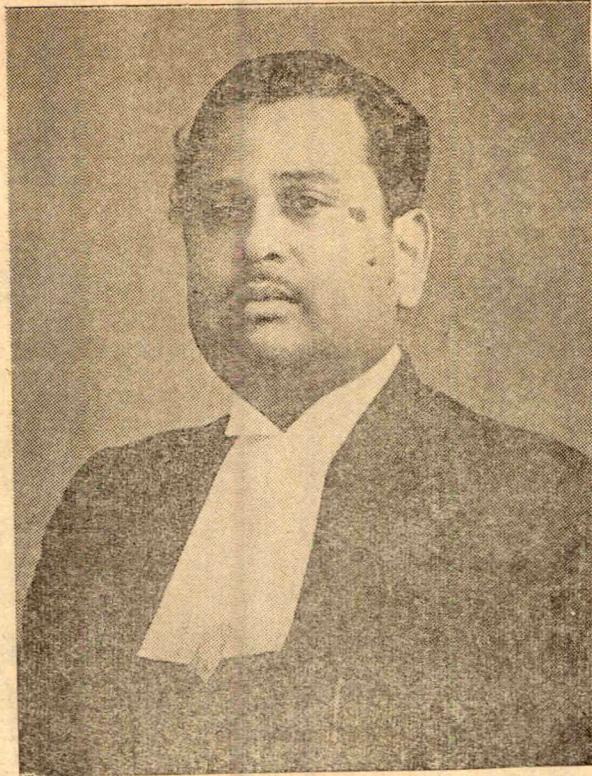
4. To serve the needs of students, certain matters have been treated in unexpected detail. At the end of each topic all possible questions that can be set at university examinations have been included. Bold types have been used to indicate basic facts, salient features have been enumerated, and tables have been used where comparisons are involved. Police officers will find enough material in the book to enable them to suspect at an early stage and detect the possibilities of crimes and unnatural death. This is a masterly short work which should well repay careful study and reference by all concerned.

R.S.S.

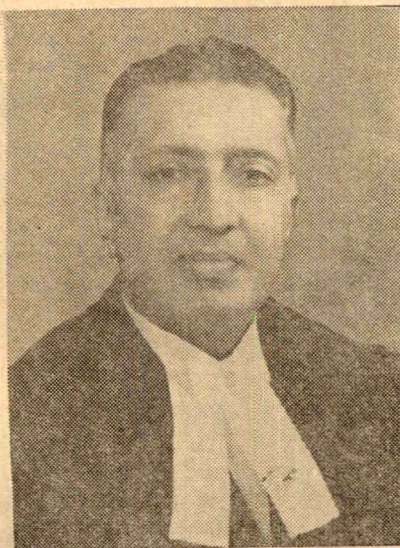
The New Chief Justice of the Mysore High Court



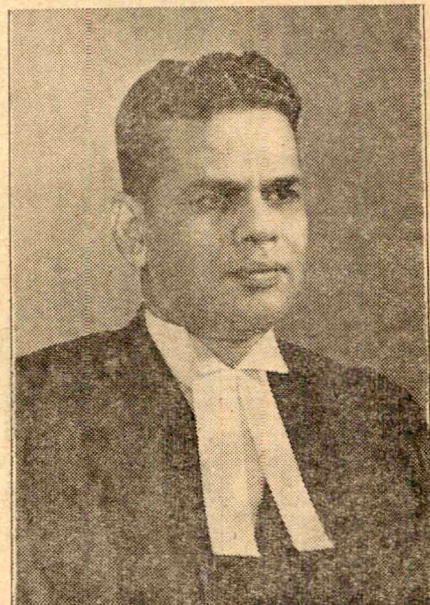
The Hon'ble Mr. Justice A. NARAYANA PAI
Chief Justice, Mysore High Court



The Hon'ble Mr. Justice V. S. MALIMATH
Judge, Mysore High Court



The Hon'ble
Mr. Justice D. NORONHA,
Judge, Mysore High Court
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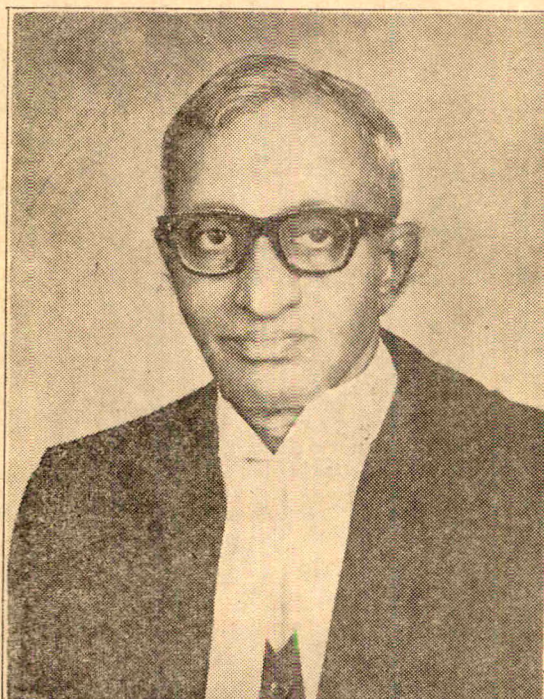
The Hon'ble
Mr. Justice E. S. VENKATARAMIAH,
Judge, Mysore High Court



The Hon'ble
Mr. Justice K. K. DUBEY,
Judge, Madhya Pradesh High Court



The Hon'ble
Mr. Justice C. S. P. SINGH,
Judge, Allahabad High Court



The Hon'ble Mr. Justice V. V. RAGHAVAN,
Judge, Madras High Court

JOURNAL SECTION

1971 FEBRUARY

THE GOVERNOR'S POWER TO REMOVE CHIEF MINISTER

(By G. H. GUTTAL, Judge, City Civil and Sessions Court, Bombay).

1. The Constitution of India has adopted the English system of parliamentary executive. The Governor of a State is, like the President of India, the constitutional head of the executive. This character of the executive was put by the Supreme Court in these words:

"... The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet.

The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State, but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, 'a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part'."

(Ram Jawaya v. State of Punjab, AIR 1955 S C 549).

It will, therefore, be appropriate to liken the position of the Governor with that of the Crown. Likewise, the Chief Minister holds a position in no manner different from the Prime Minister. Placed in this perspective, the position of the Governor and the Chief Minister may be examined.

The Extent of Power :

2. Like the Prime Minister, the Chief Minister, is the leader of the elected House of the Legislature. He is chosen as Chief Minister by virtue of his leadership of the largest party. He is the Chairman of the Cabinet. He is clothed with the power to advise the Governor to dismiss a Minister. He possesses the real executive power of the State.

Lord Morley has brought out the pre-eminence of the position of the Prime Minister of England in these words:

"... Flexibility of cabinet system allows the Prime Minister to take upon himself a power not inferior to that of a dictator, provided always that the House of Commons stands by him."

This is true of the Prime Minister of India and the Chief Minister of a State, who owe their power to the support of the elected house of the legislature.

3. Dealing with the position of Crown, Sir Ivor Jennings wrote:

"... The existence or absence of a monarch does not in itself make a fundamental distinction in a constitution. In a cabinet system the cabinet governs. The functions of the head of the State are ancillary".

See Sir Ivor Jennings "Cabinet Government."

In the words of Lord Morley "though the monarch chooses the Prime Minister, the Crown could hardly exercise any real power either by selection or exclusion against the wishes of the constituencies".

It is clear, therefore, that the Chief Minister as Chairman of the Cabinet possesses the real executive power within the limits prescribed by the Constitution and so long as the Legislature supports him.

4. The Governor of a State is appointed by the President (Article 155). He holds office during the pleasure of the President (Article 156). The executive power of the State vests in the Governor and is exercised by him either directly or through officers subordinate to him in accordance with the Constitution (Article 154). Such power extends to all matters with respect to which the Legislature of the State has power to make laws (Article 162). The Council of Ministers aids and advises the Governor in the exercise of his functions. The Governor need not, however, be aided or advised by the Council of Ministers on matters in respect of which he is by or under the Constitution required to exercise his functions in his discretion (Article 163).

The Chief Minister is appointed by the Governor. The other Ministers are appointed by the Governor on the advice of the Chief Minister. The Ministers hold office during the pleasure of the Governor (Article 164). But such pleasure is exercised by the Governor only on the advice of the Chief Minister.

With these broad features of the Governor's powers in mind, it will be convenient to consider whether he has the power to remove a Chief Minister.

Provisions of the Constitution :

5. Article 164 in so far as it is relevant reads as follows:—

"...(1) The Chief Minister shall be appointed by the Governor and the other Ministers shall be appointed by the Governor on the advice of the Chief Minister, and the

Ministers shall hold office during the pleasure of the Governor.

(2) The Council of Ministers shall be collectively responsible to the Legislative Assembly of the State.

(3) * * * *

(4) A Minister who for any period of six consecutive months is not a member of the Legislature of the State shall at the expiration of that period cease to be a Minister.

(5) * * * **

The first clause provides for the appointment of the Chief Minister and other ministers. It also provides that Ministers shall hold office during the Governor's pleasure. Since the Chief Minister is also a Minister, a question arises as to whether he too holds office during the Governor's pleasure. Under the English law also, the Minister holds his office at the pleasure of the Crown. But such pleasure is exercised solely on the advice of the Prime Minister. This is true of the Governor also. Even under normal circumstances, advice of the Council of Ministers is conveyed to the Governor through the Chief Minister who is the channel of communication between the cabinet and the Governor.

Clause (1) of Article 164 does not lay down that the Chief Minister holds office during the pleasure of the Governor. It is only "the Minister" who holds office during the Governor's pleasure. If a power to remove the Chief Minister were intended to be conferred on the Governor, the makers of the Constitution would have chosen a different language. To read such a power in Article 164 will lead to absurd results.

Clause (1) of Article 164 employs the expressions "Chief Minister", "the Ministers", "other Ministers" and "Council of Ministers". The expression "Chief Minister" has been used in contradistinction with "the other Ministers". The use of these expressions in this manner is deliberate. Article 164 (1) treats the "Chief Minister" and "Minister" differently so far as the pleasure of the Governor is concerned. "The Minister" must mean "the Minister other than Chief Minister". There is no power in the Governor to remove a Chief Minister in exercise of his pleasure.

In this connection, it may be necessary to refer to the decision of Allahabad High Court in *Har Sharan v. Chandrabhan* (AIR 1962 AL 301). The question was whether in Article 164 the expression "Minister" applies to "Chief Minister". S. S. Dhavan J., held:

"...It is clear that the word "Minister" in clauses second, third, fourth and fifth of Article 164 includes "The Chief Minister..."

This view is undoubtedly correct. It must, however, be pointed out that the Allahabad High Court was not considering the expressions "Chief Minister" and "Minister" employed in cl. (1) of Art. 164.

A conclusion that the Governor has a power to remove a Chief Minister would lead to consequences opposed to cl. (2) of Art. 164. It is fundamental that a Cabinet Government is answerable to and, therefore, removable only by the legislature. The removal of a Chief Minister must mean removal of the Government. This was not the result intended by the makers of the Constitution.

Discretion Excluded :

6. Since Art. 163 refers to discretionary powers, it is necessary to examine whether the Governor may resort to his discretion to remove a Chief Minister.

Where the Governor was intended to act in his discretion, such discretion has been expressly conferred by the Constitution. The Governor is entitled to act in his discretion where he is required to do so by the Constitution. This is emphasised by cl. (1) of Art. 163.

There are certain provisions which confer on the Governor a discretion. Article 200 provides for assent of the Governor to the bills passed by the legislature, and the second proviso requires the Governor to act in his discretion. If "in the opinion of the Governor" a bill derogates from the powers of the High Court so as to endanger its position under the Constitution, he is required to withhold his assent and reserve it for the consideration of the President. Secondly, Art. 239 empowers the President to administer Union Territories through Administrators. Clause (2) of the article confers on the President a power to appoint the Governor of a State as the Administrator of an adjoining Union Territory. It further provides that the Governor so appointed shall exercise his functions independently of the Council of Ministers. He may, therefore, act in his discretion.

These are some of the provisions where under the Governor is empowered to resort to his discretion to exercise his functions. Matters in his discretion have been specifically set out in the Constitution, wherever considered necessary. Such discretion has not been reserved in regard to the removal of a Chief Minister. The omission to do so must be taken to be deliberate. The discretion of the Governor is thus clearly excluded.

In conclusion, it must be stated that there is no power in the Governor to remove the Chief Minister.

RETIREMENT OF HON'BLE MR. HIDAYATULLAH, C. J.

Soon after the historic judgment of the Supreme Court in the Princes' Derecognition Case was delivered by the Supreme Court on the 15th December 1970, Chief Justice Hidayatullah of the Supreme Court laid down his high office as Chief Justice of India and retired from service on the 17th December 1970.

It will not be out of place to remind ourselves here that the Chief Justice of the Supreme Court of India is not only the Chief Justice of the Supreme Court but Chief Justice of India, according to the Constitution. In fact, the Constitution throughout refers to him as the Chief Justice of India and not of any particular Court. This shows the exalted position accorded to the Chief Justice of the Supreme Court by the Constitution.

Shri Hidayatullah has retired after adorning his high office for nearly three years. He also once officiated as the President of India during this period.

The Supreme Court has produced many eminent and distinguished Judges and Mr. Hidayatullah is easily one of the most distinguished of them. During his career on the Supreme Court Bench he has delivered many outstanding judgments. While the general level of the judgments of our Supreme Court has always been high and they can stand comparison with the best judgments delivered anywhere in the world, Mr. Hidayatullah's judgments were characterised by a certain literary quality which may be said to be his speciality. In this connection, his judgment in *Ranjit Uteshi's Case*, (AIR 1965 S C 881), occurs to the mind readily. His exposition of what constitutes obscenity in literary work can itself be said to be piece of literature. Similarly, he had an ori-

ginal approach to questions even when he delivered a concurring judgment, as can be seen from his judgment in *Golaknath's Case* and in the Princes' Derecognition Case.

Mr. Hidayatullah, besides having been a great Judge, is also a great jurist, scholar and educationist.

His judgment in the Contempt of Court Case against Mr. E. M. S. Namboodiripad in 1970 S C 2015 late Chief Minister of Kerala, is another memorable judgment of his. In this judgment he repudiates, on the basis of an independent study of the writings of Marx, Engels, Lenin and other writers, that there is no basis for Mr. Namboodiripad's contention that his impugned statement was, in substance, only what was found in well-known books by these Authors and did not constitute contempt of Court.

Mr. Hidayatullah had a keen sense of the role of the judiciary and of the Supreme Court under our Constitution and insisted on keeping out political considerations and party policies from the decision of issues involving constitutional questions and questions regarding fundamental rights.

Mr. Hidayatullah belongs to Nagpur. He started his practice as an Advocate at Nagpur where he was also appointed Advocate-General. He was then appointed a Judge of the Nagpur High Court, and of the Madhya Pradesh High Court at Jabbalpore where he became the Chief Justice, before being appointed a Judge of the Supreme Court.

The A. I. R. expresses its best wishes to Mr. Hidayatullah and is sure that, even after his retirement from the Supreme Court, he will have ample opportunities for the exercise of his talents, knowledge, experience and abilities in the service of the Country.

THE LATE MR. T. L. VENKATARAMA AYYAR

We regret to report the death at Madras, at the age of 77, of Mr. T. L. Venkatarama Ayyar, retired Judge of the Supreme Court. Mr. Venkatarama Ayyar was known for his erudite judgments, especially on questions of constitutional law. His perspicacity of thought and expression were remarkable. He was very independent in his views and approach to legal questions and went deeply into the real questions involved without allowing himself to be unduly influenced by clichés and formulas merely because they had been in long usage. In this connection, his remarkable dissenting judgment in *Aher Raja Khima v. State of Saurashtra*, (AIR 1956 S C 217) may be referred to. The question was about the powers of the High Court in an appeal from an acquittal in a

criminal case. He was referring to the formula that unless there are "compelling reasons" the High Court should not interfere with a verdict of acquittal. Mr. Venkatarama Ayyar strongly dissented from this view and held that the powers of the High Court in a criminal appeal were the same whether the appeal was from an acquittal or conviction. In the course of his judgment he observed: "There is always a danger in taking a phrase, attractive and telling in its context, out of it, and erecting it into a judicial formula as if it laid down a principle universal in its application".

After his retirement from the Supreme Court, Mr. Venkatarama Ayyar served, for some time as Chairman of the Law Commis-

sion and then he functioned as the one man Commission appointed to enquire into certain allegations against a former Chief Minister and other Ministers of Bihar.

Mr. Venkatarama Ayyar was great not only in law but also in other fields. He was a great Sanskrit scholar and an authority on Carnatic music, who had been awarded the title of Sangeeta Kalanidhi by the Madras

Music Academy. He was also a fellow of the Central Board of the Sangeet Natak Academy from 1964 and also a member of the Board of Music and Board of Examiners in Music for the Madras University.

His death is an irreparable loss both to the world of law and the world of music. We express our condolences and sympathies to the members of the bereaved family.

REVIEWS

THE LEGAL STATUS OF THE ARABIAN GULF STATES. (A study of their treaty relations and their international problems). By Husain M. Al-Baharna, Ph. D. (Cantab). Manchester University Press, Manchester. (In India: N. M. Tripathi Private Ltd., Princess Street, Bombay, 2.) 1968. Pp. xv & 351. Price, Rs. 54.

Based on a thesis approved for the Ph. D. degree of the Cambridge University, the present volume examines comprehensively, perhaps for the first time, the international legal problems of the Arabian Gulf countries. These problems range from those involving primarily questions of legal and international status to those which involve issues connected with territorial and boundary claims. Problems of British foreign jurisdiction in the Gulf and the relations of the Shaikhdoms with the foreign oil companies in the area have been omitted. Although not a general text-book on international law, it has called for some description of the general part of that law to which the special problems of the Gulf States are related.

2. The Arabian Gulf States comprise eleven countries of which Bahrain, Qatar and the seven Trucial Shaikhdoms are commonly known as British Protected States, Kuwait, now an independent State and member of the U. N., and the Sultanate of Muscat and Oman, an independent State but not a member of the U. N. These other States are being prepared for the assumption of greater responsibilities in their foreign relations, an indication, perhaps, of future British legal relations with them.

3. Apart from the introductory chapter, which describes the political history of the States and the constitutional history of their Governments, there are four parts in the book. In the first part the author deals with the treaties of protection between the Shaikhdoms and the U. K. and evaluates this protectorate system. He then discusses the international status of these States in the light of these treaties, including such questions as international responsibility, immunity of the rulers

of the States from the jurisdiction of foreign Courts, their position within the framework of British constitutional law, their treaty making capacity, their position during war, their nationality laws, and their position within the framework of the United Nations; the last mentioned topic is covered under the heads of applicability of the U. N. Charter to the States, competence of the U. K. to settle disputes arising between them and the U. K., and qualification for membership of the United Nations. Under British Constitutional law, in all protectorates foreign relations are controlled by the Crown, the extent of power reserved internally varying according as they are colonial protectorates, or protected States. The third part of the book contains a discussion of various territorial claims, for example, Iran's claim to sovereignty over Bahrain, the British-Saudi controversy over the sovereignty of Buraimi, and the Iraqi claim to sovereignty over Kuwait. Finally, the author describes the boundary disputes which have arisen since the oil companies began to operate in this area.

4. The Bibliography and index are useful adjuncts to the volume. The appendices include the texts of the agreements and undertakings entered into by the rulers of the Gulf States, and maps are furnished of the Arabian Gulf States, Buraimi boundary lines, Buraimi villages, and the Bahrain-Arabia boundary.

R.S.S.

THE LAW COLLEGE MAGAZINE,
ERNAKULAM, 1969-70. Editor: Jos
T. Manjooran, Law College, Ernakulam.

The latest issue of this college magazine, which is intended to encourage the writing talents of the students, includes contributions on a wide variety of legal subjects also from members of the staff and some highly placed members of the judiciary. As in its last issue, it contains a separate section on glimpses of the legal system in some foreign countries, contributed by the Norwegian and American embassies and the Australian High Commission. As is to be expected, it also records the

various social, literary, cultural and sports activities of the alumni. Among the subjects dealt with by these articles are the provisions regarding minority shareholders under the Companies Act, professional conduct and advocacy, labour management relations and socialism, the doctrine of deviation in insurance law, bank nationalisation and discrimination, and the role of political parties in a parliamentary democracy. Two of the articles examine whether the intention to create legal relationships is necessary for a contract, and whether the perpetuity rule should be abolished.

2. In the article on the translation of statutes the writer truly observes that every law must be enacted in the language in which the basic principles have originated, and the bulk of our law is based on principles of English law. The law itself must first be Indian in origin before it can express itself adequately in an Indian language. The article on Government tort liability in India examines whether an 'act of State' is a definite concept for the purpose of immunity and how to distinguish sovereign and non-sovereign functions for the purpose of the existing law. The views expressed by Justice K. K. Mathew and Justice V. R. Krishna Iyer on the subject of fundamental rights may not find general acceptance. Mr. Mathew, who considers that recognition of property rights beyond a certain point would deprive others of the means of subsistence, doubts whether Courts will give a preferred position to them in view of Part IV of the Constitution, and Mr. Krishna Iyer, while referring to the famous Golaknath case, would seem to give his blessing to Parliament's latest attempt to amend Art. 368 of the Constitution to put the fundamental rights "out of the way" of the country's march to progress.

R.S.S.

THE CALCUTTA CITY CIVIL AND SESSIONS COURTS ACTS, 1953. By Shibshankar Sarkar, M.A., LL.B., Advocate, High Court, Calcutta. With a Foreword by Justice P. N. Mookerjee, Eastern Book Agency, 4 Wood Street, Calcutta 16. 1st Edition, 1970, pp. 120. Price, Rs. 10.

This is a concise and comprehensive work on the Calcutta City Civil and Sessions Courts Acts, 1953 (as amended up-to-date), supplying to members of the legal profession and others the latest information concerning these two Courts; the 1969 amendments have considerably extended their jurisdiction. The formation of these two Courts was necessitated by the increase in the volume of work pending before the High Court; they occupy an inter-

mediate position in between the High Court and the Small Cause Court at Calcutta. The different Sections, Schedules and Rules are accompanied by elaborate notes with reference to available decisions. It also incorporates the Rules made by the High Court and enumerates the rates of ad valorem fees leviable on the institution of suits. At the end is appended the Presidency Small Cause Courts (West Bengal Amendment) Act, 1969, with notes relevant for the purpose.

2. The different Sections of the City Civil Court Act deal, inter alia, with the appointment of Judges, jurisdiction, procedure, law to be administered, and appeal. They cover also the power of the Chief Judge in respect of distribution of business and transfer and withdrawal of suits, and lay down that no Judge shall try suits or proceedings in which he is interested. Further, they consider the subjects of return of plaint for want of jurisdiction, the appointment of Registrar and clerks, and the attorneys entitled to plead in that Court. The Rules of the Calcutta Civil Court, 1956 give details about Court and office hours; diary, cause lists, oaths and affidavits; institution of a suit; processes; fixing a date for trial; decrees; classification and arrangement of records; accounts, registers, statements and returns; fees for affidavits, cost of processes, number of bailiffs, legal practitioners, and cases under the Guardians and Wards Act.

3. The Calcutta City Sessions Court Act 1953 has 17 sections, some of them relating to the establishment of the Court, the Court being a Court of Session and the Code applying to such Court, and the inability of the Court to have jurisdiction in certain matters. Trials before the City Sessions Court shall be by jury and there are sections concerning the saving of cases and proceedings pending in the High Court and about the Act overriding other law including Letters Patent. The Rules consider, inter alia, Vakalatnamas and Mukhtarnamas, rules relating to the trial, disposal of property, destruction and inspection of the records in the custody of the Court, fees for affidavits, searching and copying, and provisions as to criminal rules and orders. As is only to be expected some of the Sections will be found to be common to both the Acts.

4. The book has an index and a table of cases, and should be of assistance to those who will be called upon to interpret these statutes, viz., Judges, lawyers and the litigant public alike.

R.S.S.

HINDU LAW OF ADOPTION, MAINTENANCE, MINORITY AND GUARDIANSHIP. By S. V. Gupte, assisted By G. M. Divekar B.A., LL.B., Attorney-at-Law. (N. M. Tripathi Private Ltd., Bombay). 1st Edition, 1970. Pp. xxxix and 438. Price, Rs. 35.

The Hindu Adoptions and Maintenance Act 1956 codifies and amends the old law relating to adoption and maintenance. With the passing of the Hindu Succession Act, 1956, which treats sons and daughters equally in the matter of succession, the law of adoptions among Hindus has been simplified. The 1956 Act provides for the adoption of boys as well as girls. A husband cannot prevent his wife from taking a child in adoption after his death, and this adoption will be in the widow's own right. No person need be divested of any property which was vested in him, simply because an adoption has subsequently been made. Apart from this basic change in the concept of adoption, the Act has made other changes in the old law in the matter of the capacity to adopt, the capacity to be adopted, the capacity to give in adoption, and the effect of adoption.

The Hindu Minority and Guardianship Act 1956 amends and codifies certain parts of the old law as found in the *Srutis* and *Smritis*, the Guardians and Wards Act, 1890 and the Indian Majority Act, 1875; it does not affect these statutes but is only supplementary to them. It is in addition to and not in derogation of the Guardians and Wards Act, 1890.

2. In the volume under review, the old law is first described, followed by a running commentary on the two Acts under reference. The *Dattaka* and *Kritrima* systems of adoption are compared, and the *Dattaka* adoption is dealt with under the heads of essentials of a valid adoption; who may give in adoption; who may adopt and who, be adopted; and formalities and legal consequences of adoption. Maintenance and residence, and right of residence (*Mitakshara* and *Dayabhaga*), and guardianship, are also covered in this part of the Book. The Hindu Adoptions and Maintenance Act, 1956, in the next part, considers *inter alia*, the right of adoptive parents to dispose of their properties, determination of adoptive mother in certain cases and presumption as to registered documents relating to adoption. It is also concerned with the maintenance of wife, of widowed daughter-in-law, and of children and aged parents as well as dependants; the amount of maintenance, priority for debts, and effect of transfer of property on the right to maintenance. The third part is devoted to the Hindu Minority and Guardianship Act, 1956, under the heads, *inter alia*, natural guardians and their powers, testa-

mentary guardians and their powers, and the welfare of the minor.

3. A former Solicitor-General to the Government of India, the author was one of those invited by Dr. Ambedkar to serve on a committee to revise the draft Hindu Code prepared by the Rao Committee, and his comments on and criticism of certain recent decisions of the Supreme Court (which have, of course, been brought up-to-date) would seem to call for careful consideration. In regard to *Sawan Ram v. Mst. Kalawanti* and others (AIR 1967 S C 1761) the Author considers that the decision ignores the nature of the right to adopt conferred on a woman and that it is against the declared object of the Act in respect of widows, and contrary to the scheme of the Act. In regard to *Punithavalli Ammal v. Minor Ramalingam* and another (unreported judgment), the view of the Supreme Court is said to be opposed to the object of the Act and is contrary to the express provision of S. 12 of the Act. Similar is the learned author's comment on the Supreme Court decision in *Sita Bai and another v. Ramachandra* (AIR 1970 S C 343).

4. The volume has an index, appendices for each of the three parts, and a table of cases. It should be of great assistance to the members of the legal profession. R.S.S.

GENERAL PRINCIPLES OF INSURANCE LAW. By A. K. Bhattacharjee, Bar-at-law. With Foreword by Justice C. N. Laik, 1969. Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13. Pp. xxii, 139, & xv. Price, Rs. 10.

The present publication, which covers the theoretical aspects of the general principles of insurance law applicable in India, deals with all branches of the law, Marine, Life, and General insurance, including shipping laws regarding charter-party and bill of lading. Insurance law in India has in recent years undergone vast changes, particularly in the areas of life and marine insurance (See the Life Insurance Corporation Act 1956 and the Marine Insurance Act 1963). A contract of insurance is a financial arrangement by which a man protects himself and/or the members of his family against the contingencies of life. The fundamental legal principle is that one person agrees to take the risk for another person's life and/or business in consideration of certain small payments called 'premium'. The instrument containing the terms of the contract is called a 'Policy of Insurance'; the person insured is 'the insured' and the person who insures is the 'insurer'. A contract of life

assurance, on the other hand, is a mere contract to pay a sum of money on the death of the insured in consideration of the payment of a certain annuity, in instalments or in a lump sum, during his life. This is not, however, a contract of indemnity like the other contracts of insurance where payments take place, not simply on a certain eventuality but on that eventuality resulting in loss to the insured.

2. Insurance may be marine, or non-marine. The latter includes personal insurance (life, personal accident, sickness), property insurance (fire, burglary, livestock, etc.) and liability insurance (motor vehicles, aviation, employer's liability, etc.). Marine insurance is an agreement by which the insurer undertakes to indemnify the insured against the losses incidental to marine adventure. A bill of lading, on the other hand, is a document signed by the ship-owner or master which states that certain goods have been shipped and the terms on which they have been delivered, and a charter-party is a contract by which the entire ship or some principal part of it is let to a merchant for the conveyance of goods on a determined voyage.

3. The first chapter in the book under review, on the characteristics of a contract of insurance, describes an endowment policy; the procedure in a life policy; misrepresentation, concealment or non-disclosure in a contract; wagering contract. It discusses indemnity and guarantee, loss by unlawful act of the insured, and insurable interest. The second chapter, on marine insurance, covers inter alia specifications of the Policy, the insurance slip or cover note, insurable value, warranties, loss and abandonment, the doctrine of proximate cause, salvage loss, and actual and constructive total loss. The Indian Bills of Lading Act, 1856 and the nature and interpretation of a Bill of Lading, the characteristics of a charter-party, respective rights of charterer and shipper, the value of the cargo and of the ship, are among the topics covered in the other sections of this chapter. Non-marine and non-life insurance (general insurance) is dealt with under appropriate heads in the third, and last chapter.

4. The volume has a table of cases and index, and should be useful to lawyers, public officials, businessmen and students. We are informed that a comprehensive treatise on all aspects of insurance law and their application to India is at present in the Press.

R.S.S.

ESTATE DUTY CHANGES, 1969. By B. J. Sims, LL. B., F. T. I. I., Solicitor of the Supreme Court. Butterworth & Co. (Publishers) Ltd., 88 Kingsway, London W. C. 2. Pp. viii & 66.

Part III of the English Finance Act, 1969 (Sections 35-40) contains the provisions which make substantial changes in the estate duty system as regards deaths after 15th April 1969. As to those who died before that date the rules of estate duty will apply unaffected by the changes. As an appreciation of the law as it stood is necessary for understanding the provisions of the new legislation, the book under review gives some explanation of the old law as an introduction to the new law. The latest law repeals many of the old charging sections and adds new ones; the rate structure has been altered, and old reliefs have been abolished. The law concerning estate duty on settled property has been substantially changed, and there are many new definitions. As regards interpretation and construction it has been specifically provided that Finance Act 1969 (Part III) shall be construed as one with the Finance Act, 1894 (Part I). It was the latter Act that introduced the estate duty and still remains the basic code. It provides the scheme of liability to duty and the basis of valuation of property liable, specifies the persons accountable for the duty, and prescribes the machinery of collection. The provisions relating to estate duty operate as law in England, Wales and Scotland.

2. Estate duty on benefits under superannuation schemes was the subject of discussion in Parliament, but the present book makes the position clear. When the book went to press, the Estate Duty Office issued certain supplemental notes under the heads. Payments to the deceased's legal personal representatives; where the deceased had a general power of nomination; annuities which continue to be payable after the deceased's death; interests provided by the deceased; death of pensioner or annuitant; payments made in exercise of a discretion; and gifts inter vivos. These notes have been incorporated in the present book.

Sections 35-40 of Part III of the Finance Act, 1969 relate to amount and estate rate of estate duty; changes as to property passing on death; part only of the property to be treated as passing in certain cases; estate duty in respect of interests in expectancy; objects of national, scientific, historic or artistic interest; supplementary and transitional provisions. The present publication includes Schedule 17 (Pts. I, II and III) on the determination of the amount of estate duty on estate, supplementary provisions and consequential

amendments, as well as Schedule 21 on Estate Duty Repeals. There is also a useful index.

R.S.S.

THE WEST BENGAL COURT FEES ACT, 1970. (With Suits Valuation Act, 1887.) By Shambhu Das Mitra, M.A., LL.B., Advocate. 1st Edition. 1970. Eastern Book Agency, Calcutta 16. Pages xii & 157. Price, Rs. 15.

The Court-fees Act (VII of 1870), an all-India Act, remained in force in West Bengal for about a century. The Provinces and States having been empowered to amend or modify the provisions of the Act, it was amended several times by the West Bengal State between 1922 and 1968. The West Bengal Court-fees Ordinance, 1969 came into effect on 10th January 1970. Until then no ad valorem Court-fees were payable in the Original Side of the High Court, Calcutta, although such fees were leviable in the district and other Courts. To remove this disparity it was thought desirable to introduce ad valorem Court-fees in the Original Side of the High Court also. Further, with the increase in the pecuniary jurisdiction of the Calcutta City Civil Court from Rs. 10,000 to Rs. 50,000, litigants could pay ad valorem Court-fees on suits valued upto Rs. 50,000, while those in the High Court remained exempt from the application of this provision even on suits of greater value. But as the legislature was not in session, the above Ordinance had to be promulgated. It repealed the Court-fees Act, 1870 and has been replaced by the present Act, which is the subject of the present volume. The repealed Act still applies however, to all documents presented before any officer serving under the Central Government, and to all suits and proceedings instituted before the commencement of the Ordinance and to all appeals and revisions arising therefrom.

2. The charging provisions of the Act are schedules I and II, Schedule I prescribing the ad valorem fees payable and II laying down the fixed fees. The Act of 1870 prohibited documents specified in these Schedules from being filed, exhibited or recorded in any Court or received or furnished by any Public Officer, unless such document was properly stamped. These provisions are to be found in the present Act also, which is based substantially on the framework of the 1870 Act. Article 11 of the I Schedule and Arts. 7, 12, 14, 20 and 21 of the II Schedule of the 1870 Act applied to the Original Side of the High Court. The present Act removes this distinction and applies equally to the High Court in Calcutta as well as to the Courts in West Bengal.

3. The framework and scheme of the present Act are substantially the same as those of the 1870 Act, although it differs in some matters of detail. The sections and articles of the old Act have been re-arranged in the present Act, which has not only omitted some of the provisions of the old Act, but has also incorporated some new heads of taxation. In some cases the rate of fees payable has been increased while in others relief has been given to the litigants, e. g., relief given to widows in suits for maintenance. The Appendix gives the text of the Suits Valuation Act, 1887; the two Annexures relate to the valuation of movable and immovable property, and schedule of debts. The General Index and table of cases are useful.

4. The present publication not only states the law as it is, but also indicates the law as it was. Comparative tables of new and old sections and clauses have been given where necessary, and all important decisions under the repealed Act which are applicable in the interpretation of the new Act have been incorporated in the book.

R.S.S.

LAW OF CENTRAL EXCISE IN INDIA (in 2 Volumes). By B. L. Kanodia, B. Com., LL. B., Attorney-at-Law. Eastern Book Agency, 4 Wood Street, Calcutta 16. 1st Edition. 1969. Vol. I, Pp. xix & 360. Price, Rs. 17.50.

Excise duties are duties paid by the manufacturer on goods produced or manufactured in India other than salt, the tax being chargeable with reference to the value, quantity, volume, or weight of the product. It is necessary for the manufacturer or producer to have a clear grasp of the excise laws, which affect him very closely. Until 1944, when the Central Excises and Salt Tax Act was passed, there was no complete codification of the laws of Central Excise. The Act of 1944 is a consolidation of various pieces of legislation introduced in the Centre and in the Provinces. Divided into seven chapters and forty sections, the second chapter lays down that the duties will be collected and levied on all excisable goods and salt manufactured or imported by land into India at such rates as are specified in the First Schedule. The duties are chargeable on ad valorem basis and may alter any prevailing tariff value, the tariff values themselves being different for different classes or descriptions of the same article. The chapter also lays down the procedure for determination of value for the purpose of duty as well as the procedure for the issue of licences under the Act. Offences and penalties and the power of Courts to order forfeiture and the recovery

of the sums due to the Government are dealt with in subsequent sections.

2. The third chapter lays down the powers and duties of the officers and landholders and gives powers of arrest and summoning persons to give evidence and produce documents, searches and arrest, and the procedure to be followed by the officer in charge of a Police Station. Transport by sea and a special provision regarding salt are the subject of the next two chapters. The Act next proceeds to specify provisions regarding the power of adjudication, option to pay fine in lieu of confiscation, bails, and revisions, and provides for bar of suits and limitations of suits and other legal proceedings against the Government and its officers.

3. The various sections of the Act have been serially dealt with in the book under review, with short commentaries, each preceded by useful synopsis, and based on the decisions of the various High Courts and the Supreme Court. It contains also the First Schedule and all the Notifications thereon, as well as references to the relevant Rules relating to each section of the Act; the Schedule gives the names and descriptions of the excisable goods, and disputes sometimes arise as to the entry or category under which an article is taxable. All the Notifications relating to the items under the Schedule are given against each of them. Relevant portions of the Finance Act, 1969 have also been included. The second volume, we are informed, contains the Rules portion, with a short commentary.

4. Useful alike to the lawyer and the industrialist, the book contains a table of cases, a table of Notifications, and a detailed general index.

R.S.S.

THE DEVELOPMENT OF THE CONSTITUTION OF THE SOMALI REPUBLIC. By Dr. Haji N. A. Noor Muhammad, M. A., B. L., LL. M., J. S. D. Published by the Government of the Somali Republic, Ministry of Grace and Justice, Mogadiscio, 1969. Pp. xii and 262.

In the present publication, Dr. Noor Muhammad, Vice-President of the Supreme Court of the Somali Republic, gives the reader what is perhaps the first full-length study in English of the Somali Constitution. The Somali Republic is made up of the former Italian Trust Territory of Somalia and the former British Protectorate of Somaliland, so much so that there has been an inevitable

blend, to more or less extent, of Italian and English legal traditions in the State. The experiment is being tried in it of developing under a unitary constitution a unified legal system out of the Civil Law and Common Law systems which have been co-existing with customary law and institutions, which in turn have been considerably influenced by Islam and Shariat law. The present study covers not only the provisions of the Constitution, but also the laws enacted to implement it, as well as the decisions of the Supreme Court relevant to the subject.

2. The provisions in the Constitution for legislative power follow Italian precedent while the British influence can be seen in the executive sphere. The Supreme Court is the highest judicial organ and has to reconcile the different modes of judicial administration. The importation of the notion of administrative law follows Italian precedent, but the writ of Habeas Corpus is a typically Anglo-American instrument for the protection of individual liberty; as to the constitutional guarantees of fundamental rights, there is a meeting of both the continental and the British traditions. Freedom of religion is protected by the Constitution, and the new integrated judicial system no longer recognises Qadis' Courts or specifically customary Courts.

3. The book gives a historical outline and traces the development of the Constitution in Part I, and describes the general characteristics of the Constitution in Part II, followed by an analytical study of its provisions. The Somali Republic is an Islamic, representative, democratic Republic, with a written and rigid constitution and a Parliamentary system of government, establishing the supremacy of the law, or, the Rule of law. There are separate chapters in the book on citizenship, the President of the Republic, the National Assembly, the Government, Central and Territorial Organization, Civil Service, Local Government and Public and auxiliary bodies. The judicial guarantees of fundamental rights include the right to institute legal proceedings, the right of defence, non-retroactive nature of penal law, penal liability, and redress of judicial errors.

4. The judicial power in the Republic is vested in the judiciary, with the Supreme Court as the highest judicial organ, and the Judiciary is independent of the executive and legislative powers. It consists of the Supreme Court, the Courts of Appeal, the Regional Courts, and the District Courts; there are no Qadis' courts and Civil courts. The Constitution contemplates judicial review of legislative action by the Supreme Court constituted as the Constitutional Court (Arts. 98 and 99), and judicial review of administrative action (Art. 94). The

Supreme Court constituted' as the High Court of Justice has jurisdiction over proceeding against the President of the Republic and the members of the Government. Based upon the values of a free society, the Constitution establishes a proper distribution of powers with a view to preserving the initiative and dignity of individual citizens, and has thereby laid the foundations of the Rule of Law.

5. In an appendix is reproduced the text of the Constitution, and the bibliography and table of cases add to the usefulness of the volume. All the foot-notes in the text and explanations are carried over to the end.

R.S.S.

THE YOUNG LAWYER. Kishinchand Chellaram Law College, Dinshaw Watcha Road, Bombay 20. 1970 Pp. 51.

THE YOUNG LAWYER is the annual magazine of the Kishinchand Chellaram Law College, Bombay, and contains, in addition to the message of the President of the Governing Board and the Editor's notes, several articles contributed by the students of the College and others, besides the reports on the working of various College Associations and societies during the year. 'Collisions and Contributory Negligence', 'Towards Socialisation of Law', the 'Population problem' and 'Student unrest' are the titles of some of the student contributions.

Presiding over the elocution competition trophy award function, Mr. Justice J. L. Nain dealt with the practical side of legal education and deplored that 'Conveyancing' is a neglected subject. The drafting of pleadings, petitions and memoranda of appeal, memoranda and articles of association and other important documents is an art in itself, and in order to be a good draftsman one must have the basic principles of law concerning the transaction in question at the tip of one's fingers.

Writing on criminal law, the Additional Chief Presidency Magistrate, Bombay, lists the following fundamentals: an accused is presumed to be innocent till he is proved guilty; the burden of proof is on the prosecution to establish the guilt; else, the benefit of doubt must go to the accused, who should be assured a fair trial, and whose constitutional and legal rights must be scrupulously respected. The rights of the accused include freedom from illegal arrest and detention, bail, counsel and public trial, cross-examination, immunity from testimonial compulsion or self-incrimination, appeal, and double jeopardy. In the matter of testimonial compulsion, the Editor offers useful comments on the case of Ramesh Chandra v. West Bengal (AIR 1970 S C 940);

he also comments on double jeopardy in reference to the case of Assistant Collector of Customs v. L R Melwani (AIR 1970 S C 932). The Editor's other notes are on the Bank Nationalisation case (R. C. Cooper v. Union of India, AIR 1970 S C 564).

'Should the law concern itself only with that conduct which is harmful to others and breaks the peace within society, or may it be used to protect the morals of society?' Is a topic which the Editor discusses in his other article. A line should be drawn, he says, between private life and public control, so that the individual may not be eaten up by the Welfare State in the same manner as has happened in the totalitarian countries. The four principles which should guide us are; toleration of maximum individual freedom consistent with the integrity of society; law to move slowly in any new matter of morals; respect for privacy; the concern of the law to be for minimum standards, and not the maximum ones.

In his contribution on the linguistic re-organisation of States, Mr. Jethmalani shows how, although the Constitution created a strong Union of India, the constituent units have begun to function as independent States. Linguistic regionalism has become a powerful lobby for securing as much as possible for particular regions, and national planning has consequently to suffer. The linguistic principle has failed and it must be eradicated. A new commission should thoroughly re-examine the question on the basis of three principles: the newly formed States should promote the political unity of Indians as Indians; citizens must willingly live in multi-lingual provinces or administrative units, which should not permit any political or economic advantage to any one political group; the primary objective should be the economic prosperity of the whole of India and administrative efficiency. "Either we destroy this Frankenstein of linguism, or it shall destroy us as a nation." — Not mere rhetoric, this.

R.S.S.

SHINGNE'S SUMMARY OF SALMOND'S JURISPRUDENCE. By A. K. Sarkar, M.A., LL.B., Advocate, High Court, Bombay. 2nd Edition. 1970. N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2, Pp. xi & 194. Price Rs. 9.50.

Jurisprudence is said to be study of fundamental legal principles, including their philosophical, historical, and sociological bases, and an analysis of legal concepts. For the last seventy years Salmond on jurisprudence has been a legal classic with students, lawyers and

Judges. In recent times jurisprudential thought has undergone considerable change, particularly in the realm of social philosophy underlying Law. From the view-points of both social stability and social necessity, law is seen as a stabilising factor in human society as well as a need-based factor for the satisfaction of human want. Because of the impact made on law by the phenomenal progress in other disciplines like medical science, sociology and economic theory, the concepts of liability and ownership (state or public ownership) have undergone a radical change. In the book under review the author has given some Indian decisions and noted some new developments in the foot-notes.

2. In general Jurisprudence is a subject without practical applicability. The value of an ordinary legal subject like Contract, Tort, Crimes, lies in its practical use, but Jurisprudence is an abstract, theoretical subject. On the other hand, researches into Jurisprudence may have repercussions on the whole range of medical, legal, political and social thought. They may also wean away lawyers from excessive formalism to the social realities of the time. The law of contract, for example, may well call for a general knowledge of economics and economic theory on the part of the lawyer, and the law of crimes, for a knowledge of criminology and psychiatry. They make the lawyer more conscious as to the consideration of present social needs, pushing precedents into the background.

3. The present work discusses the nature of law, the administration of justice, the sources of law, legislation, precedent, and custom, in the earlier pages. It describes the three theories about the nature of law, law as a system of rules, the function and purpose of law and its territorial nature, international law and constitutional law. It examines the necessity for the administration of civil and criminal justice, purpose of criminal justice, civil justice, and the secondary functions of courts of law, and it illustrates the legal and historical sources of law. Supreme and subordinate legislation, codification, interpretation of enacted law, the authority of precedents, circumstances weakening their binding force, judicial reasoning, reception of customary law, kinds of custom, and conventional and legal customs, are covered in three chapters.

4. The later chapters deal with legal rights, ownership, persons, titles, and liability. They explain the characteristics of a legal right, the kinds of legal rights, the subject-matter of ownership, sole ownership and co-ownership, trust and beneficial ownership, legal and equitable ownership, vested and contingent ownership, possession in law and in fact, concurrent

possession, incorporated possession, and possession and ownership. The legal status of dead or unborn persons, double capacity and double personality, agents and beneficiaries of a corporation, its rights and liabilities, and unincorporated associations, are then considered. The next two chapters are concerned with void and voidable agreements, and four distinct kinds of agreements, as well as the theories of remedial and penal liability, two classes of wrongful acts, mens rea, intention, motive, negligence, the theory of strict liability, mistakes of law and of fact, and vicarious responsibility. The law of property, the law of obligations, and the law of evidence, are the subjects of the concluding three chapters.

5. The present book, which is primarily meant for students, should amply meet their needs. R.S.S.

ADMINISTRATIVE LAW IN INDIA.

By S. P. Sathe. Foreword by Justice P. B. Mukharji, Acting Chief Justice of West Bengal. N. M. Tripathi Private Ltd., Bombay 2. 1st Edition. 1970. Pp. xxxviii & 294. Price, Rs. 22.

The growth of bureaucracy in the modern State is largely responsible for the growth and importance of Administrative Law. Administrative Law enforces the rule of law against the State, and provides safeguards against illegal and arbitrary exercise of power by the Government. The present book is an exposition of the principles of administrative law as they have been developed by courts, legislatures and government and semi-government departments in India, and it is designed to acquaint the student with the principles of Indian Administrative Law. It examines the existing law and attempts to suggest the lines along which it should develop.

2. What sort of power does the administration exercise? What procedures do administrative authorities follow in the exercise of their powers? What are the limits of the powers of the administration? What are the ways in which the administration is kept within those limits? And what remedies are available to the individual against the illegal actions of the administration? These questions form the central theme of the book.

3. A combination of both case book system of study and theoretical analysis of the principles of Administrative Law, the book begins with a classification of administrative actions. The second chapter explains how the administration has become a meeting point of the legislative, judicial and executive functions, and attempts to formulate tests for distinguishing these powers and make a broad classi-

fication, which should help one to understand the broad questions that have been posed. The legislative functions are discussed, the practice of delegated legislation is analysed, and the constitutional limitations upon the delegation of legislative powers by the legislatures are examined. Then follows a discussion of the various mechanisms for the control of delegated legislation and a study of how the courts exercise supervision over administrative tribunals and other quasi-judicial bodies. Judicial review is limited to matters of jurisdiction and conformity with the rules of natural justice. The author then proceeds to examine how administrative discretion is controlled by the courts by determining the constitutional validity of legislation conferring discretionary authority on the executive and the validity of the exercise of that discretionary power by the executive. The author considers that the Indian Constitution provides an ideal set of remedies to the individual against the illegal actions of the administration, and the courts have applied them with discrimination and vigilance. Although the State still enjoys certain privileges, immunities, and preferences, the trend of the law is towards taking them away gradually.

4. Admitting the inevitability of delegated legislation, the author emphasises the need to ensure its conformity with the constitutional principle of the rule of law. Will it be desirable, he wonders, to have a Council of Tribunals as in England to supervise the working of tribunals and quasi-judicial bodies? Functional separation and reasoned decisions should be encouraged. Public corporations are becoming increasingly important and it is the province of administrative law to provide new mechanisms for balancing administrative justice and administrative efficiency. Finally the author commends the institution of Ombudsman as a possible remedy for the disease of corruption and maladministration.

5. Appendices to the book contain the Government (Liability in Tort) Bill, 1967, List of Public undertakings, and the Lokpal and Lokayuktas Bill, 1968. The bibliography, table of statutes, table of cases, and index are useful.

6. The need today is for "a technique of adjudication better fitted to respond to the present official requirements than the elaborate system of decisions provided by litigation in the Courts of Law", and this need has been carefully analysed in the book. A scholarly and erudite contribution, it should be useful to the Bench, the Bar, the administrators, and Government.

R.S.S.

IDENTIFICATION OF HANDWRITING AND CROSS-EXAMINATION OF EXPERTS. By M. K. Mehta, Examiner of Questioned Documents. N. M. Tripathi Private Ltd., Bombay 2. 4th Edition. 1970. Pp. xxii and 398. Price, Rs. 32.50.

In all cases of forgery, the identification and proof of handwriting, especially signatures, is of supreme importance, and the evidence of a handwriting expert, though not always conclusive, is useful in testing the validity of other evidence; it is believed that with proper data for comparison a correct and reliable opinion is possible. The present book aims at presenting a broad insight into the subject and guide lawyers and others who have to deal with documents suspected to be false. The latest edition, more comprehensive than the earlier ones, includes a large number of illustrations to help the reader to appreciate the various characteristics of handwriting. There is also a chapter on photography and the role of photographs in solving intricate problems of handwriting and allied subjects such as chemical and mechanical erasures, additions, and alterations, as well as up-to-date case law on expert evidence for the benefit of lawyers.

2. Identification of handwriting occupies an important place in the administration of justice, where the rights and liabilities of persons depend upon the genuineness of questioned documents in Courts of Law. A recognised mode of obtaining proof of disputed documents is to call a handwriting expert to give his opinion on a disputed signature or other writing; his opinion is relevant evidence under Section 45 of the Indian Evidence Act. The expert witness must have made a special study of the subject or acquired special experience in it. When he is called for cross-examination, the object is to establish that his opinion is not correct, or not dependable, and this is possible only if the lawyer himself has some knowledge of the subject, although the courts may sometimes ignore the expert opinion and report and rely on their own judgment in the background of other evidence on record.

3. Writing about the expert, the author examines expert opinion on photographs and evidence on commission, and whether the knowledge of a particular script is essential. He deals with writing habits under the heads of movement, pen pressure, shading, pen position, alignment, slope or slant, spacing, arrangement, size or proportions, style, quality of strokes, and general execution. The personal characteristics are covered under the heads of form and formation, variations, relative position of letters, pencil and ball-point pen writing.

tings, and carbon impression writings. The author would like one expert to cross-examine another, as that will ease the work of the court and promote the ends of justice, many of the lawyers not being well versed in the subject. In the chapters on standard of comparison, general characteristics, writing habits, personal characteristics, forgeries, and examination-in-chief, the author gives a specimen of the present unsatisfactory style of questioning, and gives numerous model questions for examination-in-chief and cross-examination. There are also separate chapters on the languages and dialects of India (there is a separate chart at the end giving the numerals and the alphabets in all the 14 languages recognised by the Constitution), inks, additions, alterations, erasures and sequence of strokes, and on disguised writings.

4. Although identification of type-script is said to be more reliable than handwriting identification, that has not yet been made admissible in evidence. The cross-examination of an expert is sometimes lengthy and unproductive of any result owing to the want of a general understanding of the subject, and the present book should therefore be valuable to lawyers preparing for such cross-examination; it should prove useful to judges and magistrates as well.

5. The bibliography, table of cases and index are useful adjuncts. R.S.S.

LAW RELATING TO ESTATE DUTY, GIFT TAX, AND WEALTH TAX. By C. C. Anajwala, B. A. (Hons.), LL. B., Advocate, High Court, Bombay. 1st Edition. 1970. C. Jamnadas & Co., 145-C, Princess Street, Bombay. 2. Pp. xviii & 348. Price, Rs. 15.

The book under review deals with the direct tax laws relating to Estate Duty, Gift Tax, and Wealth Tax. These laws aim at reducing the concentration of wealth in the hands of the few and the removal of inequalities in the distribution of wealth, thereby enabling the State to finance development and welfare programmes. It contains an exhaustive commentary on the various provisions of the tax laws, each commentary being preceded by a useful analysis and supported by the latest case law, particularly, the decisions of the Supreme Court, and giving practical illustrations with calculations as working models in order to make abstruse provisions easily intelligible.

2. The Estate Duty is a capital levy taxing capital wealth which accumulates after payment of the other taxes and meeting expenditure. While the law provides for the exemption of certain properties, it also provides for aggregation of property for rate purposes, so

that the rate is enhanced, and what is given with one hand is taken away with the other. It provides also for bringing within its purview the properties transferred to controlled companies. The Gift Tax is a levy on gifts intended to fill up a gap in the taxing structure which made it possible to avoid or reduce the tax liability by gratuitous transfer of property. It includes any transaction made with intent to diminish the value of one's property in order to increase that of another. The Wealth Tax, on the other hand, is a tax levied on the net wealth, which means the specified assets minus all debts owed by the assessee. The Supreme Court has held that income tax liability on the valuation date is such a deductible debt, because it is a present obligation to pay an ascertained sum of money and, therefore, a perfected debt.

3. There are three parts in the volume under reference. Part I deals with the Estate Duty Act 1953, the Estate Duty Rules, and the Estate Duty (Controlled Companies) Rules; Part II deals with Gift Tax Act 1958 and the Gift Tax Rules, and Part III, with the Wealth Tax Act 1957 and the Wealth Tax Rules. The 85 sections of Part I are appropriately grouped under such heads as imposition of the duty, exceptions, aggregation, value chargeable, deductions and collection of the duty, and jurisdiction of courts, followed by the First and Second Schedules. The 46 sections of the Gift Tax Act, 1958 are divided into chapters on the charge and gifts subject to such charge, Gift Tax authorities, assessment appeals, revision and references, payment and recovery of the tax, refunds and rectification of mistakes, followed by the Schedule giving the rates of tax. The 46 sections of the Wealth Tax Act have been grouped under similar chapter heads, followed by the Schedule of rates.

4. The Supplement to the book contains sections 26 and 27 of the Finance Act, 1970 with comments, other amendment Acts, Notifications and recent case law. The intelligent reader should be able to gather several hints for the avoidance of tax liability by suitably arranging his own affairs. Tax avoidance is not the art of dodging tax without actually breaking the law. Rather, it is the 'Lawful carrying out of a transaction which was either entered into, or took a particular form, for the purpose of minimising taxation'. As observed by Justice Jagadisan in *Aruna Group of Estates v. State of Madras*, (1955) 55 ITR 642 (648), it is sound law, and not bad morality, for anybody to so arrange his affairs as to reduce the brunt of taxation to a minimum. There is a full discussion of the subject against the background of the law in England in Potter and Monroe's *Tax Planning* (Sweet & Maxwell, 1970). The present book should therefore be

highly useful to lawyers, tax consultants, tax payers and law students alike. R.S.S

COMMENTARY ON THE CONSTITUTION OF INDIA. Vol. 5. (Arts. 300-End.) Fifth Edition (Revised, rewritten, and enlarged). 1970. By Durga Das Basu. S. C. Sarkar & Sons (Private) Ltd., 1-C College Square, Calcutta 22. Pp. xvii, 662, & (312). Price, Rs. 45.

The present volume of this monumental and encyclopaedic work of learning and research incorporates the several judicial decisions and legislative enactments that have accumulated since the publication of Volume IV in 1963. The comments on the provisions relating to Services in Part XIV (Arts. 309-323), covering nearly 230 pages, form virtually an independent treatise, and deal with such topics as recruitment and conditions of service, tenure, dismissal, removal or reduction in rank, appointment and term of office of members of the Public Service Commissions, removal and suspension of a member, and functions, expenses and reports of Public Service Commissions. A detailed casebook regarding these constitutional provisions and their application by the courts to different sets of circumstances is to be found in Madan Bhatia's *Public Service through the Cases* (1969).

2. In the present work the chapter on Amendments (Part XX) has also been developed with particular reference to the controversial decision in *Golak Nath's case* (AIR 1967 S C 1643), various aspects of which have been discussed from the juristic standpoint. In this case the Supreme Court has taken the view that the Fundamental Rights in Part III of the Constitution cannot be subject to the process of amendment provided for in Art. 338 and that if any such right is to be amended, a new constituent assembly must be convened for making a new constitution. In a tabular form the author summarises the reasons given by the Supreme Court (majority of 6 in a Bench of 11) and gives the comments against each of those reasons.

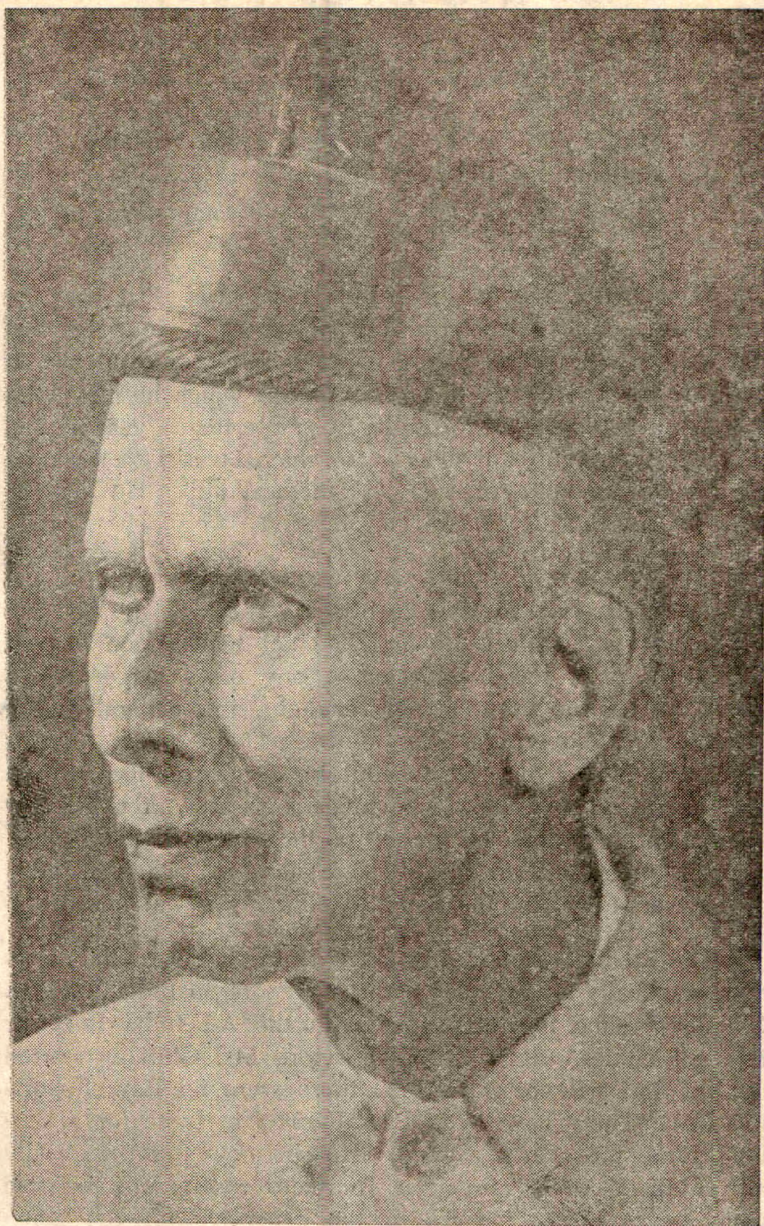
3. All amendment Acts upto the Twenty-third have been incorporated in the text. The Constitution (Twenty-second) Amendment Act 1969, followed by the Assam Reorganisation (Meghalaya) Act, 1969 have called for a thorough revision of the 6th Schedule, and this is now believed to be the only book giving a complete treatment of the autonomous States of Meghalaya. Parts XIII and XV to XVIII

(Arts. 301-307, 324-360) deal with the subjects of trade and commerce, elections, special provisions relating to certain classes, language, and emergency provisions. They cover the Power of Parliament to impose restrictions on trade and commerce and the restrictions on these legislative powers, the control of elections by an Election Commission and bar to interference by Courts in electoral matters, the language of the Union and the Supreme Court, and Emergency Provisions. Articles 361, 362 and 363 dwell on the powers of the President, the rights and privileges of the Rulers of Indian States, and bar to interference by Courts in disputes arising out of certain treaties, agreements, etc. They are among the points at issue in the present proceedings before the Supreme Court, in which the Rulers have challenged the validity of the President's order de-recognising them. The Schedules, nine in number, have been appended at the end, and account for as many as 312 pages.

4. The method of treatment adopted in the work is comparative. It is a commentary not only on the Constitution of India, but also on the parallel provisions of the Constitutions of the United States, Eire, Australia, Canada, South Africa, Japan, France, Burma and Ceylon and, most important, England. After each Article of the Indian Constitution, the comparable provisions of other Constitutions are reproduced and the commentary refers in detail to the legal position under those other constitutions. It is claimed that such a systematic comparison of different Constitutions from the standpoint of legal interpretations has not so far been attempted. In order to avoid confusion, the comments under each Article have been divided under two heads: (a) 'Other Constitutions'; (b) India.

5 The present work presents, primarily, a judicial interpretation of the Constitution of India for use in Courts whose decisions shape its application, progress and development. At the same time full attention has been paid to the political and constitutional aspects so as to be useful to political scientists and parliamentarians. Reference to existing laws is imperative for constitutional interpretation from the legal standpoint, and the book therefore includes references to the statute law under the major constitutions. In a word, the book is invaluable, to the judge, lawyer, parliamentarian and political scientist alike.

6. Though there is no general index, the commentary on each Article is immediately followed by an index. R.S.S.



The late Shri V. V. CHITALEY, B.A., LL.B.
Senior Advocate, Supreme Court of India
(FOUNDER OF THE ALL INDIA REPORTER, LTD.)
(1885—1971)

IN MEMORIAM

'Tis all a chequer-board of Nights and Days
Where Destiny with Men for Pieces plays:
Hither and thither moves, and mates and slays,
And one by one back in the Closet lays.

—Omar Khayyam

It is with feelings of the utmost grief that we are recording in this issue the passing away of our beloved founder, Mr. V. V. Chitaley, on the 11th of March last at Nagpur, after an illness of several months which he bore with exemplary patience and fortitude. For more than a year he had to suffer the anguish of Cancer to which he had to succumb in the end in spite of the best medical aid. He was 85 years of age at the time of his death.

The late Mr. Chitaley was unquestionably one of the greatest Indians of his time in his own way. As he had not entered active political life and had not taken upon himself the career of a social reformer or any other career which would have brought him into limelight, the general public had not much opportunity of knowing about his real greatness, work and achievement. But his service in the field of law was in no way the less significant on account of his not having cut a prominent figure on the stage of public life. There is practically no one in the legal world, whether Judge or Lawyer, to whom the name of Chitaley is not known.

The All India Reporter founded by the late Mr. Chitaley is now practically synonymous with law reports in India, and Mr. Chitaley's name is synonymous with the All India Reporter in legal circles. It is not that before Mr. Chitaley started the All India Reporter in 1922 there were no Law Reports in India. There have been Law Reports in India for a very long time, for nearly a hundred years now, but practically all of them were Provincial Journals, except one or two which were either meagre or too expensive for the generality of the profession. It was left to the late Mr. Chitaley to conceive of a Law Journal on a popular basis which would combine both the functions of an All-India Journal and of a provincial journal. It is this feature that made an immediate appeal to the entire body of the legal profession in India.

and made Mr. Chitaley's name familiar throughout the length and breadth of India in legal circles.

It was Mr. Chitaley who visualised, as it were by inspiration, the need for a journal on an All-India basis which would be equally useful in every High Court in India. It is said that all great things are, in their nature, simple. The same thing can be said about Mr. Chitaley's concept of an All-India Journal. Though it was of such obvious value for the country, the idea had not occurred to any of his predecessors at least in the form and with the vividness with which he conceived the idea. In that sense, the late Mr. Chitaley can be truly accorded the position of a pioneer, nay, a public benefactor.

Whatever may be the vicissitudes of the Commonwealth ties in other spheres, collaboration in the professional and academic fields has proceeded uninterruptedly, as was proved by the recent Commonwealth Law Conference in Delhi. The above statement applies with much greater force to India and its component States. It is one of the most priceless parts of the British heritage that we have the same legal and administrative system in India in all the States and the fissiparous tendencies seen in other spheres have not been noticed in the field of law. The contribution of the A. I. R. in this matter has been not only not negligible but genuinely significant inasmuch as understanding has to be based on knowledge, and knowledge has to come from books.

The dedication with which Mr. Chitaley worked for his ideal is something which only his colleagues and collaborators knew and of which the outside world cannot have a sufficient idea. Almost till the last breath of his life he was thinking only of the giant concern which he had built up and of the lines on which its service to the legal profession and to the cause of law could be improved and developed.

It must also be mentioned that Mr. Chitaley had taken upon his own shoulders the cause of freedom of law reporting in India and whenever there was a threat to such freedom it was he that stood in the forefront and took upon himself the brunt of the struggle.

Mr. Chitaley sincerely believed that there must be absolute freedom of law reporting, if there should be a proper development of law in this country. It is a self-evident proposition that in our system of jurisprudence case-law furnishes the bricks with which the edifice of law is built up and any move to affect this source of law cannot

but operate adversely on the growth of law in this country. Mr. Chitaley felt very strongly on this point like many other Jurists in the world. His work in this field is one of his most important contributions to the development of law in India.

Mr. Chitaley's name will be remembered not only as the founder of the All India Reporter and other All-India Law Journals but also as the author, inspirer and promoter of a new model of Law Commentaries and other publications like the Digests and Manual, in which the same thoroughness and systematic and scientific methods which he adopted in the case of the Law Journals can be seen. Everywhere his object was maximum usefulness to the lawyer, and the profession has come to regard thoroughness and usefulness as guaranteed characteristics of Mr. Chitaley's publications, which therefore carry a reputation of their own among lawyers and Judges.

It is not known to many that Mr. Chitaley was a radical nationalist and many are the patriotic causes to which he has made generous contributions without undue publicity. He was also very much devoted to the Hindu religion and Hindu ideals of life — facts which the outside public do not know.

In personal life Mr. Chitaley was simple to the point of austerity and sometimes staggered people by his ways of living. His heart was always touched by poverty and he never stinted help to the poor and the needy. His humility of behaviour was something absolutely genuine and unassumed and he was a gentleman to the core in every sense of the term.

Mr. Chitaley died full of years and honour.

May his soul rest in peace.

JOURNAL SECTION

1971 APRIL

REVIEWS

PATENTS, TRADE MARKS, COPYRIGHT AND INDUSTRIAL DESIGNS. By T. A. Blanco White, one of Her Majesty's Counsel, and Robin Jacob, Bar-at-Law. Sweet & Maxwell Limited, 11, New Fetter Lane, London. 1970. (In India: N. M. Tripathi Private Ltd., Bombay). Pp. xv and 189. Price Rs. 36. Paperback edition. Rs. 18.

The subject of the present publication is the law of commercial and industrial imitation; imitation by one manufacturer of another's products, imitation by one trader of the names and badges by which another's goods or services are known. The parts of mercantile law with which the book is concerned are sometimes regarded as specialised, but businessmen or lawyers cannot, on that account, put such questions aside as matters purely for the specialist. A good many of the disputes in this field arise from ignorance from failure by one or both parties to foresee the likelihood of legal rights being infringed. The Design Copyright Act, 1968 is believed to have increased the chances of such failure occurring. The present book is intended to provide enough knowledge to let the reader know when he needs to seek specialist advice.

2. In addition to the introductory section, there are three sections in the book, broadly along the lines drawn by the Acts of Parliament. The first Part, or Section (Chapters 3-7), is concerned with the copying of the product, and deals mainly with the law of patents and of industrial designs, and explains how patents are to be obtained, to what extent they are useful, the patenting of important inventions, industrial designs, Crown rights and security. The second part (Chs. 8-15) is concerned with the way things are sold, and deals mainly with the law of passing-off, trade marks, and other rules preventing unfair competition or unfair selling techniques. After discussing in detail the rights of the registered proprietor of a trade mark the author proceeds to explain what sort of thing can be registered as a trade mark, gives an outline of the procedure for registration, discusses the conditions necessary for registration and explains when other people's application can be opposed, and what precautions should be taken to keep a trade-mark registration valid. A separate chapter is concerned with a special sort of trade-mark intended, not to indicate the existence of a trade connection between the owner and the goods,

but to indicate that the owner has certified the goods as reaching certain standards. The general rule governing passing-off and its ramifications is then discussed, and the law on the matter of trade libel or slander of goods is explained with the aid of a few examples.

3. The third part (Chs. 16-22) deals with the law of copyright and the law of confidential information. It tackles the question of who owns a copyright in the first place and what may happen to it afterwards. It defines what infringement is, deals with questions arising from dealings in copyright, and finally, discusses the right, not to stop others from reproducing a work, but to stop them making use of the information contained in it. The present book is about the English law, but, generally speaking, foreign legal systems have something corresponding to the rights discussed in it, although the rules are not always the same. Where Commonwealth countries are concerned the differences are small, but outside them, the differences are significant and the approach is different; the present book contains short notes about them. Most of the law discussed in it is contained in a few Acts of Parliament, but text-books on the subject give the texts of these Acts, with explanations of what they are believed to mean; other sources of information are the reports of decided cases.

4. The present book contains a useful table of cases and index. R.S.S.

MASSACHUSETTS COURT CLINICS. APTO Monographs No. 1. Published by International Journal of Offender Therapy, 199 Gloucester Place, London NW1. England. European Editor: Melitta Schmideberg, M. D. 1970. Annual Subscription, £2. Single copy, \$ 1.75.

Although the United States of America has reached undreamt of standards of welfare and social services, delinquency and drug addiction continue unabated, and it was the need to adopt an imaginative approach in dealing with these evils that gave birth to the establishment in New York in 1950 of the Association for the Psychiatric Treatment of Offenders (APTO), a pioneer organisation in the field of offender therapy and correction, membership of which is open to all professions dealing with the problems of anti-social behaviour.

One of its goals is to establish "the psychotherapy of offenders as a speciality, by encouraging treatment, research, and active co-operation with allied disciplines." Psychiatrists need to know about the law and to appreciate the functions, prerogatives and duties of the Court, and the legal profession should become acquainted, says the Editor, with the fundamentals of psychiatry and psychotherapy, what it can and what it cannot do. The Association's *International Journal of Offender Therapy*, published thrice a year, has so far brought out authoritative therapeutic, psychiatric, sociological and legal articles from over twenty-five countries.

2. The APTO monograph under review deals with the unique set-up and the solid accomplishment of the Massachusetts Court Clinics for the treatment of offenders. It includes a study of the Administration and Community aspects of these clinics, and articles on Enforced Psychotherapy and Diagnosing Offender Patients. The writer of the last article concludes that consistent and meaningful criteria for establishing the competency of an offender, and his criminal responsibility or dangerousness have not as yet been developed and that, perhaps, the Court room is not an appropriate laboratory for such a scientific task. It would appear that the work of the twenty Court clinics in Massachusetts, carried out for many years, has demonstrated that therapy in the Court setting can be fruitful, that initial difficulties with patients can be overcome, and that harmonious co-operation with Judges and Court personnel can be developed. R.S.S.

A HANDBOOK ON THE GENERAL PRINCIPLES OF THE LAW OF CONTRACT. By Prof. M. Krishnan Nair, M. A., M. L., LL. M., Lekha Publishers, Thampanoor, Trivandrum. 1970. Pp. 246. Price Rs. 3.

An agreement enforceable by law is a contract. All agreements are contracts if they are made by the free consent of the parties competent to contract, for a lawful consideration, and with a lawful object, and are not expressly declared to be void. The book under review describes the general features of a contract, the formation of contracts, factors invalidating contracts, performance breach and impossibility, damages, specific relief, and quasi-contracts. The author discusses, inter alia, the essential elements of a contract, agreements creating obligations, simple contracts and contracts under seal, express and implied contracts, unilateral and bilateral contracts, and void and voidable agreements. Offer and acceptance, communication of offer, meaning of

acceptance and its manner, when acceptance is to be effected, revocation of acceptance, and intention to create legal obligations are then examined. The necessity of consideration, consideration being distinct from motive, privity of consideration, executed and part consideration, adequacy of consideration, consideration and discharge of contracts, limitations, and application in negotiable instruments, are analysed, and among the factors invalidating contracts are mentioned mental incapacity, mistake, coercion and undue influence, fraud and misrepresentation, legality of object, and void and contingent agreements. The discharge of contracts by performance, the parties who must perform them, time, place, and manner of performance, appropriation of payments and contract which need not be formed are the topics covered by Part IV. The other three parts deal with effect of breach of performance, the doctrine of frustration, discharge of contract by operation of law, nature of damages in breach of contract, specific performance and equity and defences to specific performance and the nature of quasi-contracts.

2. When a party to a contract breaks the obligation imposed by the contract a right of action is conferred on the party injured; it may even discharge the injured party from performance of his part of the agreement. He can claim damages from the other party for compensating the loss suffered; in certain cases the injured party may obtain a decree for specific performance of the contract. The first is a common law remedy and the second, a remedy in equity. The law relating to specific relief including specific performance of contract was till recently contained in the Specific Relief Act 1877; now it is contained in Specific Relief Act, 1963, which came into force on 1st March, 1964. A quasi-contract, on the other hand, belongs to an entirely different category which has little or nothing in common with genuine contracts, beyond the fact that the same procedure is used for actions in contract and in quasi-contract; after all it is a branch of the law of contract and subject to the same limitations.

3. With several model questions given at the end for the benefit of the student, the neat handbook under review should be very useful in practice. But there is no preface, introduction, table of cases, or index. R.S.S.

GENERAL SALES TAX LAW IN MADHYA PRADESH (in two volumes). By M. C. Gupta, B.A., LL. B., Advocate, and Tax Consultant. 2nd Edition. 1970. Wadhwa & Company, Rampurawala Building, Indore 2. Vol. I, Pp. xii &

263. Vol. 2, Pp. xi & 265 to 660. Price Rs. 30 per volume. (Sold in sets only).

Since the introduction of the Madhya Pradesh General Sales Tax Act, 1958 and the rules framed under it, there have been several amendments virtually altering the entire body of the law. The need was greatly felt for an up-to-date book on the subject by the tax-payers, tax consultants, legal practitioners, and the administrative authorities, who were at a loss how to keep themselves abreast of these successive amendments, and the present book is designed to meet that need. The 1st edition of the book was published in March 1967, followed by a companion volume in September 1968, and it included a comparative study of the Schedules and Notifications issued under Section 12 and other Sections which are of practical use in day-to-day business. In the 2nd edition have been incorporated the Delegation Orders issued by the Commissioner of Sales Tax, which are not easily available to tax consultants. The legislative history of the Act and the Rules give the position of all the sections and clauses on different dates since the coming into force of the M. P. General Sales Tax Act.

2. Volume I of the book contains the M. P. General Sales Tax Act 1958, legislative history of the sections, the history of the Schedules, and Notifications. Of the 55 sections in the Act, the earlier ones deal with the taxing authorities, incidence and levy of tax, levy of purchase tax, tax-free goods, licensing and registration of dealers, returns, assessment of tax, and payment and recovery. Refunds, remission of tax, accounts, establishment of check posts, powers of the officers of the Sales Tax Department and the delegation of the Commissioner's powers are among the topics covered by Sections 22-30. The other sections consider, inter-alia, the transfer of proceedings, the powers of the Commissioner, control of clearing agents, bar to certain proceedings, appeal, court-fee stamps, application of the Limitation Act, statement of case to High Court, rectification of mistakes, and offences and penalties.

3. Volume 2 contains the M. P. General Sales Tax Rules 1959, history of the amendments to the Rules and the Delegation Orders. The Rules are given under 15 Parts, the first four of them dealing with Sales Tax authorities, licenses, and registration of dealers, while the return of turnover and statement of purchases, payment of tax, assessment and refund are covered in the next five parts. Parts IX-XIV dwell on inspection of accounts, check posts, appeals and revision, serving the notice and summons, fees, and delegation of powers. All the Forms prescribed for use have been appended at the end.

4. The scheme of the book has been well designed for purposes of quick reference. All those connected with the study, practice, and administration of the sales tax law in Madhya Pradesh should find the publication very useful. Said to be the only book available on the subject, it brings the various amendments of the law within easy reach of all concerned. Each of the volumes has several blank pages at the end for the reader's personal notes. The law is stated as on 31st August 1970. R.S.S.

THE CARRIERS ACT (Act 3 of 1865),
By Dasugopal Mitra, M.A., LL.B.,
Advocate. 1st Edition, 1970. Sarat
Book House, 18-B Shyamacharan De
Street, Calcutta 12. pages 60, Price
Rs. 5.

A common carrier or a public carrier denotes a person other than the Government who is engaged for all the purposes of transporting for hire property of persons from place to place, by land or inland navigation. A 'person' includes any association or body of persons whether incorporated or not. There are different laws relating to the carriage of goods by land, including inland navigation, carriage by sea, and carriage by air. The 'carriage' may be by private carriers, who are ordinary bailees and for which there is no special enactment, and which are guided by the Indian Contract Act. The Carriers Act 1865 deals with common carriers of goods over land and by inland navigation. The Indian Contract Act does not govern their rights and liabilities, which are regulated by the principles of English common law as modified by the Carriers Act, 1865. The Railways Act, 1890 deals with the carriage of goods over land by railway. Carriage by sea is governed by the Indian Bills of Lading Act, 1856 and the Indian Carriage of Goods by Sea Act 1925, and carriage by air, by the Indian Carriage by Air Act 1934, which gives effect to a convention for the unification of certain rules relating to international carriage by air; internal carriage by air is governed by the English common law.

2. The small book under review is a compilation on the Carriers Act 1865, with notes and comments. The Act contains eleven sections, by the third of which carriers are not to be liable for the loss of certain goods above one hundred rupees in value, unless they are delivered as such. The carrier may fix the rates for carrying, but the person who is entitled to recover money in respect of property lost or damaged may also recover the money paid for its carriage. Section 6 specifies the categories of property regarding which the

liability of the carrier is not limited or affected by Public Notice, and lays down that carriers, with some exceptions, may limit liability by special contract. But the special contract does not limit the liability of the owner of a rail-road constructed under Act 22 of 1863. Section 7 lays down in which cases the owner of a rail-road or tram-road is answerable for loss or damage. A common carrier is liable for the loss or damage caused by neglect or fraud of himself or his agent, but plaintiffs in suits for loss, damage, or non-delivery, are not required to prove negligence or criminal act, although notice of loss or injury is to be given within six months. This Act follows the scheme, but not the details, of the English Carriers Act; the former's emphasis is on the carrier's liabilities and duties and the latter's on the protection available to him.

3. In a suit for loss, or damage, or non-delivery, a consignee, not being a party to the carriage contract, cannot enforce a contractual obligation between the consignor and the carrier, but can sue in tort. In the case of loss, the onus of proof that there is no negligence falls on the carrier. Arts. 10 and 11 of the Limitation Act prescribe the period within which a suit against a common carrier can be filed.

4. The book has a useful subject index and index of cases.

R.S.S.

A CONCISE TREATISE ON COMPANY LAW. By Philip K. Thayil, Professor and Principal, Government Law College, Cochin. Foreword by A. T. Markose, M. A., LL. D., Deputy Judge, International Administrative Tribunal, and Dean, Faculty of Law, University of Kerala. Published by Kuriachan P. Thayil, Thayil House, Kalathiparamb Road, Ernakulam South, Cochin 16. 1970. Pp. xiv and 234, Price Rs. 18.

With its 658 sections and 12 schedules, the Companies Act, 1956 is a piece of fundamental socio-economic legislation. Although it is based mainly on the English Company Act 1948, it contains certain additional provisions to meet the peculiar business conditions prevailing in India. It aims at restricting the powers of directors and managements and eliminating dishonesty in corporate management, and the statutory changes in the field of company law are calculated to achieve the nation's aspirations as codified in the directive principles of State policy contained in the Constitution of India. Measures to check concentration of economic power, for checking income concentration and to ensure proper management, are among its special features. The latest amendments to the Act abolish the manag-

ing agency system and seek to prohibit companies from making contributions to political parties, and there has been a move to make proportional representation to shareholders on Boards of Director compulsory.

2. The present publication elucidates the principles of company law comprehensively with the aid of important judicial decisions. Divided into two parts, Part I deals, *inter alia* with the formation of companies, memorandum and articles of association, capital, prospectus, dividend, interest, and annual returns. Part II discusses the position of directors; Board meetings; auditors; arbitration and amalgamation; private, Government, and foreign companies; administration; investigation; managing agents; and winding up. Government control over companies, provisions regarding minority share-holders, prevention of oppression and mismanagement and the proposed abolition of the doctrine of ultra vires, are some of the chapters and topics of special interest. As the position of manager or secretary has become infinitely more important after the abolition of the managing agency system, every section concerning it has received special notice.

3. The Act contains a number of provisions for protection of the interest of commercial moralities and prevention of abuses, and arms the Government with even quasi-judicial powers. The establishment of the Board of Company Law Administration should go far to prevent any possible misuse of power by them.

4. The present book has been written topic-wise, and not through commentaries section by section; references to the relevant sections of the Companies Act have been given throughout the commentaries. Wherever possible the law has been stated in the form of simple enumeration of points, but where important doctrines are dealt with, attempts at fairly detailed discussion have been made, and references have been given to periodical literature and select books to enable the interested to pursue in more detail the respective topics. The book should be very useful to students, for whom it is primarily intended.

5. The table of cases and index should also be mentioned.

R.S.S.

MISCONDUCT IN EMPLOYMENT (In Public & Private Sector). By B. R. Ghaiye, B. A., LL. B., Legal Adviser, Birla Cotton Spg. & Wvg. Mills, Ltd. 1969. Eastern Book Company, 34 Lalbagh, Lucknow. Pp. cii & 932. Price Rs. 40.

The present publication aims at throwing light upon the nature and scope of various

acts of misconduct in their relation to the contract of employment, for the employer has a right to award punishment of discharge, dismissal, fine, demotion, and suspension, in such cases. During the last twenty years a massive volume of case law on the subject, by the Supreme Court, High Courts, Labour and Industrial Tribunals and Labour Courts, has accumulated, but little has been done to collect, analyse, and co-relate them. A knowledge of the principles involved for application to day-to-day problems is necessary for officer, worker and Union leader, and the author has tried to meet their want.

2. The various acts of misconduct were formulated by the Model Standing Orders mentioned in the Industrial Employment (Standing Orders) Rules 1946, and the different courts and tribunals have interpreted and classified them. The Model Standing Orders have classified these acts as disobedience, insubordination, subversion of discipline, and riotous and disorderly behaviour on the premises. As a misconduct is the breach of an express or implied obligation on the part of the employee, the author has tried to elucidate these rights and obligations in relation to a strike, defamation, picketing and other activities. Some of the items of misconduct, like theft, criminal breach of trust, misappropriation, forgery, falsification of accounts, defamation and abuse, have been taken from the criminal law of India and, as the industrial tribunals follow that classification, the author clarifies what they mean in criminal law and shows in what way the concept of criminal law has been applied in industrial adjudication also.

3. The first three chapters in the book describe the nature of master and servant relationship and its historical development, the general nature of misconduct, and the employee's non-observance of his duty. The employer's right to effect a change in the duties and methods of work, disobedience of specific orders, the communication and infringement of orders, strike as misconduct, and acts of misconduct associated with it, are dealt with in five chapters. The author then proceeds to consider the topics of insubordination, acts subversive of discipline, non-performance of work, absence without leave, negligence in work, acts involving bad faith and dishonesty, and the special features regarding 'misconducts' in Government employment. In each chapter there is a synopsis and abundant case law, which has been brought upto May 1969. The table of cases and subject index are useful.

4. Each chapter contains the case law for framing the charge and specimen charge sheets, which are followed by a departmental

enquiry; though not strictly within the purview of the book, the author also discusses the employer's and worker's evidence in relation to every act of misconduct. Although mainly based upon case law, an attempt has been made to co-ordinate the different decisions of courts and industrial tribunals into legal propositions, to explain their justification, and to trace their historical evolution. The book should be of considerable assistance to the practising lawyer and the research worker as well as to the layman.

R.S.S.

THE POSITION OF THE JUDICIARY UNDER THE CONSTITUTION OF INDIA. By H. M. Seervai, Advocate-General of Maharashtra. The University of Bombay, University Buildings, Bombay 32. 1970. Pp. XIV and 16., Price Rs. 12.

The present volume brings together the lectures delivered by the author under the Chimanlal Setalvad Law Lectureship established by the University of Bombay as a result of the magnificent donation by Mr. M. C. Setalvad, former Attorney-General of India, in honour of the memory of his father. The Supreme Court and the High Courts in India with their power of judicial review touch the lives and happiness of the citizens at many points and the proper working of these courts is necessary if the Constitution is to function properly. That a fearless, independent, incorruptible and non-political judiciary, exercising the power of judicial review with wisdom and restraint, is vital to our free democratic country is the central theme of these lectures.

2. In the first lecture, the author describes the exercise of judicial review by the U. S. Supreme Court, because the framers of the Indian Constitution wanted to avoid the grave consequences which flowed from the abuse of judicial review in that country. The author considers that the majority judgment in the Golaknath case shows that the lessons of American experience have not been learnt. The judgment, which the author calls a 'strange paradox of judicial review' (Lecture 6), held that Parliament had no power to amend fundamental rights, a power twice upheld by the Supreme Court itself (Shankari Prasad's case, 1952 S. C. R. 89, and Sajjan Singh's case, 1965 S. C. R. 933). As it puts in issue the position which the judiciary was designed to occupy, the author gives particulars of the case and the reasoning behind the judgment, and tries to show that every step in the reasoning is wrong. Quoting the French and American examples, he strikes a note of warning that, where judicial wisdom

and restraint fail, the judiciary is stripped of its power to interfere with executive and legislative action. He deals briefly with some of the important cases in which judicial review brought the U. S. Court in conflict with the legislature and the executive.

3. The second Lecture, which shows that our judiciary is non-political, considers the several factors on which the satisfactory working of a Court, particularly a final Court of Appeal, depends, like the nature and extent of its jurisdiction, the judges, the relations between the Bench and the Bar, the procedure and equipment for preparing the judgment, and the judgment itself. The third Lecture makes it clear that, by and large, the Supreme Court has exercised the power of judicial review with wisdom and restraint. The author acclaims the judgment in *A. K. Gopalan's case* (1950 S. C. R. 88) as having 'preserved judicial review from the reproach that it enables judges to substitute their views on the wisdom of a law in the place of the views of the elected representatives of the people'. That the views of the ex-Chief Justice of India, Mr. K. Subba Rao, both in *Golaknath case* and in *Gopalan case*, are completely at variance with those held by the author should set us furiously to think.

4. Dealing with the harmful effect of Dicey's 'Law of the Constitution' on the Supreme Court's constitutional doctrines, the author discusses the four connected topics of separation of powers, Rule of Law, administrative law, and delegated legislation (Lecture 4). The fifth Lecture emphasises the imperative need for keeping the springs of justice undefiled by corruption. In the Preface the lecturer refers to the Bank Nationalisation case and critically comments on the majority judgment of the Supreme Court and its effect on the doctrine of *Stare Decisis*.

5. The volume is provided with a bibliography, table of cases, and index, and should make interesting and instructive reading for judges, lawyers, and jurists.

R.S.S.

THE INDUSTRIAL DISPUTES ACT, 1947. By Kirpa Dayal Srivastava, Advocate. 4th Edition. 1970. Eastern Book Company, 34 Lalbagh, Lucknow. Pp. lxviii & 1073. Price Rs. 50.

The Trade Disputes Act, 1929 imposed restraints on the right to strike or lock-out in industry, but there was no provision for referring the causes thereof to a board of conciliation or Court of enquiry, and the present Act was the sequel. The two new institutions provided for in this enactment are the Works Committees, which are expected to remove the

causes of friction between worker and management in day-to-day working, and Industrial Tribunals, which bear references made by the parties to an industrial dispute and by the State Government at its discretion. The Act also gives a reorientation to the administration of the conciliation machinery provided in the Trade Disputes Act. When an industrial dispute is under enquiry by an industrial tribunal, a strike or lock-out on the issue can be prohibited by the State Government concerned, which may also declare, in the public interests and in emergencies, any industry to be a public utility service.

2. The publication under review presents the text of the Act section by section, each section being followed by exhaustive commentaries and synopses with up-to-date and voluminous case law. The Act consists of seven Chapters and 40 Sections. The first Chapter traces the history of industrial legislation in India, the important provisions of the Constitution regarding industrial laws; provisions which secure for labour the objects laid down in the Directive Principles, writs, powers of the Supreme Court and the High Courts, industrial tribunal discharging judicial functions, appeals from awards to the Supreme Court, and the latter's jurisdiction. Sections 3-9 of the Act deal with the relevant authorities like Works Committees, Conciliation Officers, Courts of Enquiry, Labour Courts and national tribunals. Ss. 22-25 cover prohibition of strikes and lockouts, illegal strikes and lockouts, and prohibition of financial aid to them. Strikes and lockouts have a habit of eventually holding the whole community to ransom and endangering the interests of the public. The reported changes in British Trade Union legislation seeking to make them justiciable in the ordinary Courts of law would seem to come not a day too soon. Sections 25A-25J consider the topics of lay-off and retrenchment and Ss. 26-31 are concerned with the subject of penalties, while 10 sections relate to the notice of change, reference of disputes to Courts, Boards or Tribunals, and the procedure, powers, and duties of the Authorities under the Act.

3. The appendices include the texts of several State and Central Amending Acts and Acts relating to banking and insurance companies, working journalists, and standing orders in industrial organisations, accompanied by an index and table of cases. The author's discussion of the implications of an industrial dispute, misconduct and domestic enquiry, as well as natural and social justice, is comprehensive. The topic of bonus has been removed from the text, for there are separate treatises on it (one by the present author himself, and by F. Berarwalla, and D. N. Vohra).

4. In following the principles of social justice in industrial disputes, the approach is pragmatic and seeks to find a solution just and fair to both parties and to establish harmony between capital and labour. Just as the fundamental right of a citizen is subject to reasonable restriction in the public interest in constitutional law, in industrial adjudication the claims of the employer based on freedom of contract have to be adjusted to the worker's claim for social justice. R.S.S.

LAW AND PRACTICE OF EVIDENCE. (Civil and Criminal) By S. N. Bhattacharjee, M.A., LL.B., Retired District and Sessions Judge, Calcutta. Eastern Law House, Calcutta. 3rd Edition 1970. Pp. xxxvi & 516. Price, Rs. 17.50.

The Indian Evidence Act, 1872 reproduces the English law on the subject and reduces it to the form of express propositions, arranged in their natural order, with modifications to suit the peculiar Indian circumstances. The law of Evidence determines the relevancy of facts, or what sort of fact may be proved; the proof of facts, or what sort of proof is to be given of those facts; and the production of proof of relevant facts, or who is to give it, and how, and the effect of improper admission or rejection of evidence. The Evidence Act applies to all judicial proceedings, a judicial proceeding being nothing more or less than the steps taken by a Court in the course of the administration of justice in a pending case.

2. The latest edition of the commentary under notice has been thoroughly revised, and several new topics have been added, so much so that the note-head paragraphs now run to 1035 (900 in the second Edition). The contents have to a large extent been rearranged or re-written, and several old cases have been replaced by more recent ones; the case law has been brought down to June 1970, the latest decisions being included in a separate addenda.

3. Articles 14 & 20 (3) of the Indian Constitution pose several questions regarding the admissibility and production of evidence in Court as well as the procedure and conduct of police investigation. The Supreme Court decisions have laid down that the giving of thumb, or foot or palm impressions or specimen writings or showing parts of his body by the accused for identification do not contravene Art. 20 (3). Another important decision is over Ss. 123 and 162 of the Act as to the privilege and procedure with regard to affairs of State. The enactment of S. 342-A in the Criminal Procedure Code, giving the accused

the right to be examined as a witness for the defence, has given rise to some important questions, which the present commentary discusses at length.

4. Relevancy of facts (Ss. 5-55), Proof (Ss. 56-100), and the production and effect of evidence (Ss. 101-167) are the titles of the three parts into which the Act is divided. The first part examines statements by persons who cannot be called as witnesses, statements made under special circumstances, how much of a statement is to be proved, and when judgments of Courts of justice, the opinions of third persons, and character, are relevant. The second part deals with facts which need not be proved, oral evidence, documentary evidence, public documents, presumption as to documents, and exclusion of oral by documentary evidence. Burden of proof, estoppel, examination of witnesses, and improper rejection and admission of evidence are the topics included in part 3.

5. In the present attempt to bring out the basic principles of civil and criminal evidence, the Sections of the Act have been printed in big, bold type, and the commentaries divided into several numbered paragraphs, each containing a heading in bold type. Apart from the large body of judicial decisions (Supreme Court and High Court rulings), there is a critical examination of the principles of the law.

6. In addition to the subject-index and table of cases, there is an appendix which includes the Indian Oaths Act, the Bankers' Books Evidence Act and the Commercial Documents Evidence Act, 1939. R.S.S.

ADMINISTRATIVE LAW. By S. Rajagopalan, Advocate, High Court, Madras. With a Foreword by M. Ananthanarayanan (Former Chief Justice of Madras). N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2. 2nd Edition. 1970. Pp. xxxiii, & 427. Price, Rs. 25.

The coming into existence of a welfare state with an ever-expanding bureaucracy for its administration and the paramount need, in the public interest, to keep that bureaucracy under the Rule of Law have together conspired to bestow special importance on the subject of Administrative Law in India, as is evidenced by the appearance of numerous publications on the subject in recent times. The present treatise has grown out of the lectures delivered by the author to law students studying for the Diploma in Administrative Law of the University of Madras.

2. Opening the introductory chapter with a description of the administrative process and

the boundaries of administrative law, the author proceeds to deal with the origin and growth of this law and its history in India, England, France, Russia, America, Canada, and the Scandinavian countries. The concepts and ramifications of the Rule of Law and the doctrine of separation of powers are covered in the next two chapters. The fifth chapter, on delegated legislation, is concerned, inter alia, with the topics of stages of delegation; procedural requirements; Parliamentary control; statutory rules and Constitutional law; sub-delegation; principles and types of delegated legislation; delegation and taxation; validity of such legislation, and methods of review. Chapter VI, on Judicial Review, considers the grounds for review, natural justice, principles of fair hearing, *Audi Alteram Partem*, bias, procedural ultra vires, error of law, locus standi for judicial review and procedural safeguards. Crown liability and Act of State, Writs, statutory tribunals and enquiries, domestic tribunals, public corporations, estoppel, *Stare Decisis*, and *Res Judicata*, are the subjects of discussion in the last six chapters. Each subject is dealt with in the light of its history and evolution in India as well as in other countries.

3. The author considers that there should be a more categorical assertion of the powers of the judiciary vis-a-vis the penal jurisdiction of the legislatures, that delegation in the sphere of taxation should be confined within strict limits, and that the old notion of 'Act of State' and of the non-liability of the State for the torts of its servants should be given up. Further the right of the State to withhold documents needs to be abrogated in view of the latest pronouncement of the House of Lords in *Conway v. Rimmer*. Considering the difficulty of discovering the principles of natural justice in any one source, an anthology of the leading decisions on the principles of natural justice, together with a theoretical exposition, would serve a long-felt need, according to ex-Chief Justice Anantha-narayanan, who contributes the Foreword.

In this thoughtful work of reference, precedents have been carefully selected and marshalled; the erroneous ones have also been spotlighted. The leading principles and precedents have been duly stressed particularly where inferior tribunals have dealt with questions exclusively of fact. Although designed to meet the requirements of the syllabus, it should also be a source-book to everybody to whom an acquaintance with this branch of jurisprudence has become indispensable, because the judiciary has become something like a protecting buffer against administrative wrong-doing.

The book contains bibliography, a table of cases and index.
R.S.S.

SOME CONSTITUTIONAL PROBLEMS. By K. Subba Rao, University of Bombay, 1970. Pp. 318. Price, Rs. 20.

It will be admitted that an insight into the social perspectives of the Indian Constitution is necessary if it is to serve the needs of a fast-changing society. Against the background of the changing political climate, some of the constitutional provisions are believed to be already in need of meaningful re-interpretation, which has however to be done without losing sight of the enduring values of the Constitution. And this, ex-Chief Justice of India, Mr. Subba Rao, has attempted to do in the five lectures which he delivered in the Sir Chimanlal Setalvad Law Lectureship series of the Bombay University, and which have been collected in the volume under review. The five lectures focus the reader's attention on the experience of the working of the Indian Constitution, the judicial salvage of the people's freedom, the Supreme Court of India, Parliamentary Executive and Presidential Executive, and the position of the Union President and Governors.

2. The learned lecturer deploras that what was intended to be a democracy based on a multi-party system has degenerated into a single party rule, most of the fundamental rights have been either abrogated or abridged by a process of amendment and construction, there has been a steady and imperceptible movement away from federation, and, instead of a welfare state ensuring prosperity, equality, liberty and social justice to all, the constitutional provisions are being amended to suit the policies of the party in power. What is of particular relevance at the moment is the lecturer's complaint that the Supreme Court, which should be the final arbiter of the disputes between the different arms of Government, should look on idly while the Union Executive, by the amending process, made Parliament decide in its favour; the Constitution is being amended like any other statute or rule.

3. During the last 17 years, says the lecturer the Supreme Court was not allowed to contribute effectively to the progress of the country in the constitutional field, for Parliament was able to amend it whenever it suited it. As regards the language of the Courts, if the English language is replaced by a regional language or languages, it will not only deflate the legal standard of the country but also become a major disintegrating force. Being located at New Delhi, the Supreme Court has

had to work in the oppressive bureaucratic atmosphere, but the judges have been able to withstand their subtle pressures and make an impact on the powerful Executive and the people of the country. In the fourth lecture, on the Parliamentary and Presidential forms of Government, the lecturer explains why the cabinet system of executive cannot be worked unless all the parties believed in the Constitution and entered the legislature to work it and not to mutilate it. We have been familiar with the cabinet system for a long time, and, if we are not able to work it successfully, how, he asks, shall we succeed with the Presidential or any other form of Executive?

4. In a situation like the present when the political complexion of the party in power at the centre differs from that of the States, the lecturer suggests that the appointment of the Governor should be made by the President in the exercise of his discretion on the advice of a high power body, the person selected should be one with a high status and able to influence the Ministry by the sheer strength of his personality, and he should be irremovable except by impeachment. The lecturer has in these lectures critically analysed the trends of Indian Constitutional development and emphasised the importance of interpreting the provisions of the Constitution in the light of the background of Indian tradition and the aspirations of Indian society.

5. The book is provided with a table of cases and index.

R.S.S.

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THE INDIAN COMPANY LAW (with the Indian Companies Act, 1956). By N. K. Roy, M.A., LL.B., Lecturer, City College of Commerce and Business Administration, Calcutta. 1st Edition 1970. The World Press Private Ltd., 37 College Street, Calcutta 12. Pp. xxii, 432 & 463. Price Rs. 20.

The Indian Companies Act, 1956 is a gigantic piece of socio-economic legislation which aims at checking the concentration of income and economic power, restricting the powers of directors and managements, and ensuring proper management, aims which accord with the Directive Principles of State Policy contained in the Constitution. A company has ceased to be the exclusive concern of share-holders or directors, and is now considered a national asset. In the present commentary, the important provisions of the Companies Act, 1956 have been explained, and the latest case law, both Indian and foreign, has been referred to, as well as the various amendments to the Act.

2. The first half of the book contains the commentaries, and the second half, the text

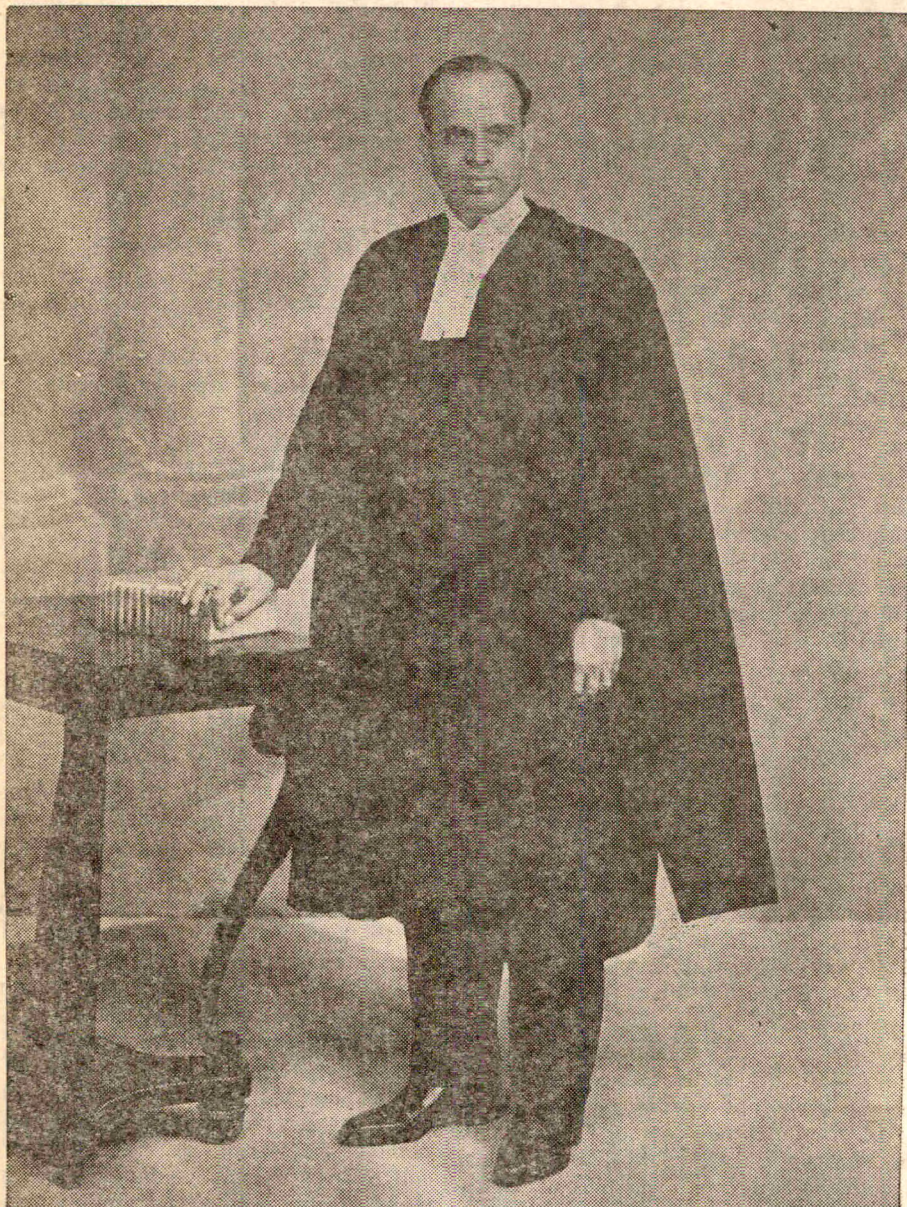
of the Act. A company is an artificial person, having a legal personality. The preparation of a memorandum of association and articles of association, preliminary contracts, registration, and issue of prospectus are the several stages in the formation of a company. The memorandum of association is the character of incorporation and it defines the extent within which the company must move; the articles of association are the regulations for the internal management of the company. A prospectus, simply speaking, is a document offering shares or debentures to the public. The directors, who are not merely agents of the company for its work, are also trustees for the company's monies. The powers of the directors are limited by the memorandum and by the fact that they can only do such acts as are delegated to them. It will be the duty of the Board of Directors to lay before the annual general meeting an annual balance sheet and profit and loss account. Certain discretionary and obligatory powers are conferred on the Central Government to appoint inspectors to investigate into the affairs of a company. Any member of a company can apply to a Court if its affairs are conducted in a manner oppressive to him.

3. Application and allotment, borrowing, shares and debentures, reduction of share capital, transfer of shares and debentures and forfeiture shares, are discussed in six of the chapters, while others cover rectification of share registers, arrangement with creditors, and offences under the Act. The appendices in this part relate to circumstances when special notice is required and the documents to be maintained by a company, and they are followed by the index, while the table of cases comes first.

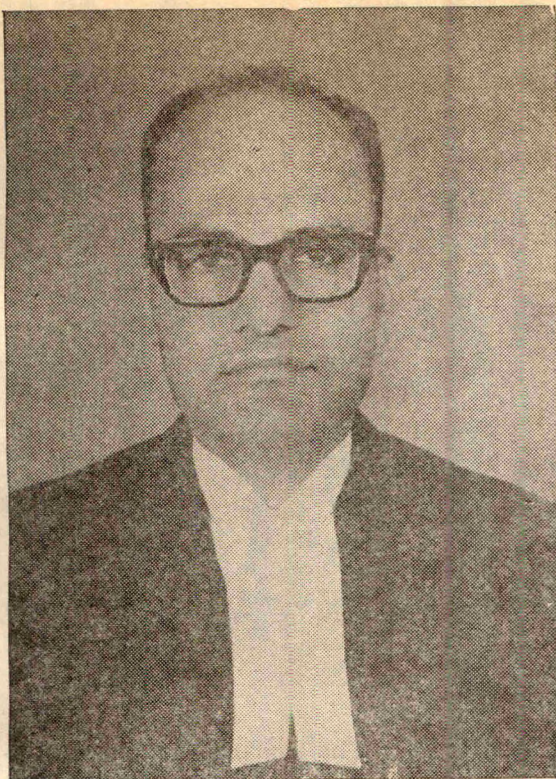
4. Under separate page numbers the text of the Act is reproduced, along with the twelve schedules. It consists of 13 Parts, Parts 2 to 5 (Ss. 11-145) dealing with incorporation, prospectus and allotment of shares, share capital, and registration of charges. While Parts 8 to 13 (Sections 561-658) cover application of Act to companies formed under other laws, winding up of unregistered companies, registration officers, offices and fees, and collection of information and statistics. Management, administration, and winding up, are considered inasmuch as two-thirds of the Act (the 13 Chapters of Parts 6 and 7; Ss. 146-560). The 1969 Amending Act, also reproduced, abolishes the managing agency system and seeks to prohibit companies from making contributions to political parties.

5. The present volume should be of use to lawyers, students of law, and businessmen.

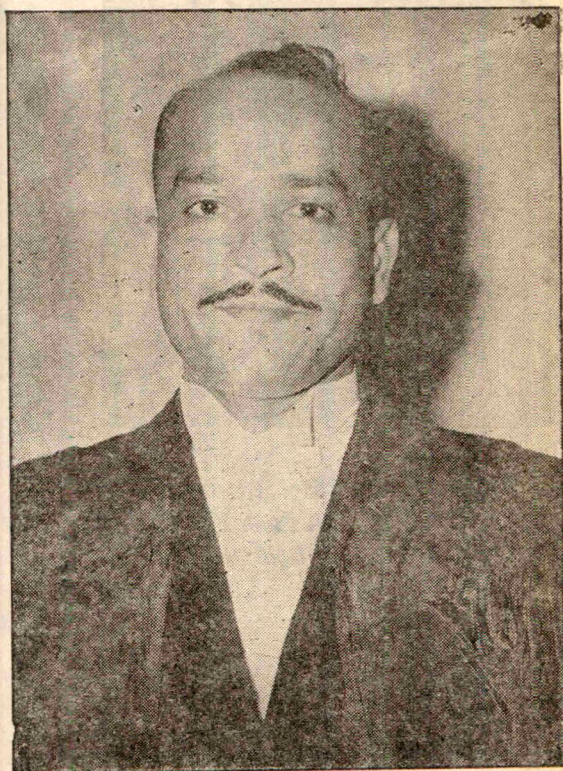
R.S.S.



The Hon'ble Mr. Justice V. RAMASWAMI,
Judge, Madras High Court



The Hon'ble Mr. Justice
K. JAGANNATHA SHETTY,
Judge, Mysore High Court



The Hon'ble Mr. Justice
M. S. NESARGI,
Judge, Mysore High Court



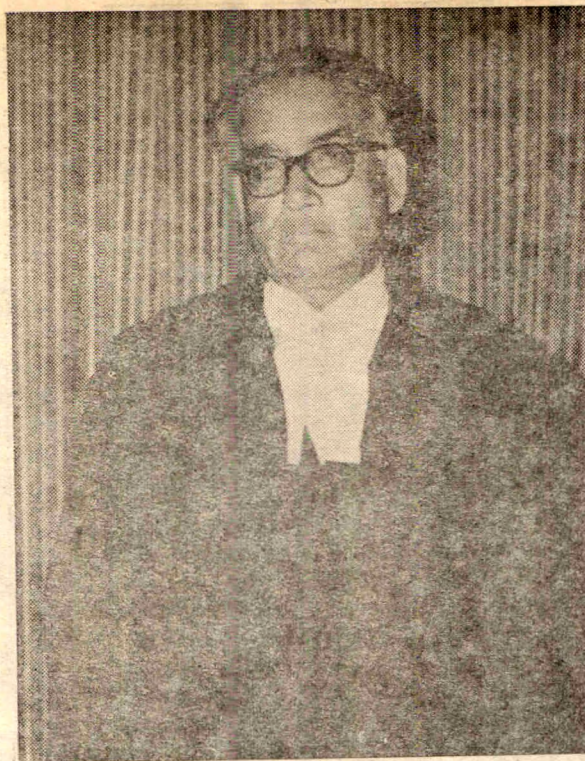
The Hon'ble Mr. Justice
H. B. DATAR,
Judge, Mysore High Court



The Hon'ble Mr. Justice
N. C. DWIVEDI,
Judge, Madhya Pradesh High Court



The Hon'ble Mr. Justice
N. S. RAMASWAMI,
Judge, Madras High Court



The Hon'ble Mr. Justice S. M. SIKRI,
Chief Justice, Supreme Court of India



The Hon'ble Mr. Justice
U. N. SINHA,
Chief Justice, Patna High Court

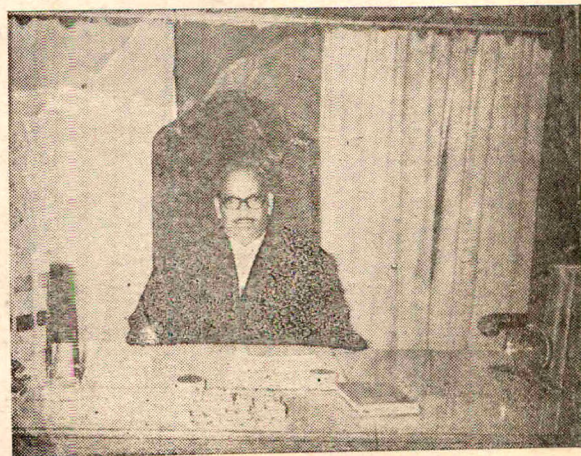


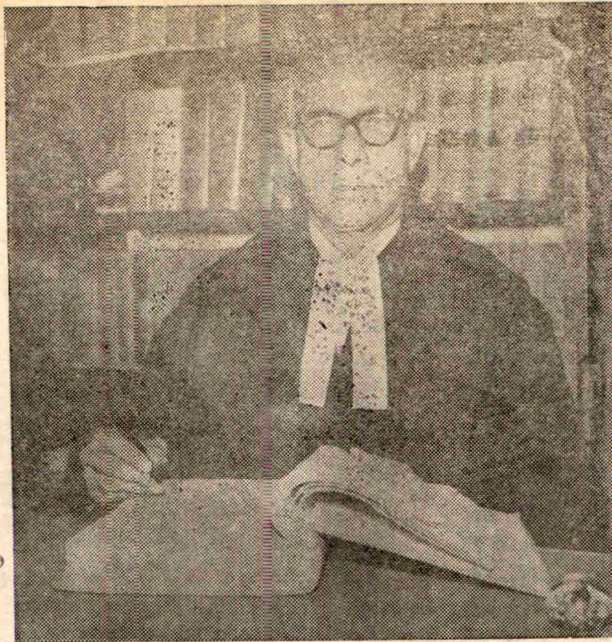
The Hon'ble Mr. Justice M. H. BEG,
Chief Justice, Himachal Pradesh High Court



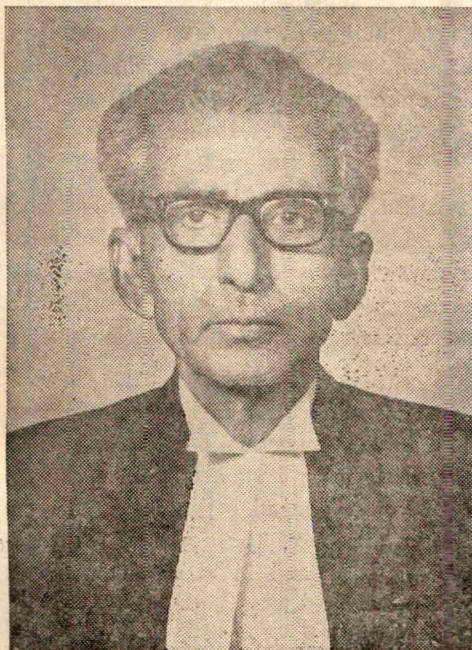
**The Hon'ble Mr. Justice
CHET RAM THAKUR,**
Judge, Himachal Pradesh High Court

**The Hon'ble Mr. Justice
D. B. LAL,**
Judge, Himachal Pradesh High Court

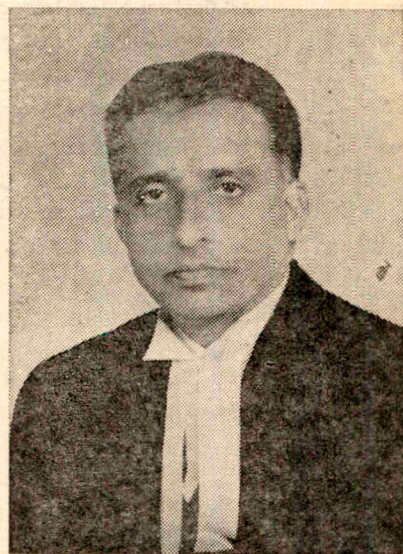




The Hon'ble Mr. Justice
KUMAR JYOTI SEN GUPTA,
Judge, Calcutta High Court



The Hon'ble Mr. Justice
AMAL KRISHNA DE,
Judge, Calcutta High Court



The Hon'ble Mr. Justice
S. R. RANGE GOWDA,
Judge, Mysore High Court

JOURNAL SECTION

1971 MAY

Mr. CHITALEY AS I KNEW HIM

(By S. Appu Rao, Chief Editor, *All India Reporter*.)

I had known the late Mr. Chitaley for more than 45 years. During this period I had come into close contact with him in connection with my work in the Editorial Department of the *All India Reporter* in all its branches.

I can say without hesitation that he was a most remarkable man and also, (to adopt the words of a title often appearing in the *Reader's Digest*) "a most unforgettable character".

I remember my first meeting with him in Madras. He had asked me to meet him at a certain place at 8 o'clock on one morning. Of course, I reached the place at the appointed time. But he had already arrived there, but was standing behind a tree. After I had reached the place and begun to look here and there, he came out of his hiding place and revealed himself to me. He said that he had wanted to test my punctuality. I thought this was rather a peculiar way of testing a man's punctuality. He could have tested my punctuality even without hiding himself behind a tree. During my long contact with him, I have noticed many other peculiarities of his nature, not very harmful in themselves, but which seemed to me not having much purpose in them.

From the moment of my first meeting with him, I got the impression that he was indeed a man out of the ordinary. The most important characteristic of his, which impressed itself indelibly on me, was his extraordinary energy which was seen in every aspect of his life. I remember his telling me that he had changed the proverb "Never postpone till tomorrow what you can do today" into "Never postpone till the next moment what you can do this moment". I think he followed this rule practically literally in his life.

Mr. Chitaley was not only very energetic but had a very sharp intellect and was capable of great concentration of mind. He told me that he made head-notes while travelling in trains. In those days he would travel third class for long distances as he was always on the move from one corner of the country to another, as the task of organising his infant business required his meeting people in different parts of the country.

Another characteristic of Mr. Chitaley was his will-power and resourcefulness. It must be remembered that he had to build up his concern almost from scratch and his difficulties, financial and otherwise, can be better imagined than described. It was only his grit and toughness of fibre, foresight, dogged perseverance, endless resourcefulness, astounding will-power, tenacity of purpose, thrift and other qualities that enabled him to overcome all his difficulties and build up such a vast concern.

One characteristic of his which must be specially emphasised is that he never lost heart or slackened his efforts, whatever the obstacles and difficulties in his way. He never yielded to pessimism. He was a true Karmayogi, who believed in doing what he thought was his duty without caring for praise or censure. He belonged to that rare type of people who say "What do they say? Let them say".

In the words of Longfellow, he had an extraordinary capacity to "labour and to wait".

One thing which impressed me very much from the beginning was that, unlike many others, Mr. Chitale never put off paying his bills—whether it was printing bills or paper bills or even pay-bills of his employees. This ensured for him extraordinary credit all round besides enabling him to get what he wanted at a cheaper rate.

Mr. Chitale's most striking feature was his absolute indifference to the conventions of society. He was most unconventional in his dress and manners. He also never attached any importance to appearances. To some extent he was like Mr. Churchill, who is reported to have said while he was sitting in his bath-tub in Tehran (where he had gone to attend one of those war-time conferences, which used to take place between the heads of the three super-powers from time to time) when President Roosevelt came and knocked at the door of the bathroom "come in, England has nothing to hide".

The late Mr. Chitale had an extraordinary capacity to come down to the level of the most humble person when talking to him. He never assumed airs and never allowed it to be felt by others that he thought himself to be a rich man.

Mr. Chitale, though extremely calculating in money matters, never stinted spending on objects which he thought would help his business. Though he was shrewd beyond all ordinary men, there were always clever people who could, at times, wangle out of him sizeable amounts of money, on some pretext or other. Mr. Chitale did not seem to very much mind these matters.

Mr. Chitale never believed in ostentatious living. Till a few years before his death he always travelled only in third class. He rarely rode in a car although he could have easily afforded a car. Even a couple of months before his death he could be seen riding in the crowded buses of Bombay and sometimes catching such buses while they were in motion. Mr. S. P. Kotwal, the Chief Justice of Maharashtra, when he came to the A.I.R., openly complimented him on his excellent health at an age when he had passed 84 and mentioned that he walked faster than Mr. Kotwal himself in the Hanging Garden of Bombay.

Mr. Chitale was very regular in his personal habits, in matters like food and other things. His diet was very simple and frugal. He took meals only twice a day. He never took tea or coffee, or pan. He was a pure vegetarian, and never drank or smoked. He enjoyed classical Indian music and used to attend Marathi Dramas. But he never liked cinema shows.

Like Mahatma Gandhi, Mr. Chitale sometimes committed Himalayan blunders, but only persons of Himalayan stature can commit Himalayan blunders and get over their effects without being too much bruised. Mr. Chitale was such a person.

Mr. Chitale was never afraid of admitting his errors, even to his subordinates. But he had his own way of valuing things with which one might not always agree.

Mr. Chitale was a deeply religious man and a staunch believer in Hindu rites and ceremonies which were scrupulously performed under his orders in his house till the end of his life.

Mr. Chitale had his own share of family and personal difficulties but he never allowed them to affect the equanimity of his mind or his work to which he attended unremittingly till his last days. Even when he came to know that he had

cancer, he made light of the matter and never allowed it to affect his usual routine of work, reading, business discussions, enquiring minutely into the working of the different departments of the A. I. R. and so on. Truly, he had the stuff of a hero in him. He knew that his end was approaching. But he wanted to finish as much work as possible before death overtook him and ensure that the concern, especially the Editorial and Commentary departments in which he was particularly interested, would work on what he conceived to be the right lines, without any dangerous deviations.

Mr. Chitale had a very keen and alert mind. He was an avid reader of books, newspapers, magazines, and periodicals of all sorts. He was fairly well informed in recent and contemporary world history. My feeling is that he had no special preference for books or periodicals in Marathi which was his mother-tongue nor could I see in him any allergy to English.

I had not much opportunity of knowing his political views, though I know that he was an ardent nationalist. I think he was not for the over-fragmentation of the country or for the attachment of too much importance to linguistic considerations in public administration. He was against anything that would weaken the country.

One of his pastimes was the study of novel and curious positions in law and recording them in note-books. He used to call them "Pocket pistols". One might call them "legal curios".

There was very little of a "doubting Thomas" in Mr. Chitale. If anything, he was too cocksure of things. Lord Palmerston, Prime Minister of England, is reported to have said about Lord Macaulay: "I wish I could be half as sure of one thing as Macaulay is of everything". I used to be reminded of the above words in my contacts with Mr. Chitale.

Mr. Chitale was a born debater and had always the best of the argument in his discussions with his assistants. But this does not mean that his assistants were always convinced as to the soundness of his proposals or policies. They too often found themselves in the unenviable predicament of being neither convinced nor able to convince. As one great man in contemporary India, is said to have told another great man, "Sir, you are able to confuse us but are not able to convince us", Mr. Chitale's capacity of supporting the most untenable conclusions with the cleverest of arguments was astounding and it was impossible to dislodge him from his conclusions or make him change his decisions when once he had made up his mind. But he would always listen to you patiently and hear your arguments but, for what? Just to find fresh arguments with which to support what we, some of his workers thought to be wrong conclusions. But he never felt in the least offended if his proposals were opposed by any of us. There was full freedom of speech in his presence to the least among us.

Mr. Chitale was very hospitable in his house. He was a true "Grihastha" in the Hindu sense of the term and kept open house where his relations and friends were always welcome. He used to feed a number of poor students in his house in the olden days, even at a time when he was just at the beginning of his career and could not be said to be rolling in wealth.

He was an ideal host and on occasions like marriages he used to feed a large number of guests lavishly. He never forgot his friends of his boyhood days or neglected his relations. His wealth and success never went to his head. But he was very sensitive to haughty behaviour by others and sometimes his sensitiveness led him to take decisions which have been turning points in his life.

He was a tireless experimenter—in every field—in dietetics, medicine, etc. He was an ardent believer in Homoeopathy and the Sanjivani system of treatment.

All in all, Mr. Chitale was not only a remarkable man but a great man. If he built up a mighty law-publishing concern, it was not by a mere fluke of good luck, but by the extraordinary qualities of his head and heart, his dogged perseverance, courage, intelligence, resourcefulness and other qualities to which I have already referred. Today, his concern is easily one of the biggest law-publishing concerns in the Commonwealth. I remember that long ago, during the early days of my acquaintance with him, he told me that his ambition was not merely to amass wealth but to build up something that would live after him for the benefit of future generations. Who can say that his was a vain and empty dream? If he was a dreamer of dreams, he was also a hero of action, who knew how to achieve his dreams and transform them into realities. In fact, he was more a man of action than anything else. He was a born strategist and tireless campaigner. In another age he might have fought battles and established a kingdom or even an empire.

A. G. Gardiner in one of his essays once wrote "Wherever Meredith sits there is the throne of English literature". Mr. Chitale had not any paraphernalia to show his position in the A. I. R. Office of which he was the supreme boss. He would be found sitting anywhere in the vast building and doing his work without anything in the furniture or the surroundings to show his supreme position in the concern. I would often quote to him the above sentence from A.G.G. and say "wherever V.V.C. sits, there is the throne of the A. I. R.". Of course, he enjoyed the joke. I also used to cite to him the example of Lord Kitchener, who, like him (I have read somewhere), would not mind even using dealwood furniture. Mr. Chitale used to like the comparison, because by nature he loved simplicity and appreciated it when this trait of his was admired by other people.

Such was the mighty Chitale under whom I had the privilege of serving for more than 45 years. Mr. Chitale was diminutive in size but was mighty in his resolution and will-power, and the iron determination with which he pursued his aims. He was a sort of 'pocket Hercules' as regards his capacity to fight and overcome all sorts of obstacles and difficulties, as it used to be said about the late L. C. M. Amery, Secretary of State for India, with reference to his physical toughness when compared to his size.

Such people are indeed rare. They are also public benefactors, as the institutions that they build up and leave behind them not only perpetuate their memory but benefit mankind.

Mr. Chitale, no doubt, had his faults, but in the words of Mr. M. C. Setalvad, who said when writing about his senior, the late Mr. Bhulabhai Desai that Mr. Desai had his faults, "but who has not his faults?" Mr. Chitale was unquestionably a great man of whom not only his family but also India may be proud.

"Lives of great men all remind us,
We can make our lives sublime,
And departing, leave behind us,
Foot-prints on the sands of time."

—Longfellow.

SPEECH OF THE HON'BLE MR. M. H. BEG, CHIEF JUSTICE OF THE
HIGH COURT OF HIMACHAL PRADESH, AT THE FIRST REFERENCE
OF THE COURT HELD ON THE 15th MARCH, 1971.

My learned brethren Lal and Thakur, the President and Members of the Bar Association.

2. When I was approached by members of the Bar with a request for holding a Reference not only to mark the assumption of office by my learned brethren, who have taken their seats today for the first time, but also to say something about me, I felt like saying that I was not leaving this Court so soon. I may explain here what a Reference means.

3. "Every High Court", says Article 215 of our Constitution, "shall be a Court of record." This means that the proceedings of the Court are recorded and preserved for future generations to see and to gather such light as they can from the record. The proceedings of the Court, which are to be so recorded and preserved, are all judicial proceedings with one exception. That exception is made when the Court, interrupting its ordinary business, takes notice of something which has occurred and which deserves to be recorded and which is recorded after a reference is made to it. The speeches made at the Reference form a part of the Court's official record. This non-judicial proceeding of the Court, which sits for it formally as a Court, is known as a "Reference".

4. I do not know of any occasion on which a Reference of this kind has been held at the Supreme Court of India. But, the Allahabad High Court, where I had the honour of practising and then holding the office of a Judge before I came here, has had the practice of holding References either when successive Chief Justices and Judges have sat for the first or the last times in Court, or, upon their deaths whether they were in or out of office. A Reference is also held when one of the leaders of the Bar has expired. References have also been held at Allahabad when a dignitary of State of nationwide importance, such as a President or a Prime Minister of India, has died while in office. A Reference was also held in that Court when Mahatma Gandhi, the father of our Nation, who was not only a great advocate but a moral giant, utterly dedicated to the causes of justice and truth, was killed. On such occasions, the Court is closed after a Reference. A Reference occasioned by the death of a sitting Judge or a leader of the Bar has also not infrequently necessitated a rising of the Court after the Reference, partly as a mark of respect and partly to enable the members of the Bench and Bar to join the funeral.

5. Now, with a High Court as large as the Allahabad High Court, with about 40 sitting Judges, a number of retired Judges, and a large number of leaders of the Bar, References at appointments, retirements, and transfers of Judges or deaths of Judges and ex-Judges and leaders of the Bar, threatened to become too frequent and time-consuming occurrences which a High Court like the Allahabad High Court, with its mounting arrears of work, could ill afford. Therefore, successive Chief Justices of the Allahabad High Court, particularly Chief Justice Nasirullah Beg, tried to do away with References altogether but only succeeded in curtailing them. In that Court, when a Judge is appointed, a short Reference is held before the commencement of the day's work, and, when he retires, it is held at the end of the day's work. It is generally held before a Division Bench only and not before the Full Court. The presiding senior Judge or the Chief Justice speaks first on behalf of brother Judges and himself. Representatives of the Bar, beginning with the Advocate-General, speak next. The Reference is closed after a reply by the

recipient of it. At a Reference on the death of a leader of the Bar, the first speech is from the Bar followed by the closing speech from the Bench. Full Court References are now reserved, at the Allahabad High Court, for very special occasions. I am glad to inform you that when I had to leave the Allahabad High Court to come here as the Chief Justice of this Court, that Court honoured me, and, through me, this Court also, with a Full Court Reference.

6. Today, we are holding a Full Court Reference because it is a special occasion. Not only have my learned brethren taken their seats for the first time today, but we are also marking, by holding this Reference, the completion of the constitution of this Court as provided by Article 216 of our Constitution. Coming as I do from the Bar and from a High Court where there is a practice of holding References of this kind, it was not possible for me to refuse the request of the Bar of this Court for a Full Court Reference on such an occasion.

7. As this is the first Reference in this Court, I have tried to explain and describe References and mention their drawbacks. Before I indicate what can be said for adopting the practice of holding References on suitable and exceptional occasions, I will also mention what has been considered by some to be another objection to the practice. A Reference on an appointment or on a retirement or transfer of a Judge is only held if the Bar, through its representatives, makes a request for it to the Chief Justice, or, in his absence, to the seniormost Judge of the Court present. The right to make such a request is one of the privileges of the Bar. The request is almost invariably granted, although some adjustment about the time to be given to the Reference, and whether it is to be a Full Court Reference or a Reference before a Division Bench only, is arrived at after discussion between representatives of the Bar and the Chief Justice, or the seniormost Judge, as the case may be, in Chambers. The Bar is generally represented by the Advocate-General and the President of the Advocates' Association at such a discussion. At Allahabad, the Bar had made it a practice to ask for References only on appointments of Judges from the Bar. Again, there have been occasions on which the Bar has not asked for a Reference on the retirement of a particular Chief Justice or Judge. Hence, some Judges have felt that the practice of holding References was capable of being used for the purpose of making invidious distinctions. However, in 1963, when I was appointed a Judge with another member of the Bar and two members of the Judicial Service, we were all sworn as Judges, at the same sitting in open Court, and a Reference was held for all four of us together. I am glad that the practice of making invidious distinctions, which has been broken only recently at the Allahabad High Court, has not commended itself to the members of the Himachal Pradesh Bar. I am happy, Mr. President and other members of the Bar, that you have started with a healthier and better precedent by requesting me for a Reference even though my brother Judges happen to have come to this Court through channels other than practice at the Bar. You have thereby shown your generosity and capacity to rise above narrow professional prejudices and vanities and to pay a tribute to worth and merit wherever it may be found. In doing so, you have conformed to the highest traditions of the Bar. These traditions, I may remind you, are the common heritage of both the Bench and the Bar. They serve the cause of a Justice which is unhampered by any fear except of that which is wrong, which is not deflected by any affection or ill-will, and which serves as the measure of the moral stature of a Society or State in which it is administered. It has been said that it is the degree to which Justice as defined by law, is actually realized in its administration, both as between one private citizen and another and as between private citizens and members of the Government, which provides the truest test of "a nation's rank in political civilization". I am confident that members of the Bench and the Bar of this Court will spare no effort in doing all they can to maintain the highest standards of administration of justice in the newly born State of Himachal Pradesh.

8. I am reminded here of a statement which I prepared for my own edification at the first Reference I had the honour to receive on my appointment as a Judge of the Allahabad High Court on 11-6-1963. I then said what I may repeat here:

"The first and foremost qualification of a Judge is the possession of a very sharp and exacting conscience. And, I know of no process which sharpens one's conscience more than the life of a practising lawyer utterly devoted to the task of procuring justice for his clients by all fair and legitimate means in a manner befitting the 'honest lawyer' depicted in Lord Denning's 'Road to Justice'.

A sharp conscience or a desire to see 'justice done even though the heavens fall' can, like other valuable qualities, be perverted and become a menace unless it is guided by a broad, balanced, and generous philosophy of life rising above narrow prejudices, bigotries, idiosyncrasies, obsessions, complexes, phobias and mental cobwebs of every kind. Therefore, the second essential requirement of one who aspires to be a Judge is a liberal philosophy of life sustained by a constant endeavour to study and understand, with a detached objectivity, what is right and what is wrong in every department of human life—whether legal, economic, political, moral or social. Without a correct philosophy of life, a Judge's appraisal of facts is apt to be lopsided and he runs the risk of earning epithets such as 'pro-capitalist', 'pro-labour', 'pro-husband', 'pro-wife', 'pro-prosecution', 'pro-accused'.

It is true that Judges are human and are bound to disclose certain predilections while performing their judicial functions. But, the direction in which these predispositions of a Judge should manifest themselves is indicated for us by the Constitution of our Secular Democratic State which we have sworn today to uphold and enforce without fear or favour. Underlying that Constitution is an egalitarian philosophy which makes no distinction between man and man on grounds of caste, creed, class, colour, race, birth, position, power, wealth, influence, or for any other similar reason. Our Judges are the specially constituted custodians of what may be called the 'religion'—from 'religio' meaning a 'binding together'—of the Secular Democratic State which promises justice to all without discrimination.

Thirdly quite apart from the liberal philosophy and outlook, which are expected to result from what has been described as a liberal education, a Judge must possess a firm grasp and a full understanding of the basic principles which regulate the system of law he has to administer. Without such a grasp and understanding, undigested erudition, instead of 'clearing thickets' (which is what learning should do according to Judge Learned Hand), can mislead a Judge with even so brilliant a mind as that of the late Mr. Justice Mahmood. Those who do not possess the required knowledge and understanding should remember the advice of Alexander Pope who said:

'Little learning is a dangerous thing;

Drink deep or taste not the Pierian spring.'

I have deliberately mentioned the need for a 'full understanding' in addition to a 'firm grasp' of principles underlying the set of laws a Judge administers because I believe that one cannot adequately comprehend one's own system of law unless one studies and knows enough about other systems too so as to be able to compare them with one's own. The greatness of the Roman lawyers and jurists was due to the fact that they studied and understood not only their own 'jus civile', but, they also scientifically analysed the laws of all the other peoples of the world with whom they came into contact, and, they deliberately evolved a host of common or universal principles or a 'jus gentium' with the help of which they progressively broadened, changed, improved, rationalised, secularised, and liberalised their own laws known as the 'jus civile'.

Judges can never forget that they are not legislators. But, at the same time, they should remember what Edmund Burke once observed:

"The law sharpens the mind by narrowing it; but, in a few of our great Judges law has lifted the mind to a level of comprehension and has kindled a degree of human ardour unsurpassed in any other profession."

Judges, theoretically, do not legislate when they find a meaning, as they usually can, sometimes 'within the interstices of the statute', which brings out the true purpose and object of law or when they fill up a gap in existing law. The particular selection made, out of the several alternative interpretations or principles of law between which Judges have often to choose, makes the world of difference there is between making law the preserver of justice, which it should be, and the destroyer of justice, which is not its true function.

Fourthly, I would like to point out—particularly in view of the problem of arrears in our law Courts—that, as Judges, we should try to develop and practise and master a science and an art of adjudication as separate and specialised fields of our endeavours so that justice is speedily and smoothly administered, and, at the same time, does not fail 'to appear to be done'.

In ancient India, special attention was paid to perfecting the technique of doing justice, and sets of simple rules and directions were framed with this end in view. One such rule was that the Judge should maintain a smiling countenance even in the face of the worst criminal.

Last but not the least, requirement from a Judge is that he must possess a temperament which enables him to view, with a crystal clear clarity of mind and an unruffled disposition, the essential features of a case before him, without being distracted by the irrelevant, the unessential, and the disturbing factors which he has to encounter sometimes during the performance of his duties."

9. I have read out this passage so as to illustrate what could, I think, be the utility of the practice of holding References on appropriate occasions. A Reference could and should, I think, be a method of holding up before ourselves certain standards to which we, who participate in the processes of rendering justice, whether as Judges or as advocates, ought to conform. It could also serve as a means of expressing our appreciation, where this may be due, of individual attainments and worths of those whom we choose to honour, at a Reference, so that the recorded story of these achievements is woven into a rich and glorious fabric of tradition at which the Bench and the Bar of a Court could look back with pride. If, however, References, are to serve this serious and valuable purpose, they should not, I venture to suggest, degenerate into merely mechanical repetitions of set formulae eulogising, in almost exactly the same general terms, the wonderful qualities of 'the head and heart' of the recipients of the honour. I have mentioned 'the head and the heart' because I recall, with possibly some uncharitable amusement, this pet expression which was invariably used by a quite lovable and certainly very loving old member of the Allahabad Bar who used to speak at every Reference at a time when there were three associations of the Bar — the Bar Library, the Advocates' Association, and the Bar Association — at the Allahabad High Court, and a representative of each of these three bodies, in addition to counsel for the State, had to speak. Whenever I heard about the qualities of his Lordship's 'head and heart' I wondered why there should be a prejudice against mentioning other parts of the human anatomy, such as their Lordships' livers or painful backs, which, according to judicial humorists, like Mr. A. P. Herbert and Mr. Henry Cecil, have also played their parts, although they never should, in the judicial process.

10. I may, while I am still on the subject of References, mention that the little homily to myself, which I have quoted above, was criticised by a very senior Judge of the Allahabad High Court when he told me that, although I had purported to deliver it to myself, it looked very much like a lecture from a newly appointed Judge to his more senior brethren. My learned brother thought that it was more appropriate for a junior Judge, coming from the Bar, to give some advice to his erstwhile colleagues at the Bar on such an occasion. I confess that, in my mind, the distinctions between senior and junior Judges and between Judges and advocates have always tended to be rather blurred and hazy. I have, in particular, been inclined to view the distinction between the Judge and the advocate as one between functions of different participants in the same process rather than one of approach, method, or of vocation which is that of administering law, in a spirit of dedication to Justice, whether we decide or argue cases. I have thought that, although it is the function of an advocate to state his client's case, an advocate is able to approach and put his client's case objectively as a Judge would as strongly as possible, that function is more effectively performed where he does it, that is to say, after fully appreciating the strength of the arguments against it, by meeting the case against his client by cool invincible logic, where this is possible, and by fair and speedy concessions where these are obviously unavoidable. Such an approach creates a very favourable impression on a Court and wins its respect and esteem. And, I have considered it to be a part of the qualities of a good Judge to be able to see and even to argue with himself both sides of a case, before reaching a conclusion, even where the advocates for one side or for both sides are not able to put the cases of their clients sufficiently well.

11. I have now very great pleasure in welcoming, as members of this Court, my brothers Lal and Thakur whose backgrounds and special qualifications for holding the very High office which the President of our Republic has been graciously pleased to confer upon them will soon be detailed by Mr. R. S. Phul, the President of the Bar Association, who was good enough to send me an advance copy of the speech he is going to make on this occasion. It is for these very qualities, about which you will soon hear, that I picked my learned brethren to help me in the arduous tasks ahead of me. I did not know them at all personally before I came here as a Chief Justice. But, I can say that their shining records, with which I soon acquainted myself, left no doubt in my mind that my learned brethren should be the first two choices if your aspirations for a model High Court of Himachal Pradesh were to be fulfilled. I will call upon Mr. Phul, the President of the Bar Association, now to give us his speech before calling upon my learned brethren to reply and then thanking you very briefly myself at the end.

LAW RELATING TO ENTRY INTO AND EXIT FROM INDIA. By B. R. Agarwala, M.A., LL.B., Advocate. With a Foreword by Mr. K. Subba Rao, former Chief Justice of India. 1st Edition, 1970. Metropolitan Book Co. (Private) Ltd., Delhi 6. Pp. xxvi & 324, Price Rs. 25.

For a long time it was the practice to issue passports according to administrative regulations, through proper procedures and through passport officers; there was provision for appeal, control and supervision. In 1967, however, in the case of *Satwant Singh Sawhney v. Union of India*, with which the author of the present publication was closely associated, the Supreme Court held that every citizen of India had the fundamental right to get a passport. The judgment was based on Article 21 of the Constitution which says: "No person shall be deprived of his life or personal liberty except according to procedure established by law," but the Supreme Court decided that there was to be no laying down of restrictions on the issue of passports, and the denial of a passport was, therefore, a violation of Article 21. In this view the right to travel abroad and to return to India becomes an aspect of personal liberty enshrined in the above Article, and freedom of movement inside and outside the country becomes an integral part of that liberty. The arbitrary discretion of the executive in the matter of issuing or refusing passports was in consequence a violation of Article 14 of the Constitution.

2. The foregoing decision led to the passing of the Passports Act, 1967 (27 sections) which, with commentary and synopsis, forms the main theme of the present book (Part D. The other four Parts contain the Passport Rules 1967, Passports (Entry into India) Act, 1920, with commentary, and the Passport (Entry into India) Rules, 1950, as well as all the relevant Acts, rules, notifications and other general information about passports and the procedure prescribed for obtaining passports, for securing foreign exchange, for avoiding the infringement of rules and incurring punishment, which the reader will find in the Appendices (Part V). All Acts and Orders regulating the entry and stay of foreigners in India have also been incorporated. Reference should be made to the table of cases and index.

3. A compilation of all the relevant laws on the subject, with clear commentaries on their provisions, the book under notice is said to be the first of its kind to furnish the necessary information for persons going out from and coming into India. Practising lawyers should find the commentary and case law

highly useful, for the author has pointed out both the merits and defects, and made suggestions for improvement. It should be a book of ready reference for judge, lawyer, officer, and citizen alike. R.S.S.

PROMISSORY NOTES (Law, Practice and Procedure). By Gentla Satyanarayana Guptha, Advocate. *Andhra Law Times*, Balaji Sadan, Hyderabad 36. 1970. Pp. 257, Price, Rs. 12.

The work under review, perhaps the first of its kind, meets the need for an exclusive account of the law of promissory notes. Most of the provisions regarding promissory notes are contained in the Negotiable Instruments Act, although there are several other Acts which have a bearing on them. The Negotiable Instruments Act deals with a particular form of contract and the law laid down for special cases prevails over the provisions of a general character. Strictly speaking, it is a branch of the law of contract, with some special provisions in it. The object of the Act is to legalise the system under which negotiable instruments pass from hand to hand like ordinary goods. As far as possible the Indian legislature has followed the English law; in fact, it often reproduces the principles of the English law as enunciated in English decisions and English text books.

2. A 'promissory note' is an instrument in writing (other than bank-note or currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person or to the bearer of the instrument. It may be discharged by cancellation, release, payment, operation of law (being time-barred by Limitation Act) or insolvency of the debtor. Any material alteration in it will invalidate the instrument against all parties not consenting to it, and its transfer can be negotiated by means of endorsement and delivery. Where a written document like a promissory note exists, it is produced in a Court as being the evidence of its own evidence. If a promissory note is executed by the managing member of a Hindu joint family for the benefit of the family, it is not open to the other members to plead that they are not liable. If the defendant in a suit for the execution of a promissory note pleads that he has not executed the instrument and that the writing, signature, or thumb impression is not his, the burden of proof is on the party who relies on the instrument; in such a case the evidence of the scribe who wrote it, or of the attestors, is admissible. In the last resort it is the expert who has to give his opinion on the genuineness of the writing in dispute.

3. Of the twenty-five Chapters in the present book, each preceded by a synopsis and illustrations, three deal with the holder of a pronote, consideration, and construction and details of the document, and six Chapters cover the position in law of a pronote, in relation to agency, partnership firm, minor, legal representative, and surety. The other Chapters consider presentment of pronote, interest on it, the pronote in relation to the Succession Act, Stamp Act and Limitation Act, place of suing and pleadings.

4. A special feature of the book is the inclusion of corresponding provisions of other allied laws, both procedural and substantive, which have a bearing on the subject of pronotes. All aspects of the law, procedure and practice, relating to pronotes, have been covered, and the latest case law is given. The appendix gives the texts of the Hyderabad Money-lenders Act and the Negotiable Instruments Act and model Forms. The book should be a useful addition to the library of a judge, lawyer, or law school. R.S.S.

HOMICIDE. By S. K. Ghosh, Formerly Inspector-General of Police, Orissa. Eastern Law House, Calcutta. 2nd Edition. 1970. Pp. xvi & 189. Price Rs. 12.

Homicide may be culpable, or not culpable. Every case of culpable homicide is not murder, but every case of murder is one of culpable homicide. The present comprehensive book discusses the different problems that are met with in the investigation and trial of a case of homicide and gives up-to-date decisions of the Supreme Court and the different High Courts, selected with care and discrimination. Since the appearance of the first edition, far-reaching amendments to the Code of Criminal Procedure (many of them believed to be still on the anvil) and the Indian Penal Code have added considerably to the volume of case law. The book has gone through very careful revision in the present edition, which includes two new Chapters, "Death due to rash or negligent driving" and "the Art of Interrogation."

2. There are thirty sections in the book, ten of them dealing with deaths due to wounds caused by blunt weapons, cutting and stabbing wounds, gunshot wounds, poisoning, asphyxia, criminal abortion, rash driving, sexual assault, and infanticide (See Text-Book of Medical Jurisprudence, C. K. Parikh, 1970). Ten sections cover abetment of murder, attempt and conspiracy to murder, joint liability, motive, bail, identification, provocation, right of private defence, search for and examination of blood and semen. The author examines the position of approvers and accomplices, when pardon

can be tendered, when it can be forfeited, approver's evidence, and the magistrates empowered to tender pardon. The general considerations of investigation, statements to the Police and magistrates during investigation, and the art of interrogation are considered in three sections. They dwell on the first information report, examination of the scene, identification of body, post-mortem examination, determining the murderer, arresting the suspect, and examination of witnesses. One section is concerned with the examination of witnesses by Police and the use of their statements in evidence, diary of proceedings in investigation, power to record statements and confessions, and enquiries into suicides. The remaining sections are devoted to the general considerations of evidence, circumstantial evidence, and the admissibility as evidence of dying declarations, admissions and confessions, and expert evidence, which last includes the medical expert, handwriting expert, fingerprint expert, foot-print expert, coin expert, firearms and explosives expert, motor-vehicle expert and chemical examiner. One way of thinking would make confessions made to a police officer admissible in evidence as well as include type-script in documentary evidence.

3. The book under review embraces a formidable range of subjects within a small compass, and its utility has been greatly enhanced by the author's practical experience in investigation. Although primarily designed for the use of police officers, who are taught not only the path they are to follow but also the pitfalls they have to avoid, it should be found useful as a guide also by the magistrate. The author's other works "Crime on the Increase", "Lawbreakers and Keepers of Peace", and "Law of Preventive Detention in India" have already been noticed.

4. There is an index but no table of cases. R.S.S.

CONTRACTS OF EMPLOYMENT. By N. C. Lahiri, Advocate, High Court, Allahabad. With a foreword by Mr. Justice P. B. Mukharji, Chief Justice, Calcutta High Court. Eastern Law House Private Ltd., 54, Ganesh Chunder Avenue, Calcutta 13. 1st Edition, 1970. Pp. xxxi & 393. Price Rs. 20.

Special contracts have generally appeared as contracts of insurance, bills of lading, bills of exchange, or contracts of carriage, or building and town planning leases. The contract of employment of Government Servants and employees of public undertakings and corporations is however an area that has been somewhat little explored, and the present publi

cation seeks to outline some of the principal problems arising out of it, including within its purview also employment under industrial organisations and mercantile firms.

2. After an introductory chapter the author proceeds to discuss the legal position and status of Government servants, and the public corporations and their employees. He finds that the Civil Service in England enjoys more security than in India, where it enjoys only the procedural protection embodied in the Constitution against wrongful dismissals. The Supreme Court has held that the relationship between the Government and its servants is not like an ordinary contract of service; the duties or status are exclusively determined by law and not by agreement between the parties concerned. Similarly, the employees of public Corporations do not hold any 'civil post' either under the Union or the 'State' and therefore cannot seek a constitutional guarantee under Article 311 of the Constitution.

3. Three chapters deal with the conditions of service, the legal character and incidents of disciplinary proceedings, and powers of removal, dismissal and compulsory retirement. Probation and confirmation, seniority and promotion, their justiciability, transfer, resignation, and retirement, are discussed, after which the author examines the procedure prescribed when an employer, including the Government, initiates disciplinary proceedings on account of misconduct or delinquency. In this last mentioned capacity the employer acts as an administrative agency and is called a 'domestic tribunal', the proceedings of which are quasi-judicial. It has to act according to law and must follow, in the absence of statutory provisions, the rules of natural justice, and its decisions or administrative actions are subject to Judicial Review, which is the title of a separate chapter; it includes a discussion of Article 311 (2) of the Indian Constitution. The last chapter examines in brief the nature of the Standing Orders in industrial establishments, their legal aspects and evidentiary value.

4. The Appendices, which account for more than half the book, are exhaustive. They include the relevant portions from the Constitution of India, the All India Services Act, 1951, and the Rules and Regulations (about 30 in number) of the All India Services, Central Services, and the Indian Administrative, Police and Forest Services. Several prescribed Forms, the table of cases, and index complete the usefulness of the volume.

5. There is no lack of case law in the book. The essential principles of important decisions are extracted and expounded with clarity to explain the relevant law and the Forms of

these special contracts of employment; the nature of the impact of the constitutional provisions on these special contracts has also been clearly brought out. The book throws a flood of light on the specialised aspects of administrative law on the topics discussed, and explains the constitutional background of this branch of law in India. It should be highly useful to members of the Bench and Bar as well as to law students and research workers.
R.S.S.

CITIZENSHIP OF INDIA. (Dual Nationality and the Constitution). By Meher K. Master, M. A., (Oxon), LL. M. (Michigan). Eastern Law House, Calcutta. 1st Edition. 1970. Pp. xvi and 332. Price Rs. 20.

Published under the auspices of the Institute of Constitutional and Parliamentary Studies, New Delhi, the present work makes a cogent plea, on behalf of Indians abroad generally and Indians of East Africa in particular, for the recognition of dual nationality in the Indian Constitution. At bottom citizenship is a matter for legislation, and nationality, one of birth or origin. Where the two converge there is no trouble; else, the situation of the migrant populations becomes precarious, as in some of the newly independent countries, and the author attempts an elaborate analysis of their problems.

2. When India attained independence in 1947, many of Indian origin in East Africa were British subjects by birth under the existing British Nationality Acts. Many of them were conferred the status of citizen of India under the Indian Constitution in 1950, in which year the British Government threw open the citizenship of U. K. and the Colonies to all persons in East Africa falling within the ambit of the British Nationality Act, 1948. Neither the U. K. Government nor the Indian Government at the time thought dual citizenship was wrong or illegal. In 1955, however, the Indian Citizenship Act was passed, by S. 9 of which they were deprived of their Indian Citizenship. At the time the new East African nations gained independence they gave the option to the Indians either to retain their U. K. Citizenship or to acquire the citizenship of the nation. At the same time, faced with economic pressure, the U. K. Government passed the Commonwealth Immigrants Act, 1968, which prevented these Indians, who are British subjects, from entering and settling in the U. K. Those of Indian origin who are British subjects were therefore rendered homeless, and S. 9 of the Indian Citizenship Act, 1955 calls for immediate repeal.

3. Five out of the ten Parts, into which the book is divided, deal with the British

Nationality Act, the Constitution of India, Citizenship under the Indian Constitution prior to the enactment of the Citizenship Act 1955, Commonwealth citizenship, and laws of Commonwealth and other countries permitting dual nationality, and four cover the Citizenship Act 1955, S. 9 of the Act, loss of citizenship and dual nationality and passports. Applying the test of fundamental rights to S. 9 of the Citizenship Act, it would appear that that Section and the rules framed under it are unconstitutional, because they violate those rights. The writer has shown that both under the Indian Constitution and the Citizenship Act, 1955 dual citizenship is permitted in some cases and not in others, with the result that certain classes of citizens have dual citizenship, certain citizens are permitted to have it, and certain others do not enjoy it at all. While U. K. and other countries, recognise dual nationality and citizenship; it is up to India, urges the author, to emulate them.

4. Nearly two-thirds of the book is taken up with the Appendices, which include the passport rules and ordinances, the registration of foreigners rules, Act and orders, and the Citizenship Act and Rules, followed by a subject index. Fortright in criticism, humane in sympathies, and eloquent in advocacy, says the General Editor, True. Intended for lawyers and legislators, it should interest the layman also. R.S.S.

PRINCIPLES AND PRACTICE OF VALUATIONS (Land and Houses).

By John A. Parks, F. S. I., Chartered Surveyor. 4th Edition, 1970, by B. P. Chatterjee, Formerly Government Advocate, Calcutta Improvement Tribunal. Eastern Law House, Ganesh Chunder Avenue, Calcutta 13. Pp. xi & 319. Price Rs. 25.

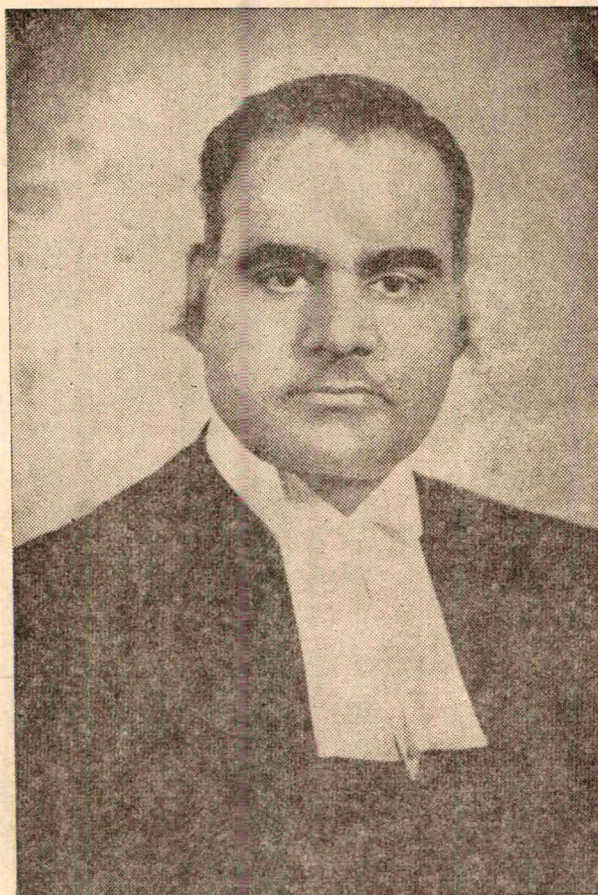
In the present publication the principles and application of making a valuation of land and buildings are set out in a simple manner. The latest edition contains more decisions showing the approach of the Supreme Court and High Courts regarding the valuation of lands under the Land Acquisition Act and other allied Acts, and brings the case law up-to-date. When the book was in the press, the Supreme Court in *State of Gujarat v. Shantilal* (AIR 1969 S C 634) overruled its own decision in *Union of India v. Metal Corporation of India Ltd.* (AIR 1967 S C 637). Regarding the valuation of machinery under the Acquisition of Undertakings Act, 1965 in the latter decision the Supreme Court had held that the worth of an article depends, apart from all other considerations, upon the market conditions at

the time of acquisition. The Act under reference was thought to violate Article 31 (2) of the Indian Constitution.

2. After explaining the theories of value, market value and rent in the first chapter, the author discusses ground rent, residential property, shops and business premises, godowns and warehouses, and industrial properties. The most common way, it is said, of supporting a valuation is to give evidence of sales of similarly situated properties in the same area. The rental method of valuation is dealt with under the heads of gross rent, deductions from gross rent, and year's purchase or security. Where the land is not developed by buildings, the rental method of valuation is ruled out, and a new method is followed by which to the market value of the land is added the value of the buildings, the value of the land depending on situation, size, shape, frontage and depth, return frontages, width of roadways, vistas, and nature of soil and tanks. It is sometimes possible to estimate the value of one plot of land fairly accurately in comparison with another plot of known value by what is called the 'Belting Method'. For the valuation of leasehold interests of the lessor and the lessee regarding property subject to a lease, there are certain points which have to be carefully ascertained and on which the author dwells at length. When a valuer has to value a property which is subject to the life interest of a person, he should have a good grasp of Mortality Tables, Expectation of Life Tables, and Year's purchase for Life Tables. The valuation of lands subject to restrictions as to user covers lands subject to resumption by Government without compensation, common passage, strip of land, and unauthorised structures. The last chapter, on valuations for various purposes and under different statutes, embraces valuation for mortgage purposes and auction reserve and under the Land Acquisition Act. Two of the chapters consider hypothetical building schemes and valuation of building estates, and valuation of easements, which are a right to receive a reasonable amount of light across another owner's property.

3. Bengal Land Measure, Valuation Tables, the Land Act 1894, the Calcutta Improvement Trust Act, the Calcutta Municipal Act, the Acquisition of Immovable Property Act and Defence of India Act, 1962, along with the index, go to make the concluding part of the book. The book deals with a number of matters not so far discussed, and includes a table of cases.

4. It should be eminently useful to students, valuers, pleaders, advocates, and others concerned with valuation matters. R.S.S.



The Hon'ble Mr. Justice GOPI NATH,
Judge, Allahabad High Court.



The Hon'ble Mr. Justice
**SALIL KUMAR ROY
CHOWDHURY,**
*Barrister-at-Law
Judge, Calcutta High Court.*



The Hon'ble Mr. Justice
JAGDISH PRASAD JAIN,
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The Hon'ble Mr. Justice
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JOURNAL SECTION

1971 JUNE

THEORY OF BLENDING AND AN EMPTY H. U. F. HOTCHPOT

(By Shri V. SETURAMAN, Member of the Income-tax Tribunal, Calcutta.)

The problem for discussion is the familiar one under Hindu Law which goes by various names, blending, throwing into common stock and throwing into the hotchpot. The question that has recently cropped up is; can there be blending where the HUF has an empty hotchpot, i.e., where the HUF has no property at all? In other words, can you blend separate property with nothing? One in a hurry may refer to the last para for the proposed answer.

2. In two recent pronouncements of the Supreme Court where though the problem did not directly arise, there are observations which create a doubt on this point. The first case is reported as *Mallesappa Bandeppa Desai v. Desai Mellappa* (1961) 3 S C R 779=1962-2 S C J 589. In that case there were certain properties obtained by one Channma by succession to her father. She had married one Ramappa. After his death, his grandsons by one son filed a suit against another son of his (uncle of the plaintiffs) for division of the said properties, among others, on the ground that they were joint family properties by virtue of blending. The defendant uncle (son of Ramappa) resisted the claim by contending that they were not joint family properties. The trial court upheld the plea of blending. The Madras High Court on appeal rejected that plea. The matter went on appeal to the Supreme Court.

3. In the judgment of the Supreme Court, the problem has been approached from two angles. They are (1) whether the doctrine of blending applied to properties held by a Hindu female as a limited owner and (2) whether the plea of blending was made out on the facts.

4. It was pointed out by Gajendragadkar J. as he then was, that the doctrine of blending is not based on any texts. We shall revert to this aspect a little later. His Lordship observed at page 593 of 1962-2 S C J as follows :—

"The rule of blending postulates that a coparcener who is interested in the coparcenary property and who owns separate property of his own may by deliberate and intentional conduct treat his separate property as forming part of the coparcenary property; in other words, the separate property of a coparcener, loses its separate character by reason of the owner's conduct and gets thrown into the common stock of which it becomes a part. This doctrine, therefore, inevitably postulates that the owner of the separate property is a coparcener, who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property A mere intention to benefit the members of the family by allowing them the use of the income coming from the said property may not necessarily be enough to justify an inference of blending; but the basis of the doctrine is the existence of coparcenary and coparcenary property as well as the

existence of the separate property of a coparcener" (underlined (here in italics) by us).

It is not necessary for our purpose to go into the conclusion about blending on the facts of that case.

5. In a more recent case (1970) 76 I T R 675, *Goli Easwariah v. Commr. of Gift-tax*, the question was whether the throwing into common stock or blending would amount to a gift for purposes of levy of gift-tax under the Gift Tax Act, 1958. It was held that there was no gift as there was neither a donor nor a donee. After referring to *Mallesappa's case* and to the principle that a coparcener alone could blend his separate property, the following passage occurs at page 678 :

"the doctrine of throwing into the common stock inevitably postulates that the owner of separate property is a coparcener who has an interest in the coparcenary property and desires to blend his separate property with the coparcenary property." (emphasis supplied.)

6. At this stage it is enough to mention that in neither of these two cases was there any scope for the contention that there could be no blending when the hotchpot was empty. In the first case (*Mallesappa's*) there were quite a few items of properties other than the ones which were the subject of the plea of blending. In the gift tax case also, there is nothing to show that the family was otherwise impecunious. It is submitted that these two decisions should not be taken as laying down the proposition that there could be no blending where there is no other coparcenary property, as the problem did not arise for decision there.

7. Having regard to the above observations of the S. C., it would be proper to examine the development of the law regarding blending in so far as it has a bearing on the point under discussion. It has been pointed out by Gajendragadkar J. in *Mallesappa's case* that in *Shiba Prasad Singh v Prayag Kumari Debi*, L R 69 I A. 331 the Privy Council had wrongly proceeded on the basis that there was authority to be found for blending in the following text of Yajnavalkya :—

सामान्यर्थे समुत्थाने

विभागस्तु समः स्मृतः ।

(Where there is increase of the common property, partition is equal). (*Nirnaya Sagar Press Edn. 1949, p. 226*).

8. Vijnaneswara's commentary on this passage runs as follows :

अविभक्तानां भ्रातॄणां सामान्यर्थस्य

कृषिवाणिज्यादिना संभूय समुत्थाने सम्यग्वर्धने

केनचित्कृते सम एव विभागः नार्जयितुं शक्यः । (ibid)

(Among the undivided brothers, if the common property is improved by cultivation, commerce or other means by any one of them, the division is equal and the acquirer does not get a double share).

9. This passage follows after Vijnaneswara noticed another extract from Vasishtha which runs as follows :—

येन चैषां स्वयमुपाजितं स्यात्

सः इच्छमेव लभेत। (sic)

(When there is a self-acquisition, then the acquirer gets a double share).

This passage would show that even self-acquired property had to be divided, subject to the acquirer having a double share. After referring to the dictum of Vasishtha, Vijnaneswara starts the rule “सामान्यं समुत्पत्तये” given earlier here (para 7) with these introductory words “अस्यापवादमात्” showing that the rule set out from Yajna Valkya in para. 7 above is an exception (to the dictum of Vasishtha). To build a theory of blending, out of the words last given above, read along with the Commentary of Vijnaneswara extracted earlier here, appears to be clearly far-fetched.

10. Thus, we have to look further backwards and see how far the rules regarding blending are traceable to Sastraic law. Let us briefly trace the point regarding the rights of the sons to the father's property during his lifetime. The word “Daya” occurs in Aitareya Brahmana. Dr. R. B. Pal in his History of Hindu Law, (Tagore Law Lecture of 1930) at Page 337 has referred to “daya” as occurring in Rigveda (x, 10,114). But the word found there is मागधेय and has no connection with any succession to property. Sayana gives the meaning thereof as “(देवाः) स्वस्वमां हविः धादयन्ति” (sic) (The Gods take their respective share). This has nothing to do with secular property. The concept of the family as such owning the property does not appear to be so well-known or at any rate not referred to in the Vedas. There are, however, some stories which appear to throw some light on this topic.

11. We may first see a story of Nabhanedishta, a son of Manu, which occurs in three places, viz., (a) the Aitareya Brahmana (part of the Rigveda), (b) in the Samhita portion of the same Veda (x.5.61) and (c) Yajurveda Samhita (3.1.29 at seq. 9th Anvaka). The story is a simple one. Nabhanedishta (hereafter referred to as N for brevity) was pursuing his studies when his father Manu divided his property among his sons other than N. It appears from the context that Manu did not keep a share even for himself.

On return from his studies, N asked his brothers for his share. They referred him to Manu, who said that he had not deprived him of his share and who then, indicated to him the means to get property.

12. Manu told him about one Angirasa performing a sacrifice for ascending to heaven. The persons participating in the sacrifice could not make progress beyond the fifth day thereof and were thus getting frustrated in their attempts to ascend to heaven. Manu told N that he could chant a Brahmana (mantras) by which they could ascend to heaven.

13. Accordingly N went to the place of the sacrifice and asked them to accept him so that he would remind them about the mantras and that he would get the sacrifice fruitfully completed. He was accepted in the sacrifice. It was completed with the mantras chanted by him, and he got as gift from Angirasa a thousand cows (and perhaps other wealth also left over on the sacrificial ground).

14. N was about to return home with his wealth when Rudra appeared and said that whatever was on the sacrificial ground when the sacrifice was over belonged to him. N claimed that all of them had been gifted to him by Angirasa before he ascended to the heaven on the performance of the sacrifice. Rudra said that he would abide by Manu's decision on the dispute.

15. On N's return, Manu asked him whether he got the wealth. N said all about the completion of the sacrifice and Rudra's dispute over what was given to him by Angirasa. Manu agreed that Rudra's claim was justified. N came back to Rudra and reported that his claim was held to be justified by Manu, his father. He thus gave up his claim to the cows, etc. Appreciating N's truthfulness Rudra allowed him to have the cows, etc., given by Angirasa. The story given here is mainly as found in Aitareya Brahmana with some details supplied from the other places referred to already.

16. The relevance of this story to the point under discussion is that this shows that Manu could divide the wealth he had among his sons, leaving out one of them (N) from the division and that N could keep all his acquisition made in the manner given above to himself.

17. There is another story in Yajurveda about Prajapathi saving his son Indra from destruction by a foe set up by a sage called Tvashtra whose son had been killed by Indra (see Yajurveda Kanda 2, Prasna 5). At the end of the story it is said “जेष्टं पुत्रं निखसाययन्ति” (sic).

“People distinguish their eldest son with heritage”.

18. The story of Sunahsepa occurs in the Aitareya. Brahmana of the Rig Veda. Harischandra was issueless. He got a son Rohita by the grace of Varuna. He had undertaken at the time of getting the boon from Varuna to sacrifice the son, but would not do so after the son was born. He was going on postponing the event. When Rohita came to know of his father's promise, he left for the forest with a bow. He heard that his father was afflicted with a stomach ailment. When he was returning home, Indra asked him to do a pilgrimage. Five times he tried to return home to see his father and every time Indra managed to send him back. When he went into the forest for the sixteenth time, he saw a sage called Ajigartha who had three sons. Rohita wanted him to sell the first son. He got by purchase Sunahsepa the second son, brought him to his father and told him that he could now do the sacrifice. Harischandra was cured of his disease and he started the sacrifice. Viswamitra acted as the priest therein. When Sunahsepa found that he was going to be sacrificed, he began to pray to Indra. Indra was pleased and Sunahsepa was released from the bonds that bound him to the sacrificial pole. Then Sunahsepa ascended the lap of Viswamitra who was acting as the priest. Ajigartha wanted him to come back to the family. Sunahsepa refused. Viswamitra declared that Ajigartha had sold him and could not be his father and that Harischandra could not be the father as he had offered him in the sacrifice. Viswamitra offered to take him, but Sunahsepa wanted to join Viswamitra only if he would make him his first son. Once bit twice shy. Viswamitra agreed to this. He had 101 sons, of whom 50 were elder and 50 younger to Madhu Chandas. The elders refused to accept Sunahsepa as their elder brother. Madhuchandas and his younger brothers agreed to this wish of Viswamitra. Viswamitra cursed his first 50 sons who became Dasyus. The others were blessed as they agreed to his wishes. He told them that they would take his Daya. (युष्मिन् दायं मे उपेत). Sunahsepa was thereafter known as Devarata and he was the progenitor of the Kausika Gotra. (This story is found also in Bhagavata 9th Kanda and 7th and 16th Adhyayas. The Ramayana story in Balakanda Sargas 61 and 62 slightly different.)

19. This story shows that Viswamitra could disinherit 50 sons and instal a stranger as his eldest son. This brings out the extent of the father's right.

20. There are also references to division in the Jaiminiya Brahmana (III, 156) of a division among four sons, while their father was old but alive, and also in the Brihadaranyaka Upanishad (III, (iv) 1) of Yajnavalkya wanting to divide his property between his two

wives, Maitreyi and Katyayani, when he was about to renounce the world.

21. Dr. Sarvadhikari holds that there was a preference for the eldest son and also that the rule of primogeniture operated in some contexts (See his Tagore Law Lectures P. 224 et seq). Dr. R. B. Pal also at p. 353 of his History of Hindu Law (Tagore Law Lectures 1930) infers from some of these stories that there is little indication of the family being regarded as the owner of the property. He holds the view that there was some kind of a preference for the eldest son. It is necessary to remember that the Vedas did not primarily concern themselves with property and it is not surprising that we do not get any direct guidance from them.

22. The guidance from the Vedas being thus only marginal, we may turn to the Sastrakaras. Gautama (Ch. XVIII) envisages division after the father's death or after the mother becomes incapable of bearing children. He poses the possibility of the whole estate going to the first born who would support the rest as the father is expected to do. But he considers that there would be spiritual merit in partition, in which the eldest son could get an additional share. Thus partition appears to be optional and not obligatory.

23. Baudhayana (II, 2) is not also specific about equality of division. In his conception, also, the equality is permissive while the eldest son can get some preference.

24. Apastamba (II, 6, 14) shows a distinct preference for equality while he also envisages that equal partition could take place after gladdening the eldest son by choice presents.

25. Vasishtha (Ch. XVII) and Manu (Ch. IX) give a greater share for the eldest son. Yajnavalkya (Ch. II) would also give a greater share for the eldest son, but the rest of the sons have to divide equally. Narada (Colebrooke's Digest V. 32) makes the father the lord during his lifetime. In the division after his death, the eldest son takes a larger share, the younger smaller and others equal share. Vishnu (Colebrooke's Digest 54) is in favour of equality while Brihaspati (Colebrooke ibid) shows a preference for the first born and Katyayana for equality of division.

26. The above would show that there was a lack of unanimity among the law givers. The references have been given in the particular order adopted by Dr. Sarvadhikari who has taken them in their historical order determined by him. It is not necessary for our present purpose to examine the background and details of this historical order.

27. The summary of the Smriti texts would show generally that the father's right by and

large was absolute and even where equality of division (with or without reservation as Jyesta Bhaga) was envisaged the idea of any right in the other members of the family is not evident. In this state of the law, it is Vijnaneswara who gave it a direction.

28. Vijnaneswara is only a commentator of the Yajnavalkya Smriti. There is a reference to one Yajnavalkya in the Vikrama Charita of Bilhana. Bilher has translated this work into English. Bilhana flourished in the Chalukya Court. The ruler at that time was Vikramaditya, and it is in his honour that the work was composed. In it there is reference to Vijnaneswara who appears to have been assigned with the work of giving and administering law. The scholars are agreed that the commentator on Yajnavalkya smriti is the same as the person who adorned Vikrama's Court. His time is thus determined as the latter part of the 12th century.

29. Vijnaneswara appears to have given an introduction to his work which is not found in the edition published by Nirnaya Sagar Press, Bombay in 1949. Some details therefrom as recorded by Dr. Sarvadhikari (p. 367) are reproduced here. His father was Padmanabha Bhatta of Bharadwaja Gotra. He was at the time of writing the commentary a Sanyasi of the Parama Hansa order. He refers to an earlier commentary by Viswarupa. He describes himself as a disciple of Viswarupa. It would not be proper to confuse this Viswarupa, with the earlier commentator on Yajnavalkya, as then Vijnaneswara would not have then said that the other commentary was "hard and turgid". It would then be decrying his own Guru's work, which one would not expect him to do. Viswarupa's must thereore have been much more ancient.

30. Of his own commentary says Vijnaneswara with humility;

"My object has been to explain as concisely as possible the texts of Yajnavalkya, but in doing so, I have not to the best of my knowledge omitted the explanation of single word or letter nay even of a single dot of the text. But it is not improbable that I have sometimes misconceived the true interpretation of the great sage. If the learned should meet with any such error. I beg them to correct it, remembering that all writers are liable to err."

31. Vijnaneswara in the commentary on Yajnavalkya (well known as Mitakshara) in the chapter dealing with Daya Vibhaga Prakaranam (the chapter on the division of property) examines the texts of Narada, Gautama and others.

32. It is Vijnaneswara who brings in various clear concepts in the law e.g. (a) सप्रतिबन्धदाय (translated not so happily as "obstructed heritage") and अप्रतिबन्धदाय ("unobstructed heritage") (b) जन्मनैव पुत्रादीनां स्वर्त्वं (right to

property by mere birth etc. He has sought to derive proposition or concept (b) given above by a close reasoning reminiscent of the method adopted by Sankara and other authors of Vedanta treatises.

33. Vijnaneswara notices the distinction between "separate property" and "common property" and deals with Narada's dictum :

शौर्यभार्या धनं चोमे

यच्च विद्याधनं भवेत् ।

त्रोज्येतान्य विभाज्यानि

प्रसादो यश्च पैतृकः ॥

(Wealth obtained by prowess, from wife, by teaching (or education) and by gift from father are indivisible). In those days, immovable property was subjected to a more rigorous restriction as :

स्थावरं द्विपदचैव

यद्यपि स्वयमार्जितं ।

असंभूय सुतान् सर्वान्

न दानं न च विक्रयः ।

(Though immovables and bipeds have been acquired by a man himself a gift or sale of them should not be made without consulting all the sons). Thus regarding immovables there was no need to invoke any doctrine of blending as the sons had a say in their alienation.

34. The development of the law appears to have been in stages. Originally the father had an absolute right in property. He could, if he cared to, divide as he pleased as Manu did. Later the first son, though it is not quite clear, seems to have been the sole successor. The Sunahsepa's episode is indicative of the eldest son having special rights. See p. 225 et seq of Dr. Sarvadhikari. Subsequently unequal partition was envisaged by many of the Smritikaras. It is to some extent Gautama and later Vijnaneswara who have evolved the doctrine of equality in partition.

35. As regards self-acquisitions, or other separate property, the father had an absolute right except in immovables (bipeds also). It follows that there was no need to invoke any doctrine of blending the separate immovable property with the joint family property as the father had no right to alienate the immovables without consulting the sons. It was also said :

मणिमुक्ता प्रवालानां

सर्वदेव्य पिता प्रभुः ।

स्थावरस्य तु सर्वस्थ

न पिता न पितामहः ॥

(The father is the master even of all gems, pearls and corals; but neither the father nor the grandfather is so of the whole immovable pro-

perty). (Mitakshara, Nirnaya Sagar, 1949 Edn., p. 218). Thus there was no question of any blending of what were moveables, as they could be dealt with by the father as he pleased.

36. The concept of money being the means by which goods (even human) could be purchased is clear from the story of Sunahsepa. Rohita purchased him for a hundred pieces of gold. But the economy was more a barter economy and money or currency assumed substantial proportions only in later days. It is, therefore, not surprising that there was no question of blending as such considered by the ancient law givers. Things could be kept separately. Even now in villages, vessels and items of gifts received at the time of a son's marriage are segregated and not mixed. The law on blending is thus a modern development. That this is so is clear also from the absence of a Sankrit equivalent for it.

37. To the extent I have been able to see, the earliest case I come across is reported in 10 M I A 490 *Ram Pershad Tewari v. Sheocharan Das*. One Deenanath was the youngest of the five sons of Sheo Dutt who was a purohit in Allahabad. He started a moneylending business which flourished well. There was no ancestral nucleus. One of the brothers filed a suit claiming partition of the properties acquired from that business as joint family properties. They were held to be partible family properties and at page 505, it was observed :

"It may be further admitted that Deenanath laid the foundation of the future fortune of the family. But there is no proof that he kept as separate or treated as separate property, that which he acquired at Agra". (from the money lending business).

38. In *Lal Bahadur v. Kanhaiya Lal* 29 All 244 = 34 I A 65, there was some family nucleus. Three sons of one Gobind Ram constituted a H. U. F. One of the sons was in service in the Education Department and his savings were mixed with the family. There was a partition and Durga Prasad got a share therein. Claiming that his properties were self-acquired, he left a will giving meagre maintenance allowance to two of his sons and the rest to his eldest son. The two sons, who suffered by the unequal arrangement, filed a suit for partition. The claim for partition was accepted by the Privy Council. After referring to the evidence, their Lordships held :

"This is strong evidence that there was but one common stock of the whole family into which each voluntarily threw what he might have otherwise claimed as self-acquired; and that the property purchased by, or with the assistance of, the joint funds was joint property of the family, and not of any particular member of it." (See p. 255 of 29 All).

39. A large volume of case law has come up later. But the cases when examined would show that persons mixing up their separate income in the joint family accounts have been

taken to have blended and converted their separate property into joint family property. See *Lal Bahadur v. Kanhaiya Lal*, 29 All 244 = 34 I A 65, *Suraj Narain v. Ratan Lal*, 44 I A 201. In the latter case it was held that the fact that other moneys not belonging to other coparceners were there in the accounts would not suggest that there was no blending as far as the family members were concerned.

40. It is enough to refer to one decision of the Supreme Court reported as *Venkata Reddy v. Lakshamma*, AIR 1963 SC 1601 wherein it was laid down :

"Property separate or self-acquired of a member of a joint Hindu family may be impressed with the character of joint family property if it is voluntarily thrown by the owner into the common stock with the intention of abandoning his separate claim therein but to establish such abandonment a clear intention to waive separate rights must be established. From the mere fact that other members of the family were allowed to use the property jointly with himself, or that the income of the separate property was utilised out of generosity to support persons whom the holder was not bound to support or from the failure to maintain separate accounts, abandonment cannot be inferred, for an act of generosity or kindness will not support a legal obligation."

41. In none of these cases, the existence of family property was regarded as a *sine qua non* for the conversion of individual property into joint family property. If the principle is that an impecunious family cannot benefit from the individual property being thrown into common stock, then 10 M I A 490 would have been differently decided.

42. There are decisions of long standing which lay down the principle :

"Nor is there anything in Hindu Law which says that possession of property is a necessary requisite for the constitution of a joint family." (See *Jankiram v. Nagamony*, 49 Mad 98 at 103 and 115).

To the same effect are propositions laid down in *R. Subramania Iyer v. C. I. T.*, (1955) 28 I T R 352; *Damodar Krishnoji Nirgude v. C. I. T.*, (1962) 46 I T R 1252; *C. I. T. v. M. Khanna*, (1963) 49 I T R 232 and *C. E. D. v. Annachalam Chettiar*, (1968) 69 I T R 607. These cases have specifically rejected the contention that there could be no blending when the hotchpot was empty.

43. In fact in *Keshavlal Lalubhai Patel v. C. I. T.* (1962) 44 I T R 266 at 274, the Gujarat High Court extracted a passage from a decision of the Andhra Pradesh High Court saying that is not necessary that he (a coparcener) should own joint family property "in order to impress his self-acquired or separate property with joint family character." This decision was affirmed in (1965) 55 I T R 637. If the view was wrong, the S. C. would have at least made a reservation about it.

44. Blending, it is submitted, is possible even where the family owns no other property. It is not proper to take the word

"blending" or its equivalent too literally. This is a legal concept evolved out of judicial decisions. Possession of property is not a requisite for the constitution of a joint family. It is submitted that the two cases referred to in paras 4 and 5 above should not be taken as

laying down the rule that there can be no blending where the family has no other property. In the absence of even a passing reference to any of the earlier cases noticed in paras 37 and 42, they cannot be taken as overruled.

REVIEWS

INDIAN CONSTITUTIONAL LAW.

By M. P. Jain, LL. M. (Del). J. S. D. (Yale). N. M. Tripathi Private Ltd., Bombay. 2nd Edition, 1970. Pp. xxxiii & 816. Price Rs. 40.

This is a thorough and exhaustive study in narrative form, giving a coherent and integrated picture of the Indian Constitution as a whole, of the inter se relations between the various Articles, and of the workings and practices of the Governmental machinery. On major points references have been made to foreign Constitutions like those of the U. S. A., Canada, U. K. and Australia, and to the latest case law. Relevant facts of important cases and a summary of the law laid down in them have been given in the body of the text. Important provisions of the Constitution have been given an analytical treatment and there is a separate chapter on constitutional interpretation. While materials on the historical development of the Constitution are to be found throughout the book, the chapter on constitutional amendment is, within a short compass, a record of the historical development from 1950 to the middle of 1970. In the present edition the book has been practically re-written in view of the accumulation of new case law and the dramatic developments that have taken place since the fourth general elections in 1967.

2. Apart from the introductory part, there are six parts entitled, respectively, the Central Government, the State Government, the Federal System, Political and Civil Rights, Miscellaneous Topics, Constitutional Interpretation and Amendment. The early chapters deal with the composition of the Central and State Legislatures, their officers, their functions and inter-relation between the two Houses, Parliamentary privileges, and delegated legislation. The functions of the Central and State Executives, and their working, the composition of the Supreme Court and the High Courts, their jurisdiction and powers, the doctrine of stare decisis, and the independence of the Supreme Court, are dwelt on. The author considers the distribution of legislative power, the three Lists, and the principles of interpretation of the Lists, as well as the allocation of taxing power, restrictions on taxing powers, and the expedients to create financial equilibrium at the State level. The succeeding chapters

focus attention on administrative relations, the emergency provisions, co-operative federalism, freedom of trade and commerce, the official language, citizenship, and elections. There are as many as seven chapters on Fundamental Rights, which are concerned, inter alia, with justiciability, reasonable restrictions, guarantee against double jeopardy, privilege against self-incrimination, protection against arrest, and preventive detention. The concept of Eminent Domain in India, right to constitutional remedies, and emergency and fundamental rights, are discussed. The other chapters cover the Directive Principles, safeguards to minorities, Government services, Government contracts, suits by or against Government, and the Rulers of Indian States.

3. In the formulation of the social objectives of the Constitution one can discern the impact of the modern political philosophy which regards the State as an instrument to secure the good and welfare of the people. It is possible to conclude that the judicial process in India has been informed by the same philosophy (see *Crown Aluminium Works v. Workmen*, AIR 1958 S C 30, 34). In a given situation, the Court may be faced with several alternative interpretations of the Constitution, and when it chooses one of these views, it does act according to its own policy considerations (see *Golaknath case*). The author considers that the Supreme Court majority opinion in this case was based on the fear of the possible erosion of fundamental rights, and does not agree about their non-amendability. Even the Supreme Court, he observes, only considers that the amendment of Fundamental Rights cannot be achieved by following the procedure under Art. 368, but by setting up a new Constituent Assembly for the purpose. And the author explains in the book why this course is not feasible.

4. The author, who was at one time Research Director of the Indian Law Institute, has made a useful and reliable contribution to literature on the subject, which should be of considerable assistance to students of law, political science and administration, as well as to legal practitioners.

5. The book contains a table of cases and an index.

R.S.S.

COMMERCIAL LAW. By Gordon J. Borrie, LL. M., Professor of English Law, University of Birmingham. 3rd Edition, 1970. Butterworths, London. Pp. lviii & 378. Price Rs. 40.50.

In the volume under review the author has selected the topics of agency, sale of goods, hire purchase, negotiable instruments, insurance law, contracts of employment, and contracts with a foreign element as being among the most important of Commercial Law. He considers all the key problems they give rise to and places special emphasis on the facts of decided cases, as their study is believed to help greatly to illuminate the legal principles involved much better than if the legal principles are merely stated in the text and the reader has to refer to bare foot note for the facts.

2. The law is given as it stood on 1st December, 1969, and the present edition deals fully with the Misrepresentation Act, 1967 and notices other incidental statutory changes; the numerous developments in case law have also been covered. The Misrepresentation Act, 1967, S. 2 (1) enables a buyer to claim damages for innocent misrepresentation unless the seller proves he had reasonable cause to believe that the facts represented were true. With regard to the equitable remedy of rescission, the buyer still has the right to seek it if he acts reasonably promptly, but now by S. 2 (2) of the 1967 Act, the Court has a discretion to award damages instead of rescission even where an innocent misrepresentation is made without negligence.

3. The opening chapter of the present book describes the creation of a contract of agency, the obligations of the agent to his principal, and agent's rights and authority, and proceeds to discuss the settlement with the agent, breach of warranty of authority, wife as agent and termination of the contract. It then examines a contract for the sale of goods, transfer of property to the buyer, risk of loss and transfer of title, and analyses the terms of a contract and the subjects of delivery and acceptance of the goods and personal remedies for breach of contract. According to the Misrepresentation Act, 1967, the passing of property no longer destroys the buyer's right to reject, and a buyer who does some act inconsistent with the seller's ownership will not be deemed to have accepted the goods under S. 35 of the Sale of Goods Act unless he has had a reasonable opportunity of examination as provided in S. 34.

4. The common law obligations of the parties to a hire purchase, rights against third parties, sale or pledge by the hirer and the effect of execution or distress are then explained

and the Hire Purchase Act, 1965 and the Advertisement (Hire Purchase) Act, 1967 are discussed. The regulations for control of hire purchase have lately been revised and the Order now in force is the Hire Purchase and Credit Sales (Control) Order 1969. Bills of exchange, cheques and promissory notes, the duties of a holder, and damages, are considered, after which the author focuses the reader's attention on life insurance and other types of insurance and the contract of insurance and the principles of insurable interest. Other topics referred to include master and servant relationship, contract of service, mutual indemnities, and remedies and contracts with a foreign element, the last mentioned one referring to contracts which are to be made or performed in a foreign country or whose subject matter is situated in a foreign country.

5. By means of foot-notes the reader is referred to various detailed works on particular aspects of commercial law, and the book is bound to be useful as a basic text book for the Law Society examination as well as for university and other courses.

6. The book has a table of cases, a table of statutes, and an index. R S.S.

LABOUR LAW. By J. B. Cronin, LL.B., and R. P. Grime, B.A., B.C.L. Lecturers in Law, University of Southampton. 1970. Butterworths, London. Pp. xlviii & 500 Price, Rs. 67. 50.

The three Parts of the work before us are entitled Law of Employment, Employer's Liability, and Law of Collective Labour Relationships, respectively. Part I deals with the contracts of service, the duties of master and servant, termination of the contract of service, and statutory control; employer's liability in the nineteenth century and his liability today as well as the Factories Act, 1961. are covered in the next Part. The last Part is concerned with collective bargaining at common law, the regulation of collective bargaining, the regulation of trade unions, and industrial disputes in relation to the criminal law, the contract of service, and the law of tort.

2. Because labour law is one field in which a great deal can be learned from other systems particularly in the matter of dismissal, the authors consider also the law of France, Germany, Italy and Russia on the dismissal of individual workers. According to the Factories Act, 1961 a factory consists of premises where persons are employed in manual labour by way of trade or for the purposes of gain in making or repairing an article or adopting for

sale.' Although the common law in England emphasises the individual contract of employment, the factual structure of industrial relations is collective. Formal or informal collective agreements are negotiated by and with representatives of groups; their interpretation and application are pursued in an equally collective manner. The subject-matter of such collective activity varies from the establishment of basic wage rates for thousands of workers throughout the country to the settlement of one man's grievance in respect of one job in one factory. The main characteristics of the common law approach to collectivism are said to be an excessive reliance upon the contract as an analytical concept; the pervasive relevance of the doctrine of restraint of trade, the piecemeal nature of both Parliamentary and judicial legislation, and the general vagueness of the conceptual framework. After showing how the common law has met the conceptual problems posed by the collective settlement of the terms of service by means of the law of contract, the authors proceed to describe how that law has been and may be used as an answer to the social needs presented by collective bargaining.

3. The Royal Commission on Trade Unions and Employers' Associations, under the Chairmanship of Lord Donovan, recommended in 1968 that the present formal system of collective bargaining at industry, or national, level should be discarded in favour of the recognition of workshop or factory bargaining. In response to the Commission's report, Government published a white paper, 'In favour of Strife,' which contained the outline of a proposed Industrial Relations Bill, containing twenty-five official proposals, which have been included in an Appendix to the present book.

4. As to trade unions, certain propositions are advanced as to the circumstances when an union can be sued, when it is liable for the torts of its servants and officers, and when its funds are liable for damages awarded. There is a systematic tabulation of nine different ways in which a tort can be created in industrial disputes.

5. The work contains a table of cases, a table of statutes, and an index. R.S.S.

CRACKNELL'S LAW STUDENTS' COMPANION NO. 2. TORTS, By D. G. Cracknell, LL. B., Bar-at-Law, 3rd Edition, 1969, Butterworths, London. Pp. vii & 231. Price. Rs. 22.50.

A 'Tort' is an act or omission unauthorised by law and, 'independently of contract, infringes either some absolute or qualified right

of another causing damage or some public right causing substantial damage to another person, and gives rise to an action for damages at the suit of the injured party.' It may be regarded as the breach of a legal duty owed independent of contract, by one person to another, for which a common law action for damages may be brought. The duties in a tort are primarily fixed by law, and in a contract by the parties themselves. Generally, the question whether a fixed number of specific torts or all unjustifiable harm is remediable in tort is of academic interest, one's conduct being judged by the objective standard of the reasonable man. There must be both damage and injury to some legally protected interest of the plaintiff before an action may be brought in tort. Every tort is remediable by damages as compensation, improper motive being generally irrelevant. As between crimes and torts, the commission of a crime carries with it the punishment of the criminal law, such as fine or imprisonment, whereas the commission of a tort gives rise only to a right of civil compensation.

2. For a real appreciation of the law of torts the student must make himself familiar with as many cases as possible and there are over 800 of them in the publication before us the attempt being to include those cases and statutory provisions which are of importance to students. The statutes are self-explanatory and the case notes contain an outline of the facts and a summary of those points in the judgment which are important from the student's point of view. Cross references have been given in order that the student who refers to one case will have no difficulty in finding others in which the same or similar points arose. In the latest edition the text has been brought up-to-date by introducing summaries of many of the cases decided since 1965 and the texts of some recent statutory provisions, and this has necessarily involved the omission of summaries of several older cases.

3. Although not intended to compete with other legal text books, the present volume should be of use as a companion to textbooks, lecture notes, and correspondence courses. It should primarily satisfy the student who has no access to or time to take full advantage of a law library and therefore finds it difficult to ascertain the facts of the cases or the wordings of Parliamentary Acts to which he may have been referred in the course of his studies.

4. There is a useful index at the end.

R.S.S.

THE EVOLUTION OF THE INDIAN CONSTITUTION. (Sir Chimanlal Setalvad Law Lectures). By T. L. Venkatarama Aiyar, University of Bombay. University Building, Fort, Bombay 32, 1970. Pp. 132. Price, Rs. 12.

Melancholy interest attaches to the publication under notice; the distinguished jurist and authority on constitutional law whose lectures at the Bombay University it contains passed away only the other day. The theme of the lectures is the presentation of the Indian Constitution as a federal one. While the Constitution has drawn largely from the Federal Constitutions of foreign countries, it has actually taken shape from the federal structure which had been established in India under the Government of India Act 1935. The learned lecturer therefore first gives an account of the set up of the Government of India before the enactment of the present Constitution, and then makes a comparative study with the Constitutions with a federal form of Government, viz., U. S. A., Canada, and Australia. He proceeds to analyse the working of the Indian Constitution, the place of conventions in the Governmental set up, the Fundamental Rights and the Directive Principles of State Policy, the place of judicial review and the provisions relating to the amendment of the Constitution.

2. Until 1967, when these lectures were prepared, the working of the Constitution did not present any problem because the party in power at the Centre and the States was identical. But when different parties, with different political programmes, began to appear, the problem of Centre-State relations and other issues became rather complicated. Some of the problems envisaged by the lecturer became matters of practical politics. In the third lecture, for example, after citing the provisions of the Constitution relating to the allotment and distribution of revenue by the Central Government to the States, he has referred to the setting up of the Planning Commission (a non-statutory body) and to the investing of it with extensive powers and observes that "it is in keeping more with a unitary than a federal Government," which has been latterly the complaint of some States.

3. As regards the true position and powers of the Governor of a State, the learned lecturer considers that the appointment of the Governor by the President is not an appointment by the Union Government, but that it is 'one to be made by the President in the exercise of his individual judgement' and that the "Governor should be a non-party man." In the matter of the relationship between the Judiciary and the

Legislature the lecturer discusses the law and practice in England, and suggests that Parliament should enact a law "codifying the conventions which have under Art. 105 (3) and Art. 194 (3) become vested in the Legislature of the Union and the State Legislatures respectively."

4. Another question of importance dealt with is the power of Parliament to amend or abrogate the provisions relating to Fundamental Rights. The majority judgment in Golaknath case is referred to; the lecturer is of the view that Parliament has the power to amend the provisions relating to Fundamental Rights, but that this power should be exercised sparingly, and subject to certain conditions.

5. Since these lectures were delivered, the changes in the political complexion of Government in the Centre and the States have brought about a situation in which the federalistic principles of the Constitution have come into play more than before. As the lectures have to a large extent anticipated the new situation, they should be of great use in understanding the latest developments. They should be of lasting practical value to the administrators, the members of the Bench and the Bar, and the students of constitutional law, alike.

6. A table of cases and a subject index are furnished in the book. R.S.S.

RIOTS: PREVENTION AND CONTROL. By S. K. Ghosh, Former Inspector-General of Police, Orissa. With Foreword by A. K. Sarkar, Retired Chief Justice of India. Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13. 1971. Pp. xx & 304. Price, Rs. 25.

A riot, which is nothing else than mob violence, may consist of indiscriminate looting and burning, attack on a particular community, or officials, or passers-by; buildings, private as well as public, may also be the target of attack. Riots are of different kinds, such as communal riots, labour troubles, and student disorders, and each kind has its own peculiar characteristics and originates from apparently different causes, so that the methods of dealing with them vary widely. In the post-Independence period, most of them were occasioned by student protests, social discontent, communal, political, linguistic, regional and group conflicts. They are mostly the work of anti-social and criminal forces, and if the law and order authorities are vigilant, swift, and impartial in rounding up of known bad characters as a precautionary

measure there would be no riots. During riots many people are arrested but seldom prosecuted or convicted. Exemplary and swift punishment for murderers and arsonists, urges the author of the volume under review, will help to reduce repetition of this phenomenon.

2. The objectives of the present volume are to highlight some of the underlying factors contributing to riots; to outline some of the procedures and techniques for the prevention and control of different types of riots, and to make readily available exhaustive and up-to-date case law on unlawful assembly and rioting. There are separate chapters each dealing with crowds and mobs, communal riots, student riots, labour riots, urban riots, rural riots, festival riots, linguistic and racial riots, as well as the police techniques evolved for handling them. There is a chapter on the law concerning riots which covers the Penal Code, Criminal P. C., Police Act, Criminal Law Amending Act, the Preventive Detention Act, the West Bengal (Prevention of Violent Activities) Act and the provisions in the Constitution of India; the Addenda provided at the end of the book contains the latest judicial pronouncements. The appendices include the Commission of Inquiry Act and the reports of several commissions on police firing in the past. A Bibliography and Index are also given.

3. The primary responsibility for the prevention and control of riots rests with the State Government and their law enforcement officers. The present author has very wide experience in the matter; there was a special chapter on crowd control and riots in his earlier work. *Lawbreakers and Keepers of Peace*, (1969) and many of his suggestions have been followed with success in actual practice. In the present treatise, which is principally concerned with the prevention and control of riots, he dwells at length on the methods of dealing with them. In doing so he has emphasised the fact that the police is our police and have to act, as observed by Mr. Sarkar in the Foreword, with sympathy and understanding so as to attract the willing co-operation of the general public. As usual, the suggestions made by the author for meeting the situation arising from a riot are quite comprehensive and should be helpful to all those in charge of law and order. R.S.S.

DICTIONARY OF ECONOMIC TERMS.

By Alan Gilpin. B.Sc., (Econ.), M.Inst. F., M. I. P. H. E., of the Queensland Public Service, Australia. Butterworths and Co. (Publishers) Ltd, 88 Kingsway, London W. C. 2, 2nd Edition, 1970, Pp. 276, Price Rs. 22.50.

The book before us has been inspired by the author's professional acquaintance with applied economics in a major industry and his experience as a lecturer in economics and allied subjects over many years. While the fundamental truths of economics are valid for all time, the details of their manifestation are constantly changing and the present edition of the dictionary (it first appeared in 1966) has undergone extensive revision, while the opportunity has also been taken to incorporate terms relating to new developments, particularly in the field of public policy.

2. The book is intended primarily for economists and students of economics, but it should prove of value and interest also to planners and engineers in industry who have to give more constructive thought to the long term development of their own industries in the context of positive national economic planning and the implications of their individual industry's development for the economy as a whole. Agreement and Arbitration, banks and negotiable instruments, Companies, articles and memorandum of association, taxation matters, instalment credit, hire purchase, monopolies and restrictive trade practices and a multitude of other economic terms and expressions do not generally lend themselves to precise definition or detailed exposition in legal treatises, but a clear understanding of them is nevertheless highly desirable for the members of the legal profession. This Dictionary will, therefore, be useful not only to economists and students of economics but also to lawyers and students of law, specially commercial law. R.S.S.

REMINISCENCES OF A JUDGE. By N. G. Shelat, Ex-Judge, Gujarat High Court, Gujarat Law Reporter Office, Ahmedabad, 1970, Pp. 282, Price Rs. 20.

Nanubhai Gaurishankar Shelat, who retired from the Bench of the Gujarat High Court in 1970 and is a cousin of Justice J. M. Shelat of the Supreme Court, presents his reminiscences to the public in the work before us. Born in 1908, he started practice as an advocate at Nadiad in 1930, but joined the Subordinate Judicial Service of Bombay in 1936. Appointed as Additional City Magistrate, Ahmedabad, in 1945, he was promoted to the post of Assistant Judge three years later. He became District and Sessions Judge, Mehsana in 1954, and Bhuj in Kutch, and worked also as Chairman of Tribunals such as the Revenue and Sales Tax Tribunal. Subsequently he was District and Sessions Judge at Surat, Rajkot, and Baroda, and Principal Judge of the City

Civil & Sessions Court, Ahmedabad (1962) for three years before elevation to the Bench of the Gujarat High Court.

2. The present book is divided into four parts. The first part refers to his school and college days and the six years of practice at the Bar, and the second part relates to his service as Subordinate Judge and in other capacities until 1948. The third part covers the period 1948-54, and the final part brings the Reminiscences to the time of his retirement as Judge of the Gujarat High Court. There is shrewd commonsense in the author's observation that a lawyer should not create the impression on the Judge that he is identifying himself too much with his client, and that he should not antagonise the Court by his behaviour in the conduct of the case, while at the same time remaining reasonably firm where the client's interests are concerned. In a Court of law, the lawyer has to be fair to all sides—to his own, to the other side, and to the Judge in particular.

3. On the appointment of High Court Judges, the author has something original to say. According to him, the appointment is now made by the President of India on the recommendation of the Chief Justice of the High Court concerned in consultation with the Chief Minister. Of course it goes also through the Chief Justice of India and the Union Home Minister. This power is rather extraordinary, for, if the High Court Chief Justice were to make his selection without consulting his colleagues, the element of arbitrariness is bound to creep in. These selections should therefore be made by the collective method and, for obvious reasons of the independence of the Judiciary, the Chief Minister of a State should have no voice in them. And to keep the Judges above the need for hunting for jobs in retirement, their remuneration and retirement benefits should be made sufficiently attractive.

4. The author's high sense of duty, love of truth and fearlessness, and broad vision and human approach to the problems before him made him popular with the public. In the Reminiscences he has expressed his views on men and matters objectively and without fear or favour. It is a running commentary on the successive stages of his career, and in the faithful chronicling of the events of his life there is just a faint hint of the Diaries of Pepys and Anandarangam Pillai, although there are no day-to-day entries. R.S.S.

STUDIES IN INDIAN LEGAL HISTORY AND INDIAN CONSTITUTIONAL HISTORY. By M. S. Rama Rau, M.A., LL.M. With a Foreword by M. A. Ansari, B.A., B.C.L. (Oxon), Bar-at-Law. 1970. J. S. Pillay, Law Book Sellers and Publishers, 4-1-319, Troop Bazar, Hyderabad 1, A. P. Pp. xxxiv & 333. Price, Rs. 7.25.

Divided into two parts, the first part of the present book gives a detailed history of the growth of the legal administration in this country during the British period starting from the days of the East India Company, with special reference to notable cases like the Cossijurah case and the Nandakumar case. In doing so, the author has analysed the growth of the civil and criminal Courts and the judicial reforms introduced from time to time. The second part narrates the history of the Constitution of India commencing from the Regulating Act of 1773 and ending with the Constitution of the present Republic of India. The landmarks in the history, like the Minto-Morley Reforms, the Montague-Chelmsford Reforms, Dyarchy, and the Simon Commission Report are described in this part.

2. The Indian High Courts Act, 1861 amalgamated the Supreme and Sadar Courts, and was a stepping stone to the introduction of a uniform and universal application of law and procedure in India. The High Courts were the highest Courts of appeal in the different Provinces and an appeal from their decisions lay to the Privy Council in England. A Federal Court was established in India under the Government of India Act, 1935, which in its original jurisdiction, adjudicated disputes between the Provinces inter se and between the Provinces and Federation. It had appellate jurisdiction also, although the Privy Council continued to be the highest Court of appeal until 1949, when the Supreme Court was established under the Constitution of India with a varied and wide jurisdiction. The Supreme Court of India, as a Federal Court, as a Court of appeal, and as guardian of the Constitution is a unique institution of integrity, independence, and impartiality.

3. The first part of the book describes the genesis of the East India Company, the administration of justice in Madras, Bombay and Calcutta from 1639 to 1726, the Mayor's Courts in the three Presidencies from 1726 to 1753, the Adalat system in Bengal and the judicial reforms of Warren Hastings. The Supreme Court at Calcutta and the Regulating Act, 1773, the judicial reforms of Lord Cornwallis in the period from 1786 to 1793, and the judicial administration in the Provinces of Madras and Bombay between 1753 and 1861

are then discussed. The development of English Law in India, the growth of the criminal law, and the personal laws of the Hindus and Muslims, are the topics of three other chapters. The second part covers Pitt's India Act, 1784, legislation between 1833 and 1903, the constitutional reforms of 1909-1918, the Government of India Act, 1935, and the constitutional developments from 1936 to 1950.

4. A sure and systematic understanding of the present legal and constitutional set-up must be based upon the knowledge of the evolution and development of the Governmental Institutions and systems from the time of the East India Company and the present author has systematically dealt with the historical events and developments leading to the present legal and constitutional systems. The present studies stop with the advent of the Constitution in 1950, but there has been a tremendous growth of the general and constitutional law since then and the reader will look elsewhere for an account of them. In the present book the author gives a full list of law reports, Acts, text books, digests, manuals, codes, regulations and judicial decisions which he has consulted, and the work should be useful to students, those appearing for competitive examinations, as well as practising lawyers.

R.S.S.

CENTRAL EXCISE: LAW AND PRACTICE IN INDIA. By F. L. Berarwalla, M. A., LL. M., Advocate. Vora & Co., Publishers Private, Ltd., 3 Round Building, Kalbadevi, Bombay 2. 1971. Pp. xvi & 243. Price. Rs. 35.

The present publication is a section-wise commentary, with text and synopsis, on the Central Excises and Salt Act, 1944 and the First Schedule, and commentary, without text, on the Central Excise Rules 1944 (Central Excise Rules, Government of India, 9th Edition, corrected upto 1st August 1969). The Act lays down that the duties will be levied and collected on all excisable goods and salt manufactured or imported by land into India at such rates as are specified in the First Schedule. The duties are chargeable on ad valorem basis and may alter any prevailing tariff value, the tariff values themselves being different for different classes of the same article. The Act lays down the procedure for determining the value, as well as the procedure for the issue of licences. Offences and penalties and the power of the courts to order forfeiture and the recovery of Government dues are dealt with. It also lays down the powers and duties of the officers, the powers of arrest and summoning persons to give evi-

dence and produce documents, search and arrest, and the procedure to be followed by the officer in charge of a police station. It specifies provisions regarding the power of adjudication, option to pay fine in lieu of confiscation, and bar of suits and limitation of suits and other legal proceedings against the Government and its officers. Included in the present publication are all Notifications, Central Excise budget proposals of 1970 at a glance, and model forms of writ petition and affidavit in support as well as departmental appeal.

2. The main Act consists of 40 sections and 234 rules, which change often. The several notifications and orders issued from time to time make it difficult for manufacturers to keep themselves abreast of the changes. The Schedule to the Act changes with every Central budget. Owing to their inability to understand the complex law and procedure the cases of many manufacturers go by default. The publication should act as a complete guide to lawyers, executives, manufacturers and excise officials. Special attention has been paid to the constitutional aspects of the Act and the Rules, and various decisions under the Constitution of India having a bearing on the excise law have been discussed; the case law has been brought up-to-date. A subject-index and table of cases are also provided.

3. Enacted in 1944, the provisions of the Central Excises and Salt Act have become inadequate. It was a concise Act leaving everything to the rules under it. Although from 1947 there is no duty on salt, its manufacture, supply and distribution, are being regulated under that Act. The Central Excise Reorganisation Committee recommended, therefore, that the law should be made comprehensive by including in it all substantive provisions which at present form part of the Central Excise Rules 1944 and that the proposed law should not contain any provision relating to salt. Chapter IV of the present Act and, Section 8 and the Second Schedule, which relate to the transport by sea and possession of tobacco need not, in Government's view, be retained. They would like to omit 'salt' and re-number all the other items in the First Schedule. A bill to consolidate and amend the law on these lines was introduced in the Lok Sabha by the Minister of State for Finance on 14th August 1969, and time must show how far the recommendations regarding the reform of this branch of the law achieve their purpose.

R.S.S.

A GUIDE TO DISCIPLINARY PROCEEDINGS FOR THE EXECUTIVE IN INDUSTRY. By E. F. Eduljee (N. M. Tripathi Private Ltd., 164, Samaldas Gandhi Marg, Bombay 2.) 1971. Pp. xv and 137. Price Rs. 15.

It is well known that the various Labour Acts, Rules, Orders and legislative enactments tend to confuse the decision making authorities of the personnel department, and the author of the work under review has therefore put together, in a methodical and chronological order, the complete procedure when disciplinary proceedings are called for against any person coming under the purview of the Industrial Disputes Act. When an employee is deemed to have committed a misconduct to merit punishment under the Standing Orders, the management is obliged to follow a definite procedure before actual punishment. The present work sets out the correct procedure in order that the management's order is not upset on a purely technical ground, should the matter be made the subject of an industrial dispute.

2. The majority of disputes concern wrongful dismissal, discharge, or punishment, and the Industrial Tribunal is empowered to examine whether the termination of service (or other punishment) is justified and, if not, to give appropriate relief. In the case of dismissal, the Tribunal interferes only when there is want of good faith; when there is victimisation or unfair labour practice; when there is a basic error or violation of the principles of natural justice, and when the finding is perverse. The different chapters in the work lay down the various steps and obligatory departmental procedures supported by the appropriate legislation and judicial decisions.

3. The cases of misconduct are enumerated by the Standing Orders; they include also cases of moral turpitude, cognisable offences under the Penal Code, acts subversive of discipline, threat of violence, fomentation of discontent, malicious charges against the management, participation in illegal strike, and adoption of

go-slow tactics. An initial step in the proceedings, the topics of suspension pending inquiry, wages during that period, and suspension as punishment are dealt with, followed by a discussion of the subject of written complaints, necessity of informing union, and issue of charge-sheet. The fixation of enquiry proceedings, selection of enquiry officer, procedure for holding enquiry and presentation of company's case are then described, while the next chapter relates to the form of recording the report, the disposal of findings and final decision, and communication of final order. Punishments, warnings and reprimands, termination of service, and proceedings to be followed during the pendency of an industrial dispute, are then covered. The concluding chapters dwell on police cases and criminal proceedings, medical staff, vacation of official quarters, deduction from wages, probationers, temporary employees, and apprentices.

4. The Appendices give draft notices in cases of misconduct and during the pendency of an industrial dispute, and cover such subjects as habitual absenteeism, habitual late attendance, overstaying leave and prolonged absence from work, and aide memoire for holding an enquiry. The annexures give suggested lay-outs of room in which enquiry is to be held, of written record of proceedings and of written finding by the Enquiry Officer, and they are followed by some important definitions.

5. These notes have been prepared keeping in view the principles enunciated by Labour Courts, Tribunals and the Supreme Court, and the author substantiates his observations with relevant court and case references. The author suggests that necessary interpreters should be provided at the time of enquiry and that translations in local languages understood by the workmen should be provided.

6. This handy volume should be of assistance to executives in industry, whether concerned with personnel matters or not.

R.S.S.

PROBATION AND PAROLE. By L. S. Saharyia. With a Foreword by Mr. Justice S. K. Verma, of the Allahabad High Court. M/s. Mukat Publications, 5/14 Koop Nagar, Delhi 7. 1970. Price, Rs. 12.50.

"Crime cannot be hindered by punishment, but only by letting no man grow up a criminal", said Ruskin. And probation and parole are two institutions which should help us towards that much-to-be desired consummation. Probation seeks to accomplish the rehabilitation of persons convicted of crime by returning them to society during a period of supervision rather than sending them to jails and reformatories, and calls for an adequate investigation into the facts of the defendant's environment, character, and previous record. Parole, on the other hand, is the release of a convicted offender under supervision and under certain restrictions, after he has served a portion of the sentence in a penal institution; it is not clemency, but a process of regulated reformation.

2. The State Governments have enacted legislation on probation of offenders, children's welfare, and prisoners' premature release. Lately the Government of India have enacted the Probation of Offenders Act 1958, which lays increasing emphasis on the reclamation and rehabilitation of the convict without subjecting him to the unhealthy effects of jail life. The book under review attempts to collect together all the probation and parole procedures obtaining at present along with other relevant information.

3. The book has been divided into four parts, each part bearing separate page numbers. Part I deals briefly with bail, for which the offender goes in immediately after arrest. The appeals, memorials and petitions for redress from a higher authority are then discussed. After the award of sentence for confinement in jail, there are rules for interviews with outsiders, so that the convict can keep in touch with his home and other affairs. Part II deals with the provisions which may enable a prisoner to secure release or leave under the different measures. The release on probation of good conduct under the supervision of a probation officer and the premature release of a prisoner on licence have been explained at length; it includes releases under the Probation of Offenders Act 1958.

4. Part III contains elaborate notes on juvenile delinquency, probation, parole, honorary aparadh nirodhaks, crime preventive societies and panchayats, on whom de-

volves the great reformatory and humanitarian work. It acquaints the reader with the various aspects of social welfare activities undertaken for the benefit of delinquents. There is also a chapter on open prison camps, a recent advance in the treatment of prisoners. Part IV, Appendix, gives the text of the relevant Acts and Rules with, whenever necessary, the latest amendments and notes. It includes the details which may prove useful to the members of the Bench and Bar either at the time of trial or after conviction.

The book brings together all the enactments and rules in one place and notices all the relevant authorities on the various topics. It should be of great use to the Bench, the Bar, Probation Officers and law teachers. There is a bibliography, but no index. R.S.S.

THE BOMBAY PUBLIC TRUSTS ACT 1950. By Kesarichand Nemchand Shah B. A., LL.B., Advocate. With a Foreword by Ratilal H. Patel, B. A., LL. B., Charity Commissioner, State of Gujarat, 4th Edition, 1970. N. M. Tripathi Private Ltd., 164, Samaldas Gandhi Marg, Bombay 2. Pp. xvi & 777. Price Rs. 38.

Containing nearly 200 pages more than in the 3rd Edition, the latest edition of the present volume has been thoroughly revised, enlarged and re-written, and includes a number of new topics and considerable body of case law, with decisions reported as well as un-reported. All Notifications, Circulars of Charity Commissioners, Policy of Charity organisations, and amendments to the Act and Rules in both Gujarat and Maharashtra till 31st January 1970 have been included.

2. The Bombay Public Trusts Act 1950 is based on the report of the Tendolkar Committee which had been appointed by the Bombay Government to investigate and make recommendations for safeguarding, co-ordinating, and properly utilising the public religious and charitable endowments in the State. According to the Act a 'Public Trust' is an express or constructive trust for either a public, religious or charitable purpose or both, and includes a temple, math, wakf, dharmada or any other religious or charitable endowment, and a society formed for that purpose and registered under the Societies Registration Act, 1860. The 88 sections contained in the 12 chapters of the Act are each followed by detailed synopses and commentaries.

3. Under the present Act no civil Court has jurisdiction to decide questions which come under the former's purview. Section 18 enjoins the trustee of a public trust to

make an application in the prescribed form, and, if a trustee fails to comply with the provision regarding registration of a public trust, he is debarred (S. 31) from instituting a suit to enforce any right on its behalf in a law Court. Section 35 lays down how public trust money has to be invested and the next section prohibits the alienation of immovable trust property except by way of leases for specified periods, without the previous sanction of the Charity Commissioner, who is authorised to enter on and inspect any property belonging to a public trust.

4. The Charity Commissioner is appointed by the author of the trust or by a Court of competent jurisdiction to act as trustee and in such cases the Act provides for the levy of administrative charges. Section 50 of this Act and S. 92 of the Civil P. C. contains provisions of almost the same character in respect of suits regarding public trusts. Two of the sections lay down the rule of 'cy pres' in relation to their administration and deal with the powers of the Courts relating to the application of this doctrine. The Public Trusts Administration Fund, whose establishment vests in the Charity Commissioner, lays down what funds shall be credited to it (S. 57), and every trust is obliged to pay to this Fund such a contribution as may be prescribed. There are penalties which are prescribed for trustees violating the provisions of the Act, and there is a separate chapter covering procedural matters regarding the jurisdiction of Courts and rights of appeal.

5. The schedules and appendix to the book include the Bombay Public Trusts Rules, 1951, the Administrators General Act, the Official Trustees Act, the Societies Registration Act, and the Wakf Act. There are also some blank pages for amendments to notifications and personal notes. There is an index but no table of cases. The book should be of assistance not only to the trustees who are to administer the trusts, but also to the Authorities under the Act, auditors, and the members of the Bench and Bar who are concerned with this branch of the law.

R.S.S.

COMMERCIAL LAW. By Robert Lowe, LL.B., Solicitor of the Supreme Court. 2nd Edition. 1967. Sweet & Maxwell Ltd., 11 New Fetter Lane, London. (In India: N. M. Tripathi Private Ltd., Princess Street, Bombay 2). Pp. xxxix & 571. Price Rs. 78.75.

This edition takes into account the changes which have occurred since the publication of the 1st edition in 1964. The chapter on hire purchase, which explains the major provisions of the Hire Purchase Act, 1965, has been largely re-written. Since that Act does not form a comprehensive code but only deals

with certain aspects, the present work deals first with hire-purchase agreements at common law, containing cross-references to the relevant sections of the Act. The regulations for control of hire purchase have lately been revised and the Order now in force is the Hire Purchase and Credit Sales (Control) Order, 1969.

2. The doctrine of fundamental breach has received a rude shaking as a result of the *Suisse Atlantique* case, and the possible effects of this decision are considered in the chapters on sale of goods (Ch. 3), hire-purchase (Ch. 4), bailments (Ch. 8) and export sales (Ch. 9). The Misrepresentation Act, 1967 affects the Sale of Goods Act in two ways; the passing of property no longer destroys the buyer's right to reject, and a buyer who does some act inconsistent with the seller's ownership will not be deemed to have accepted the goods under S. 35, unless he has had a reasonable opportunity of examination as provided in S. 34. The sections on the 'passing of property,' 'terms of the contract,' and 'delivery, acceptance and payment,' have therefore to be read in the light of the above. The chapter also contains the proposals made in the Twelfth Report of the Law Reform Committee dealing with the transfer of title to chattels.

3. The Redundancy Payments Act, 1965 is examined briefly in Chapter 2, the Diplomatic Privileges Act, 1964, in Chapter 10, and a number of new cases have been included in every chapter of the work. The present book first considers the powers of an agent to alter his Principal's legal relations with third parties and what the principal's rights and liabilities are vis-a-vis the third party. It discusses the agent's liabilities and the exceptions to the rule that an agent can neither sue nor be sued on a contract concluded between his Principal and a third party. It refers to the more important statutory provisions from which the terms of a contract between master and servant are derived, as, for example, wages, holidays, safety, health and welfare, and examines the ways in which a contract of service is brought to an end. A whole chapter is concerned with the functions of bills of exchange, cheques, and promissory notes, and the rules relating to them.

4. The volume before us does not include any reference to the Misrepresentation Act, 1967 for the reason that the Misrepresentation Bill had not yet reached the statute book at the time of publication. According to the changes made by that Act, the right to rescind for innocent misrepresentation will be available even though the contract has been performed and the representation becomes term of the contract; the court will have a discre-

tionary power to award damages in lieu of rescission for innocent misrepresentation; and, if a party has been induced by a non-fraudulent misrepresentation to enter into a contract, he will be entitled to damages unless the maker of the statement can show that he had reasonable grounds to believe, and did believe, that the contract was made, that the facts represented were true.

5. The book contains a table of cases, a table of statutes, and index. R. S. S.

A DICTIONARY OF COMPANY LAW. 1968. By Dr. A. K. Sur, Director, Institute of Company Affairs, 11, Kalicharan Ghosh Road, Calcutta, 50, Pp. 220 & xvi. Price, Rs. 10.

The Indian Companies Act, 1956, which follows the recommendations of the Company Law Reform Committee, not only adopts several of the changes introduced into the English Company Act, 1948 but also departs from it in many ways. Ninety-five Sections of the Indian Act are calculated to ensure more effective powers of control and supervision by the Central Government over the activities of Companies.

2. An incorporated company, registered under the Act, is a distinct and independent person in law, and is endowed with special rights and privileges which are distinct from the rights and privileges of its members. It has perpetual succession and remains in existence "however often its members die" or change, until it is dissolved by liquidation. It has the right to sue or be sued or to hold property in its own name; its shares are transferable and the liability of its share-holders is limited; it can enter into a contract with its share-holders and is managed by its chosen representatives, the directors. In many matters the Government of India is empowered to intervene, and in some its approval is necessary. The Government's powers are exercised through the Department of Company Law Affairs, which functions through a Company Law Board. The Board consists of not more than five members one of them being appointed by the Government as its Chairman.

3. Conceived in an original way, the scope of the work under review is encyclopaedic, and it is designed in such a manner that the reader can easily and promptly obtain the answers to any of his inquiries. The topics in the Dictionary are arranged alphabetically and case law has been made available for all disputed points of law. Further light on disputed points is thrown by citations from the works

of Backley, Palmer, Gore-Brown, Topham, and Halsbury. When looking for a point, enquirers should refer to the cross-references also if it is not found in the original article. In the appendices are listed the documents that should be maintained in the registered office of a company, the documents that should be produced or filed with the Registrar, the documents that should be filed with a stock exchange by a listed company, and a Table of Forms to be used.

4. The amendments to the Companies Act, 1956 abolishing the managing agency system and prohibiting company contributions to the funds of political parties were passed in 1969, i. e., subsequent to the publication of this book. All the same the Dictionary should be of considerable assistance as a ready reference book not only to the personnel in the Secretarial departments of companies and those who are quite familiar with the detailed provisions of the Act, but also to the many others to whom that Act is a sealed book. R.S.S.

HOW ARE LOSSES TREATED UNDER INCOME TAX ACT 1961. By Champatrai and Devi Dayal Gupta, Advocates, Supreme Court. 1968. Taxmann, Kucha Chelan, Khari Baoli, Delhi 6. pp. 152. Price, Rs. 13.50.

Although there are many commentaries on the subject of losses under the Income Tax Act, the present treatise deals exclusively with all aspects of this important subject. It traces the history of the legal provisions, discusses case law on the subject, and presents practical illustrations and examples taken from the decided cases.

2. Losses may be due to fluctuations in rates, prices, arrivals of bumper crops, strikes in factories, the banning of exports, the removal of import restrictions, lack of supervision, bad debts, embezzlements and defalcations by employees, theft, dacoity or sinking of vessel. In computing business income, deduction is allowed of such losses, for unless it is done, genuine gains or profits cannot be arrived at. But in claiming such a deduction, the loss must be incidental to that particular business and should be of a revenue nature. There should not also be any law denying the same expressly or impliedly. Sections 70-80, Chapter VI of the Income-tax Act, 1961, are mainly devoted to this part of the law and its procedure.

3. The book under the review describes the various heads of income and the circumstances in which there can be a 'net loss' under these different heads. Section 14 of Ch. 14 classi-

fies these heads of revenue as salaries (S. 16), interest on securities (S. 19), income from house property (S. 24), profits and gains of business or profession (Ss. 28-44A), capital gains (Ss. 45-55), and income from other sources (S. 57). Having seen the place of losses under the different heads of income, the author proceeds to study the circumstances and manner in which the losses can be set off against other incomes.

4. Although the profits of each separate source of income or business have to be computed separately, the tax is not charged separately on every distinct business, but on the aggregate of the profits of all the businesses carried on by the assessee. The relevant law relating to set off of losses is contained in Ss. 70 and 71 of the Income-tax Act, 1961, and S. 72 relates to the carry forward and set off of these business losses. The author considers the subject of losses in speculative business (S. 73), the losses under 'capital gains' (S. 74), the losses of registered firms (S. 75), the losses of unregistered firms assessed as registered firms and their partners (Ss. 76-78), the losses of companies (S. 79), and the submission of loss returns (S. 80). Losses due to theft and embezzlement, highway robbery, proper year for claiming loss, unabsorbed depreciation of past years, loss of cash by theft, and claim for development rebate, are then covered. Loss of capital cannot be set off against the profits or gains, but only trading or business loss. Whether the loss is of a capital or a business nature is a question to be decided on the facts of each case.

5. The publication before us, which contains a table of cases and an index, should be of assistance to the business community, accountants, and practising lawyers.

R.S.S.

THE COMMON LAW IN INDIA. By M. C. Setalvad. 2nd Edition, 1970. N. M. Tripathi Pvt. Ltd., 164, Samaldas Gandhi Marg, Bombay. 2. Pp. viii & 251. Price, Rs. 11.

The volume under review embodies the lectures delivered in 1960 by Mr. M. C. Setalvad, ex-Attorney-General of India, under the auspices of the Hamlyn Trust, London (12th in the series), which aims at the furtherance of the knowledge of comparative jurisprudence among the common people of Great Britain and Northern Ireland. The author traces the development of Indian jurisprudence in the last two centuries and points out its similarity to the 'mother' jurisprudence of England. Common Law in India being taken

to mean all that is of English origin in the Indian system of law, he covers not only what is known strictly in England as the common law but also its traditions, some of the principles underlying the English statute law, the equitable principles developed in that country, and even the attitudes and methods pervading the entire British system.

2. In the opening chapter on the rise of the common law, the historical introduction is followed by a discussion of the selective application of English law, equity and common law, Indian common law and some fundamental principles and traditions of the common law like the jury system, Habeas Corpus, independence of the judiciary, the adversary system of trial, the system of precedents, and the rule of law. Dealing with civil law, the author touches, *inter alia*, on the subjects of law of succession, contracts, specific relief, sale of goods and partnership, negotiable instruments, real property law, and torts. The base and foundation of civil law in India is the English common and statute law, but perfectly adapted to Indian needs and conditions. The ground work and features of the Indian Penal Code are then examined, as well as the concepts of *mens rea*, exemptions from criminal liability, self-defence, provocation, degrees of criminality, punishment, and criminal procedure. Explaining finally, the position since the coming into existence of the Indian Constitution, the author focuses the reader's attention on, *inter alia* judicial control over legislation, delegation by Parliament, subordinate legislation, administrative tribunals, fundamental rights, and the directive principles of State policy. The makers of the Indian Constitution have left the entire legal system untouched because it is suited to the needs of the people and has been a powerful integrating factor.

3. To sum up, the principles of the English common and statute law, after slowly taking root for 200 years, are now firmly embedded, with suitable changes, in the structure of the great Indian Codes. The present Constitution embraces not only the statutes in force at its commencement but also personal and customary laws and the common law principles applied in India by Indian judicial decisions, and the evolution of Indian law continues to be largely influenced by the development of English law and the decisions of English Courts. It is the author's hope that, with a greater interplay between legal minds in India and the Commonwealth and elsewhere, the time may not be far off when English courts themselves recognise Indian contributions to legal thought and principles.

4. The present publication is a reprint of the English edition, printed in 1960. The

mistakes in that edition have been corrected and a Table of cases, Index, and Bibliography, have been added for the reader's convenience.

R.S.S.

LAW OF PARTNERSHIP IN INDIA AND PAKISTAN. By Sunderlal Trikamal Desai, B.A., LL.B., Bar-at-Law. 4th Edition. 1970. S. C. Sarkar and Sons Private Ltd., 1-C College Square, Calcutta 12. Pp. lxii & 465. Price, Rs. 30.

Originally the law relating to partnership was regarded as a part of the ordinary law of contract (Indian Contract Act 1872), and it was only in 1932 that the Indian Partnership Act was passed incorporating the relevant sections of the 1872 Contract Act with modifications and amplifications. Based mainly on the English Partnership Act and incorporating many of its provisions, it did not depart substantially from the law previously prevailing in the country but only laid it down in an exhaustive manner in clear and definite propositions carefully and systematically arranged. An important and new element in the law, however, was introduced, viz., the provisions for the registration of Firms. An application for registration to the Registrar of Firms, in the form of a statement signed by all the partners, should state the Firm's name, the principal places of business, the names of other places where the Firm carried on business, the names and permanent addresses of the partners, and the duration of the Firm. Although the law relating particularly to partnership is embodied in this Act, many of the general principles of the Indian Contract Act continue to be applicable to partnership transactions and Firms.

2. The first part of the work under review, which deals with the Indian Partnership Act 1932, gives an exhaustive and dependable commentary on its provisions, particular care being taken to examine and incorporate all important cases, Indian and English. The second part deals with Practice and Procedure, particularly with the various questions which arise in suits between partners, the mode and manner in which the rights and obligations arising on the death of a partner may be enforced, and suits by and against partners. The law of insolvency affecting partners and partnership firms and the subject of illegal partnerships have also been discussed. Not simply a digest of cases, the book adequately summarises the principles involved in the leading cases.

3. Of the 74 sections in the Partnership Act, Ss. 9-13 consider the general duties of

partners, determination of their rights and duties by contract, and the conduct of the business, and Sections 19-37 are concerned, inter alia, with the implied authority of the partner as agent of the Firm and his liability for the acts of the Firm; the Firm's liability for the partner's acts; the introduction, retirement, expulsion and insolvency of the partner, and the rights of the outgoing partner. Sections 45-55 relate to the liability for acts of partners done after dissolution; mode of settlement of accounts between partners; payment of firm debts and of separate debts; and sale of goodwill, while Ss. 58-70 refer to the application for registration, recording of changes in the Firm, rectification of mistakes, amendment and inspection of register, and penalty for furnishing false particulars.

4. The book includes the English Partnership Act, 1890 in the appendix and contains an index and table of cases. In the present edition some of the chapters have been rewritten and the case law has been brought up-to-date. The businessman and the lawyer should both find the necessary information for their guidance and solution in this one volume.

R.S.S.

SARKAR'S SPECIFIC RELIEF ACT. By Sudipto Sarkar, B.A. (Cantab) and Ajoy Nath Ray, B.A. (Oxon). 11th Edition, 1970. S. C. Sarkar & Sons (Private) Ltd., 1/C College Square, Calcutta, 12. Pp. xxxii and 423. Price, Rs. 18.

Specific relief is a form of judicial redress where the suitor gets his relief by way of the very thing which the other party is bound to perform or to forbear from performing; the other type of remedy is the compensatory remedy by way of damages. The Specific Relief Act, 1963 is reproduced in the present publication with notes, illustrations, and examples. It omits certain sections of the old Act of 1877, amends some and inserts a few new provisions. The changes have been indicated by the use of italics, while there is also a comparative table showing, sectionwise, the provisions of the 1877 Act and the corresponding provisions in the new Act.

2. The different kinds of a specific relief dealt with by the Act are the recovery of movable and immovable property (Ss. 5-7), specific performance of contracts (Ss. 8-12), rescission of contracts (Ss. 27-28), cancellation of instruments (Ss. 31-33), and declaratory decrees (Ss. 34-35). Section 73 of the Contract Act provides for the remedy of damages for breach of contract, but specific performance, which the present Act ensures,

is an additional remedy which can be had at the suitor's option. It, however, lays down that the dismissal of a suit for specific performance will bar a subsequent suit for damages, unless the suitor had already asked for this alternative form of relief; any other relief to which he may be entitled will always be available to him. Contracts which cannot be specifically enforced, persons for or against whom contracts may be specifically enforced, discretion and powers of the court and the enforcement of awards and directions to execute settlement, are the topics covered by Ss. 14-25.

3. The Specific Relief Act deals also with preventive relief by way of injunctions (Ss. 36-42) which are designed to prevent the invasion of or injury to one's rights by another. It would appear from decided cases that even independently of this Act the Court has jurisdiction to grant certain kinds of relief. Other kinds of specific remedy include the one available to a mortgagor or mortgagee under the Transfer of Property Act, and the remedy provided by the Partnership Act, like dissolution and accounts between partners, and there are provisions in the Civil Procedure Code for administration by a creditor and for the execution of trusts. In matters on which the Act is silent or does not lay down a contrary rule, the principles of English law are generally followed.

4. The authors make a few passing observations on the concept of 'possession' in law, of which uniform connotation seems to be impossible. As the cases show, the concept has developed through similarities and family resemblances like the concept of game (e.g., football and bridge are both games though quite different in character) and should be tackled accordingly. The law is stated as in May 1970 and the 11th edition of the book has been brought up-to-date, but no thorough revision has been attempted.

5. The book has a Table of cases and Index.

R.S.S.

NEW YORK APTO THERAPISTS' REPORT. May 1970. International Journal of Offender Therapy, 199, Gloucester Place, London N. W. 1, England. Pp. 40, Price. \$3.50.

Among the developments of recent times in the field of criminal justice and correction, special mention should be made of the realistic and sympathetic approach of the APTO Therapists. The Association for the Psychiatric Treatment of Offenders, New York (APTO for short) has for its goal the establishment of the

psychotherapy of offenders as a speciality, by encouraging treatment, research, and co-operation with allied disciplines. Psychiatrists have to know about the law and lawyers have to know the fundamentals of psychiatry and psychotherapy. But, in India, the study of psychiatry has yet to begin on an adequate and systematic basis, as deplored by the 23rd Conference of the Indian Society of Psychiatry recently held in Madurai. The Monograph before us is a symposium of papers on the approach and technique of offender therapy by a group of prominent APTO members.

2. The first paper on the principles of reality therapy explains that the task of therapy is to improve the offender's reality sense and develop feelings of affection and guilt, so that he must become aware that social adjustment is in his own long term interest. The aim is to get the offender back into society; if he associates with social-minded persons, he tries to be like them. In working with offenders, says the second paper, we should focus primarily on helping them to achieve peace of mind and to adjust to society, and, for this purpose, society must change its attitude to the under privileged and should be more concerned than now with the equitable distribution of the good things of life if large scale delinquency is to be prevented. To convert the pattern of non-involvement to one of adjustment, the offender must be able to talk freely about what worries him. The present paper describes how far non-communicative and unwilling offenders were taught to express themselves to adjust better, and how they developed more interests. Although adjustment to one's family is a principal aim of modern treatment ideology, many are still being sent to far-away residential institutions, sometimes near mental hospitals. Mere good will and allotment of money is not enough, for poor planning leads to harmful consequences, as is highlighted by the article on mental health.

3. In the article on helping pre-offenders, effective mental health teams are invaluable, says the writer, and the help given to young children from a poor background is one useful preventive service. Even very difficult children often react positively to the interest shown by the guiding counsellor. The writer of another paper points out how any crisis or indeed any life situation can be used therapeutically, socially and educationally. The crisis may make him more responsive and more ready to discuss his problems.

4. Finally, there is a review of the book, "Emergency Psychiatric Treatment; A Handbook of Secondary Prevention," by Leon Hankoff, who urges that the prevention of

violence is a mental health problem akin to suicide prevention, to which similar techniques and principles should be applied. The present monograph contains also summaries of these papers in English, French, German and Spanish.

5. The annual subscription to the International Journal of Offender Therapy, the publishers of this monograph, is £2.

R. S. S.

THE ADMINISTRATIVE REFORMS COMMISSION AND ITS WORK. A Brief Survey. 1970. The Manager of Publications, Delhi. Pp. 68. Price, Rs. 1.45 Paise.

During the fifteen years after Independence, several studies were made of administrative problems but they were not co-ordinated or comprehensive. When administrative efficiency deteriorated complaints regarding the inadequacy of the administrative machinery became persistent. The Administrative Reforms Commission (ARC for short), with Sri Morarji Desai as Chairman, was therefore appointed in January 1966 and it was required to consider and report on the problems of the machinery of the Government of India and its procedures of work; the machinery of planning at all levels; Centre-State relationships; financial administration; personnel administration; economic administration; administration at the State level; district administration; and problems of redress of citizen's grievances. Though originally the Commission consisted of Sri Morarji Desai, Sri K. Hanumanthaiya, Sri H. C. Mathur, Sri G. S. Pathak, Sri H. V. Kamath and Sri V. Shankar, owing to transfer, retirement or death, it finally consisted of Sri K. Hanumanthaiya, Sri H. V. Kamath, Sri D. Mookerjee, Sri T. N. Singh, and Sri V. Shankar.

2. Commissions of Inquiry generally base their findings on replies to questionnaires, material supplied by Government departments, and examination of witnesses. The ARC decided also to set up a number of study teams and working groups for various sectors of administration. Twenty Study Teams were appointed, including one on Administrative Tribunals, and thirteen Working Groups, including those on Police Administration, Central Direct Taxes Administration, and Company Law Administration. The first Group considered the detailed working of the Police Department and of the department's reports on student unrest, and juvenile delinquency and crime prevention. The enquiries of the second Group mentioned related mainly to the Income Tax Department, while the third

of the Groups examined the administration of the Companies Act, the Department of Company Affairs, and their adequacy in enforcing the provisions for dispersal of ownership and avoidance of concentration of economic power. It obtained also a wide variety of views on Agricultural Personnel, and District Administration through two seminars and a conference.

3. After making extensive enquiries and gathering direct evidence, the ARC forwarded its reports to the Government of India in June 1970, and they contain 537 recommendations on a wide variety of areas and organisations of Government. The brochure under notice provides general information on the work done by the A R C. The appendices in it contain the Government resolution appointing the Commission and the schedule of the 40 heads under which the terms of reference of the Commission were grouped, the biodata of members, list of witnesses examined, the staff position, and the table of expenses incurred by the Commission.

R.S.S.

ADVOCATE'S HANDBOOK, 1970.

Compiled by B. R. Ranade, B. A. (Hons.) LL.B., Advocate. The Poona Lawyers' Consumers Co-operative Society Ltd., Dist. Court Buildings, Shivajinagar, Poona. 5. pp. xxxvi & 141. Price, Rs. 5.

Full particulars about court-fees, stamp fees, registration charges, advocates' fees, and a host of other topics are presented for the ready reference of the busy lawyer in the *Handbook* under notice. It opens with the rules of the Bar Council on the standards of professional conduct and etiquette, under the heads of duty to the court, duty to the client, duty to opponent, duty to colleagues, and restrictions on employment, followed by the Poona Bar Association Schedule prescribing minimum fees. Ad valorem court-fees, fees payable in certain suits, registration fees, copying and comparing charges in the Registration office, and the fees for the grant of copies and for custody of documents are then presented. The next few pages deal with the charges for search, refund of court-fees, documents exempted from court-fees, stamp duty, rules for computing advocates' fees, and valuation of certain suits. Then are listed the fees in industrial court or tribunal and labour court, under the Payment of Wages Act, the Workmen's Compensation Act, the Employees' State Insurance Act, the Minimum Wages Act, the Bombay Industrial Relations Act, the Industrial Disputes Act, the Bombay Public Trusts Act, the Bombay Tenancy and Agricultural Lands Act, the Maharashtra

Agricultural Lands (Ceilings on Holdings) Act, the Bombay Sales Tax Act, the Bombay Rent Act, the Income-tax Act, the Co-operative Societies Act and the Marriage Registration Act. Several statutory notices and some sections of the Bombay Rent Act and the Transfer of Property Act have been reproduced. Lastly the periods of limitation have been indicated for suits relating to accounts, suits relating to contracts, suits relating to declaration, suits relating to decrees and instruments, suits relating to immovable property and movable property, suits relating to trust property and torts, and suits relating to other miscellaneous matters.

2. Besides the foregoing, the *Handbook* includes several items generally found in diaries, like calendar, postal information, table of Wages and Table of Interest Rates, Conversion tables, and an inset showing the process fees chargeable in Civil and Criminal Courts.

3. For the very busy lawyer who is engrossed in the multifarious activities of his profession from day to day this '*Multum in Parvo*' should act as an useful time-saving device.

R.S.S.

MY LIFE: Law and Other Things:
By Motilal C. Setalvad. Published by
N. M. Tripathi, Private Ltd., Princess
Street, Bombay 2. Pages 636. Price
Rs. 30.00.

"My Life—Law and Other Things" by Mr. M. C. Setalvad is not exactly an autobiography by the great lawyer, but jottings of his views and observations of personalities he came into contact with during his professional and public activities. In his illustrious career, the author came into contact with great jurists, Judges, politicians and public men. As an Advocate General of Bombay and as an Attorney General of the Government of India, he had occasions to appear in many important constitutional cases. He had also occasions to lead Indian Delegation in International gatherings and Law Conferences. He was also invited to deliver law lectures not only in India but also outside India. Since the Independence, our Constitution had come before the highest Court of Judicature in India, for interpretation on many constitutional problems. There is hardly a case in which the author had not appeared. His keen observations of the personalities of the Judges and his objective appraisal about them, as jotted down by him in this book are sometimes unsparing in denunciation. But out-spokenness is absolutely

objective in character and without any tinge of malice or conceit or boastfulness.

His active life began at the age of 66 when people think of retiring. At this age he was appointed Attorney General of India. Earlier he had served the country as delegate to U. N. General Assembly and Security Council. He stayed in the office of Attorney General for twelve years. It was even thought to combine the office of Attorney General and Law Minister in Mr. Setalvad. Mr. Setalvad's capacity for a succinct summing up of complex issues is so often witnessed in his conduct of many celebrated cases including the Chagla Commission of Enquiry into the Mundhra affairs (Chapter Nine). In this Chapter, Mr. Setalvad has some adverse comments against Mr. Chagla whom he described in another context along with Rajamannar of Madras, as the last of the great line of our recent Chief Justices (p. 242). But the strictures against Chagla are nothing compared with those against some of the Chief Justices of India. Even Mr. S. R. Das is not spared for his hand in the matter of some judicial appointments (p. 343).

Mr. Setalvad has all respect for both Mr. Gajendragadkar and Mr. Subba Rao as Judges. But even they have not escaped his keen scrutiny. Mr. Gajendragadkar is blamed for trying to hush up the case of a High Court Chief Justice who had made an incorrect claim about his age. Mr. Setalvad is also critical of Mr. Subba Rao's accepting nomination for election to Presidentship of India. He calls this an act of grave judicial impropriety (p. 594).

About Mr. Mehr Chand Mahajan, Mr. Setalvad says that he was rough and brusque and very assertive at times making things difficult not only for counsel appearing before him but for his colleagues on the Bench (p. 152). About Mahajan's treatment of counsel appearing before him Mr. Setalvad says, that it was often peremptory and at times discourteous, and created great dissatisfaction among the members of the Bar. Even Bakshi Tek Chand in whose chamber Chief Justice Mahajan had read in old days at Lahore was not spared. Mahajan's manner sometimes almost amounted to insulting the members of the Bar appearing before him. Mr. Setalvad recalls one incident. "I remember his asking a senior Punjab lawyer, who was urging an argument after the Chief Justice had repeatedly rejected it, 'How many years have you been at the Bar?' The lawyer replied with natural pride that he had been at the bar for over thirty years. Quick came the Chief Justice's sharp retort: 'you have wasted them all'" (pp. 204, 205). Lawyers were not the only persons against whom his rough ways were directed. Even his brother Judges were many

times, made targets of his brusqueness. This behaviour of Mr. Mahajan made him extremely unpopular, so much so that the members of the Bar were opposed to a portrait of the Chief Justice being presented on behalf of the Bar to the Court. But Setalvad is all praise of Mr. Mahajan as a person. Outside the Court he was most affable and pleasant and his hospitality knew no bounds. He had intense feeling and interest in his large family, which consisted of sixteen sons and daughters all living together happily under the beneficent regime of himself and his wife. He ruled his family like a paterfamilias. Mr. Setalvad, has shown a great respect to Chief Justice Mahajan's pronouncements in some notable cases involving constitutional points. But the last public act of Mr. Mahajan as one man—Commission over Maharashtra-Mysore Boundary Dispute was according to Mr. Setalvad, a failure. Neither Maharashtra nor Mysore was pleased. Mr. Setalvad says of this, that Mahajan totally disregarding all settled notions had made allocations of territories which do not seem to have satisfied either party (p. 206).

Of all the Chief Justices Mr. B. P. Sinha comes off the worst. Mr. Setalvad has remarked about him that his knowledge of the Constitution and constitutional law was meagre and that he had earned reputation while in Nagpur of being a "Shirker" because he avoided delivering judgments (p. 428). Mr. Setalvad is also very critical of Mr. Sinha's acceptance of directorship in certain private firms after retirement and his attempt to influence promotions in Bihar subordinate judiciary (p. 500).

In the controversy on the question whether the President can disregard the advice of the Prime Minister, Mr. Setalvad has definite views. According to him the advice tendered is binding on the President. The question of their respective powers had arisen at the time of giving assent to the Hindu Code Bill (pp. 170-172).

Even Mr. Nehru and Mr. Krishna Menon are not spared from denunciation for their conduct in interfering with judicial process in the Nanavati's case (435-441).

The book contains some stringent criticism of the Indian judiciary at the highest level, by a person who had a first hand knowledge of things and matters. It is a reflection on the modern trends. We think that such judicial improprieties are the result of too much executive interference in the administration of law.

In between pages the reader comes across refreshing passages of personal and family reminiscences.

The book is divided into chapters, according

to periods. It is written in a lucid language. Our politicians and Judges would greatly profit by going through the pages of this "post mortem dissection" of public men and their activities. Our judiciary and the public at large may be shocked by some revelations made by Mr. Setalvad. But such occasional shock treatment, would do immense good to the morale of the judiciary. After all it is the independence of the Judges, specially of the highest Court of Judicature that is the bulwark of any Constitution.

R.G.D.

LAW OF BIAS AND MALA FIDES (JUDICIAL AND ADMINISTRATIVE). By Anand Swarup Misra, Advocate, and Retd. Dy. Secretary, U. P. Government. With a Foreword by Justice Jagdish Sahai, Allahabad High Court. 1970. Eastern Book Company, 34 Lalbagh, Lucknow. Pp. xxix and 274, Price, Rs. 17.50.

That the creation of a large number of tribunals and authorities performing judicial or quasi-judicial functions by the side of the ordinary courts of law and the larger functions nowadays being performed by the executive authority of the State make it imperative for their adjudications to be completely free from bias and mala fides is the theme of the comprehensive study under review. It deals with the subject in an analytical manner with the aid of Indian, English and foreign rulings.

2. Since the commencement of the Constitution of India, the rule of law and the rules of natural justice have been increasingly applied by the Courts to quasi-judicial as well as administrative decisions. Administrative officers have at times to pass quasi-judicial orders or administrative orders which affect the citizen's fundamental or ordinary civil rights as well as pass disciplinary orders. In the judicial sphere, of course, enactments make specific provision for eliminating bias on the part of the presiding officers.

3. The law of bias and mala fides issues from the principle of natural justice that no man shall be a judge in his own cause. According to these principles, which are analogous to the American "due process of law", every person must have reasonable notice of the case he has to meet; he must be given reasonable opportunity of being heard in defence; the trying authority must act impartially, objectively and without bias, and the trial must be held in good faith, not arbitrarily or unreasonably. By way of 'judicial review', the law courts examine the decisions of Government and its administrative organs,

including public bodies and other autonomous institutions, as well as legislative enactments and the rules made by Government or any other authority empowered by statute to frame rules. As in America, so in India the citizen trusts the Courts more than the administration and relies upon the courts for a fair treatment of the individual. On the other hand, the rule of law, adjusted to the 'felt necessities of the times' binds the executive as well as the judiciary.

4. In the present study the author discusses the questions of pecuniary and non-pecuniary interests raising assumptions of bias, the inference of judicial bias, judicial neutrality and civil service anonymity, influencing judges and contempt of court, and judicial intemperance and impropriety. Bias in disciplinary proceedings before domestic tribunals, pro-managerial bias in industrial adjudication, and safeguards against judicial bias, administrative bias, and political bias, are also covered. Among the remedies against biased or malicious orders are mentioned constitutional remedies like the writs, remedies under Specific Relief Act, suit for damages, penal remedies, proceedings for contempt of court, transfer of case, and void and voidable decisions. Three of the chapters consider a standard case on bias and administrative justice (*Kraipak v. Union of India*) and administrative partiality and abuse of power (unreported cases), and the elimination of bias under the rule of law.

5. Words and phrases like administrative decision, *audi alteram partem*, *Coram Non Judice*, Quasi-judicial authority and decision, subordinate legislation, and *ultra vires*, are explained in an appendix, and there is a discussion of the ethical sources of the law of bias and *mala fides* in another appendix. The bibliography, table of cases, and subject index, complete the usefulness of the volume.

6. With the large number of leading authorities cited on the subject, the book should be useful to lawyers, members of judicial tribunals, and others interested in this branch of the law.

R. S. S.

DISCIPLINARY ACTION AGAINST GOVERNMENT SERVANTS AND ITS REMEDIES. By Kripa Dayal Srivastava, MA., LL.B. and Naresh Kumar Srivastava, Advocates. 3rd Edition. 1970. Eastern Book Company, 34 Lalbagh, Lucknow. Pp. Lix & 857, Price, Rs. 35.

The substantial volume of commentaries under review investigates, in particular, the subject of employment in Government service

in relation to punishment. The authors devote separate chapters to recruitment, conditions of service and rules of enquiry, reasonable opportunity, penalties, and remedies, as well as to the topics of the Constitution and Government employment, and the Public Service Commission, each of the chapters being preceded by an exhaustive synopsis. First they deal with the master and servant relationship, wrongful termination of service, and tortious acts of civil servants, covering the rules for recruitment, the appointing authority, period of probation and confirmation, services under contract and their termination, Local authority and Corporation employees, and employees of statutory companies and corporations. They then consider breach of rules, transfer, resignation and retirement, promotion, seniority and Government Servants and fundamental rights.

2. This is followed by an examination of preliminary enquiry and its scope, charge-sheet, explanation, necessity for a departmental enquiry, bias, natural justice, mode of enquiry and burden of proof. The nature of penalties, punishments and their imposition, dismissal, removal and reduction in rank, are discussed, as well as appeal in disciplinary proceedings, suits in pursuit of remedies, and damages.

3. Generally speaking Government servants have to be obedient, faithful, careful, honest, punctual, well-behaved and reasonably competent, and the present work enumerates the matters that come under 'discipline,' every breach of which may amount to misconduct. Are there no remedies or safeguards, it may be asked, available to Government servants? Art. 310 of the Constitution invests the State with absolute control over the tenure of every State servant, subject to Art. 311. Article 311 holds that no one shall be dismissed or removed by an authority subordinate to that by which he was appointed, and no one shall be dismissed, removed or reduced in rank unless he has been given a reasonable opportunity (the observance of the principles of natural justice) of showing cause against the action proposed to be taken. The Supreme Court regards these orders as punishment, so that if the termination of service or reduction in rank is brought about otherwise than by way of punishment, the protection of Art. 311 will not be available. But this would appear to be a distinction without a difference. It is possible that the administrative authorities do not regard a particular impugned order as punitive, but so long as the ultimate effect of the order is of a penal nature, that would seem to attract the protection of Art. 311; else the protection would seem to be illusory. It was the opinion of Justice Bose that the Article

cannot be evaded by saying in a set of rules that a particular action is not intended as a penalty. Why, he asked, should we give greater sanctity and more binding force to rules and regulations than to our own Constitution? A more categorical assertion of the control of the judiciary over administrative and quasi-judicial decisions is perhaps indicated. In this connection the authors suggest that all orders affecting the pecuniary interest of Government employees should be subject to scrutiny by an independent judicial machinery, by way of appeal or revision. As it is, the protection of Art. 311 is procedural rather than substantive and it has been whittled down to a mere formality.

4. The arrangement of the latest edition of the present book remains the same as before, and there have been additions of case law and headnotes. It contains a table of cases, index, and several appendices which reproduce the Rules of All India Services, Central Services, Indian Foreign Service, and other Services.

R. S. 3.

LAW AND PRACTICE OF SALES TAX IN RAJASTHAN. By V. K. Singhal, B.A., LL.B., A.C.A., S.L. Kakkar, I.A.S. (Retd.), & G. G. Mundra, B. Com., A. C. A. 1970. Metro Trading Corporation, Film Colony, S. M. S. Highway, Jaipur 3. Pp. iv; 212; viii & 354; 172 & v. Price, Rs. 30.

Sales Tax is a permanent source of substantial revenue to the States and has therefore been generally adopted to meet the increasing expenditure on social services and development needs. It was first introduced in Tamil Nadu in 1939 to make up for the loss of revenue from Prohibition, and all the other States which followed suit now look up to the Tax as the single largest source of revenue. The present volume is an analytical summary and detailed commentary on the Rajasthan Sales Tax Act 1954, with the amendments and legal interpretations as in force on 15th September, 1970.

2. Although under the Rajasthan Sales Tax Act, 1954 it was a single point tax payable by each successive dealer in the series of sales, provision has now been made for a multiple point of taxation, and the Commercial Tax Officer, who is the Tribunal which makes the assessment, has to act judicially. As an administrative Tribunal his decision should be governed not only by the relevant laws and rules of procedure but also by the principles of natural justice, a doubly important thing because the tribunal may not have the training and experience of a judicial Court.

3. Sections 3.7 of the Act, which contains 29 Sections, deal with the liability of a dealer registered under the Central Sales Tax Act 1956, the rate of tax, burden of proof, registration of dealer, and submission of return. The topics of assessment, payment and recovery of tax, determination of disputed questions, appeals, revisions offences and penalties, and rectification of mistakes and indemnity, are covered in Ss. 10.18, and three other Sections are concerned with the power of inspection of records and seizure of books of account, refunds, and Court-fees on appeals applications, and other proceedings under the Act. The Rajasthan Sales Tax Rules, which form the latter part of the book, specify the assessing and appellate authorities and their jurisdiction, the point at which the tax is payable, registration certificate, return of turnover, mode of assessment and notice of demand, and appeal and revision procedure. Rules 12-16 explain the powers of officers, procedure and penalties, practitioners and persons authorised to appear before Sales Tax authorities, the administration of check posts and barriers, and court-fees.

4. The volume has a table of cases and index, and includes the 45 forms prescribed under the Rules, as well as the rate of tax, list of goods and persons exempted, and the proviso sections.

5. That all changes under fiscal statutes should be defined through clear and unambiguous language is a well settled rule of law; else, it would be difficult for a lawyer or a trader to keep abreast of amendments. In fact there have been so far twenty-six notifications amending the Rajasthan Act, and it is well, therefore, that all cases of importance of the Rajasthan High Court and the Rajasthan Board of Revenue have been given, in addition to the decisions of the Supreme Court and other High Courts. The book should be of value to the legal profession, the members of the mercantile community, and the officers of the Department.

R.S.S.

DIGESTED ANALYSIS OF SALES TAX LAW. By Arvind M. Thakkar, B.Sc., LL.B., L.S.G.D., Advocate, High Court, 1970. Meghdoot Tax Publication Bureau; D/77 Chittaranjan Nagar (V-5), Vidya Vihar, Bombay 77. In Three Volumes. Vol. I (A-C), pp. i & 466. Price Rs. 30.

The Law of Sales Tax is Judge-made law to a greater extent than statute law, and the present author has tried a praiseworthy maiden attempt—to examine it through the medium of the substantial body of case law that has

grown up around it. The Sales Tax Law and the Central Sales Tax Law as amended by the Amending Act of 1969 have been analysed subjectwise, aided by a ratio of selected cases of the Supreme Court and the State High Courts reported in the Sales Tax cases from 1938 to 1.10.1970 as well as all India Reports, and a digest of all cases decided by the Maharashtra Sales Tax Tribunal between 1965 and 1969 along with selected cases decided by it from 1947 to 1965 and between 1969 and October 1970; selected decisions of the Gujarat Sales Tax Tribunal have also been included. Several judgments under the Income Tax Law applicable to the principles of Sales Tax, selected from the Income Tax Reports from 1933 to 1st October 1970, have also been noticed.

2. The twelve headings in the first volume cover Absconders, Advocate, Affidavit, Agriculturist, Appeals and Revision Applications, Assessment, Benami Transactions, Best Judge Assessment, Burden of Proof, Central Sales Tax, Composition, and Constitutional Validation. They deal with the right of pleading and advocacy, service of notice to an advocate, and default of an advocate in filing an appeal and in appearance before the assessing and appellate authorities. They refer to the award of costs, limitation, maintainability, admissibility of fresh evidence at appellate stage, appealable and non-appealable orders, part-payment, powers and duties of appellate authorities and procedure in and right of appeal. Notice of assessment, limitation period, assessment officers and orders, and procedure and general principles of assessment are described. Other headings focus attention on the nature of benami transactions, sale price under Central Sales Tax Act and registration, penalty, forfeiture and procedure in appeal under it.

3. The Sales Tax laws applied by each State on inter-State sales differ widely, but most States recognise the need for an uniform classification of goods and commodities in order to facilitate such taxation. Though immediate co-ordination of the Sales Tax policies may not be possible, it is at least up to the tax officers to get themselves acquainted with the implications of the various Court decisions on tax issues. A knowledge of important Court decisions, which should be available at one's fingertips, is at least as important as the knowledge of the bare provisions of the law. The arrangement of the decisions topic-wise, therefore, has increased the usefulness of the Digest.

4. The various judicial decisions are arranged in a chronological order for purposes of easy reference, and the Digest should be found quite useful by legal practitioners as well as

dealers. It carries an useful table of cases and index. R.S.S.

LAW IN A CHANGING SOCIETY. By W. Friedmann. 1st Indian Reprint of Abridged Edition, 1970. University Book House, 15-U.B., Bungalow Road, Delhi 7. Pp. 475. Price, Rs. 3.25.

In newly developed and developing countries the adjustment of traditional and static social and legal institutions to the needs and demands of societies striving for economic development and social advancement has become a problem of supreme importance. The present work approaches the subject with the conviction that the law must, in contemporary conditions, respond to social change if it is to fulfil its function as a significant instrument of social order.

2. Of the six parts in the book, the introductory one presents some general reflections on the inter-relation of legal and social change in the context of different political systems and different social pressures, followed by an analysis of the role of the courts in the adaptation of the law to social change. The second part deals with the impact of social change on legal institutions like property, contract, tort, criminal law and family law. Social change is shown sometimes to affect the concept itself, for example, of property and contract, and at other times to put it to use for other purposes, eventually representing something entirely different from its earlier meaning. In Part 3 the metamorphosis and legal eclipse of the ideal of freedom of trade is traced in the field of anti-trust and other public controls, and the growth of corporate power is analysed regarding its impact on the State and on the individual. Similarly, the three-fold pressure on the individual through the commercial corporation, the labour union, and the demands of State security, is analysed.

3. Part 4, on public law, is concerned with the growth of the administrative process, Government liability, administrative discretion, and the problem of administrative remedies and procedures. The author makes an extensive comparison with the principles and institutions of the continental systems of administrative law. The part on international law makes a survey of the present international legal institutions and relations which are affected by divergencies of social organisations, and briefly estimates the kind of international society into which we are moving.

4. The last chapter seeks to reassess the current meaning of the rule of law, taking as

its theme the triangular tension between the claims of the individual, the group, and the State. In this connection, the deliberations and conclusions of the Fourth Commonwealth Conference on Law which met in New Delhi in January last, are worth noting. The Conference was anxious about the statutory exclusion of State liability in civil law and about the 'shockingly short' periods of limitation for filing cases against public authorities, and it was against the extension of State privileges to public corporations and semi-Government bodies. It considered that, subject to narrow exceptions, there should be no State immunity from a civil suit, either in tort or in contract.

5. In each of the areas surveyed the author has concentrated on the most significant challenges of social change and illustrated them by corresponding responses—or lack of them—in legislation, case law and legal thinking. The treatment is comparative and is based on the different common law and civil law systems, including those of Germany, France and Russia.

6. The Notes, Bibliography, and Index at the end should also be referred to. R.S.S.

CAN THE STATE KILL ITS CITIZEN?

By K. G. Subrahmanyam, Advocate.
With an Introduction by S. Mohan Kumaramangalam, Bar-at-Law, Madras Law Journal Office, Madras. 4. 1969. Pp. 70, Price Rs. 2.

Dedicated to Mahatma Gandhi in the year of his Centenary, the present neat booklet discusses in all its aspects the need for abolishing the penalty of death in judicial decisions. Although it is still being continued in India in spite of its abolition in 26 other countries and the United Kingdom, from which last mentioned country the original framers of the Indian Penal Code drew their inspiration, the opposition to it from the ethical point of view is becoming more and more pronounced. Is the killing of a human being absolutely necessary, it is asked, in the administration of justice and in the protection of society?

2. The author begins with an exposition of Mahatma Gandhi's views on the death penalty, examines its usefulness as a deterrent and highlights the fallibility of human decisions, the errors and malpractices during investigations and trial and the possibilities of errors in passing a sentence of death. He deals also with the manner in which execution is carried out, the condition of the condemned man, the execution scenes, and the psychic aspect of the whole affair.

3. That capital punishment acts as a deterrent is an erroneous theory, says Mr. Kumara-

mangalam, in his introduction, which by the way, is very well-written, informing and also thought-provoking who quotes evidence to prove that homicide rates are conditioned by factors other than the death penalty, and the abolition of the penalty does not give rise to an increase in the incidence of murder. The chief deterrent to crime is not, it would appear, the barbarity of the punishment as such, but certainty of conviction, which becomes uncertain if the punishment is barbarous. In comparison with the total number of murders in the last 10 years in Madras State, for example, the percentage of convictions has been from 40.55, but the percentage of executions has been less than 3. Do not these figures, ask Mr. Kumaramangalam, demonstrate the unlikelihood of the death penalty being enforced and thereby reduce its value as a deterrent? He gives figures to show that, during the six years, 1945-1950, when the capital sentence was kept in abeyance in Travancore and Cochin, the incidence of murder cases was not higher but lower (956 : 967).

4. On the other hand, the author deplores that while the framers of the I. P. C. wanted the death penalty to be enforced sparingly, the presiding judges impose that penalty normally and award life imprisonment in special cases. However that may be, with modern criminology placing all the emphasis on reformation and rehabilitation rather than on retribution, the death penalty should be fast losing the ground under its feet. The criminal, it is now accepted, is essentially a product of society and the aim of punishment should be to reform him.

5. The present booklet has been written with a passionate belief and purpose behind it, and the author's thesis is sustained by arguments and facts cogently presented, so that it provides good intellectual rabelum to those who want to abolish the death penalty as well as to those who are for its continuance. R.S.S.

A CRITIQUE OF MODERN HINDU LAW. By J. Duncan M. Derrett, D. C. L. (Oxon), Ph. D. (London), Professor of Oriental Laws, University of London. 1970. N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2. Pp. xlviii & 460, Price Rs. 35.

Professor J. Duncan M. Derrett needs little introduction to the reader. He is the author of *Religion, Law and the State in India*, and Editor of *An Introduction to Legal Systems*, both of which have been reviewed in these columns. His present work constitutes a blueprint for the next stage in the development of

Hindu Law. The first step in the provision of a common family law for India's citizens was taken in the enactment of the 'Hindu Code', and the next step must be to re-orientate the entire system in such a manner that the majority community may design a uniform civil code worthy of a secular State. The author, who has studied the laws of the Hindus for over twenty years here sets out to test, rule by rule, topic by topic, the quality of the Hindu law, judged by Hindu standards. At the same time he brings up-to-date his account of the system in his Introduction to Modern Hindu Law (1963). Where decisions conflict, he explains which is the right one, and why.

2. The author formulates 14 fundamental principles as our touchstone. They are : Law must be capable of being known; law must be capable of being foreseen; law must enable rather than disenable; law favours the termination of disputes; law must correspond to facts; law should facilitate the moral principles of the nation and aim at the unity of the nation; law must be educative and in keeping with the principles of the Constitution, and the parties should be treated for what they are. Further a variety of regimes or ways of life must be tolerated and the moral values of the Hindus must be upheld. This chapter has an appendix giving the original texts (in Sanskrit) of Hindu ethics with a short commentary.

3. The substantive chapters of this book commence with the joint family because it is believed to be the most characteristic and fundamental institution of the Hindus as known to the law. It is sometimes called an ancient 'welfare state mechanism', a laboratory in which the members are continually subjected to education for living and to an examination of character. The concepts of Stridhanam, bequests, shares at partition and maintenance rights of women are discussed, followed by an examination of the basis of succession and testamentary power, the law of intestate succession, charitable bequests, construction of wills, the manager's position and family arrangements. The topics of marriage ceremonies, quarrels, separation and reconciliation, divorce, and alimony are then dealt with, while the last chapter deals with the acquisition and disposition as well as succession and management of religious endowments. Among the four appendices regarding Anglo-Hindu law and matrimonial causes has been included a summary of recommendations for the amendment of statutes.

4. Believed to be the first systematic critique of its kind, it is based on principles which are carefully set out and justified with full documentation. The rest of the book provides illustrated talking points, one to every para-

graph. The index of cases, index of topics and names, and index of statutes, are very useful. The author has made use of recent decisions, as they reflect the state of the law better than the pronouncements of the Privy Council and High Courts of long ago, and the citation of the law reports follows the model normally used in India, although the author has unequivocally expressed his views against the innovation of omitting "A.I.R." before the citation of All India Reporter.

5. It is hoped that the members of the Bar and Bench will find the book highly useful for appeal cases. R.S.S.

THE LAW OF CENTRAL SALES TAX. By Shambu Dayal Singh, M.A., LL.B., Formerly Judge, High Court, Allahabad 1971. Eastern Book Company, 34 Lal Bagh, Lucknow. Pp. xxxix & 666. Price, Rs. 30.

A sale of goods consists of various elements such as goods, agreement to sell, transfer of property in the goods, consideration for sale and delivery of the goods and, in a completed sale, they are often distributed over more than one State. On the ground of territorial nexus with anyone or more of these elements each State began to levy a tax on the transaction of sale, and Article 286 of the Indian Constitution therefore sought to check this evil; but its interpretation met with difficulties. While permitting State legislatures to tax the sale of goods in the States, the Constitution (Article 286) placed restrictions on the levy of the tax on inter-State sales and prohibited it on sales which took place outside the State or in the course of export and import. Several States, however, attempted to bring within the ambit of their laws sales outside their territorial limits if the goods happened to be manufactured or produced within the State. This led to an amendment of the Constitution and the passing of the Central Sales Tax Act 1956, which defines 'inter-State sales or purchases', 'Sales in or outside the State', 'Sales in the course of import or export', and 'goods essential for the life of the community', it also levies a tax on inter-State sales, though for the benefit of the States.

2. The Central Sales Tax Act, 1956 having been enacted against the background of the law which developed under Art. 286 of the Constitution, that law has been discussed in Part I of the present publication under the heads of constitutional provisions, sales inside or outside the State, sales or purchases in the course of export or import, inter-State sales or purchases and essential goods. Part II reproduces the text of the Act, followed by an exhaustive commentary. Section-wise each

chapter in Part I and each commentary being preceded by a useful synopsis. Full notice has been taken of all the amendments up-to-date, including the Central Sales Tax Amending Act 1969 and the proposed Central Sales Tax Amending Bill 1970. The commentary analyses and explains the different provisions of the Act in the light of the accepted principles of interpretation, all connected information has been duly incorporated where necessary, and the case law has been brought up-to-date. So far as the Rules are concerned, in order to keep the size of the book within limits, only Central Rules and such State Rules as apply to centrally administered areas are given, but the State Rules are available in commentaries on the State Acts.

3. Section 4 of the Central Sales Tax Act 1956 formulates the principles for determining when a sale or purchase takes place in or outside a State, and Ss. 6, 8 and 9, impose the tax on inter-State sales, prescribe the rate of tax and provide for its levy, collection and distribution. Sections 14 and 15 relate to the imposition of tax on certain goods declared to be of special importance in inter-State trade. The other Sections cover registration, the manner of calculating turnover, offences and penalties, cognizance of offences and indemnity. The III Part of the book contains the Appendices, which give all the amending Acts, Rules, Ordinances and Orders and it includes a table of cases and index.

4. The publication should be highly useful to members of the Bench and the Bar as well as the business community. R.S.S.

STATE AND RIGHTS OF MEN. By R. G. Chaturvedi, M. A., LL.B., Advocate. 1971. Metropolitan Book Co., Pvt. Ltd, 1 Netaji Subhash Marg, Delhi 6. Pp. xi & 247. Price Rs. 20.

"Can the State abridge or take away all the rights of men, including those claimed to be fundamental and inviolable?" is the line of inquiry which the author of the volume under review sets out to pursue. He first traces the growth of political consciousness in man, which gives rise to the institution of the State, and then investigates whether the State is an institution and in what body sovereignty resides ultimately. He examines the basic principles on which a constitution is contrived to work. He takes a juristic view of the rights of men in the phenomenon of the State, whatever its constitution, and restates the contractual theory of the State. The constitution is a contract reduced into writing, and its declarations of the rights of men relate to rights which are anterior to the constitution itself. The contract, says the author, is not a guaran-

tee of the rights but the rights are a guarantee of the contract.

2. The political consciousness of man, the family as a facsimile of polity, analogy between family and polity, and the Hindu undivided family, are first discussed, followed by an examination of the State as a politically administered society, the theories of thinkers from Plato to Lenin regarding the State, the origin of rights, rights that the State can touch, and the declaration of rights in constitutions. The contractual basis of rights, the political contract, the constitution as a contract of the State, social contract theory of natural rights, and the preservation of natural rights, are analysed. Four chapters cover the institution of Government and the rights of men, sovereignty, constitution and legislation, altering the constitution and Parliamentary supremacy. The concepts of fundamental rights and rights to life and liberty, property and equality, are explained, followed by the concluding chapter on rights under the Indian Constitution. The topics covered include the Preamble, the philosophy of justice, judiciary as arbiter of rights, constitutional law and ordinary law, and rights determinable by another constituent body; which cannot be Parliament.

3. The Constitution is the expression of the sovereign will of the people, and the legislature, the executive, and the judiciary are the instruments whose powers and obligations are demarcated by the Constitution, with the judiciary as the sentinel on the qui vive to see that they do not transgress on the bounds of each other and to ensure that the provisions of the Constitution are not violated by them. But the same sovereign will of the people has made a provision in the Constitution whereby it has made a limited delegation of its powers (Art. 368) to the legislature for amending the Constitution. The fundamental rights, however, have been written down in the Constitution by the original makers of the Constitution, the people of India. (See the Preamble to the Constitution), and they can be curtailed, amended or removed only by the people expressing themselves through another constituent body or convention. The legislature being, therefore, incompetent to tamper with these fundamental rights, the Supreme judiciary steps in when it tries to do so (Refer to Golaknath case, Bank Nationalisation case and Princes' Purse case.) It has been observed by the author that it would be "sheer inanity" to suggest a double step amendment first by using the amendatory powers of Art. 368 to remove the obstacle under Art. 13 (2) and then to repeal or remove any of the fundamental rights. It is true that in cases of consti-

stitutional amendment of the Supreme Judiciary has to use its powers of judicial review with restraint and care. In any given case it can be a matter of opinion whether the judiciary has discharged its responsibility properly and well, but it can admit of no two opinions that what has been written down in the Constitution by the sovereign will of the people as fundamental rights can be removed only by the people expressing themselves in a new constituent body, and not by the legislature itself.

The book contains a useful bibliography and index. R.S.S.

ANNUAL SURVEY OF COMMONWEALTH LAW, 1968. Editor; H. W. R. Wade, Q. C., LL. D., D. C. L., Professor of English Law, University of Oxford. Butterworth & Co. (Publishers) Ltd., 88 Kingsway, London W. C. 2. (In India: Eastern Law House Pvt. Ltd., 54 Ganesh Chunder Avenue, Calcutta 13.) Pp. lxxxiv & 857. Price, Rs. 180.

Prepared under the auspices of the British Institute of International and Comparative Law and the Faculty of Law in the University of Oxford, the volume under review, which is the fourth in the series, covers material received at the Bodleian Law Library, Oxford, between 1st July 1967 and 30th June 1968, with occasional additions; Where possible, reference is also made to appeals against judgments noted in it. Mr. B. K. Chandrasekhar B. A., B. L. (Mysore), LL. M. (Leeds), assisted in classifying material from India. Like its predecessors, the present volume aims at presenting a high level of commentary on a wide range of legal decisions and enactments throughout the British Commonwealth, which constitute the most enduring common links between the different member countries. Whatever the vicissitudes of the Commonwealth ties may be in other spheres, collaboration in the professional and academic fields has proceeded uninterrupted. An Indian lawyer is more at home with English, Australian, Canadian and other reports of decided cases than with European, Latin American, or other Asian laws and judicial decisions. And the Fourth Commonwealth Law Conference, which met in New Delhi in January 1971, was only an expression of this common identity of the legal and judicial systems in the countries of the Commonwealth.

2. Of the twenty essays in the present Survey, the first three deal with constitutional

law, fundamental rights and civil liberties, and administrative law, and the next six dwell on criminal law, evidence and procedure; torts; contract; real property; trusts, and succession. Industrial property, commercial law, company law and partnership, monopolies and restrictive trade practices, and taxation, are the subjects of the next five essays, the last six contributions covering family law, labour law, civil procedure (including courts and evidence), conflict of laws, international law, and maritime law. Written by a group of outstanding lawyers and academic men, each of the essays has a summary and bibliography accompanying it.

3. The political situation in the different Indian States during the period under reference revealed to what extent the conventions of the British type of Parliamentary Government depend on the good faith and respect for the common good, of the chief actors in Governmental change-overs. In the matter of fundamental rights, the writer reverts to the much-debated decision in the Golaknath case, and that the doctrine of 'prospective overruling' is a more or less logical extension of the doctrine of "Stare Decisis" is highlighted. There have also been a number of judicial decisions which have set aside orders and rules which offend against the constitutional provisions prohibiting discrimination in public employment, in the Universities and in penalties for tax offences. Besides, the power of the President to suspend fundamental rights during emergencies only suspends the right to move the courts to enforce such rights, and does not do away with them altogether. Regarding administrative control of a company, the Government should not appoint an inspector to investigate into the affairs of a company merely on suspicion, and in adjudication, an industrial tribunal should not be fettered by the limitations of an ordinary court-social justice and industrial harmony should be the impelling motives, and contractual obligations should be secondary.

4. In the book before us we have an invaluable library of information on Commonwealth law, providing a comprehensive coverage of useful authorities and comparisons not easily available elsewhere in one volume. It is hard to minimise its value to the lawyer advising on a doubtful or disputed point of law, or arguing or judging appeals.

5. The useful table of cases, table of statutes subject index, and territorial index, should also be mentioned. R.S.S.

JOURNAL SECTION

1971 JULY

APPELLATE JURISDICTION OF THE SUPREME COURT IN REGARD TO CIVIL MATTERS UNDER ARTICLE 133 OF THE CONSTITUTION.

NOTE BY THE LAW COMMISSION OF INDIA.

[NOTE :—The Law Commission which is at present engaged in a consideration of the question whether the right of appeal to the Supreme Court in civil matters under Art. 133 (1) (a) and (b) of the Constitution should be abolished, has prepared a note on the subject for eliciting the views of interested persons and bodies. The note is printed below. Replies to the note may be sent to the Joint Secretary and Legal Adviser, Law Commission, Government of India, 'A' Wing, 7th Floor, Shastri Bhavan, Dr. Rajendra Prasad Road, New Delhi-1, as early as possible—Ed.]

This note deals with a proposal regarding the appellate jurisdiction of the Supreme Court in regard to civil matters under Art. 133 of the Constitution. The proposal is to repeal sub-clauses (a) and (b) of clause (1) of the article, and thereby limit this jurisdiction to cases in which the High Court certifies that the case is a fit one for appeal to the Supreme Court under sub-clause (c), without reference to the amount or value of the subject matter of the dispute.

2. The Government of India had in 1969 introduced a Bill in the Rajya Sabha, the object of which was to enhance the amount mentioned in sub-clause (a) from Rs. 20,000/- to Rs. 1,00,000/-. This Bill* was passed by the Rajya Sabha on the 3rd August 1970, but owing to the dissolution of the Lok Sabha before it could consider the Bill, the Bill lapsed. A copy of the Bill, as passed by the Rajya Sabha, is attached for reference. (Annexure A).

3. Article 133, as is well known, was based on the provisions of Ss. 109 and 110 of the Civil Procedure Code which formerly regulated appeals to the Privy Council. The important differences between the article and the sections were—

(i) the enhancement of the pecuniary limit from ten thousand rupees to "twenty thousand rupees or such other sum as may be specified in that behalf by Parliament by law";

(ii) the right of appeal, formerly restricted to decrees and final orders passed on appeal by the High Court, now made available against "any judgment, decree or final order in a civil

proceeding of a High Court", thus including final orders passed by a High Court in the exercise of its revisional jurisdiction;

(iii) the right of appeal on a certificate of fitness, which was formerly available against any order of the High Court, now restricted to final orders of the High Court.

4. The raising of the pecuniary limit to Rs. 20,000 in the Constitution was obviously made in view of the depreciation of the rupee, but it was by no means proportionate to the fall in the purchasing power of the rupee. No appreciable fall in the number of appeals to the Supreme Court could have been expected from the small increase in the pecuniary limit, because the Constitution, for the first time, conferred extensive writ jurisdiction on High Courts under Art. 226. There is a right of appeal under Art. 133 against any judgment or final order passed by a High Court under Art. 226 if this proceeding can be classified as "a civil proceeding"; and it is now well settled** that it can be so classified if it deals with civil rights conferred either by civil law or by statute.

5. The present position, therefore, as regards the appellate jurisdiction of the Supreme Court in civil matters is as follows :—

(1) There is an unrestricted right of appeal to the Supreme Court where the value of the subject-matter of the dispute is not less than Rs. 20,000 or where the order of the High Court involves directly or indirectly some

** (a) *Narayan Row v. Ishwar Lal*, (1966) 1 S O R 190=A I R 1965 S C 1818.

(b) *Ramesh v. Gendalal*, (1966) 3 S O R 198=A I R 1966 S C 1445 (1448).

(c) *Arbind Kumar v. Nand Kishore*, (1968) 3 S O R 322=A I R 1968 S C 1227.

* The Supreme Court (Enhancement of Valuation for Civil Appellate Jurisdiction) Bill, 1970.
1971 Journal/7.

claim or question respecting property of that amount or value —

(a) if the judgment or the final order of the High Court is passed in exercise of its original jurisdiction (ordinary or extraordinary),

(b) if in exercise of its appellate jurisdiction, the High Court reverses the judgment or order of the Court below.

(2) Where the appellate judgment of the High Court is one of affirmance, there must also be "some substantial question of law" involved.

(3) Where the High Court certifies that the case is fit for appeal to the Supreme Court, the pecuniary limit does not apply.

Judicial decisions have made it clear that the test for grant of a certificate of fitness under sub-clause (c) of clause (1) of Art. 133 (corresponding to clause (c) of old E. 109, Civil Procedure Code) is much more rigorous than the test of a "substantial question of law" required for a certificate to appeal against a judgment of affirmance under clause (2) of Art. 133.[†]

6. In India, the conferment of a right of appeal to the highest tribunal based mainly on the value of the subject matter in dispute has an historical origin. As early as 1726, when Mayors' Courts were functioning in the three presidency towns of Calcutta, Madras and Bombay, an appeal was provided to the King-in-Council in cases where the subject matter of the litigation was worth more than 1000 pagodas. After the establishment of the Supreme Court of Calcutta by the Regulating Act of 1773, the Charter of the Supreme Court provided for an appeal to the King-in-Council where the subject matter of the dispute exceeded the sum of one thousand pagodas. In Bombay, however, the pecuniary limit for appeal to the King-in-Council was fixed at 3000 Bombay rupees. In the mofussil, where the corresponding High Courts for civil litigation were the Sadar Diwani Adalats, a pecuniary limit was fixed for the purpose of appeal to the King-in-Council, but it varied from place to place.

7. By an Order in Council dated 1838, uniformity was introduced, and an appeal to the King-in-Council was permitted only where the subject matter in dispute was at least Rs. 10,000 company rupees in value. This minimum value continued the same after the constitution in 1861 of the High Courts (which replaced the old Supreme Courts and Sadar Diwani Adalats), and it was incorporated in the Civil Procedure Code of 1908 notwithstanding the considerable fall in the purchas-

ing power of the rupee since 1838. The makers of the Constitution maintained the principle of valuation, though they raised the amount to Rs. 20,000 and indicated that Parliament might raise it further to any extent by an ordinary law.

8. The main advantages of an unrestricted right of appeal to the highest Court in the country may be said to be—

(1) It ensures uniformity in interpretation of the laws, thereby avoiding the confusion which would result where the High Courts in the States give conflicting decisions.

(2) Correct determination is more likely to be obtained in the highest Court than in the lower Courts.

(3) There is always a possibility of error, and there should be a superior Court to correct the error.

9. On the other hand, the existence of a right of appeal based on valuation is open to the following criticism:—

(1) It discriminates unfairly between the rich litigant and the poor.

(2) It is well known that important questions of law do not depend on the value of the subject-matter in dispute.

(3) It promotes the leading of perjured evidence as regards valuation, and causes considerable delay in the High Court in determining valuation for the purpose of appeal. It is notorious that litigants under-value the subject-matter for the purpose of court-fee, and then try to over-value the same for the purpose of appeal to the Supreme Court.

(4) It causes avoidable congestion in the Supreme Court, and thereby impairs the prompt discharge of its primary functions, namely, the grant of speedy relief in those cases which involve (a) interpretation of the Constitution (Article 132), and (b) enforcement of fundamental rights (Article 92) in regard to which this Court has (in the words of Chief Justice Patanjali Sastri) "been assigned the role of a sentinel on the *qui vive*".^{††}

10. Uniformity in the interpretation of civil law, as indeed of all laws, throughout the country is essential. But this uniformity can always be brought about either by the High Court granting a certificate of fitness under sub-clause (c) of Article 133 (1), or by the Supreme Court granting special leave under Article 136. As regards the other two advantages also, the power of the Supreme Court to grant special leave under Article 136 may suffice.

[†] See Mulla, Civil Procedure Code (1955), Vol. 1, page 467.

^{††} *State of Madras v. V. G. Rao*, (1952) 8 O R 597, 805—AIR 1952 S C 186, 189—1952 Cri L J 966.
§ Para. 8 above.

11. An English Chief Justice observed** long ago that "it is the glory and happiness of our excellent Constitution that, to prevent any injustice, no man is to be concluded by the first judgment; but that, if he apprehends himself to be aggrieved, he has another Court to which he can resort for relief". This principle will not be substantially jeopardised by the repeal of sub-clauses (a) and (b). Ordinary civil litigation reaches a High Court either in the first appellate stage or in the second appellate stage, according to the valuation of the subject matter of litigation. Hence, by the time the High Court disposes of the matter, the parties have had the benefit of at least one appeal on law and facts, and sometimes also a second appeal on questions of law. Even in those High Courts which have ordinary original civil jurisdiction, such as the High Courts of Calcutta, Bombay and Madras, if the original judgment is delivered by a single judge, there is always an unrestricted right of appeal to a Division Bench under the Letters Patent. It is true that if, in those High Courts, the original trial is held before a Division Bench, there will be no unrestricted right of appeal if sub-clauses (a) and (b) are repealed. But such original trials of civil suits before Division Benches are very rare indeed. However, if this aspect is considered important, a suitable provision on the subject could be made in Art. 133.

12. The proposed amendment is not intended to interfere with the appeal to the Supreme Court against orders passed by the High Court, where such a right is conferred by provisions in special laws.*† That right will not be affected in any way by the present proposals.

13. It may be said that by giving a right of appeal based solely on the test of value of the subject-matter—and that too—after an appeal to the High Court—the law gives an opportunity "to put the dice into the box for another throw".*‡ It only leads to heavy expense and delay in litigation, and to some extent, affects the prompt discharge by the Supreme Court of its primary functions.

14. A review of the existing position in England, France, U.S.A. and a few other coun-

tries with a federal constitution has been made, and the result briefly indicated in Annexure B. The value of the subject-matter in dispute at the final appellate stage is relevant in three countries, viz., Australia, Canada and Switzerland; in England, France, West Germany, Russia and the U.S.A., it is not.

15. The points for consideration are—

(i) does the existing position under Art. 133 require to be changed; and

(ii) if so, is it sufficient to enhance the valuation limit from the present 20,000 rupees to one lakh rupees, as proposed in the lapsed Bill (Annexure A); or

(iii) is it preferable to repeal sub-clauses (a) and (b) of Art. 133 (1) allowing appeals under that Article only on a certificate of fitness under sub-clause (c) [without prejudicing in any way the power of the Supreme Court to grant special leave under Art. 136], or

(iv) alternatively, in place of sub-clauses (a) and (b), should there be a provision for appeal from a judgment, decree or final order of a Division Bench of the High Court*§ exercising original jurisdiction (ordinary or extra-ordinary, e.g. on a writ petition) irrespective of value, or when above a certain value;

(v) whichever alternative is adopted, what should be the transitional provision as regards—

(a) matters pending in the High Court by way of appeal or revision or in its original jurisdiction, and

(b) matters pending in the High Court for the issue of a certificate on the basis of pecuniary valuation, would a provision on the lines of clause 4 of the lapsed Bill† be satisfactory?

16. It would be useful to know the extent to which each of the above alternative is likely to reduce the number of civil appeals before the Supreme Court. Detailed and upto date figures are not readily available. The following figures pertaining to the years 1966 and 1967 may afford some guidance:—

	1936	1967
1. Civil Appeals filed under Arts. 133 (1) (a) & (b) ...	245	367
2. Civil Appeals filed under Arts. 132(1) & 133 (1)(c)...	636	648
3. Civil Appeals filed under Arts. 132(1) & 133 (1)(a), (b) and (c) ...	75	86
Total	956	1101

** *King v. Chancellor, Masters and Scholars of the University of Cambridge*, (1723) 93 E F 693, (702-703) (Sir John Pratt C. J.)

*† E.g. — (a) Section 56, Indian Divorce Act, 1869; (b) Section 45-II, Banking Regulation Act, 1949; (c) Section 126-A, Representation of the People Act, 1951; (d) Section 29, Wealth Tax Act, 1957; (e) Section 28, Gift Tax Act, 1958; (f) Section 28, Advocates Act 1961; (g) Section 23, Income-tax Act, 1961; etc.

*‡ Ambrose Pierce, quoted by Carpentier, Counsel on Appeal, page 145.

*§ Or of a Judicial Commissioner's Court with a single Judge.

†† Annexure A.

About one-third of the total number of civil appeals filed on certificates given under Art. 132 (1) or 133 (1) were on the basis of valuation only; and it may also be mentioned that the time taken in hearing and deciding such appeals is ordinarily more than the time taken in deciding an appeal under Art. 132 (1) or Art. 133 (1) (c).

ANNEXURE A

Bill No. XXXI-C of 1969.

THE SUPREME COURT (ENHANCEMENT OF VALUATION FOR CIVIL APPELLATE JURISDICTION) BILL, 1970.

(As passed by the RAJYA SABHA on the 3rd August, 1970).

A Bill to enhance the amount or value of the subject matter of dispute for purposes of civil appellate jurisdiction of the Supreme Court, and further to amend the Code of Civil Procedure, 1908.

Be it enacted by Parliament in the Twenty-first year of the Republic of India as follows:—

1. Short title and commencement.

(1) This Act may be called the Supreme Court (Enhancement of Valuation for Civil Appellate Jurisdiction) Act, 1970.

(2) It shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.

2. Enhancement of valuation for civil appellate jurisdiction of the Supreme Court.

(1) On and from the commencement of this Act, for the purposes of an appeal to the Supreme Court under sub-clause (a) or sub-clause (b) of clause (1) of Art. 133 of the Constitution,—

(a) the amount or value of the subject matter of the dispute referred to in the said sub-clause (a) shall be not less than one lakh rupees instead of twenty thousand rupees;

(b) the judgment, decree or final order referred to in the said sub-clause (b) shall involve directly or indirectly some claim or question respecting property of the like amount or value.

(2) Save as aforesaid, the provisions of Art. 133 of the Constitution shall apply in relation to any such appeal as they apply in relation to an appeal under that Article to

the Supreme Court before the commencement of this Act.

3. Amendment of Act, 5 of 1908.

In section 110 of the Code of Civil Procedure, 1908, for the words "twenty thousand rupees", the words "one lakh rupees" shall be substituted,

4. Continuance of certain proceedings.

(1) Nothing in this Act shall affect any appeal under sub-clause (a) or sub-clause (b) of clause (1) of Art. 133 of the Constitution, which, on the commencement of this Act, is pending before the Supreme Court, and every such appeal may be heard and disposed of by the Supreme Court as if this Act had not been passed.

(2) Without prejudice to the provisions of sub-section (1), no appeal from any judgment, decree or final order referred to in sub-clause (a) or sub-clause (b) of clause (1) of Art. 133 of the Constitution arising out of a civil proceeding pending in any court at the commencement of this Act, shall be entertained and disposed of by the Supreme Court, unless such appeal satisfies the provisions of section 2.

ANNEXURE B

RELEVANCY OF VALUATION IN APPEALS TO THE SUPREME COURT OR OTHER HIGHEST COURT OF THE COUNTRY.

1. Australia :

Position as regards appeals to the High Court of Australia :—

(i) Valuation relevant (£1500).

(ii) Appeals also lie irrespective of valuation, where questions of status (marriage, divorce, bankruptcy, aliens, etc.) are involved.

(iii) Leave not required. But, besides the matters mentioned above, leave can be granted by the High Court, in other cases.

2. Canada :

Position as regards appeals to the Supreme Court of Canada :

(i) Valuation relevant—10,000 dollars.

(ii) No limitation as to nature of the question involved.

(iii) Leave not required. But, in cases not covered by (i) above, leave can be granted by the Supreme Court of Canada or the Provincial Court of Appeal.

3. England :

Position as regards appeals to the House of Lords :—

(i) Valuation not relevant.

(ii) No limitation as to nature of the question involved in general, except for 'leap-frog' appeals etc.

(iii) Appeal is only by leave of the Court of Appeal or the House of Lords.

4. France :

Position regarding appeals to the Court of Cassation :—

(i) Valuation not directly provided for. But it may be noted that appeals to the first appellate court from the trial court (court of grand instance) are ordinarily allowed only if valued at a certain amount, roughly, 200 U. S. Dollars.

(ii) Appeal limited to question of law.

(iii) Leave not required.

5. West Germany :

Position regarding appeals to the Supreme Federal Court :—

(i) Valuation not relevant.

(ii) But the scope of appeal is limited indirectly, because the function of the Supreme Federal Court is "to preserve the uniformity of application of federal law," and, apparently, the appellate jurisdiction will be confined to cases involving such questions.

(iii) Leave not required.

6. Russia :

Position regarding appeals to the U. S. S. R. Supreme Court :—

(i) Valuation not relevant. But it should be noted that a private party has no right of appeal to the U. S. S. R. Supreme Court.

(ii) The jurisdiction of the Supreme Court is indefinite. Motion for review can be filed on the ground of "a particularly essential violation of the laws in force or a plain violation of the interests of the workers' and peasants' State and the toiling masses."

7. Switzerland : —

Position regarding appeals to the Federal Tribunal :—

(i) Valuation relevant (8,000 Swiss francs).

(ii) No express limitation as to the nature of the question involved could be discovered. But this seems to be implicit in the Tribunal's function of ensuring uniform application of federal law. Apparently, its appellate jurisdiction will be confined to cases involving such application.

(iii) Leave not required.

8. U. S. A. :

Position regarding appeals or certiorari to the Supreme Court of the U. S. A. :—

(i) Valuation not relevant.

(ii) The question involved must be what can be roughly described as a "federal" one.

(iii) Leave not required. But review is discretionary in many cases.

Appellate cases may be taken to the Court by two routes, appeal and certiorari, depending on the nature of the case. The avenue of appeal, (which replaced the older writ of error), is reserved principally for cases from State courts in which the highest court of the State has held a State statute valid under the federal Constitution. Other cases from the highest courts of the States—decisions holding State statutes unconstitutional, construing federal statutes, or involving federal privileges and immunities like full faith and credit to judgments of sister States—must take the avenue of certiorari. Jurisdiction under appeal is obligatory, while jurisdiction under certiorari is discretionary with the Supreme Court.

(b) Position regarding appeal to the highest Court of the State in the U. S. A. : —

There is wide variation in detail in the provisions governing the right to further review, by the higher appellate court, of the determination made by the lower appellate Court. Seldom is such further review a matter of right in all cases. Illustrative is a provision in one State giving such right of further review where the lower appellate court has reversed the judgment of the trial court, or where the affirmance of the judgment has been by a divided court; in all other cases review may be had only by permission, granted either by the lower or the higher appellate court.

BANGLA DESH IN THE EYE OF INTERNATIONAL LAW

(By DR. DEBIPROSAD PAL, LL.D., D.LITT, *Advocate, Calcutta High Court and Supreme Court*)

The recent political upsurge among the people of Bangla Desh and the proclamation of a Sovereign Democratic Republic of Bangla Desh by Sheikh Mujibur Rahman have posed a problem in the field of International Law which does not appear to have received the proper attention and consideration of the United Nations and that of the Security Council, its chief executive organ.

2. The circumstances in which this political upheaval occurred are well known. President Yahya Khan of Pakistan who had no mandate from the people was functioning with the aid of his military power as a Junta Government. Sheikh Mujibur Rahman and the followers of his Awami League had swept the recent elections held in Bangla Desh and it is Sheikh and his party who represent the will of the people of Bangla Desh. The Sheikh tried his best for a political settlement without compromising the fundamental principles on which he got mandate from the people of Bangla Desh in the recent election. Subsequent events show that President Yahya Khan had no intention of accepting the legitimate demand of the people of Bangla Desh but under the cover of a vague negotiation to increase and consolidate his military strength. But President Yahya Khan has failed to feel the throbbing pulse of a new Bangla Desh imbued with a high sense of patriotism, determined to rule out the exploitation and oppression under which the people were groaning. The subsequent events which have followed the resurgence are too well known. The way in which the military Junta Government is recklessly and deliberately killing the unarmed civilian population by use of the latest weapons of destruction, by the use of tanks, aeroplanes, machine guns, heavy artillery and mortar fires should have shocked the conscience of the civilised world and particularly of the big powers who proclaim themselves to be the champions of liberty and of democracy and who consider themselves to be the custodian of the peace and democracy in the world. Surprisingly enough excepting some feeble voice for "insistent appeal for the adoption of the most urgent measures to stop the bloodshed and repression against the people of East Pakistan," coming out from Soviet Russia, the other big powers are significantly reticent over the situation and although the mass destruction of humanity in this part of the world is going on since 25th March 1971, even the Security Council and its Secretary General Mr. U. Thant did not consider it

proper to take appropriate measures under the United Nations Charter. It is in this light that the international obligations of the member States of the United Nations and of the United Nations itself need to be considered.

3. It is true that in the course of developments of International Law, there has grown up a practice which yields to the individual State, if it be an independent one, freedom to deal as it seems fit with many matters pertaining peculiarly to itself and they are roughly described as lying within the "domestic jurisdiction" of such State. Article 2 (7) of the U. N. Charter recognises this right and provides that nothing contained in U. N. Charter shall authorise the U. N. to intervene in matters which are essentially within the domestic jurisdiction of such State. But the same Article equally provides that this principle shall not prejudice the application of enforcement measures under Chap. VII of the U. N. Charter. The question whether a certain matter is or is not essentially within the jurisdiction of a State is a relative question; it depends upon the development of international relations(1).

4. Judge Lauterpacht(2) thinks that the matter is essentially within the domestic jurisdiction of the State only if it is not regulated by International Law or if it is not capable of regulation by International Law. A matter is essentially one of domestic concern if it is incapable by its nature of assuming an international complexion, i.e., if it cannot have any international repercussions. In the modern age of economic and political interdependence, most questions which, on the face of it, appear to be essentially domestic are, in fact, essentially international. Prof. Kelsen(3) is also of the view that if a matter is not regulated by a rule of customary or contractual International Law i.e. if international law does not impose any obligation upon a State with respect to a matter, then and only then the matter is solely, but never essentially, within the domestic jurisdiction of the State.

5. Can it be said that the ruthless massacre of unarmed civilian population falls exclu-

1. See the Judgment of P. C. I. J., in the Tunis-Morocco—Nationality Decrees Case, 1 Hudson's World Court Reports—Page 136.

2. Lauterpacht : International Law & Human Rights—Page 156.

3. Kelsen : Law of the United Nations—Page 776.

sively within the domestic jurisdiction of the Pakistan Government so that the United Nations have no moral or legal obligation under the Charter to make intervention and take appropriate measures provided under the Charter?

6. Although by virtue of the personal and territorial supremacy, a State can treat its own nationals according to discretion, a large number of Jurists take the view that when a State renders itself guilty of cruelties against and persecution of its nationals in such a way as to deny their fundamental human rights and to shock the conscience of mankind, intervention in the interest of humanity is legally permissible(4). In fact, numerous interventions took place during the nineteenth century upon what were called in a broad way "grounds of humanity". The Ottoman Empire, seeking to retain its hold over its rebellious vassal States and subjects, resorted to methods of suppression which shocked the conscience of Europe. In 1827 the Great Powers jointly intervened to secure the independence of Greece and the battle of Navarino may fairly be looked upon as the use of force by the community of nations, acting through the intervening powers, in the interest of law and justice. In spite of the admission of the Ottoman Empire to participate in the public law and concert of Europe in 1856, interventions again took place in 1860 to protect the Christians of Mount Lebanon, in 1878 to secure the deliverance of the Balkan States and in 1891 to 1896 following massacres in Armenia and in Crete(5).

7. The Charter of the United Nations in recognising the promotion of respect for fundamental human rights and freedoms as one of the principal objects of the U. N. Organisation marks a further step in the direction of elevating the principle of humanitarian intervention to a basic rule of organised international society. The promotion of "universal respect for and observance of human rights and fundamental freedoms" is declared to be one of the objects of the United Nations in the sphere of international economic and social co-operation. Article 55 of the Charter lays down that the United Nations shall promote... universal respect for and observance of human rights and fundamental freedoms for all. In Art. 56 "all members pledge themselves to take joint and separate action in co-operation with the organisation for the achievement of the purposes set forth in Art. 55". Judge Jessup thinks that at least for the Members of the United Nations the

respect for human dignity and fundamental human rights is obligatory. The duty is imposed by the Charter, a treaty to which all the Member-States are parties(6). However imperfect from the point of view of enforcement, the relevant provisions of the Charter constitute legal obligations of the Members of the United Nations and of the Organisation as a whole. The fundamental rights and freedoms acknowledged by the Charter are now regarded as legal rights recognised by International Law and observance of these rights has ceased to be one of exclusive domestic jurisdiction of States and has become a matter of legitimate concern for the United Nations and its members(7). The degree to which this task can be fulfilled by the United Nations, however, will depend to a large extent upon the moral and the political authority the United Nations can exercise in a given situation.

8. The acts of calculated massacre of the millions of civilian population, the brutal suppression of the unarmed and defenceless people by the use of tanks, aeroplanes, machine guns, heavy artillery and mortar fires with a sinister design to the racial annihilation of the people of Bangla Desh committed by the Yahya Government amount to a genocide. The extermination by Germany, under the National Socialist regime, of 8 millions of her own nationals and persons of foreign nationality, as well as the practices of some other States both in time of war and peace led to the adoption by the General Assembly, in 1948, of the Convention on the Prevention and Punishment of the Crime of Genocide. The Convention defines, genocide *inter alia*, as acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group such as killing or causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its total or partial destruction. The Convention declares punishable, as a crime under International Law, genocide itself as well as acts of conspiracy, incitement, attempt and complicity. The Convention lays down that not only private persons are punished for the crime of genocide but also rulers and public officials. This is an implied recognition of the protection by International Law, of the fundamental rights of the individual in so far as it prohibits and penalises crimes against humanity which are conceived as offences of gravest character against the life and liberty of the individual, irrespective of whether such acts

4. Oppenheim: International Law, Vol. I (8th Edn.) Page 812.

5. Fenwick : International Law—Page 287.

6. Jessup : A Modern Law of Nations (1948)—Pages 87-93.

7. Oppenheim: International Law, Vol. I (8th Edn.) Page 740.

have been committed in obedience to the law of the State. The acts of commission or omission in respect of genocide on any interpretation of the Charter, are no longer considered by international jurists to be a matter exclusively within the domestic jurisdiction of the States concerned. The parties expressly concede to the U. N. the right of intervention in this sphere(8). Thus the acts of genocide committed by the Yahya Government of Pakistan cannot be a matter exclusively within the domestic jurisdiction of the Government of Pakistan because of its international implications. If the Government of Pakistan has any international obligation, towards the respect and the observance of human rights in respect of its own citizens, breach of such international obligation cannot be a matter essentially within the domestic jurisdiction of that Government. Its repercussions are such that it constitutes a menace to international peace and security. The United Nations under Art. 39, Chap. VII have a direct obligation to determine the existence of any such threat of breach of peace and has equally an obligation to make recommendation and decide what measure it should take in accordance with Arts. 41 and 42 to maintain or restore international peace and security.

9. The next question that arises is whether the recognition of the newly formed Democratic Republic of Bangla Desh is justified by the events which have given birth to its origin. Recognition of a new State may be defined as an unilateral act by which one or more States declare, or tacitly admit that they consider a political unit, which exists in fact and considers itself to be a State, as a State having the rights and duties which flow from such Statehood.

10. In International Law recognition is of special matters in those cases where a new State tries to establish itself by breaking up from an existing State in the course of a revolution. Foreign States must then decide whether the new State has already safely and permanently established itself or only makes over to this end without having already succeeded. Thus, in the case of a civil war a Foreign State can recognise the insurgents as a belligerent power, if they succeed in keeping a part of the country in their own, set up a Government of their own, and conduct military operations according to laws of war.

11. If revolutionaries contemplate secession, their limited recognition may well be but the first step on the road to recognition of one or more new independent States. This was what happened in the revolutionary wars fought by

the Latin-American colonies against Spain during the first half of the nineteenth century. Conversely, limited recognition of rebels whose object is the seizure of power in a State may be but the forerunner of their *de facto* or *de jure* recognition as the Government of the State concerned.

12. Until a revolution or civil war has reached serious proportions, any form of intervention by a State in favour of insurgents constitutes illegal interference in the domestic affairs of another sovereign State. If, however, revolutionaries effectively control large areas of a country, other States may find it unavoidable to establish contact with them, if only for the protection of their own nationals and their property.

13. On the insistence of Great Britain and, subsequently, the United States of America, this exception to the rule of non-intervention has been accepted in State practice since the last century. If revolutionaries have shown a certain staying power in more than a purely local area, other States may grant them recognition as insurgents or belligerents. The difference between these two forms of limited recognition is one of degree(9).

14. The question is, precisely, at what time recognition of a new State may be given as distinguished from the recognition as a belligerent power? No hard and fast rule can be laid down as regards the time when it can be said that a State created by revolution has established itself safely and permanently.

15. Indications of such safe and permanent establishment may be found either in the fact that the revolutionary State has utterly defeated the mother State or that the mother State in spite of its efforts is apparently incapable of bringing the revolutionary State back under its sway. A Government which enjoys the habitual obedience of the bulk of the population with a reasonable expectancy to permanence can be said to represent the State in question and as such to be entitled to recognition. As a rule, this principle has been interpreted in the sense that the new Government must be supported by the will of the nation, substantially declared and that there must be evidence of popular approval, adequately expressed, of the revolutionary change. Exercise of the power, with the acquiescence of the population, is considered to be sufficient proof of such effectiveness(10).

16. Sometimes *de facto* recognition is granted to a State when in the opinion of the recognis-

[9. George Schwarzenberger: *Manual of International Law* (5th Edn.) Pages 76-77.

10. Oppenheim : *International Law*, Vol. I (8th Edn.) Pages 130-131.

ing State a new regime or authority meets some but not all requirements which are deemed essential before recognition should be granted. Thus, when in the view of the recognising State the new authority, although actually independent and wielding effective power in the territory under its control, has not acquired sufficient stability or does not as well offer prospects of complying with other requirements of recognition such as willingness or ability to fulfil international obligations. The essential feature of a *de facto* recognition is that it is provisional and liable to be withdrawn in cases where the recognised regime or authority succumbed or is superseded by another. The true purpose of *de facto* recognition is a declaration that the body claiming to be the Government established or a new State actually wields effective authority, without, however, specifying the other conditions of full *de jure* recognition. Should thus remaining conditions be forthcoming, full recognition *de jure* will become a matter of course; should they remain permanently absent, recognition will lapse automatically or will be finally or expressly withdrawn(11)

17. After the first World war, the Governments of various new States such as Finland, Latvia and Esthonia which formerly constituted part of the Russian Empire, were recognised in the first instance as *de facto* governments pending the final territorial settlement in that part of the world.

18. From the prevailing practice of the States, there is ample evidence to show that Governments consider the granting or withholding of recognition primarily as an exercise of political discretion, although according to Prof. Oppenheim in thus acting the existing States perform in the full exercise of their discretion a quasi-judicial duty.

19. When in 1903 Panama seceded from Columbia, the United States immediately recognised the new Republic as an independent State and prevented Columbia from asserting her authority over the rebellious Province(12). In 1930 with regard to Peru, Bolivia and Argentina, recognition was granted on the basis of evidence that the new Governments in those countries "are *de facto* in control of their respective countries" and that there was no active resistance. The recognition by the United States on 3.9.1918 of the Czecho-Slovak National Council as being "a *de facto*

belligerent government" clothed with proper authority to direct the Military and political affairs of the Czecho-Slovaks was made while the territory of the new State was still under the actual control of Austria-Hungary. In the case of Poland, Germany, Austria-Hungary anticipated the movement for liberation by proclaiming the independence of the country in 1918 while the Russian Cadet Government had likewise recognised in 1917 that the creation of an independent Poland must be one of the conditions of a just peace. When on 27.1.1919 the United States gave full recognition to the Polish Provincial Government, the communication described the new State as entering "upon a new cycle of independent life." As a result of the revolution in Russia, Finland proclaimed its independence on 4.12.1917. Denmark promptly recognised the new State and the United States and Great Britain also decided to recognise the independence of Finland and the *de facto* Government. Again in 1948 U. S. A. recognised Israel within a few hours of proclamation of independence(13).

20. It is not recognised as a rule of International Law that the strict observance of constitutional procedures should be a condition of recognition. The transition of France from Empire to Republic in 1870 during the course of Franco-Russian War was recognised promptly by the leading powers in spite of the exceptional circumstances. President Grant of the United States promptly telegraphed his congratulations as soon as he had "learnt that a Republican body had been proclaimed at Paris and that the people of France had acquiesced in the change"(14).

21. The overthrow of the Empire in Brazil in 1889 by a "bloodless revolution" was followed by immediate recognition by the United States of the Provincial Government and by formal recognition of it when it was clear that a majority of the people supported the new Government. In 1930 the Revolutionary Government of President Vargas of Brazil was given recognition by the United States within three weeks of his accession to his office after President Washington Luiz was deposed. In 1959, the Revolutionary Government of Fidel Castro in Cuba was recognised by the United States within six days of his coming into power(15).

22. According to the Soviet theory, if a new State has emerged as a result of revolu-

11. (i) Oppenheim : International Law, Vol. I (8th Edn.) Pages 134-135.

(ii) Lauterpacht : Recognition in International Law—Page 340.

(iii) Screen-Sen : Manual of Public International Law—Page 279.

12. Oppenheim: International Law, Vol. 1 (8th Edn.) Page 129.

13. Fenwick : International Law—Page 183.

14. Moore Digest Vol. I, Section XLIII—Quoted in Fenwick : International Law—Page 183.

15. Whiteman Digest of International Law, Vol. II—Page 266.

tion or the exercising of its right to self-determination, it has every reason to expect recognition by other States. Non-recognition is one form of indicating hostility to it and contradicts the generally recognised principles of International Law.

23. Under the Atlantic Charter the United States and Great Britain declared that it was their desire to see that no territorial changes which do not accord with the freely expressed wishes of the people concerned were made and that they respect the right "of all people to choose the form of Government under which they will live." Under the U. N. Charter, among its purposes are the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of people.

25. Judged by the tests set out above, the Democratic Republic of Bangla Desh should be given a recognition immediately by the United Nations and its member nations. The new Democratic Government undoubtedly has the overwhelming support if not the universal one of the entire people of Bangla Desh. This Government has been proclaimed by Sheikh Mujibur Rahman, the leader of the Awami League which has come out with overwhelming

success in the recent democratic election. It has already a de facto control over the administrative agencies of the State. It appears, therefore, that the new Government has been established over the entire territory of Bangla Desh and all the conditions of Statehood have been fulfilled by this new Government. Moreover, this new Government from the very beginning is willing to honour its obligations under International Law. It is significant to note in this connection that out of the total 10 crores of population in the entire State of Pakistan, the people of Bangla Desh constitute more than $7\frac{1}{2}$ crores. In other words, people of Bangla Desh constitute more than $\frac{3}{4}$ th of the entire population of Pakistan. In such a case the State of Pakistan has neither any legal nor any moral support to set up its own Junta Government which does not represent the will of the people. The newly constituted Sovereign Republic of Bangla Desh presents challenge to the people of the world and to the civilised nations who still cherish any principle of democracy and freedom. At this critical stage, all the freedom loving nations of the world should come forward and hail the new democratic government of Bangla Desh without any reservation or hesitation.

REVIEWS

COMPANY MEETINGS AND RESOLUTIONS. By C. R. Datta, M. A., LL. B., A. T. I. I. (Eng.), D. I. A. (Lond.). Bar-at-Law. Eastern Law House Private Ltd., 54 Ganesh Chunder Avenue, Calcutta 13. 1971, Pp. (16) & 373. Price, Rs. 30.

Company meetings are of various kinds. There is the Board meeting, in other words, the meeting of the Board of Directors, the statutory meeting, and the annual general meeting. Further, we have extra-ordinary general meetings and requisitioned meetings, not to speak of what is known as class meetings and meetings of debenture holders, as well as meetings of creditors and contributors called by the liquidator or the Court in the event of winding up, and the volume under review deals comprehensively with all of them. Its aim is to present a concise but definitive account of law and practice relating to company meetings together with some forms of notices, agenda, poll papers, report of scrutineers, resolutions, report of chairman, and minutes of proceedings.

2. The powers and functions of the company are exercised by the directors, and the Board must meet at least once in three months, but

not less than four times a year. The statutory meeting of shareholders is held after one month but within six months from the date of commencing business; it affords the shareholders an early opportunity of obtaining information as to the circumstances of the company's promotion and its immediate future prospects. Further, a company must every year hold a general (shareholders') meeting, and not more than fifteen months should lapse between one annual general meeting and another.

3. A meeting of the members of a company other than the annual general meeting is called extra-ordinary general meeting, which is convened generally to consider matters which, due to their urgency, cannot wait till the next annual general meeting, and it is convened either by the directors or at the instance of shareholders, in which latter case it is called a requisitioned meeting. The requisition must state the objects of the meeting, but the requisitionists cannot dictate the date and time of the meeting. Besides, class meetings are held to vary the rights of particular classes of shareholders, and meetings of debenture and debenture stock-holders are held under the provisions of the trust deed which secures

them, as well as for effecting compromises and arrangements. Mention should be made also of meetings of members and creditors for voluntary winding up, the meeting convened by the liquidator, of creditors and contributories in an official winding up, and the meeting convened by the Court to ascertain the wishes of creditors and contributories in all matters of winding up.

4. Normally, the secretary is present at all meetings of the company and of the directors and makes proper minutes of their proceedings. He issues under the direction of the Board all notices to members and others, conducts correspondence with shareholders in regard to calls, transfers, forfeitures, etc. He is in charge of the books of the company, like the register of members, share-ledger, transfer book and register of debenture holders. He submits the necessary returns to the Registrar of Companies, and makes preparations for holding and conducting meetings. The book under notice provides separate lists of the documents, resolutions and notices to be produced or registered with the Registrar of Companies, matters for which Central Government sanction is necessary, and the ordinary resolutions as required by the Companies Act, 1956.

5. The book gives model forms and resolutions on each subject in the text itself, the relevant sections of the Companies Act are set out, and annotations given supported by the decisions of Indian and English Courts. Furnished with a table of cases and index, it should be of great value to company promoters and directors, secretaries, executives and lawyers, as well as to company shareholders who take a particularly keen interest in company management.

R.F.S.

CRACKNELL'S LAW STUDENTS' COMPANION, No. 11: CONFLICT OF LAWS. By M. R. Chesterman, B.A., LL.B., LL. M., Lecturer in Laws, King's College, London. Butterworths. London, 1969. Pp. vii & 150. Price Rs. 22.50.

'Conflict of Laws' deals with international law as it affects individuals; it is public international law from the viewpoint of individuals. The law of conflict of laws is connected with the resolutions which result from the fact that there is a multiplicity of different sets of courts and different systems of private law in the world. Each nation has its own set of courts and its own set of laws. In some instances a single system of law obtains for the whole country. But diversity prevails not

only in countries with a federal pattern but even in countries with a unitary political structure, and between a country and its colonies, when a country is divided (e.g., Korea, Viet Nam and Germany), and also in the same country on a religious or ethical basis, e.g., Hindus and Muslims.

2. As a general principle most countries or States agree that a case may be tried in their courts if both parties have consented to their jurisdiction. The plaintiff's consent may be taken for granted from his commencing the action in the state in question; that of the defendant is presumed when he confesses judgment or begins to litigate on the merits of the controversy, rather than object to the jurisdiction.

3. English Conflict of Laws, which is the subject of the present book, largely depends on case law. But it is of comparatively recent growth and its volume is within manageable limits. A book like the present one sets out most of the rules on the subject while preserving the framework within which they were developed, i.e., the cases themselves. In the case summaries, the aspect emphasised is the reasoning on which the ultimate decision rests, because it is most important and often complex. The cross-references between cases is somewhat elaborate because of the tendency of many leading cases to contain significant rulings on two or more distinct issues; in contrast, the facts of the case are stated fairly shortly.

4. The following cases are typical of those arising in this sphere: Two Muslims domiciled in India were married there according to Muslim law, which permitted polygamy. In 1961 the husband acquired English domicile. He later instituted divorce proceedings based on the wife's desertion in 1959, whereupon she filed a cross-petition alleging adultery in and since 1964. It was held that the husband's acquisition of English domicile converted the marriage from a potentially polygamous one into a monogamous one, because it precluded him from taking another wife. The Court had thus jurisdiction, but only as regards the adultery, this being the only matrimonial offence since 1961.

5. A domiciled English woman was married in England to a Hindu of Indian domicile. The husband subsequently brought nullity proceedings on the ground that Hindu law prohibited him from marrying outside his caste. It was held that, even assuming that the Indian Courts would give effect to this prohibition, the marriage was still valid.

6. Furnished with an index and a glossary of Latin and other words, abbreviations and phrases, the book before us gives the relevant

portions of the several statutes, including the Administration of Justice Act, 1920, Adoption Act, Arbitration Act, Bankruptcy Act, Diplomatic Privileges Act, Foreign Marriage Act, Matrimonial Causes Act, and Uniform Law on International Sales Act. It is designed as a source book for those who cannot see as much as they would like of the law reports and as an aide-memoire for the others. R.S.S.

THE RENT ACTS BY SIR ROBERT MEGARRY, LL. D., VOL. 3. PERMANENT SUPPLEMENT. By Anna Cowan, B. A., LL. M., 10th Edition. 1970. Stevens & Sons, Limited., London. (In India : N. M. Tripathi Private Ltd., Bombay). Pp. xiv & 1009 to 1290. Price, Not stated.

Rent Control in England, which began in 1915 at the time of the First World War, has been more or less maintained by successive pieces of legislation. With a number of variations the Acts were adopted by many countries. The basic idea was that the rent of every dwelling house within the Acts, "should be restricted to the rent being paid at a particular date (standard rent), with certain permitted increases, and that no landlord of such a house should be able to obtain an order for the possession of the house except on certain limited grounds."

2. The first edition of the present work was published in 1939, but the tenth edition, published for the first time in two volumes, appeared in 1967. The arrangement in two volumes made it possible to put the words of the statute and text side by side and so obtain much of the advantage of annotated statutes without losing the coherence of a cursive text. That arrangement has now been retained, and present volume is intended to be supplementary to the two volumes of the 1967 edition.

3. The publication is designed to bring both parts of the last edition up to date. New cases, and important changes in the law which affect the text of volume 1 have been noted in the first section of this supplement. Each note is linked to the body of the main work by means of marginal page references; the correlation of new material and the relevant text has been simplified by the insertion, above each note, of the heading and sub-heading under which the text concerned appears in volume 1. A comparative table showing what has happened to each section of the repealed Acts is also set out.

4. Volume 2 of the 1967 edition is a collection of statutes and statutory instruments relating to rent, which are often needed to dis-

cover what the law was at a given point of time, and to understand some of the decisions. All previous rent legislation was consolidated in the Rent Act, 1968, which does not change the law but makes it more ascertainable. It deals with all provisions concerning the control of rent, security of tenure, and the control of premiums and mortgages. It repeals, inter alia, the Rent Act 1957 (except S. 16) and the Rent Act 1965 (except Part III). All the 118 sections and 17 schedules are set out in this Supplement. Each section is linked to Volume I by a text reference, which shows where a discussion of the contents of the section may be found.

5. The Act of 1968, however, does not contain the law in its entirety. The Supplement therefore includes the relevant sections of the Housing Act 1969, dealing with the conversion of controlled tenancies; the certification and registration of fair rents, and alterations to the Act of 1968 as well as the relevant parts of the Leasehold Reform Act 1967, the Matrimonial Homes Act 1967; the Caravan Sites Act 1968, the Prices and Incomes Act 1968, and the Rent (Control of Increases) Act 1969.

6. The Supplement to Volume I is divided into five parts, viz., General, Application of the Acts, Benefits conferred upon tenants by the Acts, Mortgages and Furnished Houses (Rent Control) Act 1946 and the Supplement to Volume 2 includes several statutory rules and orders and statutory instruments.

7. The law has been stated as at 1st July 1970. R.S.S.

RUSSELL ON THE LAW OF ARBITRATION. By Anthony Walton, Q. C., Bar-at-Law. Stevens & Sons Limited., London (In India : N. M. Tripathi Private Ltd., Bombay). 18th Edition, 1970. Pp. lvi & 542. Price, Not stated.

Published originally in 1849, the publication relating to the law of arbitration in England before us is now 120 years old. Since the appearance of the last edition in 1963, arbitration has had a new Chapter of Rules of the Supreme Court (England) (Order 73) all to itself in the domestic field, and a new statutory arbitration regarding international investment disputes, while the case-law also has been growing in volume. While the book was in preparation, proposals were in the air for a new Commercial Court with power to sit in private in order to encourage firms to bring their disputes to court rather than resort to arbitration (usually in private), it being alleged that few firms come to Court for fear of trade secrets being dis-

closed. However, as pointed out by the Editor, the courts already have adequate safeguards against the disclosure of trade secrets, and when there is need for immediate relief against improper use or disclosure, an arbitration is quite ineffective, and may even be a hindrance. It is true that no court can disguise the fact that a dispute between particular parties is in progress (as an arbitration can), but if a particular person is always involved in disputes it may not be the best public policy to conceal the fact. The fact is that both the courts and arbitrations have their distinctive roles to play, and each in their sphere is irreplaceable.

2. The essence of an arbitration is that a dispute is referred by the parties for settlement by a tribunal of their own choosing, instead of to a court. To be effective, the method should receive some assistance from the ordinary machinery of law; recourse to it may be necessary for enforcing the arbitrator's decision. Some degree of control by the courts accompanies the official status thus lent to duly constituted arbitrations; the law governing all these matters is contained in the Arbitration Act, 1950. Because arbitrations differ from legal proceedings proper only in the choice of the tribunal, all ordinary legal defences are available. The parties to an arbitration may themselves determine the procedure to be followed and the constitution of the arbitral tribunal. The 1950 Act lays down a code governing these matters, but many of its provisions may be excluded by agreement between the parties. These rules governing arbitration are more or less applicable also to many statutory arbitration tribunals. The matter relating to statutory arbitration is largely confined to a discussion of the extent to which the Arbitration Act does apply to it, and not further.

3. Of the twenty-one chapters in the book, the early chapters describe the nature of arbitration, statutory arbitration, matters which may be referred to arbitration and by whom, submissions and arbitration agreements, and staying arbitration proceedings. Next, who may be an arbitrator, his personal rights and obligations and duties, and his appointment and removal are discussed. The proceedings in the reference, evidence, control of reference by the Court, and stay of concurrent proceedings in court, are then examined, and the last few chapters cover directions in the award, its effect and enforcement, challenging the award, and costs.

4. The Appendices include the Arbitration Act 1950, additional statutes, Rules of the Supreme Court, and Notes on arbitration in Supreme Court Practice. There is every reason to believe that the Forms and Precedents

given are quite perfect in all respects. A table of statutes, table of cases, table of rules and orders, index and bibliography, are also provided. The law is stated as at 1st January 1970.

5. The law as regards arbitration in India was long contained in the Second Schedule to the Civil Procedure Code and the Indian Arbitration Act, 1899. The Arbitration Act, 1940, which made various improvements in the old laws and incorporated new sections in it, standardised the law throughout this country, and the Second Schedule of the Code of Civil Procedure has now been repealed, as also the Arbitration Act of 1899. R.S.S.

THE LAW OF CONTRACT. By G. H. Treitel, B.C.L., M.A., Fellow of Magdalen College, Oxford. Stevens & Sons Ltd., 11 New Fetter Lane, London (In India: N. M. Tripathi Private Ltd., Bombay). 3rd Edition, 1970, Pp. lxxiv & 379. Price, Not stated.

Many important changes have taken place in the law of contract since the appearance of the last edition in 1966. Although many pages of the former text have been cut, the present edition is still considerably larger than the earlier one and over a quarter of the text is new. In Chapter 7 the discussion of Fundamental Breach and related concepts has been re-written in the light of the *Suisse Atlantique* case, and the Misrepresentation Act, 1967 has made it necessary to re-arrange and largely re-write Chapter 9. As a result of the *Esso* case, the discussion of Restraint of Trade has been re-arranged and much new material added. *Beswick v. Beswick* has led to important changes in Chapter 15, on Privity, and Chapter 22, on Specific Performance and Third Parties. Recent developments are responsible for a new section on Effects of Failure to Perform, in Chapter 19, and, in the last chapter, on Remedies, the discussion of Remoteness has been revised in the light of the *Heron* case, and the *Esso* case has led to a number of changes in the discussion of injunctions. Other and less drastic changes have been made in Chapter 8 and Chapter 12, the discussion of Anticipatory Breach in Chapter 20 has been expanded, and in the last chapter the discussion of Object of Damages and Contributory Negligence has been revised, and there is a new discussion of Duplication. Many new changes have also been made in the early chapters on Agreement and Consideration.

2. Allowing for several qualifications, broadly speaking, the law of contract deals mainly with the two questions of agreement

and legal enforceability. The rules relating to offer and acceptance deal with the process of reaching agreement, and those relating to consideration and contractual obligation concern the requirements which must be satisfied before an agreement will be legally enforced, while the rules relating to misrepresentation and illegality deal with effect of special circumstances in which the law may refuse to enforce agreements. The rules regarding capacity are based partly on the view that certain classes of persons (such as mental patients and very young children) cannot agree, and partly on the view that it is not desirable to enforce agreements with certain persons. The rules regarding mistake are based on the view that there is no agreement when the parties are at cross purposes on a fundamental point and can have no legal effect if it is made under a fundamental mistake as to the subject-matter. The rules about the contents of a contract, performance, breach and frustration are based on the agreement between the parties and on rules of law which determine its legal effect.

3. A number of other questions, like plurality, privity, assignment, transfer of liability, and agency, have also been discussed in the present book, which provides a table of cases, a table of statutes, and index. The law is stated in the book as it stood at the end of November 1969.

4. The Indian Contract Act, 1872* is itself the work of English lawyers and embodies the main principles borrowed from English law. A full exposition of these principles is possible only by reference to authorities like Cheshire and Fifoot and the present book, which is primarily intended for the student is a good introduction to the law of contract.

R. S. S.

THE LAW OF INSURANCE. By Raoul Colinvaux, Bar-at-Law. Sweet and Maxwell Ltd., 11 New Fetter Lane, London (In India: N. M. Tripathi Private Ltd., Bombay). 3rd Edition, 1970. Pp. lxxiv & 379. Price, Not stated.

This practical text-book on the English law of Insurance policies appeared for the first time in 1950 and, when it reached the second edition in 1961, it had the rare distinction of being recorded on tape for the benefit of the blind; as many as 300 copies are said to have been so recorded. The present revised edition became necessary with the passing of the Companies Act, 1967 (Part II of the Act relates to

insurance companies). On matters of principle there have been only minor alterations, and much out-of-date and obsolete matter has been cut out; the book is confined to the law of England as it stands, and foreign decisions, are cited only when they indicate what an English Court might well hold. Practical matters are given special attention and a full table of cases has been added. The provisions of the relevant insurance statutes are set out in the Appendix and particular care has been given to the index.

2. The author has added references to modern forms of insurance in constant use such as, transit risks, house-holders' comprehensive policies, livestock insurance, contractor's liability policies, and professional liability policies (including barristers' and solicitors'). The basic principles of marine insurance are covered, although special fields like freight insurance and statutory provisions on industrial insurance are outside the author's purview; he has also omitted rules of law governing insurance companies for which the reader is referred to other authorities.

3. In contracts of insurance the insurer agrees to pay or otherwise benefit the assured on the happening of a specified event or contingency, for financial or other consideration. The determination of risk is very important, for the insurer can adjust his premium profitably only if he knows the nature of the risk, and the assured also must know the precise extent of his cover. As the insurer knows nothing and the man who wants to insure knows everything, it is the duty of the assured to make a full disclosure to the insurance company without being asked of all the material circumstances. Although the general principle of the common law is that anyone with normal contractual capacity may enter into a contract of insurance, the Insurance Companies Act, 1958, which repealed earlier Acts (now amended by Part II of the Companies Act, 1967) restricted the classes of persons who may engage in insurance business. As to contractual capacity, anyone may enter into a contract of insurance, subject to the limitations on the contractual capacity of certain classes of persons that apply throughout the law of contract. A person may insure himself against not only the risk of death and personal injury, or damage to property, but also against the risk of incurring liability to third parties.

4. The author describes the general principles of insurable interest, the nature of insurable interest, illegal contracts of insurance and loss caused by criminal act, and discusses the legal effects of conditions, and how warranties and representations are made.

*A. C. Dutt on Indian Contract Act (Eastern Law House Calcutta: 1969). For a briefer account see Prof. Krishnan Nair's Handbook on General Principles (1970).

The settlement of claims, arbitration, and fraudulent claims, are then dealt with, and the principles of indemnity and subrogation, policies as a form of property, and assignment of policies, are explained at length. There are also separate chapters on the construction of the policy, re-instatement, and re-insurance.

5. The present volume, which is provided with a table of cases and table of statutes, sets out the principles and practice of English insurance law in a form easily accessible for the guidance of the man of business, the lawyer and the student alike. R.S.S.

SOCIETY AND THE CRIMINAL. By M. J. Sethna, Ph. D., Professor of Law, University of Bombay, 3rd Edition, 1970. By Jehangir M. J. Sethna, LL.M. (Harvard), Advocate, Bombay High Court. N. M. Tripathi Private Ltd., Bombay 2. Pp. xxv and 508. Price Rs. 24.00.

The work under review deals with the problems of crime and its prevention, the personality and treatment of the criminal, prison reform, punishments, probation, reformation, and juvenile delinquency. It is divided into three Parts, the first dealing with society, the State, the Law, the individual and personality of the criminal, and the second with the problems of crime, its causes and prevention, and the problems of punishment and prison reform. The third Part deals with juvenile delinquency.

2. The introduction shows how criminology involves a study of the relevant principles of all the social services in so far as they have a bearing on the problems of crime, the personality of the criminal, and the methods of treatment and prevention. There are twelve other chapters the text matter of each of which is neatly summed up in a concluding paragraph. The necessity of adjusting the individual to the community is emphasised, as well as the fact that the State is not a mere police force but it should be concerned with the creation of an environment unfavourable to crime. Bad laws create conflict and crime, and the criminal, who is in a sense a defective, requires individualised treatment. Discussing the causes of crime, the author shows how education, the practice of the rules of genetics, and social security, are good preventives. His new remedy of indeterminate compulsory education is fully explained and in dealing with the theories of punishment, the theory of compensation is emphasised. The development of the prison system is traced, and it is explained how important it is to handle criminality in its early stages. Legislation for the prevention of juvenile delinquency

and Children's Homes and schools are the subject of the last few chapters.

3. In the second edition of this work the author included the latest changes in methods of penal reform and treatment of offenders. The latest theories of abnormal psychology were studied and the relevant passages amended as a result. The salient features of the various Children Acts were explained with constructive suggestions for the improvement of legislation relating to juveniles. The present edition has also been thoroughly revised in the light of the latest developments in the field of criminology, and a new chapter has been added on War Crimes and their prevention. Infra-red and ultra-violet methods of photography in the detection and investigation of crime have also been explained.

4. The author shows that the Criminal is an antisocial and maladjusted being who needs cure, help, and rehabilitation. The psychology of the criminal is as important as the sociological and legal problems attached to the reduction of crime. There has to be good co-operation between judges and lawyers, police officers and probation officers, and psychiatrists and case students.

5. In the Appendix is a statement of the study of actual cases tracing the factors in the causation of crime. From an examination of over 507 cases of homicide it was found that 73.72 per cent. of the cases showed unprompted attacks while only 26.28 per cent. showed deliberate assaults. The select bibliography should help the research scholar in choosing materials for his thesis, and the index to this comparative study of the entire field of criminology is quite exhaustive.

R.S.S.

SWEET & MAXWELL'S FAMILY LAW STATUTES. 1970. Edited by Sweet and Maxwell's legal Editorial staff. Advisory Editor: Olive M. Stone (In India: N. M. Tripathi Private Ltd., Bombay 2). Pp. viii & 564. Price, £2.10s. net.

The present volume of seventyfive English statutes is a collection of the leading Acts relevant to the subject of family law, giving the texts of the statutes, showing amendments or repeals, upto 1st July 1970. The contents range from the Wills Act, 1837 to the Matrimonial Proceedings and Property Act, 1970, the Law Reform (Miscellaneous Provisions) Act, 1970, and the Administration of Justice Act, 1970, the first two Acts of 1970 dealing with divorce law. Also included are various statutes starting with the Custody of Infants Act, 1873 covering guardianship and mainten-

ance of infants, and other statutes which cover wills and succession, education of children, their criminal liability, legitimacy and adoption, and many of these Acts came into operation on 1st January 1971.

2. The Matrimonial Proceedings and Property Act 1970 makes fresh provision for empowering the court in matrimonial proceedings to order either spouse to make financial provision for, or transfer property to, the other spouse or child of a family, to make orders for the variation of ante-nuptial and pre-nuptial settlements and for the custody and education of children. It abolishes the right to claim restitution of conjugal rights and declares what interest in property is acquired by a spouse who contributes to its improvement, and makes provision as to a spouse's right to occupation in certain cases. And it amends the law about the property of a person whose marriage is the subject of a decree of judicial separation dying intestate.

3. The Law Reforms (Miscellaneous Provisions) Act 1970, on the other hand, abolishes actions for breach of promise of marriage and makes provision with respect to the property of, or gifts between, persons who have been engaged to marry. It abolishes the right of a husband to claim damages for adultery with his wife, and all actions for the enticement or harbouring of a spouse, and it makes provision for the maintenance of survivors of void marriages. By the Administration of Justice Act 1970, the Probate, Divorce and Admiralty Division of the High Court is renamed the Family Division, and the Principal probate registry is renamed the principal registry of the Family Division. All causes and matters involving the exercise of the High Court's jurisdiction in proceedings specified in the Act are to be assigned to the Family Division.

4. The publishers have omitted, as not being of sufficiently general interest, the Royal Marriages Act, 1772 and all Acts dealing with foreigners' marriages or marriages abroad, as well as procedural Acts and those covering nationality and citizenship. Here we have all the basic statutory material which would be needed by a student for professional or university examinations on divorce and family law. It is also a valuable reference book for practitioners, magistrates, and probation officers. The index at the end is useful. R.S.S.

LAND LAW, (Concise College Texts).

By E. Swinfen Green, Bar-at-Law. & N. Henderson, B.A., Sr. Lecturer of the College of Law, 2nd Edition, 1970,

Sweet & Maxwell, London (In India: N.M. Tripathi Private Ltd., Bombay 2), Pp. xiv & 208, Price, £1.4s. net.

The law of land, or real property, is concerned with the rights, interests and obligations which can exist over land and buildings, and how they are created, enforced, assigned and extinguished. It is highly complex because land lends itself to the creation of a diversity of concurrent and consecutive interests. Land has virtually been the sole form of wealth since the Norman conquest, and land laws in England acquired a rigidity and formalism unsuitable to a changing social and economic structure and, although the deficiencies of the common law have to some extent been made good, the result was more often to complicate it than to simplify it. Sweeping changes were finally introduced by the 1925 property legislation. The publication before us considers the effects of this legislation as well as of the Law of Property Acts, 1922 and 1925, the Settled Land Act, 1925, and the Land Charges Act, 1925.

2. In the second edition of this practical, introductory outline of the land law in England, including the law of wills and intestacy, many small changes have been made to bring the text up to date, the Rent Acts of 1965 and 1968 having necessitated the substantial re-writing of the section on Security of Tenure; some topics have been more fully discussed and a new chapter on contracts has been added. As in the first edition, care has been taken to give examples where the meaning might not be clear and technical terms are explained as they are used.

3. The publication deals with the classification of property, words of limitation, the contribution of equity, reduction in the number of legal estates, the fee simple, the fee tail, the life estate, and the leasehold. It covers contracts for the disposition of land, settlements, co-ownership, the perpetuities and accumulations rules, easements, rent charges, covenants and mortgages. It concludes with chapters on limitation, registration, devolution on death, wills and intestacy.

4. The book should meet the needs of students who are studying law as part of a wider syllabus. It will be useful as an introductory book to those who require a more detailed knowledge of the subject; studying a short work before proceeding to a more comprehensive account is always an advantage. It should also be useful to others in revising the subject, e.g. in preparation for the study of conveyancing.

5. A table of cases, a table of statutes, and index, are useful adjuncts. R.S.S.

JOURNAL SECTION

1971 AUGUST

DIVORCE UNDER THE HINDU MARRIAGE ACT — A CONFLICT OF PRINCIPLES

(By JUSTICE V. S. DESHPANDE, M.A., LL.M. (Nagpur), LL.M. (Stanford); Judge, Delhi High Court.)

The Hindu conception of marriage was and has been one of sacrament even though customary divorce has been ubiquitous except in the higher castes. In England, however, the doctrine of marriage being a sacrament was disclaimed at the Reformation though the idea of marriage being a divine institution in its general origin was still retained. Divorce in English law came to be granted on the ground of a matrimonial offence committed by one party to the marriage which gave a right to the innocent party to apply for a divorce. The basis of divorce, therefore, was the wrong committed by the guilty party and the right to apply for divorce was, therefore, available only to the innocent party. The grounds of divorce in the various Matrimonial Causes Acts were, therefore, based on the wrong or fault or a matrimonial offence committed by the guilty party. At the same time, the conduct of the petitioner or a wrong committed by the petitioner constituted a bar to the grant of relief at the instance of the petitioner. The provisions of Part III of the Indian Divorce Act, 1869, giving the right to apply for divorce to the aggrieved party also gave the discretion to the Court to dismiss the petition for the conduct or fault of the petitioner. When divorce was first introduced in Hindu law by the Hindu Marriage Act, 1955, the right to divorce was, in consonance with the background of the English law and the Indian Divorce Act, 1869, based on the fault or wrong committed by one party giving the right to apply for divorce only to the innocent party. This was the scheme of S. 13 of the Act prior to its amendment in 1964. The discretion to refuse the relief of divorce on the ground of any wrong committed by the petitioner or in view of the conduct of the petitioner was given to the Court by S. 23. The scheme of Ss. 13 and 23 was thus clear. It was for the petitioner to make out a case for the relief of divorce under S. 13 by proving that the respondent has been guilty of one of the grounds stipulated therein. Section 23 had an overriding effect. For, the discretion was exercised by the Court "if the Court is satisfied that (a) any of the grounds for granting relief exists," etc. It is, therefore,

only after the petitioner succeeds in making out a case for the grant of relief of divorce that the question of the Court refusing the relief on the ground of the conduct or fault of the petitioner under S. 23 could arise. There was, therefore, a difference between (a) the dismissal of a petition for divorce on the ground that the petitioner has not proved the existence of any of the grounds enumerated in S. 13, and (b) the dismissal of such a petition under S. 23 on the ground of the conduct or fault of the petitioner even though in the absence of such conduct or fault, the petitioner would have been entitled to a decree for divorce under S. 13.

2. From this principle of divorce based on the theory of fault or wrong or a matrimonial offence of the guilty party, two departures were later made in India, namely, (a) divorce by mutual consent was for the first time made available by the Special Marriage Act, 1954, to persons whose marriages were registered under that Act: No question, therefore, arose of either party being guilty or innocent at all; and (b) divorce was made available simply on the ground of the breakdown of the marriage to either party by the amendment of S. 13 of the Act made by the Hindu Marriage (Amendment) Act, 1964 (Act 44 of 1964). These changes in law were the result of a considerable ferment of opinion about the reform of the divorce law which took place particularly in England. That the ground of divorce cannot be confined only to the fault of the guilty party but must recognize the breakdown of marriage even if such breakdown was due to the fault of a party was an idea underlying the various Bills introduced in Parliament by Mrs. Eirene White (1951), Mr. Abse (1963), Mr. Parker (1965) and ultimately the Divorce Reform Bill which became an Act in 1969. The Royal Commission on Marriage and Divorce who reported in March 1956 were of the unanimous view that the mere option of either spouse should not be made a ground for divorce. But the Commission were divided on the more important issue of the principle underlying the Bill introduced by Mrs. White, namely, the doctrine of breakdown of marriage. The

Chairman Lord Morton followed by eight members of the Commission was opposed to this doctrine. They admitted that marriage failures were not always due to the fault of a party and that there was "an element of artificiality . . . in the doctrine of the matrimonial offence and the consequential emphasis on legal guilt or innocence." But they were not prepared to hold that the frustration of a marriage may be a misfortune for which neither party is to blame. They opposed the "belief that there was a wholly blameless way of terminating a marriage" and insisted that "it is not the function of the law to provide such a means of release; its proper function is to give relief where a wrong has been done."

3. Nine other members of the Commission while agreeing that "the present law based on the doctrine of the matrimonial offence should be retained" were in favour of introducing "to a limited extent the doctrine of the breakdown of marriage." No member of the Commission favoured the idea that a party against whom a separation decree or order has been made (as distinguished) from the one who had obtained a decree or order should be able, after three years, to have it converted into a divorce. But the nine members favouring the introduction of the doctrine of breakdown of marriage to a limited extent did not want the existence of a separation decree or order to be a bar to its application.

4. The nineteenth member of the Commission, Lord Walker proposed to abolish the doctrine of matrimonial offence altogether. He also rejected the divorce by consent. He recommended that "dissolution on breakdown" should be "the sole mode of ending the marriage tie" and this "at the option of either party." Lord Walker drew a sharp distinction between a divorce by consent and a divorce by breakdown in the following words:

"A marriage cannot fairly be said to have broken down beyond hope of reconciliation merely because the parties had consented to lead separate lives in the past and intended to do so in future; for consent "may be withdrawn and intention may change. What does preclude hope of reconciliation is rather the character of the acts done by the parties respectively and of the events affecting their lives."

A Committee appointed by the Archbishop of Canterbury adopted the proposal of Lord Walker and his reasoning. The report of this Committee is published under the title "Putting Asunder". Sir Jocelyn Simon, President of the Court of Probate, went further and recommended grant of divorce by consent

where there are no dependent children. The last proposal in 1966 was the report of the Law Commissioners under the name of the "Reform of the Grounds of Divorce." They proposed three alternatives for divorce, namely:—

(1) breakdown without inquest, that is, breakdown of marriage evidenced by period six months' separation;

(2) divorce by consent; and

(3) divorce on the ground of separation which should apply with a difference both to divorce by consent and divorce without consent. The difference would be in the length of the prescribed period of separation. This would be two years where the parties consented and five or seven years where they did not.

In view of the above discussion it was inevitable that the breakdown of marriage, though to a limited extent, should have motivated the amendment of section 13 in 1964.

5. Prior to the amendment in 1964, clauses (viii) and (ix) of section 13 (1) of the Hindu Marriage Act, 1955 read:

"13 (1) Any marriage solemnised, whether before or after the commencement of this Act, may, on a petition presented by either the husband or the wife, be dissolved by a decree of divorce on the ground that the other party

* * * * *

(viii) has not resumed co-habitation for a space of two years or upwards after the passing of a decree for judicial separation against that party; or

(ix) has failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after the passing of the decree."

After the amendment in 1964, the new subsection (1A) which was substituted by the amendment in place of the old clauses (viii) and (ix) reads:—

"(1A) Either party to a marriage whether solemnized before or after the commencement of this Act, may also present a petition for the dissolution of the marriage by a decree of divorce on the ground

(i) that there has been no resumption of co-habitation as between the parties to the marriage for a period of two years or upwards after the passing of a decree for judicial separation in a proceeding to which they were parties; or

(ii) that there has been no restitution of conjugal rights as between the parties to the marriage for a period of two years or upwards after the passing of a decree for restitution of conjugal rights in a proceeding to which they were parties."

6. The scheme of section 13 prior to the amendment was that the right to apply for divorce was given only to the innocent party who had to prove the commission of a wrong by the respondent to obtain the divorce. In keeping with this scheme the pre-amendment clauses (viii) and (ix) of sub-section (1) of section 13 provided that it is only the party in whose favour a decree for judicial separation or restitution of conjugal rights had been passed who could apply for divorce on the grounds that the other party had not resumed co-habitation for a period of two years or upwards after the passing of a decree for judicial separation or had failed to comply with a decree for restitution of conjugal rights for a period of two years or upwards after passing of a decree. The Amending Act of 1964 made a sharp distinction between this original scheme which was confined to the first seven clauses of sub-section (1) of section 13 as they existed prior to the amendment and the new sub-section (1A) which was substituted by the amendment in place of the old clauses (viii) and (ix). After the amendment, therefore, only sub-section (1) of section 13 continued to be based on the fault theory. Sub-section (1A) of section 13 was based on the new breakdown theory. For, it gave the right to apply for divorce to either party to a marriage on the ground that there has been no resumption of co-habitation between the parties for two years or more after the passing of a decree for judicial separation or there has been no restitution of conjugal rights between the parties for a period of two years or upwards after the passing of a decree for restitution of conjugal rights. The changes made by the amendment were as follows:

(1) Prior to the amendment, the right to apply for divorce was given only to the innocent party. After the amendment the right has been given to either party.

(2) Prior to the amendment, the party against whom a decree for judicial separation or for restitution of conjugal rights had been passed was held to be in the wrong if such a party did not resume co-habitation or did not comply with a decree for restitution of conjugal rights for two years or more after the passing of these decrees. It is this wrong which gave the cause of action to the party in whose favour these decrees were passed. But after the amendment, the difference between the parties in whose favour the decrees were passed and against whom the decrees were passed has been eliminated. The mere fact that after the passing of these decrees, co-habitation has not been resumed or the restitution of conjugal rights has not come about is regarded as sufficient to give either of the parties a right

to apply for divorce. This is the new way of looking at the phenomenon of the judicial separation between the parties and the non-restitution of conjugal rights between them. This phenomenon by itself is regarded as a breakdown of the marriage necessitating the grant of divorce irrespective of the question by whose fault the breakdown of the marriage has resulted.

7. The question whether a marriage has broken down may be considered in two ways:—

(1) as in section 2 of the Divorce Reform Act, 1969 by the proof of facts, some of which consisted of the matrimonial offences committed by one of the parties but all of which showed that both co-habitation and reconciliation were not possible;

and (2) substituting decrees of judicial separation and restitution of conjugal rights to dispense with proof of facts, as in S. 13 (1A) of the Hindu Marriage Act.

The former method was adopted by the Divorce Reform Act, 1969 and the latter method by Act 44 of 1964 amending section 13 of the Hindu Marriage Act, 1955. It is to be noted, however that the very fact that decrees for judicial separation and restitution of conjugal rights had been passed presupposes that the various facts some of them showing that one of the parties was at fault and all of them showing that neither co-habitation nor reconciliation was possible had already been proved in the proceedings leading to these decrees. The principle of the breakdown of marriage has thus been introduced by both these enactments only in one particular manner, or putting it differently, to a limited extent. The cohabitation and reconciliation have become impossible not because the parties had consented to lead separate lives but because of the character of the acts done by the parties and the events which affected the lives of the parties. The distinction drawn by Lord Walker between divorce by consent and divorce for breakdown is relevant to understand precisely the principle underlying these enactments. The inquiry into the conduct of the parties is eliminated only in the sense that the decrees for judicial separation and restitution of conjugal rights have been accepted as the results of those inquiries in the amended sub-s. (1A) of S. 13. But it is not the theory of the amendment that the conduct of the parties leading to the breakdown of marriage was not relevant at all. On the contrary, such conduct was very much relevant. In section 2 of the Divorce Reform Act, 1969 such conduct has to be proved while in sub-section (1-A) of section 13 of the Hindu Marriage Act, 1955 such conduct is regarded as proved by the decrees.

8. It is in this background that the amended section 13 (1A) of the Hindu Marriage Act, 1955 has to be construed.

9. On a plain reading it is clear that the very object of the amendment was to enable either of the parties to the decrees to apply for divorce. This was a deliberate departure from the law prior to the amendment which barred the parties against whom the decrees were passed from making such an application. It is only in this sense that the guilt or the wrong of the party against whom the decrees had been passed was not allowed to act as a bar to the making of the application. But this did not mean that the judgment debtors against whom the decrees were passed were in fact regarded as blameless as the decree-holders in whose favour the decrees were passed. Sub-section (1A) does not differ from sub-section (1) of section 13 in one fundamental respect. Both these provisions merely enable applications for divorce to be made. They do not say that Courts shall grant divorce on such applications. They only enable the applications to be made on the grounds stated in these provisions. Neither sub-section (1) nor sub-section (1A) of section 13 is, therefore, a complete code in itself for the grant of divorce. The other provisions of the Act have to be read along with them. The provision with which we are concerned is section 23. There can be no controversy that section 23 had to be read with section 13 as the latter stood prior to the amendment of 1964. For, the Act has to be read as a whole. Can it be said that sub-section (1A) of section 13 overrides section 23? It is true that sub-section (1A) of section 13 was enacted in 1964 while section 23 was enacted in 1955. If, therefore, sub-section (1A) of section 13 is inconsistent with section 23, one argument can be that the subsequently enacted part of the Act would prevail against the previously enacted part of it. But this rule is subject to context to the contrary. While section 13 is concerned with enumerating the grounds for divorce, section 23 is of a general nature. It opens with the words "in any proceeding under this Act." It, therefore, applies to every proceeding under the Act. It could not, therefore, be overridden by sub-section (1A) of section 13 which applies to the divorce proceeding. Section 23 (1) (a) further says that "if the Court is satisfied that any of the grounds for granting relief exists." This means that section 23 (1) (a) applies only after the Court is satisfied that the petitioner is entitled to relief on one of the grounds enumerated in section 13. This applies not only to the grounds enumerated in sub-section (1) but also to the grounds enumerated

in sub-section (1A) of section 13. Section 23 has, therefore, to be read with sub-section (1A) of section 13. What is the result of reading these provisions of law together?

10. On this question there has been a conflict of judicial decisions. On the one hand is the view impliedly based on the fault theory that persons against whom decrees for judicial separation or restitution of conjugal rights have been passed are precluded from taking advantage of sub-section (1A) of section 13 unless some other factors or altered circumstances have intervened and placed the whole affair in quite a different light from that in which the original proceedings were viewed. Similar changes can happen between parties who are separated by a decree for judicial separation. Even a judgment-debtor subject to such a decree may later become interested to regularize unions to give illegitimate children some future and otherwise to achieve certain ends quite different from those which were in contemplation when the decree was passed against him. Under section 23, the Court would have to use its discretion and to see whether a judgment-debtor is able to make as good a case for divorce as would have been made by the decree-holder if instead of the latter the former applies under sub-section (1A) of section 13 for divorce. *Laxmibai Laxmichand Shah v. Laxmichand Ravji Shah A I R 1968 Bom 332*, *Chaman Lal Chuni Lal v. Smt. Mohinder Devi AIR 1968 Punj and Har 287*, *M. Someshwara v. Leellavathi AIR 1968 Mys 274*, and *B. B. Syal v. Smt. Ram Syal AIR 1968 Punj and Har 489*.

11. The other view implicitly based on the breakdown of marriage theory is that no inquiry into the conduct of a judgment-debtor who applies for divorce under sub-section (1) of section 13 can be made because the very purpose of the amendment was to enable such a judgment-debtor to apply despite the fact that he was the guilty party and the decree had been passed against him expressly on the ground of his fault. If his conduct were to disentitle him to make such an application, then the purpose of the amendment would be defeated. *Smt. Ram Kali v. Gopal Dass, 1968 Delhi L T 503* and *Ram Kali v. Gopal Dass L. P. A. No. 101 of 1967, D/- 13-1-1971 (Delhi) (FB)*.

12. It appears to me that the apparent conflict in these two sets of judicial decisions is capable of reconciliation in the following manner: Firstly, it must be understood that the theory underlying sub-section (1A) of section 13 is the breakdown of marriage but only to a limited extent. Therefore, on the one hand, an inquiry into the conduct of the judg-

ment-debtor petitioner is dispensed with in so far as such conduct relates to a period prior to the passing of the decree. It is well-known that the proceedings in a suit or a petition terminate in the decree and the effect of these proceedings is to be seen only as reflected in the decree. The decree was either for judicial separation or for restitution of conjugal rights. It was executable only at the instance of the decree-holder but not at the instance of the judgment-debtor. To that extent, the merits of the contentions of the parties are reflected in the decree. But the effect of the amendment was that an application for divorce could be made by either the judgment-debtor or the decree-holder. These two parties are, therefore, placed on the same footing as far as the making of the application is concerned. If the Legislature had intended that the conduct of the judgment-debtor should again be considered in granting or refusing his application under sub-section (1A) of section 13, then the Legislature would not have placed the judgment-debtor on the same footing as it placed the decree-holder in making such an application. If the Court were to take into consideration the conduct of the judgment-debtor prior to the passing of the decree, then to that extent, the Court would be holding that the right of the judgment-debtor to make the application is not equal to the right of the decree-holder to make such an application. Such a holding would be contrary to the plain wording of section 13 (1A) which does not make any distinction between these two parties as to the making of the application.

13. Of course only such conduct of the decree-holder or the judgment-debtor petitioner would become irrelevant in considering his application under sub-section (1A) of section 13 as had been already considered in the making of the decree against him. But other conduct which had not been so considered in the proceedings leading to the decree would not be precluded from consideration. For, the argument that the judgment-debtor and the decree-holder are placed on the same footing under sub-section (1A) would not be available to rule out the consideration of such conduct as it was never the subject-matter of consideration in the proceeding leading to the decree.

14. For the same reason, the conduct of the decree-holder after the passing of the decree would also have to be taken into consideration. For, the equation of the judgment-debtor and the decree-holder for making the application has no bearing on the conduct of either party whether the judgment-debtor or the decree-holder after the decree is passed. By reading section 23 with sub-section (1A) of

section 13, therefore, the following propositions emerge —

(1) Under section 23 all conduct of both the husband and the wife has to be considered by the Court as would have a bearing on the exercise of the discretion by the Court in granting the relief of divorce. For, the nature of the jurisdiction of a divorce Court is not merely to decide a dispute between the parties but also to investigate not only the "facts in Court" but also the "facts of life" between the parties. This is why under sub-section (1) of section 23 the Court has to satisfy itself that the petitioner is not in any way taking advantage of his or her own wrong or disability for the purpose of such relief and that the petitioner is not guilty of various other things which may also operate as a bar to the relief. This is also the reason why under sub-section (2) of section 23, the Court has to try to bring about reconciliation between the parties.

(2) The specific and limited effect of sub-s. (1A) of S. 13 is to preclude the Court from taking into account that portion of the conduct of the parties which has already been considered by the Court in the proceedings leading to the decrees for judicial separation and restitution of conjugal rights. The intention of the Legislature in giving both the judgment-debtor and the decree-holder the right to make an application for divorce was to eliminate the consideration of such conduct.

(3) All other conduct of the parties not considered in the proceedings leading to the decrees and in particular the conduct of the parties subsequent to the decrees has very much to be considered by the Court under section 23 of the Act. Instances of such subsequent conduct or of conduct not considered in the proceedings leading to the decrees would be :—

(i) failure of the husband to provide for the maintenance of the wife;

(ii) when one of the spouses attempted to come and live with the other spouse and the latter spouse defeated such an attempt after the passing of the decree, the Court would have to consider under section 23 whether in such circumstances it could be said that there has been no resumption of co-habitation or no restitution of conjugal rights as between the parties. The Court may come to the conclusion that the spouse who prevented the other spouse from co-habitation and restitution of conjugal rights was taking advantage of his or her own wrong in pleading that there has been no resumption of co-habitation or no restitution of conjugal rights for over two years. He or she could not be allowed to take such a stand in view of his or her conduct.

15. This conclusion accords with the reconciliation of the conflicting principles of fault and the breakdown of marriage as an alternative basis for divorce. In the Divorce Reform Act, 1969 as also in sub section (1A) of section 13 of the Hindu Marriage Act, 1955, while the breakdown of marriage has been made the principal ground for divorce, the inquiry into the conduct of the parties leading to such breakdown has not been made altogether irrelevant. Further, the inquiry into such conduct of the petitioners as would have a direct bearing on the grant of the relief of divorce has always been made by the Courts. Such inquiry has not been made irrelevant by sections 1 and 2 of the Divorce Reform Act, 1969 and by sub-section (1A) of section 13 of the Hindu Marriage Act, 1955. On the other hand, section 4 of the former Act and section 23 of the latter Act have expressly enjoined on the Courts to make inquiry into

the relevant conduct of the parties before exercising the discretion to grant the relief of divorce. Even in Australia, the same reconciliation between the breakdown of a marriage forming the main basis of divorce and the conduct of parties being taken into account in exercising the discretion to grant relief is found to have been made in the Matrimonial Causes Act, 1959. Sections 28 (m) and 36 provide for dissolution of marriage by divorce on proof of circumstances showing the irreparable breakdown of a marriage. But section 37 gives the power to the Court to exercise its discretion to refuse divorce if it is satisfied that by reason of the conduct of the petitioner "whether before or after the separation commenced or for any other reason, it would, in the particular circumstances of the case, be harsh and repressive to the respondent or contrary to public interest, to grant a decree on that ground on the petition of the petitioner".

REVIEWS

THE LAW OF INTERNATIONAL TRADE (Nutshell Series). By Gloria Hooper, B.A., 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay-2). Pp. ix & 68. Price 12s.60p.

The present 'Nutshell' provides readers with a brief outline of the considerations involved in international trade transactions. In compressing a large mass of detail certain subjects have had to be omitted and others treated by cross reference only, mostly to other 'Nutshells', and perhaps inevitably only the English side of transactions is dealt with.

2. Every international trade transaction invariably involves the manufacturer, the export and import merchant, the banker, the insurer and the carrier, and embraces several legal and political systems and languages, so that some form of simplification and standardisation has been found desirable. International agreement has attempted to create uniform rules to be incorporated into national legislation, and institutions like UNECE (United Nations Economic Commission for Europe) issue standard contract forms for use in international sales.

3. The establishment of UNICTRAL (United Nations Commission on International Trade Law), which is an important stage in the evolution of international law and codification and unification in the field of international trade, is a development of particular interest to lawyers. The Commission is considering the international sale of goods, international

payments, and commercial arbitration, and has compiled a register of organisations in the field together with details of their activities, and a register of texts showing relevant international instruments and related documents, both of them being under constant revision by the legal division of the Secretariat of the United Nations.

4. Besides, the International Chamber of Commerce (ICC) has published Incoterms for the interpretation of terms to be incorporated into contracts, the Uniform Customs and Practice for Documentary Credits for use by bankers throughout the world, and the Rules of Conciliation and Arbitration, being the rules of the ICC's Court of International Arbitration.

5. An export contract is a contract for the sale of goods as defined by the English Sale of Goods Act, 1893, as extended by the First Schedule to the Uniform Laws on International Sales Act, 1967 (not yet operative), and the 'Nutshell' deals mainly with those parts of a transaction which are peculiarly affected by the customs and practices of international trade. The clause incorporating the payment provisions will normally specify the time, mode, place, and currency of payment, always subject to current exchange control restrictions. The settlement of disputes is by arbitration or legal action. Commercial travellers, branch offices abroad, subsidiary companies abroad, and joint export organisations are forms of representation abroad.

6. The 'Nutshell' deals with trade terms, rights of unpaid seller against goods, frustration and force majeure, and the law applicable. It considers exclusive sale agreements, export via agents, investment abroad, documentation and invoices, carriage of goods, and Government controls. It contains a table of cases, table of statutes, and index.

7. Although the 'Nutshell' is useful as an aide memoire for last-minute revision before Bar examinations, major textbooks, like 'The Export Trade' by Clive Schmitthoff, are indispensable. As adviser to the United Nations, Schmitthoff helped to prepare the report which led to the creation of UNICTRAL.

R.S.S.

PUBLIC INTERNATIONAL LAW. By D. J. Latham Brown, M.A., LL.B. (Cantab), Sr. Lecturer, in Law, Leeds University. 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay). Pp. XXX & 295. Price, Not stated.

What is public international law and how has it come about? How does it work and what are its limitations? What may or may not be expected of it? The work before us attempts to give us the answers. In a general way, public international law, or the law of nations, is a body of rules and principles which States consider legally binding on them. According to the author, international law is a body of principles and rules embodying general and particular commitments, binding in honour, which are formulated by States and their agents to deal with certain aspects of their external relationships..... "International commitments are a species of quasi-law, on the verge of true law, properly treated as a branch of jurisprudence."

2. After a brief historical introduction, the author discusses types of States, incidence of international commitments, evolving institutions and controls, transactions and responsibility, the problems of nationality and the rights of peoples and persons. He considers the dignity and equality of States, intervention in war and peace, force and obligation, disputed titles, dependent rights, and misuse of territory. The topics of relationships of States and people, asylum, treatment of aliens, the governing principles of recognition, the concept of non-intervention, and membership of organisations, are covered.

3. International law is less efficient than internal law in that there are many areas of State activity, e. g., nationality, armaments, immigration, and fiscal and trade policies, where the law does not reach. An interna-

tional court can exercise jurisdiction only where the State has consented to that jurisdiction. Although taking precedence over municipal law, it is closely related to the internal law of the States, for it is in the municipal courts that a large part of international law is enforced.

4. The main sources of international law are treaties, custom, and the general principles of law recognised by civilised Governments. Institutions such as the League of Nations, the United Nations, the Court of Justice of the European Communities like the European Coal and Steel Community and the European Economic Community, the European Court of Justice of the Council of Europe, and the World Court or the Hague International Court of Justice are implements by which the law of nations can be made more effective. The International Court of Justice applies international conventions establishing rules expressly recognised by the consenting parties, international custom as evidence of a general practice, judicial decisions, and teachings of highly qualified publicists. Where the "general principles of law recognised by civilised nations" is applied there could really be no lacuna to make a dispute non-justiciable. The reference to judicial decisions 'as subsidiary means for determining rules of law' enables the Court to utilise the advantage of its own permanence by looking to previous decisions.

5. The aim of the present author has been to get hold of principles and to seek out working doctrine from the practice of States revealed by the conduct of their agents. The work is provided with a table of cases and incidents, table of drafts, resolutions, declarations, and conventions, and British legislation, and should well repay the serious student's efforts to understand the subject. R.S.S.

EUROPEAN BUSINESS LAW. By G. A. Zaphiriou, LL. M. (Lond.) Visiting Lecturer in European Law, City of London Polytechnic, 1970. Sweet and Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay 2). Pp. xxiii and 264. Price, £3.15s. net.

The European market is expanding fast with the rapid process of integration and, whether or not the United Kingdom eventually joins the European Economic Community, European business law, to which the publication before us is an expert introduction, must become a subject of great practical relevance to those in commerce and industry. There are still many differences in the various

European national legal systems, whose business laws are compared and contrasted, care being taken to cover the French and West German law in detail, and all aspects of trading under the European Economic Community are explained. A variety of rules, including those that relate to contract and tort, private and administrative rules, and rules which fall within the spheres of internal, Community and international law, are dealt with.

2. Of the six Parts in the book, the first three deal with trading under the European Community treaties, general features of commercial laws in Europe, and commercial companies, including partnerships and subsidiaries. Taxation of enterprises, corporation tax, double taxation relief, value added tax, industrial property and anti-trust law, are the subjects of the next three parts.

3. After some introductory paragraphs on the common origin and influences of Continental European law and the international unification of commercial law, the author proceeds to describe the impact of the treaties of the European communities on business enterprises and the extent of their means of redress before the European Court of Justice. He then deals with companies and amalgamations, and with the status, residence, establishment and recognition of companies within the European Community. American and United Kingdom interests at present carry on business in a large scale within these territories. In view of the recent company law reforms in Germany and France and the first directive of the Council of the European Communities on the approximation of Company law, the analysis is limited mainly to these two countries. After discussing the tendencies of approximation and alignment of tax laws within the Community the domestic provisions of the member States affecting business enterprises are briefly outlined. Further, the international and especially European, background of the law relating to patents, trade marks and unfair competition is discussed. The last Part, on the restrictive practices and exclusive dealing agreements within the European Community, contains brief references to domestic rules on restrictive practices and monopolies.

4. The publication contains general concepts and terminology and detailed information on the law upto December 1969. Further important developments will appear in the European Business Law Section of Journal of Business Law, of which the present author is Co-Editor. As it is, the publication traces the pattern of current tendencies in modern European business law and provides the basic information and its sources to enable business-

men and their legal advisers to reach solutions to concrete legal problems. It includes a table of cases, table of legislation, table of treaties and conventions, and index. R.S.S.

LIFE ASSURANCE & TAX PLANNING. By Peter Harris & Derek Heuson, LL.B. (Lond.) Directors of Life Assurance and Tax Planning Services Ltd. 1970. Sweet & Maxwell, London. (In India: N. M. Tripathi Private Ltd., Bombay 2.) Pp. xix and 256. Price, £3.15s net.

The ramifications of life assurance and the tax laws which affect it are highly complex, and the technical book under notice explains fully the modern policies available and their use in tax planning by bringing together all the schemes available for the mitigation, if not the solution, of many income and estate duty problems in England; a full survey of the range of policies available in the market is provided, with clarification, from examples, of their practical effects.

2. In its practical approach, the book deals, for instance, with problems facing professional partnerships, provision for school fees, the difficulties of the private company director and the alternative estate duty claims that different trust arrangements attract; it makes comparisons of the varying investment returns available by tackling these problems with life assurance based solutions. The basic law and practice is fully discussed and advice is given on how to maximise return through an optimum investment and minimum taxation.

3. The earlier part of the book deals with the Finance Act, 1968 and the ways of mitigating estate duty and the use of life assurance, the combined effects of the Finance Acts of 1968 and 1969 and estate duty funding. Partnerships, private companies, annuities, surtax mitigation, settlements; and types of policy, are covered in the rest of the book.

4. Life assurance business is regarded as a single class of business, whether the company exclusively transacts life and annuity business or is a composite company, and the different kinds of life assurance and annuity contracts are commented upon. The effect of the Finance Act, 1968 in restricting the use of life assurance contracts in tax planning is examined. How premiums paid out of income, so as to keep a life policy drawn up under trust, can provide an estate duty free policy from the moment of inception, and how this approach can be adapted to the position of a private company shareholding, is explained. After considering the estate duty implications

of the Finance Act 1969, the position of a life policy as an alternative to a settlement is discussed, as well as the different aspects of solving partnership problems through life assurance. A separate chapter describes 'Back to Back Arrangements', an expression used to describe what is a combination of two separate contracts, and the main categories of life annuity from the tax planning angle are considered.

5. Provided with a table of cases, table of statutes, and index, the book includes appendices on estate duty rates and surtax rates. In another appendix all the relevant legislation is reproduced for the busy practitioner to instantly refer to the wording of a statute and for the numerous outsiders who may have neither the time nor the facilities to consult the Acts elsewhere. Similarly, Appendix 2 gives the definition of many life assurance terms for the benefit as much of those in life assurance business as of those outside it. But there are no drafting precedents, which can be of use only to the lawyer.

6. This comprehensive handbook on assurance techniques should be of particular assistance to solicitors, accountants, bank managers, and investment advisers generally. The presentation of the material being in non-technical terms, the reader should be easily able to assimilate the very considerable specialist tax information provided in the book.

R.S.S.

REVENUE LAW. By Barry Pinson, LL.D., Fellow of the Institute of Taxation. 4th Edition. 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay 2). pp. lxxvii & 702. Price £2.18s. net.

The volume under review is an introduction to the study of Revenue Law in England for the reader who already has some knowledge of the basic legal principles. Since it last appeared, in 1968, the law of income taxation has been consolidated in the Income and Corporation Taxes Act, 1970 and the Taxes Management Act, 1970. The Finance Act, 1969, amended by the Finance Act, 1970, altered the law of estate duty to such an extent as to necessitate the re-arrangement and re-writing of a good part of the text. New anti-avoidance provisions, introduced in 1969, have made it necessary to re-write the final chapter, now entitled "Tax Avoidance".

2. There are five parts in the book. Part I deals with taxes on income and on capital gains, and is in four Divisions dealing, respectively, with the taxation of the income of non-corporate bodies (under the heads of profits

of a trade, profession or vocation; the taxation of emoluments, of income from land, of foreign and of trust incomes; covenants and settlements; partnership taxation; losses, and capital allowances) the taxation of companies, the taxation of short term and long-term capital gains, and administration and assessment.

3. This part leads on to the second part on the Estate duty (under the heads of rates of duty; exemptions and reliefs; gifts, settled property; partnership interests and joint property, life companies; controlled companies; valuation; and foreign elements), and to the third part, on betterment levy. The interaction of betterment levy with other taxes and estate duty is discussed, and the next part states the principles of stamp duties briefly, while Part 5, entitled "Tax and Estate Planning" gives the reader a glimpse of the kinds of problem which commonly arise in practice in connection with gifts, settlements, arrangements on divorce and separation, Wills and Pension schemes.

4. Believed to be the only text book dealing with the whole of British Revenue law in a single volume, it states the law as on 1st July 1970, and carries a list of the works cited, a table of cases, a table of statutes, and index. The subject-matter of the book is presented in such a form as to make it useful as a text book for examinations as well as to the practising lawyer and accountant. The main object has been to state the principles of Revenue law in a readable and intelligible form. No attempt has been made to be exhaustive, but, in a number of cases, the reader is referred to the standard works on the various branches of Revenue law where a more detailed discussion or citation of authorities may be found.

R.S.S.

CRIMINAL PROCEDURE IN UGANDA AND KENYA (Law in Africa No. 13) By Douglas Brown, LL.B., M.A. Sr. Lecturer in Law, University of West Australia. 2nd Edition. 1970. Sweet & Maxwell, London. (In India N. M. Tripathi Private Ltd., Bombay 2). Pp. lxxvii & 185. Price, £1-10s. net.

The principal source of the law governing criminal procedure in Uganda and Kenya is the Criminal Procedure Code Act, which is the main enactment governing criminal trials. It is a comprehensive, detailed statute which lays down how a trial should be conducted, the rights of the parties, and the role of magistrates, police officers and witnesses. The Code follows the principles of English law closely and has been amended several times. That the accused should be tried in a just and

fair manner remains however the basic principle. The present text-book sets out to explain the rules and practice governing these criminal trials, and supplements the provisions of the Codes. A substantive body of case-law has evolved in East Africa laying down how the statutory provisions of the Codes should be applied in the Courts, and this book seeks to merge the statutory provisions and the case law in a manageable form. A basic knowledge of substantive criminal law is presumed throughout and no attempt is made to examine the merits or deficiencies of the law. It just explains what the law is and how it operates in the magistrates' courts.

2. Since the 1st edition appeared in 1965, both Uganda and Kenya have successfully integrated the two systems of law represented by the courts administering English law and local statutes on the one hand and customary law on the other. The Criminal Procedure Code having been made applicable to all Courts, magistrates, who formerly relied on simple rules of procedure, had now to administer a more complex set of rules. And the various amendments to the Code have now necessitated this new edition.

3. When the British established a protectorate in Uganda in 1894, they introduced English law and a system of Courts to administer it. There had already been in existence a system of customary law Courts administered by Chiefs and others in different tribes. The abolition of existing customary law was attended with difficulty as the British knew from experience and so it was permitted to continue alongside the administration of English law in courts where the procedure was similar to that obtaining in England. For nearly seventy years, therefore, the structure of the courts was based on the division of Uganda Law into that which was based upon English law and that which was based on customary law. The former were generally known as the 'protectorate' courts, and the latter as the 'native' or 'African Courts'. It soon became clear, however, that this artificial division would have to disappear and that a single system of law and courts would have to evolve, and the merger of the two systems became possible under the Magistrates' Courts Act 1964. A similar situation existed in Kenya where the courts were merged under the Magistrates' Courts Act 1967.

4. The present book discusses the topics of jurisdiction, summonses and warrants, and arrests and searches, and proceeds to deal with prevention of offences, prosecutions, charges, bail, pleas, hearings, witnesses and defence. The other chapters cover judgment, sentence, orders, appeals, magistrates, assessors, and

statutory interpretation, and the book carries a table of cases, a table of statutes and index.

5. The material in the book is presented as simply as possible and it should be of great assistance to lawyers; magistrates, police officers, students, and others who have occasion to be involved in a criminal trial. R.S.S.

THE PROPOSED INDIAN OMBUDSMEN. (A comparative study of the Lokpal and Lokayuktas Bill 1968). By S. K. Agrawala, M. A., LL.M., LL.D., Professor and Head of the Department of Law, University of Poona. 1971. N. M. Tripathi Private Ltd., Bombay 2. Pp. xvii & 81. Price, Rs. 12.50.

Swedish in origin, the post of Ombudsman was created more than 150 years ago, and several countries subsequently followed suit. But it is the Danish Institution, created in 1954, which has aroused the greatest international interest in political and academic circles. In India the President of the Republic appointed in 1968 the Administrative Reforms Commission, one of its terms of reference being to consider the problems of citizen's grievances. The Commission, in its interim report, unanimously recommended the setting up of "an institution analogous to that of Ombudsman," viz., the Lokpal and the Lokayukta, to cover the vast area of cases arising out of the exercise of the executive power which may involve injustice to individuals and for which no remedy is available. The Report gives a full justification for the setting up of the institution, considers the conditions for its creation, and makes comprehensive recommendations regarding appointment, powers, and procedure.

2. In order to set up an institution analogous to that of 'Ombudsman,' the Lokpal and Lokayuktas Bill 1968 was introduced in the Indian Parliament in May 1968. The Bill was said to have been passed by the Lok Sabha and was pending consideration by the Rajya Sabha when the latest mid-term elections intervened. The present monograph, which was originally prepared as a paper for the Fourth Commonwealth Law Conference held in New Delhi in January 1971, is a first critical and comprehensive study of the Bill. In the first three chapters the author deals with appointment, qualifications, and tenure, the principle of ministerial responsibility and the Ombudsman, and his powers and functions. He discusses the matters not within the jurisdiction of the Ombudsman, administrative and quasi-judicial functions of the administration, matters of policy and matters of administra-

tion, secrecy of information, the procedure of investigation, and the Ombudsman's powers of action. In the appendices are given the Government of India Resolution on the establishment of the Central Vigilance Commission, and the text of the Lokpal and Lokpyak as Bill 1968 as reported by the Joint Committee of Parliament.

3. The scope of the study is in no sense exhaustive. It attempts to cover only certain controversial aspects of the bill and considers some of the theoretical objections to the introduction of an Ombudsman-like institution in a parliamentary democracy. It extensively refers to the experience of New Zealand and U. K., the two Commonwealth countries where the institution has been most successfully functioning, parallel Scandinavian law and practice have also been mentioned where necessary.

4. The institution of Ombudsman has three basic characteristics: He is an independent and non-partisan officer of the legislature who supervises the administration, he deals with specific complaints from the public against administrative injustice or maladministration (or he may proceed on his own information); he has the power to investigate, criticise and report back to the legislature, but not to revise administrative actions. Although the present Indian Bill satisfies these conditions, it can by no means be a panacea for all bureaucratic ills. Administrative procedures must be improved, parliamentary control must be strengthened, and review by the Courts must be simplified. It may be necessary also to adopt the tribunals and enquiries as a general pattern for settling disputes between the individual and the authority. R.S.E.

EVIDENCE (Nutshell Series). By R. J. Clayton, B. A., B. C. L. 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay 2). Pp. ix & 68. Price, 12s. 60p.

The law of Evidence determines the relevancy of facts, or what sort of facts may be proved in judicial proceedings; and the production of proof of relevant facts, or who is to give it and how, and the effect of improper admission or rejection of evidence. The real, little 'Nutshell' before us deals with definitions, the classification of evidence, the functions of judge and jury, and relevancy, and the burden and standard of proof, in the early chapters. Four of the chapters are concerned with facts which need not be proved, like presumptions, judicial notice, and formal admissions, the competence and compel-

lability of witnesses, privilege, the method of securing witness's attendance, and oaths and affirmations; they consider the topics of corroboration required by law and by practice, the nature of corroboration, the examination-in-chief, cross examination and re-examination of witnesses.

2. The rule that 'hearsay evidence' is not admissible was formerly true of civil cases as well as criminal cases. The old rule still exists in criminal cases but has been modified by the Civil Evidence Act 1968 in civil cases. But there are certain exceptions to the rule even in criminal cases, as for example, the declarations of deceased persons, evidence given in former trials, admissions, confessions, and statements contained in public documents. In civil cases, according to the Civil Evidence Act 1968, hearsay evidence is admissible only by virtue of this Act, although certain common law rules about admissions are preserved in S. 9 of the Act.

3. The other chapters consider further rules of admissibility, opinion evidence, State interest, illegally obtained evidence, and convictions as evidence in legal proceedings. Character, previous convictions of the accused, or similar facts, are covered in the chapter on evidence of disposition, followed by the topics of documentary evidence, its proof, admissibility of extrinsic evidence, and procedure to ensure production of the original.

4. The book, which carries a table of cases, table of statutes, and index, states the law as on 6th June 1970.

5. 'Archbold: Pleading, Evidence and Practice in Criminal cases' (1969) and 'Phipson on Evidence' (1970) are among the major authoritative works on Evidence*. The former deals with the subject generally and in its application to particular categories of offence. The latter has incorporated most of the recent legislative developments in the field and, in consequence, the chapters on burden of proof, facts relevant to show identity, similar facts, hearsay evidence, confessions, written statements in criminal proceedings, judgments and rules of evidence, have had to be extensively revised or re-written. So far as India is concerned, the English law on the subject has been reduced to the form of express propositions, arranged in their natural order, and with modifications to suit the peculiar Indian circumstances, in the Indian Evidence Act 1872.† R.S.S.

*Both are available with N. M. Tripathi Private Ltd., 164, Samaldas Gandhi Marg, Bombay. 2.

†Law and Practice of Evidence by S. N. Bhattacharjee (1970: Eastern Law House, Calcutta.)

THE LAW OF INCOME-TAX, SUR-TAX & CAPITAL GAINS TAX (In a nutshell). By Michael P. Barber, LL.B., (Lond.), Lecturer in Law, Brighton Polytechnic. 1970. Sweet & Maxwell Ltd., 11 New Fetter Lane, London (In India: N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2.) Pp. xi & 114. Price, 12S.60P.

The law of income-tax in England is based upon the Income and Corporation Taxes Act 1970, a consolidating Act replacing the Income-tax Act 1952 and subsequent Finance Acts. The Act of 1970 will itself be amended by annual Finance Acts until the relevant legislation is codified. The administration of the Acts is dealt with in accordance with the provisions of the Taxes Management Act 1970. Corporation tax was introduced by the Finance Act 1965 Part IV and the relevant legislation is called the Corporation Tax Acts. The tax on capital gains, on the other hand, was introduced by the Finance Act 1962 in respect of short term gains, and the tax on gains realised outside the short-term period was introduced by the Finance Act 1965.

2. The income-tax, corporation tax and capital gains tax are administered by the Commissioners of the Board of Inland Revenue, the detailed provisions being laid down by Taxes Management Act 1970. It is worthy of note that the law as to capital allowances has been consolidated into the Capital Allowances Act of 1968, and provides for the aggregation with the income of the parent of the investment income of unmarried infant children, not regularly working. The Finance Act 1969 disallows, subject to exceptions, interest as a deduction for tax purposes. Capital allowances are available for expenditure on industrial buildings, machinery and plant, agricultural land and buildings, mines, oil wells, and scientific research expenditure.

3. The neat little guide-book before us, deals, inter alia, with the profits of a trade, profession or vocation, partnership income, losses, taxation of emoluments, personal reliefs, and occupational pension schemes. It covers the taxation of income from land, foreign income, life assurance policies, total income, surtax, charities, and covenants and settlements. It is provided with a table of cases, a table of statutes, and an index, and states the law as at the time of the Finance Act 1970.

4. The United Kingdom tax legislation is so voluminous and complex that it has been next to impossible to produce a student's book in reasonable compass which will give a general view of the subject. The present publication is a concise guide to this extensive

and complicated law with special reference to the needs of students studying for the final LL.B., or other professional examinations. It is not a substitute for bigger text books like C. N. Beattie's "Elements of the Law of Income and Capital Gains Taxation" and Barry Pinson's "Revenue Law" (1970 N. M. Tripathi Private Ltd., Bombay 2), both of which have already been noticed in these columns. In order to keep the *Nutshell* to manageable size the law relating to Corporation Tax has been omitted. It should be of great assistance as an aid to comprehension and revision. R.S.S.

INTERNATIONAL LAW THROUGH THE CASES. By L. C. Green, University Professor of International Law. University of Alberta. 3rd Edition. 1970. Stevens & Sons Ltd, 11 New Fetter Lane, London. (In India: N. M. Tripathi Private Ltd., Bombay. 2.) Pp. xxii & 855. Price, Not stated.

Since the appearance of the first edition of the Case-book before us in 1959, the International Court of Justice has delivered several important judgments and advisory opinions while the European Court of Justice and the European Court of Human Rights have also begun to make a substantial contribution to European jurisprudence. Further, municipal tribunals have given a number of decisions which are of significance beyond their own national limits. It is no longer possible to consider international law simply from the standpoint of international judicial tribunals and of the judicial practice of countries like the United Kingdom and the United States.

2. In the present edition some of the earlier judgments, like those on internationalised territories, have been omitted as being of primarily historical interest. Judgments on the law of armed conflict being of importance, the decisions on war and neutrality have been retained, although in reduced size. Of the seven parts in the book, two deal with the foundations of international law and international personality. They describe international law and society, the law-creating processes, international and municipal law, the domain of international law, and are concerned with the typical subjects of international law, the sovereignty and equality of States, recognition, international representation, and the continuity of international personality. The next two Parts, on State jurisdiction and objects of international law, focus attention on immunities and limitations under customary law and under conventional law, e. g., the freedoms of fisheries, communications and

water use, international economic law, criminal law, and protection of minorities. Territory, land frontiers, maritime frontiers and the high seas, individuals, corporations and ships, from the objects of international law. Parts V and VII, on international transactions and the law of international institutions. Consider the meaning, conclusion and legal effects of international treaties, their interpretation, breach, reparation, and termination, as well as international torts, judicial and quasi-judicial international institutions, supra-national institutions, and international civil service. Part VI, on the law of armed conflict, discusses the legal and illegal uses of force, State and effects of war, land warfare, military occupation, war crimes, neutrality, and Civil war.

3. Referring to the emergence of the new conception of international law, Judge Alvarez, of the International Court of Justice, emphasised that the new law is not only juridical but also political, economic, social and psychological and is a law of social interdependence concerned with the harmonising of the rights of States and emphasising their duties as well, and condemning the abuse of right. He spoke of the Convention adopted by the United Nations General Assembly in 1948 on the Prevention and Punishment of the crime of Genocide. The new international law, reflecting the new orientation of the legal conscience of the nations, condemns genocide as a crime against civilisation.

4. The system used in the present book for the classification of topics is broadly speaking that of the earlier editions although some chapter headings have had to be altered. The reference books cited at the beginning of each chapter to enable students to use the case-book in conjunction with leading text-books have also been amended. Each judgment has been printed as a single document so that the Court's process of reasoning may be pursued. Where cases refer to more than one aspect of law, cross references are used, and separate and dissenting judgments are included where they are significant.

5. The volume is furnished with an index and a list of cases.

R.S.S.

Private Ltd., Bombay). Pp. xv & 194 : Price, Not stated.

Public law is concerned with the constitution and functions of all kinds of governmental bodies, including local authorities, and their legal relationship with one another and with the individual. It embraces constitutional law and administrative law, and also covers criminal law, which is only one aspect of the State's relationship with the individual. The second edition of this broad outline of public law (1st edition, 1967) has become necessary owing to continuing developments in this field. Changes were expected to occur in 1970 as the result of the Beeching Commission Report on the Courts and the Radcliffe Maud commission Report on local government.

2. The Beeching Commission recommended a complete separation of the criminal and civil business of the higher courts and the reconstitution of the Supreme Court, and a revised split of jurisdiction between the High Court and the County Court by increasing the latter's jurisdiction to £1000 in tort and contract actions. According to the Administration of Justice Bill 1970, there will be a redistribution of business among the Divisions of the High Court, and the re-naming of the Probate, Divorce, and Admiralty Division as the Family Division.

3. The first three chapters of the present outline give the stranger to English law a general introduction to the English legal system. The hierarchy of Courts exercising civil and criminal jurisdiction is shown in diagram form and explained in detail. Although criminal law really forms part of public law it is considered here only in so far as it is relevant to the discussion of the Liberties of the Subject and Police Powers in the last two chapters. In the main, the book is concerned with certain aspects of constitutional law, such as the common law powers of the Crown that are discussed under the head of 'Royal Prerogative' and the workings of Parliament. The prerogative powers are conveniently subdivided into those that are exercised in the legislative, the executive, and the judicial spheres of Government. More especially, the book dwells on administrative law and such matters as delegated legislation, administrative tribunals and enquiries, and the jurisdiction of the Courts over administrative action taken by Government departments and local authorities.

4. Among the topics considered are Parliamentary supremacy in legislation, delegated legislation, Parliamentary scrutiny and judicial control. The discussion then centres on the Council on Tribunals, the constitution

PUBLIC LAW (Concise College Texts).

By Gordon J. Borrie LL.M., Professor of English Law, University of Birmingham. 2nd Edition. 1970. Sweet and Maxwell, London. (In India: N. M. Tripathi

of tribunals, procedure, review by the High Court, the Inspector's report in administrative enquiries, and costs. Attention is focussed on the judicial control of administrative action and the rules of natural justice, and the ultra vires doctrine and the judicial review of administrative action. The topics of substantive ultra vires, procedural ultra vires, use of powers for an improper purpose, irrelevant consideration, unreasonableness, want of evidence, and bad faith, are considered. Among the methods of challenging administrative action are mentioned the prerogative orders of prohibition and certiorari, mandamus, injunction the declaratory judgment, and action for damages.

5. The book should be useful to students and others who want a background knowledge of public law on which to build a study of more detailed works. The selected bibliography lists a number of books, both introductory & comprehensive, and the volume is furnished with a table of cases, table of statutes, and index.

R.S.S.

A FIRST BOOK OF ENGLISH LAW.

By O. Hood Phillips, Q. C., B. C. L., M. A. (Oxon.), J. P., of the University of Birmingham. 6th Edition. 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay 2.) Pp. xxix & 346. Price, £ 1. 2 s. net.

This elementary introduction to the study of English law briefly surveys its characteristics and the principles on which justice is administered in England, and gives, in Part I, an account of the various systems of courts and their composition and jurisdiction, with just enough history to indicate their origins. Dealing relatively fully with the sources of English law, the author explains the principles underlying the interpretation of statutes, the application of judicial precedent and the use of legal text books, and describes the literary materials in which legislation, judicial decisions, and juristic opinion, are embodied. In the third and last Part the main branches of English private law are sketched and the general principles stated, with the object of introducing the reader to legal conceptions and terminology.

2. In the latest edition, Part I takes account of the extended jurisdiction of county courts; the reorganisation of the Court of Appeal into a Civil Division and a Criminal Division, the latter displacing the Court of Criminal Appeal; new rules regarding committal proceedings; the introduction of majority verdicts in criminal cases; the proposal to set up a new Family Division of the High

Court, and a new Admiralty and Commercial Court in the Queen's Bench Division; the establishment of the Parliamentary Commissioner for Administration or 'Ombudsman'; the setting up of the Senate of the Inns of Court to exercise the disciplinary jurisdiction of the Benchers; and the Beeching Report on Assizes and Quarter Sessions.

3. In Part II sections of chapter 10 have been re-written to incorporate discussion on the report of the Law Commission on the interpretation of statutes, its proposals for reform, and the draft clauses of a Bill for giving effect to them. The chapter on judicial precedent has been re-written in the light of the House of Lords Practice Statement of 1966. The effect of the House of Lords decision in *Conway v. Rimmer* is discussed as well as the dicta of the Civil Division of the Court of Appeal in *Gallie v. Lee* concerning the binding force of its own precedents, the corresponding dicta of the Criminal Division of the Court of Appeal in *R. v. Gould*, and the treatment of the House of Lords precedents by the Judicial Committee of the Privy Council. The discussion of *ratio decidendi* has also been expanded.

4. In Part III the chapter on Criminal Law has been largely re-written to take account of the many changes introduced by the Criminal Law Act 1967, the Theft Act 1968, the Criminal Justice Act 1967 and the Children and Young Persons Act 1969. The chapter on the law of tort has been revised while in the chapter on the law of contract new topics, such as mistake, frustration and misrepresentation, have been included. Paragraphs on the legal position of children, young persons and minors have been inserted in appropriate places in the book.

5. Apart from these topics, notice has been taken of the Criminal Appeal Acts 1966 and 1968, the Administration of Justice Acts 1968 and 1969, the Justices of the Peace Act 1968, the Race Relations Act 1968, the Hire Purchase Act 1965, the Family Law Provision Act 1966, the Land Commission Act and the Leasehold Reform Act 1967. Some of the new cases referred to are concerned with mens rea and strict liability in Criminal Law, use of books of authority, exemplary or punitive damages, remoteness of damage in nuisance, fundamental breach, and specific performance.

6. Mention should be made of the table giving the dates of accession of English sovereigns from the Norman conquest, the table of cases, the table of statutes, and index.

R.S.S.

SENTENCING OFFENDERS IN MAGISTRATES' COURTS. By Keith Devlin, J. P., LL.B., M. Phil., Lecturer in Law, School of Social Sciences, Brunel University, 1970. Sweet and Maxwell, London (in India: N. M. Tripathi Private Ltd., Bombay-2). Pages xxii and 223. Price, Not stated.

Imprisonment, fines and monetary penalties, probation, attendance centres, remand homes, approved schools, detention centres, and Borstal training, are the common sentences given in criminal trials in Magistrates' Courts. But discrepancies between sentences passed by different Courts (or even by the same Court) for apparently similar offences are such as to call for serious notice. The application of the principles of sentencing is therefore of particular interest to the vast majority of people who come into contact with the criminal Courts as complainants, defendants, or witnesses. The present work deals authoritatively with every important aspect of the problem and covers all the ground from a discussion of first principles to a detailed examination of the law and procedure relevant to every kind of sentence, supported by abundant references to decided cases.

2. The book describes in broad outline the sentencing process itself in terms of the legal factors affecting the decisions, and deals individually with the main methods of disposal, custodial and non-custodial. Each of the measures is considered in terms of its effects upon the offender, its effectiveness, and the factors taken into account in dealing with the quantitative aspects of sentencing, like calculating the amount of the fine or the length of the period of imprisonment or probation. The author, who touches on some of the procedural aspects also, is concerned with such subjects as costs, compensation and disqualification, and he considers briefly the treatment of mentally disordered offenders, female offenders, and offences involving strict liability.

3. The five commonly identified aims of sentencing are retribution, individual deterrence, general deterrence, protection of the public, and rehabilitation. The different stages in the sentencing process are the obtaining of information regarding the circumstances of the offence, about the background of the defendant, and from the defendant himself in mitigation of the offence, the making of the sentencing decision, and the communication of it to the defendant. The non-custodial measures include fines, absolute and conditional discharge, probation orders, attendance centre orders and binding over orders, and

custodial measures include committals for sentence, imprisonment, committal for Borstal training, and detention centre orders. Orders on conviction include orders on costs, reparation and retribution, disqualifying from driving and endorsement of driving licence, and recommendation for deportation. The book, which contains a table of cases, a table of statutes and a table of regulations, states the law as at 1st February 1970.

4. Eminently fitted for working on this subject, the author, a practising barrister, has been deputy Chief Clerk in a busy London Court and Magistrate in the Inner London Juvenile Courts, and as University lecturer has engaged in research projects in this field; the book should help to encourage further discussion on the wider issues and encourage further research. A general complaint in India is that the Courts devote much time and labour to the trial of cases, but the question of determination of punishment is disposed of in minutes, and Mr. K. S. Chhabra has prepared certain broad guidelines for the Courts to avoid, or reduce the chances of, disparity in punishments under similar circumstances (Quantum of Punishment in Criminal Law in India, 1970). Everybody, whether Magistrate or student, is bound to benefit more or less from a perusal of the present volume.

R.S.S.

THE BOMBAY SALES TAX ACT, 1959. By C. C. Anajwala, B. A. (Hons.), LL.B., 1971. C. Jamnadas & Co., 146-C Princess Street, Bombay-2. Pp. xvi & 320. Price, Rs. 15.

In consolidating and amending the law regarding the levy of sales-tax on the sale or purchase of certain goods in the State of Maharashtra, the Bombay Sales Tax Act 1959 repeals the pre-existing laws on the subject. The charging section (Section 3) renders every dealer having a turnover of all sales or purchases during the year in excess of a specified limit liable to pay tax. The limit of turnover is fixed at Rs. 10,000/- for importers and manufacturers and at Rs. 30,000 for other dealers, provided in each case that the dealer has sold or purchased taxable goods of at least Rs. 2500/- during the period.

2. For the purposes of the Act, all goods are divided into five schedules, viz., exempted goods (A) declared goods (B), luxury goods (C), raw materials (D), and remaining goods (E). The main features of the Act are; exemption of Schedule A goods from the tax; introduction of a composite system of sales tax, i.e.,

a single point levy of sales tax at the first stage and a general sales tax at the last stage on Schedule B goods; a single point levy of sales tax at the first stage on Schedule C goods; a single point levy of general sales tax on Schedule D goods, and a two-point levy of tax (sales tax at the first stage and general sales tax at the last stage and retail sales tax) on the rest of the goods in Schedule E.

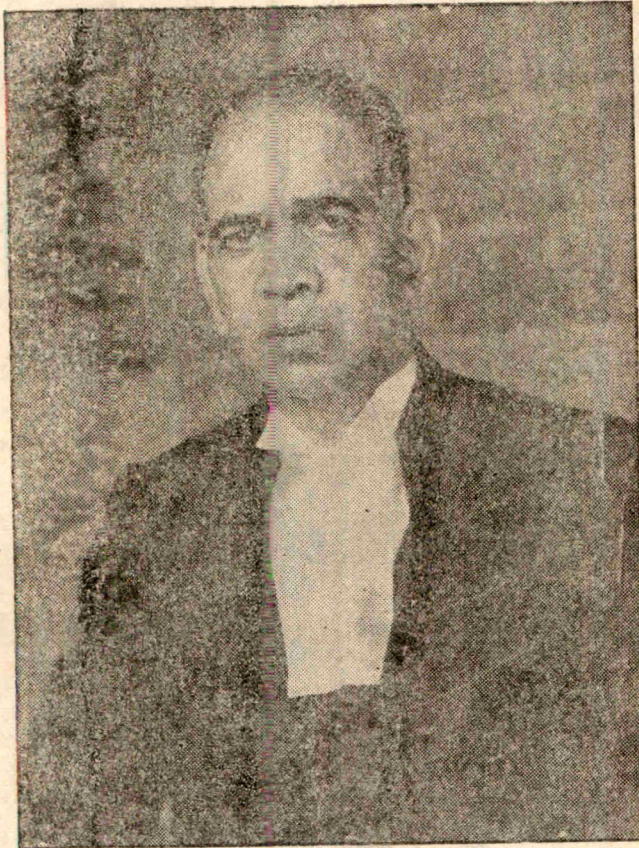
3. Sales tax is leviable on the sale of taxable goods after establishing a proper territorial nexus between the taxing authority and the transaction sought to be taxed. The sale must be in the course of business and not a mere casual sale. The Act provides for the determination of disputed questions by the Commissioner, but a question once determined cannot be entertained for determination once again, but only in appeal or by way of revision. The determination by the Commissioner is binding on all subordinate courts, but not on superior courts, and even the Commissioner, acting as appellate authority, is not bound by his own determination. The jurisdiction of civil courts is expressly barred, but this would not preclude the exercise of the writ jurisdiction if the administrative tribunal acts in violation of the declared law or acts against the principles of natural justice, or refuses to exercise its powers, or acts in excess of its powers.

4. The Act has separate chapters on the incidence and levy of tax (Ss. 3-19), sales-tax authorities and tribunal (Ss. 20 & 21), Re-

turns, assessment, payment, penalty, recovery and refund of tax (Ss. 22-47), liability to produce accounts and supply information (Ss. 48-51), and proceedings, offences and penalties (Ss. 52-69). Similarly, the Bombay Sales Tax Rules 1959 has chapters on sales tax authorities and tribunal (Rules 5-6B), registration, licences, authorisation, recognition and permits (Rules 7-21), returns, payment of tax, penalty, amount forfeited or composition money, assessment of tax and penalty (Rules 22-39), grant of drawback, set-off and refund (Rules 40-52-A), bills and memoranda, inspection of accounts, appeals and revision (Rules 54-65), and sales tax practitioners, service of orders, copies of documents, offences and penalty (Rules 66-71), followed by as many as fortyfour different forms, all amending Acts and Notifications upto 26th January 1971.

5. The present publication, which contains a table of cases and index, gives detailed commentaries on the various provisions of the Act, as supported by the latest case law and includes several illustrations in clarification of complicated questions. When the book was practically ready, there were two new developments; the legislature passed the Amending and Validating Act 1 of 1971 and the State Government amended Rule 22 of the Bombay Sales Tax Rules.

6. The book should be eminently useful to students of law, tax-payers and tax consultants.
R.S.S.



The Hon'ble Mr. Justice D. G. PALEKAR
Judge, Supreme Court.



The Hon'ble Mr. Justice
MUFTI BAHA-UD-DIN FAROOQI
Judge, Jammu and Kashmir High Court.

JOURNAL SECTION

A.I.R. 1971 October

REVIEWS

THE LAW OF ACCOUNTS, By N. Krishnama Charlu, B.A., B.L. Advocate, Dhone, Kurnool Dt. (A. P.), 1971. Pp. 141 & ix. Price, Rs. 10.

An 'Account' connotes a statement showing credits and debits grouped under classified headings for every separate business or undertaking and balance showing to what extent one is liable to another. For instance, a cash account shows a summary of transactions affecting cash. Similarly, accounts are maintained for different kinds of assets a person may possess, different kinds of income and expenditure he may receive or incur, and different persons with whom he may have to deal. Whatever the consideration for each item, every item must be entered in terms of money, and every specific sum whether actually paid out or due to be received, must find a place. The 'account' therefore naturally implies that one person is responsible to another either by contract or by other fiduciary relations created by law or otherwise and an 'account book' is a compilation of day-to-day dealings carried on by a person, the entries in it, provided they are regularly kept in the routine of business, being relevant under Section 34 of the Evidence Act.

2. In recent years the law relating to accounts has become increasingly important owing to the remarkable expansion of trade and commerce in the country, and books of account are the traditional evidence of the justice of one's claims. The legal principles governing accounts lie scattered in various enactments, and the busy lawyer, uncertain and doubtful about a point, finds little time to delve deeply into the statute laws and the stream of judicial decisions for clarification. The compact handbook under reference is designed to be of assistance to him.

3. The meaning of accounts, accounting and books of account, their various kinds and the different types of errors in them are described, as well as open, current, running and mutual accounts. Stated or settled accounts and the distinction between real account and account stated are discussed. The meaning of acknowledgments, their scope and essentials are explained, and then consideration is given to acknowledgments during Court vacations, and acknowledgments by the member of a joint family, by an advocate, or by an heir. The book is next concerned with payments and the law of appropriation, and payments made by an advocate, by the Court, or by the husband or wife. Another chapter covers suits, accounting periods, order for production by

Court, non-production and consequences and adverse inference. Other topics canvassed are what is cause of action, pleading, limitation, burden of proof, considerations before and after obtaining decrees and their forms.

4. Furnished with an useful index, the present handbook gives an up-to-date and comprehensive account of the law, covering the entire gamut of the problems concerning the use and value of traders' books of accounts in Courts of law. Set out in simple language, with illustrations and examples, the book analyses and brings out the basic principles involved in the judicial decisions. It is arranged in such a way that the desired point on topic can be traced readily. The headings and sub-headings are boldly printed and a detailed synopsis is given at the head of each chapter.

R.S.S.

INTRODUCTION TO LEGAL THEORY. By John D. Finch, B.C.L., B.A., Lecturer in Law, University of Liverpool. 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay), pp. viii and 145. Price, £1.2s net.

Because too many factors are common, to both jurisprudence as a whole and legal theory, it is difficult to draw a fine distinction between a study of the general nature of law itself and of particular concepts in it. Jurisprudence is the study of fundamental legal principles, including their philosophical, historical and sociological bases, and an analysis of the legal concepts. Jurisprudential thought has in recent times undergone considerable change, particularly in the realm of social philosophy underlying law. Broadly speaking, legal theory, which is the subject of the present publication, involves a study of the characteristic features essential to law and common to legal systems, an analysis of the basic elements of law which distinguish it from other forms of rules and standards and from other systems and social phenomena.

2. A legal theory course should induce genuine understanding of the issues involved and discourage the habit of merely memorizing disconnected detail, and the book before us keeps this in mind. It presents a short guide to some of the most significant aspects of that part of jurisprudence which has to do with legal theory, and provides an understanding of some major developments in the theory of law. The views of a number of jurists are examined and compared in order to highlight their essential characteristics.

3. The aim of the book is to give an insight into analyses of the nature of law. More a self-contained course than a reference book, it provides a basis for wider studies in the field of legal theory. There is a special introductory chapter calculated to dispel unnecessary doubts and remove complications, and to provide guidelines with reference to specific issues. Substantial reference is made throughout the book to original sources.

4. The eight chapters in the book are concerned with natural law and positivism, Bentham and Austin, Law as a system of rules, Kelsen and the great mystery, law, force, and authority, and the central position of the courts. The nature of law and the law of nature, law and sovereignty, law and sanctions, and sovereignty in action are considered; and the reader's attention is focussed on law and legal concepts, law and fact, the basic norm and the legal system, and law and lawyers. One of the chapters (Ch. 7) deals with three principal relationships, viz., the connections between law and force, i. e., physical force and physical powers; the notion of power considered from the angle of the element of authority in law; and a brief review of some notable interpretations of the nature of international law. The character of law in its relation to factual situations and physical events can largely influence the manner of accounting for the place and function of legal institutions, especially the Courts, within a system of law.

5. The book does not attempt to cover the whole field of jurisprudence. It is concerned primarily with legal theory and with the principal methods which have been used to describe and analyse the essential constituent elements of the phenomenon 'law'. It should be of immense value not only to the law student but also to any person or institution interested in the nature of law and the analysis of legal concepts.

6. Mention should also be made of the index of contents and the index of proper names.

R. S. S.

VETERINARIAN & THE LAW. By Dr. H. K. Lall, Director, Animal Husbandry, U. P., Lucknow. 1st Edition. 1971. Metropolitan Book Co. (Pvt.) Ltd., Delhi 6. pp. xii & 488. price Rs. 35.

It is necessary for a veterinarian to be familiar with common law like a member of any other profession, as well as with the various Acts and statutes pertaining to his special sphere of work regarding the improvement of livestock, control of diseases, and protection of animals, in order to perform his duties effectively and efficiently. The volume

under review describes the various Acts which will be useful to a veterinarian or an animal-husbandry man in the performance of his duties connected with meat inspection and protection of animals, including prevention of cow slaughter. There is also mention of common law duties which will be helpful to him in dealing with the ordinary cases of criminal assault or poisoning of livestock.

2. A veterinarian may have to appear as an ordinary witness or complainant in the Court, when his only duty is to state accurately as to what he observes without exaggeration or suppression of any detail. In his capacity as a witness to facts it is improper to express any opinion on them; it is for the Court to form an opinion or draw a conclusion from the proved facts. Generally, he appears as an expert witness on account of his special knowledge of the subject, as the Court itself does not generally have the benefit of special study or acquired skill. The present volume gives a brief description of the Courts, their powers, and some of the common legal procedures followed in them.

3. For veterinarians who are working as managers of factories, sales organisations, or institutions preparing biological products like anti-sera and vaccines for veterinary use, it is necessary to know the broad objectives and some of the relevant sections of the Act dealing with factories and with labour. Some familiarity with these Acts will also be useful to veterinarians and others working as managers of agricultural or livestock farms. As a result of actual experience, it was thought proper to include some of the broad essentials of these Acts for the general guidance and information of veterinarians. For those in charge of these institutions it may be desirable to consult the texts of the Acts and the relevant rules.

4. The extent to which animals have been involved or incriminated in legal cases in foreign countries like the U. K. and Canada is very considerable. Review of several important cases, besides various enactments concerning animals, have been published in the *Veterinary Annual*, and they provide useful information about the claims upheld in law Courts for damages on account of injury or loss sustained through acts done by animals. The legal decisions reported in the *Veterinary Annual* have now been compiled for the information of veterinarians in India. Other chapters in the book are devoted to service conditions and professional conduct, regulation of slaughter houses and food inspection, powers and functions of local bodies, purchase of drugs, including spirituous preparations and poisonous drugs, co-operative societies, grants-

in-aid, and contracts, and export of livestock and livestock products. There are as many as fortysix useful appendices, a glossary of vernacular terms, and index.

5. The volume should prove useful for day-to-day reference by field workers as well as by veterinary students for the study of veterinary jurisprudence. To avoid repetition, the various Acts in the States have not been described; only the Central Acts and some selected Acts, mostly pertaining to U. P., have been dealt with in detail, the rest being given in the Appendices. For the benefit of the young and aspiring veterinarian, a chapter on post-graduate courses and fellowships has also been included.

R.S.E.

JAMMU AND KASHMIR LAW REPORTER. December 1970. Vol I, Part I. Published by the High Court of Jammu and Kashmir, Srinagar. Chairman of the Editorial Board: Mr. Justice Jaswant Singh. Annual subscription, Rs. 30/- Monthly subscription Rs. 3/-.

In view of the substantial rôle of case law as a principal source of law, the importance of the practice of accurate law reporting cannot be over-emphasised. Law Reports, which are intended for practical use, contain the essential matters which practitioners need to know, i. e., a statement of the facts in issue, the general nature of the pleadings on either side, a brief statement of the arguments of counsel, and the judgment of the Court. The High Court of Jammu and Kashmir has now resolved to bring out its own Law Reporter. A few years after the establishment of the State High Court in 1928, its judgments began to be published in a special section of the Punjab Law Reporter, but in 1942 the Law Department of the Government embarked upon the publication of the Jammu and Kashmir Law Reporter, which was however discontinued in 1953. Subsequently several judgments found a place in the All India Reporter, and in 1962 the Kashmir Law Journal was started, but it was said to be unable to meet the growing needs of the High Court, the subordinate judiciary and the litigant public, with the result that the High Court itself has now decided to bring out its own official journal.

2. The judgments of the High Courts of Jammu and Kashmir are of course published in a number of journals like the All India Reporter and other journals covering particular specialised branches of the law, but it is thought they cannot provide adequate space

for all the important judgments of the Jammu and Kashmir High Court. As it is considered that the judgments of this Court are binding on the lower Courts as against the judgments of the other High Courts in the country which have only a persuasive force, it is believed essential that the subordinate Courts should be apprised of the latest pronouncements of the High Court with all reasonable expedition. The Law Reporter should also enable the Court to publish all the Rules and circulars issued by it from time to time. That there is some difference between the provisions of the laws in force in the State and the corresponding laws obtaining in other parts of India is another reason why this Reporter was thought necessary.

3. The Jammu and Kashmir Law Reporter will be a monthly publication covering all the important decisions of that High Court, and it will cover also important decisions of the Supreme Court relating to that State. The initial volumes will contain all the important decisions of the High Court given in 1969 and 1970 as well as Supreme Court judgments of this period. An attempt, we are informed, will also be made to publish such of the old judgments of the High Court as have not so far been published and have not been overruled or reversed.

4. The Supreme Court case reported in the present issue is the well-known case of *A. K. Kraipak & others v. The Union of India*, where the distinction between administrative and quasi-judicial powers is dilated upon as well as the matters to be considered in determining the nature of these powers. The scope and object of the rules of natural justice are examined and the changes in the concept of natural justice discussed, as well as their applicability to quasi-judicial and administrative inquiries. The issue carries both a nominal and a subject index of cases.

R. S. S.

THE CHOICE OF LAW IN EX-BRITISH AFRICA. By Kwamena Bentsi-Enchill, M. A. (Oxon), LL.M. (Harvard), J.S.D. (Chicago), Formerly Dean and Professor of Law, University of Zambia, 1970. Sweet & Maxwell, London (In India: N. M. Tripathi Private Ltd., Bombay 2.) Pp. 30. Price, 10s. 50p.

Reprinted from Zambia Law Journal (1969 Vol. I No. 2), the article under notice is in four parts. The first part deals with the formal sources of legal pluralism and considers that in territories like India and Africa, where

there was no pre-established system of European law, a uniform legal dispensation has been accorded, under which the doctrines relating to settled colonies are placed side by side or partially intermixed with the doctrines relating to conquered or ceded colonies. The pre-existing legal systems are regarded as "adapted to the requirements of the local population" though "insufficient for and unsuitable to the requirements of European settlers". The treatment was that of a newly discovered country, like a settled colony for the administration and British and Christian settlers using the laws of the mother country, leaving the Muslim and Hindu inhabitants to their own laws and customs with exceptions that were called for by commercial policy.

2. The second part is concerned with the standard formula for the reception of English Law and its problems. For the British West African colonies during the colonial period, one common statutory formula provided the frame-work within which the different systems of law were recognised and rules laid down for regulating the relations between them. Northern Rhodesia and Nyasaland, though retaining important features of this West African formulation, differ in some respects; so do the British East Africa territories, while those of South Africa differ further by largely substituting Roman Dutch Law for English Law. The primary concern of the present article is with the broad range of problems which the different formulations throw up, and to delineate them in the context of a detailed discussion of the West African formulation, and more particularly in connection with Ghana where that formulation was fully applied until changes were introduced with the introduction of a republican constitution on 1st July 1960. It is concerned with how far the law of England is in force, the application of Native law and customs, problems of interpretation, and suitability to local circumstances.

3. The formula for the recognition of Native Law and Custom, which is considered in the third part, deals with the conditions of validity, and the problem of ascertainment, while the last part, on the problems concerning the choice of law rules, treats of the exceptions where English law is the party's choice and where the transactions are unknown to Native Law and Custom, and then proceeds to discuss the residual rule.

R.S.S.

Lecturer in Law, The City of London College. 5th Edition, 1969. Stevens & Sons Ltd., 11, New Fetter Lane, London (In India: N. M. Tripathi Private Ltd., Bombay). Pp. xxxii & 451. Price £5-10s net.

The thirtyone chapters of the standard work before us are divided into four separate parts, viz., the International sale of goods, representatives abroad, matters incidental to exporting, and Government regulation of exports. It deals in detail with the frustration of contracts, the incidence of foreign law (conflict of laws), agency arrangements, branch offices and subsidiaries, joint export transactions and restrictive practice legislation. It covers also banking and financial practices, export credit guarantees, insurance, transport by sea and air, protection of patents and trade marks abroad, arbitration and litigation, export documentation, export licences and exchange control, as well as customs regulations, relief from purchase tax, and other topics of practical importance.

2. In the present edition, a new chapter deals with the two Uniform laws on International Sales and the Uniform Rules for the collection of Commercial Paper 1967 and international hire-purchase. The effect of containerisation is fully considered and the section on carriage by air re-cast. The treatment of the protection of Patents and Trade Marks Abroad has been expanded, while other topics discussed for the first time in this edition include the international settlement of investment disputes, the Czechoslovak International Trade Code of 1964, the proposed Visby amendment of the Hague Rules on Bills of Lading, new trade terms, export marketing partnerships and other forms of joint export marketing. For the first time the provisions of the American Uniform Commercial Code are referred to regularly.

3. United Kingdom legislation referred to for the first time in this edition includes the Companies Act, 1967, the Resale Prices Act, 1964, and the Restrictive Trade Practices Act, 1968. More than 100 Court decisions are noted, the Board of Trade suggestions for the simplification of export documentation are discussed, and as many as five chapters consider the Government regulation of exports. The provisions of the Convention of Stockholm, which constituted EFTA, and the Anglo-Irish Free Trade Area Agreement have been noticed, as well as the provisions of the Treaty of Rome. The book, which has several appendices and an index, includes a table of cases, a table of statutes, and a list of international conventions and other formulations of international trade law. Since this book is widely used abroad

THE EXPORT TRADE (THE LAW & PRACTICE OF INTERNATIONAL TRADE). By Clive M. Schmitthoff, LL.D. (Lond.), LL.D. (Berl.), Principal

—it was translated into Russian in 1958 and into Japanese in 1968—a list of the major works on export trade law in English, French, German and Spanish has been added.

4. For more than twenty years this concise account of the law and practice of international trade has been a reliable guide to exporters and students. An internationally recognised authority in this field, the author who deals comprehensively with all aspects of the subject, helped to prepare the report which led to the creation of the UNCTAD (United Nations Commission on International Trade Law). Businessmen and students who study the subject as part of their syllabuses in business studies and law should find the volume extremely useful. The newcomer as well as the expert receives proper guidance through the description of the elements of legal institutions and their special functions in international trade. The book states the law as it stood on last July 1969.

5. A briefer outline of the considerations involved in international trade transactions is to be had in *The Law of International Trade* (Nuttall Series, 1970. N. M. Tripathi Ltd. Bombay 2). R.S.B.

FAMILY LAW (Concise College Texts).

By Judge H. B. Grant, 1970. (Sweet & Maxwell Ltd., London. (In India N. M. Tripathi Private Ltd., Bombay-2.) pp. xix & 172. Price £. 1.2s.

The aim of the Concise College Texts Series is to cover in detail, with lucid and helpful explanation but in manageable length all current law and practice. The emphasis is on clarifying and placing in context recent legislation and case law. The essentials of the subject are clearly explained and presented in such a way as to enable the student to acquire and retain a thorough understanding of the law and its practical background, and the present publication provides a readable introduction to family law in England in its widest sense.

2. The author covers the full range of family law. Part I, which is headed Engagement and Marriage, deals with the law relating to the matrimonial relationship, including the duty to cohabit, the duty to maintain, matrimonial property law, and the legal consequences of the death of either husband or wife. The subject matter of Part II is the breakdown of marriage, which is described in chapters on separation by agreement, matrimonial orders, divorce and judicial separation, nullity, and the recognition of foreign decrees. Part III, which outlines the laws relating to

children, consists of chapters on custody and guardianship, legitimacy, wardship, and children in need.

3. The Matrimonial Proceedings and Property Act, 1970 makes fresh provision for empowering the court to order either spouse to make financial provision for, or to transfer property to, the other spouse or child of a family, to make orders for the variation of ante-nuptial and post-nuptial settlements, and, for the custody and education of children. It abolishes the right to claim restitution of conjugal right, and declares what interest in property is acquired by a spouse who contributes to its improvement, and makes provision as to a spouse's right to occupation in certain cases. And it amends the law about the property of a person whose marriage is the subject of a decree of judicial separation dying intestate.

4. The publication gives sufficient details and is complete enough to satisfy the needs of students for passing their examinations, of practitioners for solving everyday problems, and of social workers for appreciating the legal implications of family problems. By incorporating the recent changes in English family law—in particular the provisions of the Divorce Reform Act, 1969 and of the Matrimonial Proceedings and Property Act, 1970—it also becomes a useful guide to the new divorce laws which became effective in January 1971. The main provisions of the Law Reform (Miscellaneous Provisions) Act, 1970 and of the Marriage (Registrar General's Licence) Act, 1970 have also been included in the text in anticipation of their full implementation.

5. Seventy-five leading English statutes relevant to the subject of English family law have been brought together in Sweet and Maxwell's Family Law Statutes 1970 (N. M. Tripathi, Bombay), where we have all the basic statutory material which would be needed by a student for professional or university examinations on divorce and family law.

6. The volume is provided with a table of cases a table of statutes, and index.

R.S.S.

ADMINISTRATIVE LAW FOR SURVEYING STUDENTS. (Concise College Text). By H. W. Clarke, LL.M., D. P. A. 1970. Sweet & Maxwell Ltd., London (In India: N. M. Tripathi Private Ltd., Bombay-2). Pp. xvi & 159. Price £. 1.5s net.

Hitherto, students in England have been obliged to work from books dealing specifically with local government law; town and country planning law; compulsory purchase and com-

pensation; and the Land Commission and betterment levy. The volume under review obviates that need, because it provides an outline of those aspects of administrative law which are important from the viewpoint of surveying students. Its contents differ substantially from books on administrative law written for lawyers, who are mainly concerned with the general nature of the legal powers of the executive branch of government and the methods by which such powers may be limited and controlled by the courts. Surveyors may be interested in these aspects also, but their main concern is with the substance of executive powers particularly as they affect the property rights of individuals in land.

2. The volume covers the structure and organisation of local government; the powers of local authorities with regard to housing, public health, and highways; town and country planning law; compulsory purchase of land and compensation; the powers of the Land Commission and the assessment of betterment levy. In the last two centuries, powers were frequently sought from Parliament by private companies to enable them to provide public utility services like canals and railways, and these powers included that of acquiring land compulsorily, subject to the payment of compensation. Subsequently urgent problems of sanitation arose in urban areas and similar powers of compulsory acquisition had to be given to the public health authorities. Owing to the expansion of local authority social services in the fields of housing, health and welfare, and other developments since then, the granting of such powers increased enormously. There are four separate elements in the process of compulsory acquisition and compensation. The first is the source of the power, Act of Parliament or otherwise, to acquire land compulsorily. Secondly there are the procedures for authorising the acquisition (Acquisition of Land Act, 1946), and there is the procedure for actually taking the land (Compulsory Purchase Act, 1965); finally, there is the process of assessment, settlement and payment of compensation mainly under the Land Compensation Act 1961. It is still possible for land to be taken by the Crown for defence purposes in an emergency without payment of compensation, but the prerogative powers of the Crown are superseded wherever an Act is passed regulating the exercise of a particular power.

3. The Land Commission Act, 1967 had two main objectives: To ensure that enough land is available for houses and other buildings needed and, secondly, to ensure that part of the increased value due to development should be returned to the community. To achieve

these objectives the Act sets up a Land Commission with power to acquire, manage and dispose of land which is suitable for development; and to collect a betterment levy on the development value arising out of certain transactions in or operations on land. It is clear from the second annual report of the Commission, published in October 1969, that the realisation of neither of the objectives has come upto expectations.

4. The aspects of administrative law dealt with are required by the revised syllabus for the examinations of the Royal Institution of Chartered Surveyors. They cover a very wide field dealt with in a number of standard works referred to in the further reading list given in the Appendix. A detailed study of these works may take much longer than the time usually available to a surveying student, who should, therefore find this one volume extremely useful.

5. Mention should be made also of the table of cases, the table of statutes and index.

R.S.S.

THE NEW FRONTIERS OF COMPANY LAW. By S. C. Sen, Bar-at-law, 1971. Eastern Law House, Calcutta 13. Pp. xl & 423. Price, Rs. 40.

The twentieth century changes in legal thinking on company jurisprudence have been fundamental and many established concepts have given way to newer ideas and developments. English company law is no longer the only source for Indian lawyers and courts. The impact of modern corporations in the United States, Germany and several other countries and the new accounting methods in the U. S. S. R. have set into motion far-reaching changes in the conventional approach to company jurisprudence. The main object of the book under review is to focus the attention of corporation lawyers to the modern developments. While trying to analyse the effects of the new ideas on conventional corporation law, the author has summarised the studies of various reputed writers on the changing nature of a corporation, and has drawn special inspiration from Dr. Friedmann's *Law in a Changing Society*, which approaches the subject with the conviction that the law must, in contemporary conditions, respond to social changes if it is to fulfil its function as a significant instrument of social order.

2. Dealing with the newer concept of the corporation the author describes how it has grown in size, resulting in the dilution of the powers and control of the shareholders and increase in the powers of the manager. Despite literal compliance with the statutory require-

ments, there may be other facts inducing courts to withhold from the members of an association one or more of the attributes of a corporation, or 'to pierce the corporate veil'. The doctrine of ultra vires, which has been presenting a confusing spectacle, is dealt with and the inner conflict of the doctrine of Royal British Bank v. Turquand analysed. The author then proceeds to cover the modern position of company directors, and the changing pattern of their functions, liabilities, and duties. He is then concerned with the great debate as to whether profit motives or social responsibilities are the dominant objects of a company and also as regards the parties to whom the corporate directors are responsible. He considers the powers of the court to convene company meetings and the question of forfeiture and lien, and suits and proceedings by and against companies. Government companies, the new reliefs and remedies available against mismanagement and oppression under Sections 397 and 398 of the Companies Act, 1956, and some aspects of winding up by courts are covered. The important question of the worker's position in a company is discussed as well as that of worker participation in management and the legal effects of modern thinking on the subject. A chapter has also been included on the Monopolies and Restrictive Trade Practices Act. The book, which includes the text of the Monopolies and Restrictive Trade Practices Rules, 1970 and a table of cases and index, states the law as in June 1970.

3. The present book should furnish considerable guidance to company executives and lawyers. Included in it are the results of some of the author's own researches, viz., the legal structure of the modern corporations and the position of the different organs, the doctrine of ultra vires, lien and forfeiture of shares, winding up by court suits and proceedings against companies, and reliefs against oppression and mismanagement. Some of his views have been accepted by the courts and the others are yet to be canvassed.

R.S.S.

THE SECRETARIAL PRIMER, 1971.
1st Indian Edition. Eastern Law House Private Ltd., Calcutta 13. Pp. xii & 390. Rs. 18.

The publication of the work under review is an important development of the Chartered Institute of Secretaries in India, because it is the first book sponsored by the Institute, dealing with secretarial practice, that has been specially written in accordance with Indian law and practice. The Institute has secured the services of a team of writers who are well

qualified in Indian Company Law and who have had many years' practical experience in the company field.

2. The company secretary arranges for and attends meetings of the board of directors and of the shareholders and creditors, and the business done at the meetings should be validly transacted and not be capable afterwards of being impugned owing to irregularities, so that it becomes incumbent on the secretary to carefully study the law on the subject. The manager or secretary of a company on the requisition of a director shall at any time summon a meeting of the board. A balance sheet and profit and loss account having been prepared and audited, the secretary will draft a director's report for submission to the board, based on the results of the company's working for the year, his knowledge of the position of the particular trade concerned and the intention of the directors with regard to the payment of a dividend and of amounts to be placed to reserve. The report should be confined strictly to facts although some directors like to insert a paragraph with regard to the prospects for the next year. The preparation of the agenda for meetings is an important duty of the secretary, as the quick transaction of business depends largely on the ability of a secretary to draft the agenda in a manner calculated to facilitate quick decisions.

3. Divided into twenty-five chapters, the present work covers joint stock companies, incorporation, memorandum and articles of association, capital and its division into shares, commencement of business, and prospectus. It considers offers for sale and underwriting, stock exchange requirements, issues of shares, share certificates and register of members. It is also concerned with annual return, calls and forfeiture, debentures and deposits from the public, transfer of shares and registration of documents. The topics are then discussed of directors and secretaries, inter-corporate loans and investments, alterations of capital, ac. counts and audit, dividends and reserves, and winding up. Illustrative model resolutions and specimen forms are interspersed throughout the book.

4. The Secretarial Primer has been acknowledged to be a useful text-book on secretarial practice for students taking the examinations of the Chartered Institute of Secretaries, London, and as a valuable work of reference for members of the company Secretarial Profession. It is also useful to students appearing for the examinations of the Institute of Company Secretaries of India as well as to others taking secretarial practice as a part of the commerce courses in the different Indian

Universities. By sponsoring publication of this Indian edition the Indian Association of the Institute has done real service towards the progress of professional education in India.

5. The work carries a table of cases and index.
R.S.S.

THE NEW JURISPRUDENCE (The Grammar of Modern Law.) By the Hon. Mr. Justice P. B. Mukharji, Chief Justice, High Court of Calcutta, 1970. Eastern Law House Private Ltd., 54, Ganesh Chunder Avenue, Calcutta 13. pp. (42) & 490. Price Rs. 35.

Jurisprudence is the study of fundamental legal principles, including their philosophical, historical and sociological bases, and an analysis of legal concepts. Jurisprudential thought has lately undergone considerable change, particularly in the realm of social philosophy underlying law. Although an abstract and theoretical subject, researches into it have repercussions on a wide range of other subjects; for example, the law of crimes calls for a good knowledge of criminology and psychiatry. As taught today much of the jurisprudence has become out-of-date and the teaching of jurisprudence in universities and law schools requires radical reorientation, both in basic ideas and presentation. No wonder, therefore, that this subject should have been chosen as the theme of the Tagore Law Lectures of the Calcutta University which are embodied in the volume before us.

2. The first four chapters deal with the New Jurisprudence, the Schools of Jurisprudence and Theories of Law in the world context, the Law and its definitions indicating its many concepts, and the New Thesis which the distinguished author suggests. These are followed by successive chapters on Legislative jurisprudence, Constitutional jurisprudence, Common Law Jurisprudence, Equity Jurisprudence, Company Jurisprudence, Industrial Jurisprudence, Taxing Jurisprudence, Administrative Jurisprudence, International Jurisprudence, Matrimonial Jurisprudence, Economic Jurisprudence, and Justice in theory and practice. The chapter on Economic Jurisprudence indicates the growing emphasis on economics as a part of modern jurisprudence, while the final chapter covers theories of justice, courts, tribunals, and precedents, including Procedural Jurisprudence, Jurisprudence of developing countries and patterns of decisions and judgments. The volume, which carries a useful index, cites and discusses cases (a table of cases being included) which are not exhaustive but only illustrate the points made in these Lectures.

3. "No Court or other authority in the State under the Constitution", says the author, "can determine the primordial question whether the Constitution has been lawfully framed—Even if framed under violence, . . . it stands outside the whole area of law, jurisprudence, and justiciability . . . the Constitution is the supreme law of the land, even supreme above the law, and itself Governing all other laws. The supremacy of the Constitution is beyond the reach of the legislative, the executive, and the judicial power created by the Constitution itself . . . But the Constitution consents to a vulnerability when it provides for its own amendment, and such amendment is within the field of justiciability, jurisprudence, and law for the purpose of examining whether the constitutional amendment has been made strictly according to the constitutional provision itself."

4. Jurisprudence, says the present author, includes whatever law sees and does in every field of human activity. It includes not only the concept of ideas, described as New Jurisprudence but also the critical analysis of the different schools of jurisprudence, and the theories and definitions of law, as well as applied jurisprudence covering a very wide variety of subjects. The method of treatment followed in each chapter does not discuss the entire law on the subject but dwells only on the juristic trends operating in the particular field. It pinpoints new ideas and makes a new presentation. These Lectures, which should stimulate new ideas and new thinking, should help to re-adjust many of our notions about jurisprudence, its functions, its ideals, and its techniques of operations. Making a complete departure from the orthodox approach to jurisprudence, the learned author presents, perhaps for the first time, the whole panorama of law and justice in theory and practice illuminated by penetrating and far-reaching observations.
R. S. S.

ANNUAL SURVEY OF COMMONWEALTH LAW 1969. Editor: H. W. R. Wade, Q. C., LL.D., D.C.L., 1970. Butterworth & Co. (Publishers) Ltd., 88 Kingsway, London W. C. 2 (In India: Eastern Law House, Calcutta) Pp. lxxxiv & 792. Price, Rs. 180.

Prepared under the auspices of the British Institute of International and Comparative Law and the Faculty of Law in the University of Oxford the Fifth Volume of the Annual Survey of Commonwealth Law, which is just to hand, covers the period from July 1968 to June 1969. Its twenty-one chapters provide a high level of critical commentary on statutes,

cases and legal literature throughout the Commonwealth.

2. Seven of the twenty-one chapters cover constitutional law, fundamental rights and civil liberties, administrative law, social services and controls, maritime law, international law, and conflict of laws while five deal with taxation, monopolies and restrictive trade practice, company law and partnership, industrial property and labour law. Real property, trusts, succession, and family law are the topics of four chapters, and the others consider criminal law, evidence and procedure, civil procedure including Courts and evidence, commercial law, torts and contract.

3. Parliamentary Government in the States in India, legislation, and judicial decisions concerning acquisition of property excessive delegation, equal protection to everybody, free trade, and Government contracts, are among the Indian topics dealt with in the section on Constitutional law. The Supreme Court reversed the judgment of the Punjab High Court in invalidating the Appropriation Acts passed after the Speaker's purported adjournment of the Assembly. It held that the ruling of the Speaker can be questioned in a Court of law; the Speaker was wrong in ruling on March 18 that his order of adjournment of March 18 still stood; the Governor has an absolute and unfettered power to prorogue the house; the Governor is entitled to promulgate an ordinance in circumstances such as those of mid-March 1968, and the Deputy Speaker's certification of a Money Bill will suffice in such circumstances.

4. In Bihar, on coming to power, the united Front Government had appointed a Commission of Inquiry into alleged malpractices, abuse of power, favouritism and corruption by members of the preceding Ministry. The Supreme Court was clear that, when a Ministry goes out of office, its successor may consider any 'glaring changes' and may, if justified, order an inquiry "Otherwise each Ministry will become a law unto itself and the corrupt conduct of its Ministers will remain beyond scrutiny."

5. In respect of judicial decisions, three cases in the period under consideration provide a conspectus of constitutional doctrine as to the discrimination permitted under Article 15 (4) of the Constitution in favour of the 'Backward classes'. In view of the judicial decision invalidating State laws imposing sales tax on inter-State sales the Union Parliament devised a scheme which allowed the States to receive the proceeds of the Sales tax levied on inter-State sales and this scheme was upheld by the Supreme Court (*State of Madras v. Nataraja Mudaliar*, A I R 1969 S C 147).

The Supreme Court also held that attempts by Ministers to whip up party and public support for a Presidential candidate do not per se amount to undue influence.

6. Several other Indian references relate to labour law. Indian Courts have continued to discuss the purposes of industrial law and industrial tribunals more openly than is the case in many other countries. A worker is a person employed in industry but what is 'industry'? In *Fraser & Ross v. Sambasiva Iyer* (A I R 1969 Mad 134) the Madras High Court held that accountancy was a learned or liberal profession and therefore not an industry and the Supreme Court held that the catering employees in the Cricket Club of India could not be parties to an industrial dispute as the Club was non-profit making and could not be called an industry (A I R 1969 S C 276). In various statutory contexts the Courts have had to interpret the terms 'dismissal' and 'discharge.' Further a new form of industrial action has become very popular on the Indian sub-continent, viz., Gherao, which is held to be always likely to involve a violation of the criminal law. A stay-in-strike is legal in India, although workers who stay in their employer's premises after normal working hours are liable for a trespass, but their conduct per se is not a criminal offence.

7. The Survey which contains a table of statutes, table of cases, and subject-index and territorial index, maintains the high standards of scholarship, analysis and presentation which we have come to associate with it. Lawyers seeking concise well-documented information on Commonwealth decisions cannot do better than turn to it.

R. S. S.

THE METRICS OF LEGAL PHILOSOPHY. By A. R. Biswas, M.A., LL.M., 1970. Firma K. L. Mukhopadhyay, 6/1A Dhiren Dhar Sarani, Calcutta 12. Pp. ii and 59. Price, Rs. 10.

"Legal science", observed K. G. Wurzel, "would succeed in stopping the principal breach in its ramparts through which uncertainty may enter, if the social forces and value judgments could be transformed into clearly conceived logical formulae of definitely limited legal effectiveness." This can come about with the utilisation in legal science of the concepts of other sciences, according to the author of the book before us. Science has so far remained outside law and its philosophy, and it is high time it was also pressed into service, as has been attempted in the present book.

2. The book contains thirteen sections, with an epilogue. Twentythree main equations of social mathematics have been derived on the basis of analogy and induction to get at the legal truth. Juridical truth often eludes one's grasp since it does not coincide with historical, psychological or empirical truth, notwithstanding the positive tendency dominant in jurisprudence. It however admits of quantum-mechanical treatment, which is attempted here. The logical formulae are transformed into those of analogy and induction and become related to life and experience, and this has formed the foundation of the present work.

3. Among the topics dealt with in the work are; the calculus of probability; analogy, social mathematics; the law of the libido; a mass man in a mass society; the pyramid of power politics; society and revolution in a pictograph; Government as a triple point; three powers in a circuit; jurimetrics; judicial power in a 'tunnel effect'; and legal philosophy in a new key.

4. As remarked by the author, science has two kinds of impact on law, ideal and material. The first relates to ideas and the second consists in the influence of science and technology upon law as an instrument of social control. Thus in the U. S. A. Virginia's cedar-dust statute is a collaboration of science, technology and law, for the public good. It declared all red cedar trees within two miles of any apple orchard to be nuisances if the State entomologist certified that they were the hosts of the cedar rust, in which case he was authorised to order their destruction, and the Supreme Court upheld the validity of this statute. The scientific statement of the effects of cedar rust spores on apple orchards holds good for all time, but in 1960 there was a change in the technology of fungicides, for it was found that they could now prevent fungus. But the statute was not changed, because at any time cedar dust might develop a strain which would be immune to all known fungicides. This is law in the shadow of science. The scientific method has been applied in legal research in recent years on the analogy of the natural sciences and the term 'jurimetrics' is suggested for it; it means the scientific investigation of legal problems such as the quantitative analysis of the judicial process. G. Schubert's "Quantitative Analysis of Judicial Behaviour" (1959) has done good work on this in respect of U. S. Supreme Court decisions.

5. A versatile scholar, the present author has also written legal studies such as "the evolution of judicial power in India" and "Indian jurisprudence of property rights." He is reputed to have studied Politics, Economics,

History, Sociology and Law on the one hand, and Mathematics, Physics, Chemistry, Botany, and Statistics on the other. He has also exercised the powers of a Magistrate and Collector. The claim, therefore, is perhaps justified that the present attempt is somewhat unique to measure the concepts of legal philosophy in terms of Social Mathematics. R.S.S.

THE LAW COLLEGE MAGAZINE, ERNAKULAM, 1971. Managing Editor: M. P. Padmanabha Pillai. Pp. English-Section 136, Malayalam 28.

Replete with as many as twenty-eight instructive articles on current legal problems, ten of them from student contributors, the latest issue of this College magazine has the distinction of carrying contributions not only from the judges of the Kerala High Court and the members of the Kerala University staff but also from practising lawyers and academic men from outside Kerala. The student contributions deal, inter alia, with property right as a fundamental right, Kashmir as an international dispute, the executive, the Legislature and the judiciary, and the place of the judiciary in a democracy.

2. The article on the utilisation of river waters in international law should be of topical interest in view of the disputes frequently plaguing the relations between Tamil Nadu, Mysore and Kerala. The Inter-State Water Disputes Act, 1956, authorises the Government of India to constitute ad hoc tribunals for deciding inter-State water disputes, and the Government of Tamil Nadu, it is well known, has been pressing the Government of India for the appointment of such a tribunal.

3. Discussing the constitutional position of the Governor, the writer of another article specifies the following four areas as requiring clarification: appointment and dismissal of Council of Ministers: summoning, proroguing, and dissolution of legislative assembly; frequent legislation by ordinance; report to the President on the failure of the constitutional machinery in the State. In a review of the functioning of the International Court of Justice, the writer considers some of the urgently felt defects in the existing procedure and law and indicates possible reforms.

4. Writing on the subject of equality under the constitution and the Supreme Court, Dr. A. T. Markose deplors that there has been a complete misconception concerning the doctrine of classification and that there have been no intelligible differentia on which the classification should be based and no rational nexus

which that differentia should have to the object of legislation. The question to be asked in this connection, points out another contributor, is whether the injunction of Article 14 of the Constitution is merely a ban on the creation of inequalities by the State or a command to eliminate inequalities existing without any contribution thereto by state action. The fundamental question, according to him, is, to what other areas should the new approach to equality be extended? What role should the Courts play in defining both the areas and the relevant norms? The incidence of the charges for State operated services falls more heavily on the poor than on the rich, and should the new approach be applied to them?

5. Mistakes in the formation of a contract and the disputed problem concerning the identity or existence of the parties are covered in three of the contributions. The first article throws light on certain inequities and defects in the existing law on this topic and suggests desirable amendments. The problem of common mistake in contract law and the varying juristic opinions on the subject are covered in the second, and the question of the liability of joint promisors under Indian Contract law in the third of the articles.

6. The Magazine includes an account of the activities of the College Association, and the several illustrations it carries add to its attractiveness.

R. S. S.

THE LAW OF PARLIAMENTARY PRIVILEGES IN U. K. AND IN INDIA. By P. S. Pachauri, M. A., LL.M, 1971. N. M. Tripathi Private Ltd., 164 Samaldas Gandhi Marg, Bombay 2. Pp. xx & 506. Price, Rs. 45.

The expression 'Parliamentary privileges' in constitutional statutes generally connotes three different legal terms, viz., privileges, powers, and immunities. Parliamentary privilege is an integral part of parliamentary democracy as it exists in U. K. and as it has been adopted by many democratic countries, as for example in India, where it has in its entirety been made a part of the Constitution (Arts. 105 and 194). On the whole thirty-one countries of the Commonwealth with parliamentary types of democracy have, between 1950 and 1967, made laws conferring privileges on their legislatures. Three other broad features in India are the conferment of fundamental rights on the people, of special powers to issue prerogative writs on the High Courts, and of the right to move the Supreme Court for the enforcement of these fundamen-

tal rights, which has itself been made a fundamental right. These constitutional provisions have given rise to several anomalies in law and to the problem of their interpretation, as well as to the problem of codification for which the constitution gives the necessary powers to the legislature. It is, however, noteworthy that opinion is sharply divided on the desirability of codification, as can be seen from the views of ex-Chief Justices K. Subba Rao and M. Hidayatullah.

2. Issued under the auspices of the Institute of Constitutional and Parliamentary studies, New Delhi, the book before us, which represents the result of many years of research for the degree of LL.D., contains a critical analysis of the operation of the law of Parliamentary Privilege in the U. K., from whom it has been imported into India wholesale, how it has operated in India so far, and how the intention of the makers of the constitution in importing this law can be fulfilled. The Introduction explains clearly what privilege is about and why the House of Commons and the Lok Sabha need it for the proper discharge of their responsibilities to the electorate.

3. The author is concerned with privilege as a judicial concept, proceedings in Parliament, privacy in deliberations, and proceedings as evidence. Freedom from arrest, powers, the constitutional provisions in India, and the application of the privilege are next considered. The term "breach of privilege" is described in Chapter IX as well as the narrow distinction between it and the term 'contempt.' In another chapter (Chapter V) the author quotes from a House of Commons Report of 1945-46 which stated: "The border line between legitimate political activity and illegitimate pressure upon members of the House of Commons must be sometimes difficult to determine" and the proper declaration of interests by legislators threatens to be a continuing problem. The volume is furnished with several appendices, a table of cases, bibliography and index.

4. The law of Parliamentary Privileges in England has evolved from precedent to precedent, but very few precedents have gone up to the courts of law, unlike other branches of law which have been built up by them. In these cases, moreover, the courts had to deal, not with the different ingredients of the law but with the general powers of the legislature to punish for breach of privilege or contempt. The real operation of the law is to be found in the proceedings of the House of Commons and reports of its Committee of Privileges.

Few attempts have, therefore, been made to analyse these precedents and formulate the principles underlying them. May's Parliamentary Practice is believed to be the only available treatise on the subject, which contains its main feature without detailing the precedents out of which the law has been developed. The present comparative and well-documented analysis of the Parliamentary process should be a valuable aid to the understanding of our Parliamentary institutions and furnish practical guidance to the legislator as well as the citizen. R.S.S.

SECRETARIAL PRACTICE IN INDIA.

By J. C. Bahl, B.A., M.Com., 9th Edition, 1971. (N. M. Tripathi Private Ltd., Bombay 2), Pp. vii & 676, Price Rs. 16.

What is a company secretary? What is he required to do? What is he not required to do? What should be his qualifications? And what is his position and influence in the actual working of a company? The present publication, which is now in the 9th edition, answers these questions. Thoroughly revised and brought up-to-date, several specimen documents and reports in it have been replaced by more recent ones. The chapter on Management of Companies has been revised to drop portions dealing with managing agents, and secretaries and treasurers, as these have been abolished since April 1970. The chapter on correspondence and reports has been made to include some original specimen, circulars issued by companies and a chapter has been included, dealing with foreign companies in India and the secretarial practices relating to them.

2. The author describes the various kinds of joint stock companies, the formation of public and private limited companies, classes of capital and shares, membership and register of members, share certificates, share warrants, and stock certificates, calls on shares and forfeitures, transfers and transmission of shares, and borrowing powers and methods. He is concerned with various kinds of company meetings, specimen resolutions, board meetings, the statutory meeting, the annual general meeting, extraordinary general meetings and minutes. He then considers dividend and interest, the management of companies, books, annual return, accounts and profits, conversion of companies and alteration of share capital, arrangement, reconstruction and amalgamation, foreign companies in India, correspondence and reports, and winding up, and these are the topics covered in the last four chapters.

3. The duties of a secretary can be classified into those in relation to the directors, those in relation to the share-holders and the public, those relating to the administration of the office, and statutory duties. A sound general education, knowledge of office organisation and business methods, knowledge of book-keeping, of mercantile law, of the law of meetings and of foreign languages, and a good personality, are among the qualification required of a secretary. The secretary of a company is the officer through whom its administrative work is carried on. He is a servant of the company and, as such, must carry out the orders of the directors and must put into effect the resolutions passed at the directors' meetings.

4. Normally the Secretary is present at all meetings of the company and of the directors and makes proper minutes of their proceedings. The minutes of each board meeting, to be entered into the Minute Book, must contain a correct and fair summary of the proceedings, appointments of officers made at the meeting, the names of the directors present and, in the case of each resolution, the names of directors dissenting from the resolution. The Minutes are the written records of the business transacted and the decisions arrived at by a meeting of the directors of share-holders. It preserves in a concise and clear manner a correct record of the decisions taken and, when signed by the Chairman, becomes the permanent official record of the company. Under the direction of the board, the secretary issues all notices to members and others, conducts correspondence with share-holders in regard to calls, transfers and forfeitures. He is in charge of the books of the company like the register of members, share ledger, transfer book and register of debenture holders. He submits the necessary returns to the Registrar of companies, and makes preparations for holding and conducting meetings.

5. The Appendices to the book give particulars of the documents to be registered with Registrar of Companies, matters requiring the sanction of the Central Government, matters requiring the sanction of the share-holders, and schedules of fees payable. Students of commerce and others connected with company secretarial work should find the publication, which has an index, extremely useful.

R. S. S.

THE NIGERIAN LAW JOURNAL.
Vol. 3. 1969 General Editor : Prof. T. O. Elias, Dean of Law, University of Lagos, Lagos, Nigeria. Published in 1970 by Sweet & Maxwell Ltd., London (In India : N. M. Tripathi Private Ltd., Bombay 2) Pp. 185. Price, \$2.18s. net.

Apart from the book reviews, the journal carries notes and comments on some recent amendments to the criminal code, the Nigerian Territorial Waters Decree 1967 and international law, and Homicide by Reckless or Dangerous Driving (Summary Trial and Punishment) Edict 1968, and includes contributions, inter alia, on the legality of the O. A. U. Council of Ministers' Resolution on Rhodesia in December 1965 and on civil suits by and against public corporations in Nigeria.

2. Four articles deal with the legal framework of industrial relations in Nigeria, some recent constitutional issues, the proper place of Islamic Law, and the reform of the customary Court systems. The basic concept of Nigerian Labour law is the acceptance of the common law principle that the relationship between an employer and employee is based upon the individual contract of employment, but this presupposition of equality between the parties tends to ignore other social and economic considerations which tilt the scales so much in favour of the employers that safeguards have had to be provided by way of collective bargaining or by State regulation. Until recently virile and strong trade unions were absent and the State had therefore to pass legislation (the Labour Code) designed to provide protection to workers and to guarantee them certain minimum standards as regards their terms and conditions of employment. Does collective bargaining give rise to legal rights and duties? The somewhat uncertain position was however regularised by the present law contained in the Trade Disputes (Emergency Provisions) Decree, No. 21 of 1968. The writer suggests that an industrial Court should also be established to deal with such matters as termination of contracts of employment, interpretation of collective agreements, and adjudication upon industrial disputes.

3. Should the Nigerian Courts adopt a consistent method of construction of the constitution or leave room for choice between a strict and liberal method? Some want a liberal approach to the interpretation of the constitution, but it is feared that a consistent application of liberal interpretation may result in unfettered legislation in the sphere of

fundamental human rights, and the position of the Courts as the guardians of individual liberty may be weakened. The Courts, it is urged, should be free to make a choice between a liberal and a strict approach; it will be possible only then to decide whether the interest of the Government should prevail or that of the individual in a given legal contest.

4. Another of the articles tries to define the proper place of Islamic law in Nigeria. Islam has influence in legal matters in the northern parts of Nigeria only and is virtually unknown in the legal life of the south, which raises a very interesting issue of finding the reason for the differences in the approach to Islamic law. The conclusion is arrived at that Islamic law should be applicable only when the parties have selected Islamic law to bind them in a particular transaction or when the matter in question is known to no other law but the Islamic Law.

5. The military revolution of 15th January 1966 brought about striking reforms in the customary Court systems in Nigeria, and the various changes effected are discussed in another contribution. One of the writers attempts an analysis of the sources of equity in the Nigerian legal system and shows how equity has exercised a continuing and growing influence on its development, while another considers at length the area in which the constitution could be influential in remoulding the rules governing the admissibility of evidence in Nigeria. The latest Navakal case in India should have made it evident that the Indian Evidence Act also requires certain specific amendments. The article on character as a basis of criminal liability examines those cases in which the good or bad character of the accused forms an essential ingredient of the offence.

R. S. S.

COMMENTARIES ON THE CONSTITUTION OF INDIA. By V. B. Raju, M. A., I. C. S., Formerly Judge, Gujarat High Court. 1971. Eastern Book Company, Lalbagh Road, Lucknow. Pp. xxxviii & 899, Price, Rs. 35.

Commentaries and dissertations on the Indian Constitution have been numerous. The reader is familiar with the works of distinguished jurists and legal experts like Durgadas Basu, H. M. Seervai, K. Subba Rao, T. L. Venkatarama Ayyar and M. P. Jain, and the volume under review is a notable addition to that long list. The 395 Articles of the Constitution are grouped under 22 different

Parts, several of the Parts being sub-divided into appropriate chapters. Parts I and II (Arts. 1-11) deal with the Union and its territory and citizenship. Parts III and IV (Arts. 12-51) deal with the fundamental rights and directive principles of State policy, and Parts V and VI (Arts. 52-237) cover the Union and State Executive, Legislature, and Judiciary. Parts XI and XII consider the relations between the Union and States, and finance, property, contracts and suits. Parts XIII and XV to XVIII (Arts. 301-307, 324-360) deal with the subjects of trade and commerce, elections, special provisions relating to certain classes, language, and emergency provisions. Articles 361, 362 and 363 dwell on the powers of the President, the rights and privileges of the rulers of Indian States and bar to interference by Courts in disputes arising out of certain treaties, covenants, etc., and Art. 368 with the procedure for amending the constitution.

2. Can new pleas and arguments be advanced for the first time before the Supreme Court? Is the advice of the Council of Ministers binding on all matters on the President or Governor? Can the fundamental rights be modified? On these and other topics the author's views are presented with cogency. An Act amending the constitution under Art. 368 is valid even if it abridges or takes away fundamental rights (AIR 1965 SC 845—Sajjan Singh case). But the contrary view is taken in *the cause celebre*, Golaknath (AIR 1967 SC 1643), on the ground that the amendment of the constitution is law under Art. 13(2) and Art. 368 deals only with the procedure, although the present author would seem to be in good company when he holds that fundamental rights can be modified as provided in Art. 368. As if to give the quietus to this vexatious controversy, the latest constitution amendment bill seeks to empower the Parliament to amend any provisions of the Constitution, including fundamental rights, priority being accorded to the Directive Principles of State policy. The Prime Minister

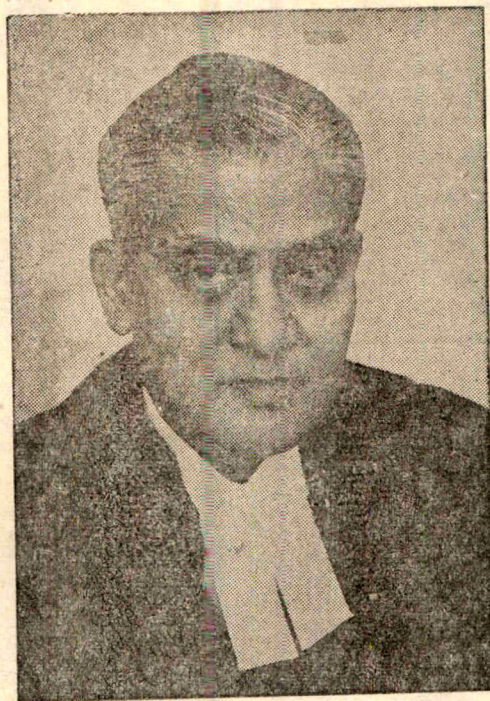
has made it clear that it is not the intention straightway to make mincemeat of these rights, but only to make it possible to acquire compulsorily private property for a public purpose on payment of a certain sum (not to be confused with compensation). No confrontation between the legislature and judiciary is envisaged and it is quite plausibly argued that what the people have given themselves, viz., the constitution, through a constituent assembly, they should be able to amend or abrogate through the constituent power of their own parliament.

3. Similarly, all the powers of his office exercisable by a Governor can be exercised only on the advice of Ministers except in so far as the constitution expressly or by necessary implication says that he can exercise those powers in his individual discretion. As regards summoning and dissolution of Parliament the author's views are based on the fact that the President of India, unlike the King of England, is elected and represents the whole nation, and, therefore, the conventions which apply in England cannot be applied in India in the face of the constitutional provisions. The author deplores that in spite of the fact that India is a Union of States, the Constitution has been amended to deprive some territories of their statehood in order to make them "Union territories".

4. That the important principles of the Constitution should be clearly understood by the lawyer, law student and layman nobody can gainsay. In the present attempt to present an analytical, explanatory and critical commentary with synopsis on the different Articles of the Constitution, the author has expressed his own views independently and cogently.

5. The volume contains all the nine schedules of the constitution as well as ten appendices (including the twenty-three Constitution amending Acts), and carries a table of cases and index.

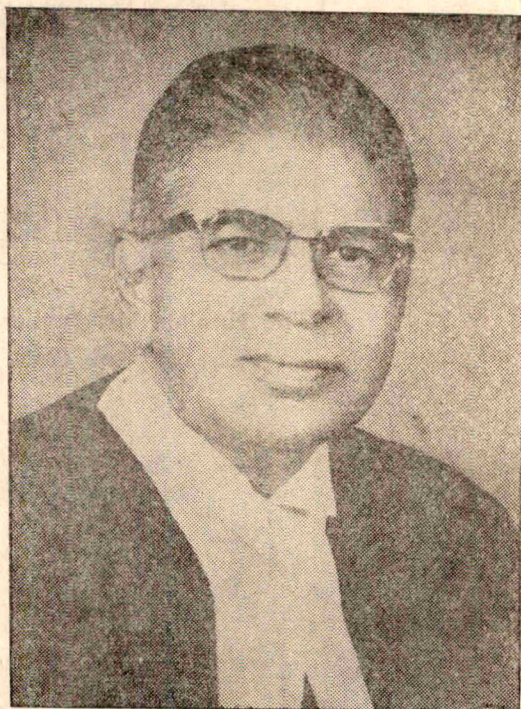
R.S.S.



The Hon'ble **Mr. Justice S. C. ROY**
Judge, Supreme Court of India.



The Hon'ble Mr. Justice
P. N. BAKSHI
Judge, Allahabad High Court.



The Hon'ble Mr. Justice
B. N. LOKUR
Judge, Allahabad High Court.



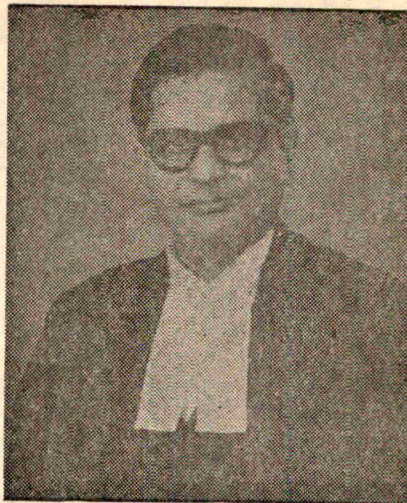
The Hon'ble Mr. Justice K. N. SETH *Judge, Allahabad High Court.*



The Hon'ble Mr. Justice
JAGMOHAN LAL SINHA
Judge, Allahabad High Court.



The Hon'ble Mr. Justice
N. D. OJHA
Judge, Allahabad High Court.



The Hon'ble Mr. Justice
MADAN MOHAN PRASAD
Judge, Patna High Court.



The Hon'ble Mr. Justice
JITENDRA NARAYAN
Judge, Patna High Court.



The Hon'ble Mr. Justice
SYED AKBAR HUSSEIN
Judge, Patna High Court.



The Hon'ble Mr. Justice
SHIVESHWAR PRASAD SINHA
Judge, Patna High Court.

JOURNAL SECTION

1971 NOVEMBER

REVIEWS

EXTRADITION IN INTERNATIONAL LAW. By I. A. Shearer, LL. M. (Adelaide), S. J. D. (Northwestern), University of Adelaide. 1st Edition. 1971. Manchester University Press, 316-24 Oxford Road, Manchester, England. (In India: N. M. Tripathi Private Ltd., Bombay. 2.) Pp. xxiii & 283. Price, £ 4.20 net.

Increasing air traffic has made the flight of a fugitive from the law easier than before and extradition proceedings are a necessary instrument to secure the return of the offender to his country; the latest case of Dharma Teja's extradition from the U. K. for being tried in India will readily occur to the reader's mind. Extradition means the surrender of an accused person or a convict by the territorial State where he is found to the requesting State where he is alleged to have committed or to have been convicted of a crime. The Indian Extradition Act has certain special features like Basis of Extradition, Categorisation of States, Pre-Independence Treaties, Two categories of Extradition offences, and Extradition with Formalities and Extradition without Formalities. Extradition law is a dual law involving municipal as well as transnational law.

2. In 1932 a committee appointed by the Harvard Law School 'Research in International Law' Programme drew up a draft convention on extradition law and practice, and the book before us is, in part, a re-assessment of the Harvard team's proposals in the light of the subsequent thirty years of treaty practice, legislation and national jurisprudence. It makes a special study of hindrances to the effective working of extradition law, such as lack of sufficient extradition treaties, the rigidity of several of them, and excessive procedural requirements. The book deals with the role of treaties, statutes, the courts and the executive, with alternatives such as abduction and deportation, with the problem of defining the offences, and the question of whether evidence of guilt should always ac-

company a request for surrender, and with political offences and procedural difficulties.

3. An essential element in international law, the extradition law, the author argues, should be harmonised with national practice in order to strengthen inter-State co-operation in the fight against crime. He therefore pleads for the conclusion of further extradition treaties, the overcoming of old barriers erected by outdated prejudices, the requirement of prima facie evidence of guilt as a protection to the fugitive and the simplification and harmonisation of extradition proceedings.

4. International co-operation in the suppression of crime, the framework of extradition, procedures other than extradition, and the nationality of the fugitive are discussed; and then are considered the subjects of acts for which extradition may be granted, evidence of guilt, political offences, and procedural problems. It is the author's conviction that there already exists more common ground than is supposed between national laws and practices of extradition and further harmonisation is both attainable and necessary. The book gives selected extradition statistics and treaties and lists of extradition statutes and texts of treaties, and includes a bibliography, table of cases, and index.

5. It is believed that, in the present book, for the first time in this century a scholar of international criminal law from a common law country has tried to re-appraise all the basic problems of extradition in the light of the needs and difficulties of the modern world. It should help greatly in promoting the knowledge of extradition law both in theory and practice, in protecting the rights of man, and in improving co-operation between States and peoples.

R.S.S.

DEVELOPMENT OF JUDICIAL SYSTEM IN INDIA UNDER THE EAST INDIA COMPANY FROM 1833 TO 1858. By Ramesh Chandra Srivastava, M.A., LL.B., Ph. D. With Foreword by M. C. Setalvad, 1st Edition. 1971. Lucknow Publishing House, 37 Cantonment Road, Lucknow. Pp. xii & 232. Price, Rs. 45.

The present judicial set-up in India is largely a legacy of British rule and its foundations go back to the days of the East India Company, and the present work is a detailed and analytical study of those foundations, based mainly on original and contemporary sources from the National Archives of India. The source material is the original and unpublished records of the Government of India, Parliamentary proceedings, judicial correspondence, and official reports and compilations. The work is concerned with the evolution of the norms and procedures which provided the infra-structure of the Indian judiciary and the legal edifice which in its essence exists even today. Of special importance in the work are the chapters dealing with Indians in the Judiciary, inter-State law, court language, codification of the law, and the emergence of the Indian Bar.

2. The Charter Act 1833, among other things, sought to simplify the complexities of the law re-assess the situation objectively by adopting a more enlightened and progressive policy, and in the next twenty years the British Indian Administrators set out to make the judiciary equal to the needs of the people and the exigencies of the situation. Clause 87 of this Act contained a specific recognition of the right of the Indians for employment under the Company, and yet the increase of Indians in judicial employment was slow and tardy and resisted by Englishmen resident in India. Even in those early days it is of interest to note that there were the familiar law officers like the Legal Remembrancer, the Advocate General, the Registrar, the Company's Solicitor, and Standing Counsel.

3. Dealing with Inter-State Law, the work describes difficult questions of international law arising out of the attempts of criminals to escape from one jurisdiction to another at a time when several jurisdictions prevailed at the same time in India. The question of court language in those days is of some particular relevance to us. For a long time Persian was the court language, but Act XXIX of 1837 "empowered the Governor-General to dispense with any Regulation which enjoined the use of the Persian language . . . and to prescribe

the use of any other language". Although the change from Persian to Hindusthani was reported to be a success, a number of local languages held the field in subordinate courts until the preponderance of English barristers and judges brought English into vogue as the language of the courts.

4. As regards codification, Macaulay's efforts to compile a draft of the Indian Penal Code, the delays of which he was accused, and the eventual submission by him of the Draft Penal Code in 1837 are depicted in great detail. The story is also told in brief of the preparation and enactment of the Codes of Criminal and Civil Procedure, and, finally, the author traces the rise of the Indian Bar since Regulation VII of 1793, "which was the first attempt to regularise the institution of vakils in India."

5. For the period prior to 1833, the reader may refer to "*Studies in Indian Legal History and Indian Constitutional History*" (By M. S. Rama Rau, Hyderabad. 1970.) It describes the genesis of the East India Company, the administration of justice from 1639 to 1726, the Mayor's Courts, the Adalat system and the judicial reforms of Warren Hastings, as well as the Regulating Act 1773, the judicial reforms of Lord Cornwallis, and the judicial administration in the Provinces of Madras and Bombay between 1753 and 1861.

6. In concluding the present work the author observes that though the judicial system had its inadequacies, it went far towards the consolidation of the political and administrative unity of the country and provided a permanent base for the edifice of modern Indian judicial organisation. A highly useful work for the research worker and the lawyer, it should be equally suitable as a basis for further work on a topic essential to the study of legal history in India.

7. Several appendices, glossary, bibliography and index are useful features of the work.

R.S.S.

LECTURES ON JURISPRUDENCE. (According to Meerut University Syllabus), 1971. By Bakshish Singh, M.A., LL.M., Advocate, Lecturer, Law Department, N. A. S. College, Meerut. Pp. 156. Price, Rs. 6/-.

Fundamental legal principles and their philosophical, historical and sociological basis

and analysis of legal concepts, constitute the subject of jurisprudence. Jurisprudential thought has lately undergone considerable change, particularly in the realm of social philosophy underlying law. Because of the impact made on law by other subjects like sociology and economic theory, the concepts of liability and ownership (State or public ownership) have undergone a radical change. Although an abstract and theoretical subject, researches in it have repercussions over a wide range; the law of contract, for example, may well call for a general knowledge of economics and economic theory on the part of the lawyer.

2. Out of the twenty-seven lectures contained in the present publication, the first five deal with the nature and schools of jurisprudence, the evolution of law, justice and its administration, and law and fact. The topics of jurisprudence and comparative law, English and foreign jurisprudence, the Austinian definition of law. Law in terms of judicial process, natural and legal justice, necessity and administration of justice, civil and criminal justice, theories of punishment, and secondary functions of law Courts, are discussed.

3. It is understood that law should be made precise and clear, and a true picture must be available to the reader. Law is as much an abstract body of rules as a social process for reconciling the conflicting interests of the members of society. It should therefore have sanction behind it and be recognised by the bulk of the members of society. The scope of the present lecture is mainly analytical, and the lecturer accepts Salmond's definition of law "as the body of principles recognised and applied by the State in the administration of justice".

4. The lectures cover the classification and kinds of law, the theories of law, the sources of law like custom, judicial precedent and legislation, and consider kinds of custom, chief requirements of custom, distinction between custom and prescription, doctrine of stare decisis, ratio decidendi and obiter dicta, supreme and subordinate legislation, interpretation of statutes, harmonious construction, and strict interpretation. They are concerned with the analysis of legal rights, their classification, and the classification of duties. Ownership, possession, titles, intention and liability, are the subjects of five of the lectures, which describe the various kinds of ownership, the nature of possession, mode of acquisition of possession, the theory of penal liability, malice, motives and criminal attempts. The last four lectures cover the law of property, the law of obligations, the law of procedure, and the State and sovereignty.

5. It is the opinion of competent critics that, as taught today, much of the jurisprudence is out of date, and the teaching of jurisprudence in universities and schools requires radical re-orientation, both in basic ideas and presentation. Designed to meet the requirements of the LL.B. (Third Semester) students of the Meerut University, the lectures are largely in the form of question and answer, and should be of great assistance to the students for whom they are intended. The lecturer has done a competent piece of work in presenting the views of all authoritative writers, more especially of Salmond.*

B.S.S.

* See Shingne's summary of Salmond's Jurisprudence. (By A. K. Sarkar, 1970, Tripathi Private Ltd., Bombay-2).

JOURNAL SECTION

1971 DECEMBER

REVIEWS

DIGEST OF REPORTED AND UN-REPORTED DECISIONS ON REVENUE LAW. 1964-68. Compiled by H. P. Vaishnav, B. A. LL. B. 1963. 1st. Edition. The New Gujarat Law House, Three Gates, Ahmedabad. Pp. 292. Price, Rs. 20/-.

There are more than twenty tenure abolition laws in Gujarat, and each of them is meant for either a particular area, or tenure, or situation. Added to the laws of the erstwhile States of Saurashtra and Kutch, they present a confusing picture as they are always in a state of flux. Under the Tenancy Act of 1939, for example, the mortgagee could become a tenant; under the Tenancy Act of 1948, however, he lost that right, and a tenant inducted by a mortgagee was also not recognised as a tenant, but the Supreme Court in the case of *Dahya v. Rasul* held that, even if a mortgagee does not become a tenant, a tenant inducted by him can become one. The amendments made in 1952, 1953, 1956 and 1960 have made changes in the law. But in Kutch area the Tenancy Act of 1948 was still in force in 1958, when the Bombay Tenancy Act was applied. Although the Tenancy Act 1939, is mostly repealed, some of its sections still endure as good law as well as some other sections of the repealed ordinances in Saurashtra.

2. It is no wonder, therefore, that the interpretation of revenue laws became difficult and complicated and, in the volume covering 1960-64, the present author, who is a member of the Gujarat Revenue Tribunal, collected, collated and classified these decisions on the interpretation of the revenue laws, and this work has been continued in the present volume, which covers the period 1954-68. The total number of cases; i.e., dicta digested is 436 and they fall under more than 20 different Acts, and, where the dicta are relevant under more than one section, suitable cross references are given.

3. The author is specially qualified for the present task because he is in constant touch with the amendments which are from time to time being made and their purpose and background. Several decisions of the Gujarat Revenue Tribunal are challenged before the Gujarat High Court in writ petitions, the High Court orders are received by the Tribunal, and are circulated among its members. Persons

unconnected with the writ petitions may not come to know about the decisions, but the author, as a member of the Tribunal, has access to all of them. He briefly sets out the facts leading to the decisions, bringing out the points in dispute, and then clearly sets out the result which brings out the ratio underlying each decision. The Digest should be highly useful to lawyers as well as litigants. Officers of the Revenue Department, who have to work quickly and under heavy pressure, should find valuable guidance in it. It should also be a useful addition to the libraries of offices connected with the work of administering the land reform laws. R.S.S.

THE LAW OF TORTS. By B. L. Vohra M. A., LL. B. 1967. University Book House, 15-U.B, Bungalow Road, Jawahar Nagar, Delhi 7. Pp. XIII & 273. Price, Rs. 7.50.

A tort usually consists in some act done by the defendant whereby he has without just cause done some kind of harm to the plaintiff. The law of torts prevents men from hurting one another, whether in respect of their property, persons, reputations, or anything else. To constitute a tort, there must be a wrongful act or omission, i.e., breach of duty by a person; the wrongful act or omission must result in legal damage to another; and the wrongful act or omission must be of such a nature as to give rise to a legal remedy in the form of an action for damages. As administered in India, the law of tort is the English law as modified by such Acts of the Indian Legislature as the Fatal Accidents Act, 1855, Carriers Act, 1865, Easements Act, 1882, Patents and Designs Act 1911, Workmen's Compensation Act, 1923, Sale of Goods Act, 1930, Employer's Liability Act, 1938, and the Specific Relief Act, 1963. In the absence of statutory or customary law applicable in a case, the Courts in India are guided by principles of justice, equity and good conscience, which has been the rule in England. They are applicable to Indian circumstances.

2. The law of torts has seen many developments in recent times. This book on the subject is well written and decisions of importance have been collected by the Courts recently. The

'remoteness of damage' and 'the liability of occupiers towards trespassers' has been restated by the Judicial Committee, and the decision of the House of Lords in *Hedley Byrne v. Heller* regarding 'careless misstatements' is another landmark. *Rooks v. Barnard* has established the tort of intimidation. Other landmarks relate to the decisions regarding forceability in negligence, master's liability for criminal acts of servants, contributory negligence of children, occupier's duty towards visitors, occupiers' duty towards users of the highway, lending a servant, and course of employment. This is said to be the first book to take note of the decisions reported from April 1965 to 1967. Butterworths' publications (Sole Selling Agents: Eastern Law House Private Ltd., Calcutta) on Torts by Philip S. James, D. M. Scott, and D. G. Cracknell, appeared subsequently in 1969.

3. The book contains, an appendix, the full text of the Government (Liability in Tort) Bill 1967, which is at present before the Select Committee of Parliament in India. The main provisions of the Bill relate to the liability of Government to third parties for torts committed by its employees and agents; liability of Government to third parties for torts committed by an independent contractor employed by the Government and his servants and workers; liability of Government in tort as owner or occupier of immovable property; liability in respect of escape of dangerous things, and liability in respect of breach of duties to its employees. The exceptions are the armed forces of the Union and the Police forces, Judicial acts, and Act of State.

4. The book deals with the elements of tort, general exceptions to liability, capacity to sue and be sued, felonious and foreign torts, vicarious liability and joint tortfeasors. It covers death in relation to tort, discharge of torts, remedies, trespass to the person, and negligence. The topics of remoteness of damage and measure of damages, particular aspects of negligence, breach of statutory duty, nuisance, strict liability, and fraud, are considered, while the other chapters are concerned with wrongs relating to (1) immovable property; (2) movable property; and (3) families and service relations, defamation, inducing breach of contract, and abuse of legal process. A table of cases and index are provided.

5. The book attempts to state the principles of the law of torts simply and concisely primarily for the benefit of students who may not be able to read the original works of great authors and keep themselves abreast of important developments. R.S.S.

JURISPRUDENCE. By R. W. M. Dias. M. A., LL. B., (Cantab.) Lecturer in Law in the University of Cambridge. 3rd Edition. 1970. Butterworths, London (Sole Selling Agents: Eastern Law House Private Ltd., Calcutta.) Pp. lxviii & 606. Price, Rs. 50.

Generally speaking, the material of the law may be identified provisionally by taking the application of the word 'law' by courts. But what regulates the use of this label? The regulators in Great Britain are judicial precedent, statute (including legislation by prerogative) and immemorial customs. The material constituted as 'law' by these media comprises the body of the law. The present volume deals first with the ways in which the courts handle these media and suggest ideas about the nature of the judicial function and to some extent also of laws. Tentative hypotheses are suggested about the nature and function of laws. The next step is to examine in the light of the judicial process some concepts of the law, i.e., the tools or instruments that are used for the purpose of regulating and judging behaviour. The structure of these concepts is examined with a view to improving one's understanding of them and assessing their suitability to fulfil the required needs. Finally, the author considers some theories about law. These reveal the manner in which the people in different countries at different times have speculated about some of the problems revealed by the preceding portions of the book. And these theories should serve as an introduction to great thinkers in history.

2. Sources of Law, Concepts of Law, and Theories of Law, are the three parts into which the book is divided. Part I deals with the criteria of identification, precedent legislation, statutory interpretation, custom and values. Part II is concerned with duties and rules, rights, conduct, persons, possession, and ownership, while the final part considers the Austinian theory of law, the pure theory, the historical and anthropological approaches, the economic approach, the sociological approach, modern realism, and natural law. The subject-matter of many of these chapters is ably summed up in the concluding pages of each chapter.

3. The main change in the latest edition of the book under notice is the introduction of a 'temporal' approach to legal phenomena, which affects practically every part of the book, and lends itself readily as a basis for more meaningful treatment of the existing material. The 'temporal' approach offers a systematic plan by asking: What factors (social, political and moral) brought about a rule of law? What

factors keep it going? How does it work? (which calls for an investigation into its structure, its efficiency in fulfilling its task and the factors that affect its working) Can it be improved? Such questions reach out into other fields like sociology, ethics, and other fields, and the present book seeks to amplify this 'temporal approach'.

4. Other changes have been induced by the ever-changing contemporary scene, which constantly throws up new problems. There is also an attempt to draw the book more tightly together by bringing various theories (Part III) into the context of discussion in the earlier chapters. Forward references are given in the first two parts to appropriate theories appearing in the last part. In the result the length of the text has been increased by about sixty pages and much has had to be cut out from the chapters on precedent and statutory interpretation.

5. The present book, which includes a table of cases and index, furnishes material for the evolution of one's own ideas and the understanding of other theories and serves as a prelude to such contributions by inducing an informed and critical approach to them. On the one hand, an attempt has been made to provide a text which might serve as a guiding thread to the literature on the various topics and, on the other, explanatory references to the literature itself. The text should give readers a picture of certain topics and some idea of the issues and problems they involve. The reading lists appended are pointers only and fuller references are available in the companion volume, *A Bibliography of jurisprudence*. The University undergraduate should benefit greatly by the present book.

R.S.S.

BEST JUDGMENT ASSESSMENT AND PENALTY UNDER SALES TAX LAW. (With Particular reference to Andhra Pradesh). By B. Satyanarayana, M. A., LL. B., Formerly Deputy Commissioner of Commercial Taxes, 8-3-1015, Srinagar Colony, Hyderabad 38. Pp. VI & 214. Price, Rs. 7.50.

In this handy and compact commentary on the Andhra Pradesh Sales Tax Law, with particular reference to the best judgment assessment and penalty, the author tries to state clearly the principles evolved by the Courts in these matters. A Best Judgment assessment is assessment made estimating the turnover, and determining the tax payable when no return is submitted or when the return sub-

mitted appears to the assessing authority to be incorrect or incomplete. Power is conferred on the assessing authority to make best judgment assessment under certain circumstances; but it should not be arbitrary or capricious and the estimate should have due regard to the material collected by the assessing authority and conform to the guidelines laid by the courts. There can be no rule or principle universally applicable and the task of the assessing authority is, therefore, rendered all the more difficult. The author has devoted much labour in classifying the different views of the law courts with regard to the definition of 'Best Judgment Assessment' and 'Levy of Penalty', and gives a very clear picture of the law on the subject. We have here a clear analysis and critical statement of the Sales Tax Law in Andhra Pradesh and carefully compiled case law on the subject.

2. The author has discussed at length the duties and responsibilities of the assessing authority as well as the assessee. He has devoted adequate space to the method and manner of scrutiny of accounts, mode of making enquiries, and of conducting inspections and searches. The various methods of estimating turnover and determining tax have been dealt with. The assessing authority has to act judicially and in a judicious manner and to follow the principles of logic and reason instead of basing the assessments on set formulae while estimating turnovers. In matters like inspection, scrutiny of accounts, rejection of returns and estimation of turnovers the author has quoted extensively from the judgements of the High Courts and the Supreme Court.

3. In regard to the imposition of penalty, the author has explained the distinction between assessment proceedings and penalty proceeding and has cited authorities to show that penalty proceedings need not automatically follow assessment proceedings and that only conscious and deliberate concealment can attract penalty, and that the burden lies on the Department to prove that the assessee was guilty of suppressing turnover with a view to evading sales tax. He has explained at length the meanings given by the courts to such words as 'wilful' and 'not wilful' and 'bona fide mistake'. Matters relating to the burden of proof, limitation, and the procedure for passing an order imposing penalty have also been discussed.

4. The author's object has been to acquaint the assessing authority, as well as the assessee with the procedure prescribed under the Acts and the Rules for making assessments and imposing penalties against the background of

court rulings. The commentary should be of great assistance to the Departmental authorities, the practitioners and the businessmen in dealing with the problems connected with the levy, assessment, and collection of sales tax.

5. A suggestion made by the author in conclusion would appear to be worth noting. The Department, he thinks, should have its own Staff Training College in which officers like the Assistant Commercial Tax Officers and Commercial Tax Officers, directly recruited, could be given intensive and comprehensive training in the study of the Act and the Rules and in subjects like check of accounts, conducting inspections and making enquiries. Employees already in service could also undergo refresher courses in order to keep themselves posted with the latest legal pronouncements.

R.S.S.

LECTURES ON COMPANY LAW. By Shantilal Mohanlal Shah, formerly Judge of the Bombay High Court. 16th Edition 1971, N. M. Tripathi Private Ltd., 164, Samaldas Gandhi Marg. Bombay 2, Pp. xxxi, 460, ccclii, Price Rs. 24.

The fifteenth edition of the present publication appeared in 1968, but since then the Company (Amendment) Act 1969 has been passed, doing away with the system of managing agents and secretaries and treasurers as from 3rd April 1970. It also imposes a complete ban on contributions by companies to political parties or for any political purpose to any individual or body. The provisions relating to managing agents and secretaries and treasurers, contained in Chapters III & IV of the Companies Act, have been omitted and only such of them retained as continue to be effective with further comments where needed. But the topic of 'Secretaries', in relation to their appointment, position, powers and duties, has for the first time been included as it is an important limb of company management in the present set-up. References to managing agents and secretaries and treasurers elsewhere also have been deleted to the extent that they are no longer necessary. A brief reference to the English Companies Act, 1967, which amends the principal Act of 1948, has been made in the first Lecture and at other suitable places.

2. There are nineteen Lectures, each preceded by a summary. The memorandum of association, the articles of association, and preliminary contracts, promoters, and registration, are considered at the outset, followed by Lectures on prospectus, members, capital,

shares, contracts, investments, and borrowing powers. Directors, managing agents, secretaries and treasurers, meetings, appointment of staff, arbitration and compromise, and accounts and audit, are the subjects of the other Lectures. Finally, are examined the topics of investigation and prevention of oppression and mismanagement, private, foreign, and other companies, modes of winding up and dissolution, liquidators, and consequences of winding up and defunct companies.

3. The text of the Companies Act, 1956 as so far amended has been given at the end along with the twelve Schedules. The Act consists of 13 Parts, Parts 2 to 5 (Ss. 11-145) dealing with incorporation, prospectus and allotment of shares and registration; Parts 8-13 (Ss. 561-658) dealing with companies formed under other laws, winding up of unregistered companies, registration officers, offices and fees, and collection of information and statistics; management, administration and winding-up taking up as much as two thirds of the Act (13 chapters of Parts 6 and 7; Ss. 146-560). Matters requiring the approval or order of the Central Government, matters requiring the sanction of the share-holders by special resolution, documents and notices to be filed with or given to the Registrar, books and registers to be maintained by the company, rights, powers and duties of the Central Government, provisions of the Act which do not apply to private companies and provision relating to managing agents which wholly ceases to be effective, are given in the Appendix.

4. For the purposes of the present edition, the Lectures have been thoroughly revised and to some extent enlarged and made more comprehensive in certain respects. Various aspects of the several important topics have been marked out and assigned distinctive sub-titles. Equipped with a table of cases and index, this practical book for lawyers, businessmen and students, contains references to all important English and Indian decisions reported till the end of 1970.

5. A company now-a-days has ceased to be the exclusive concern of shareholders or directors and is now considered a national asset. Company legislation aims, therefore, at checking the concentration of income and economic power, restricting the powers of directors and managements and ensuring proper management, aims which accord with the Directive Principles of State Policy contained in Part IV of the Indian Constitution.

R.S.S.

CRIMINAL RESPONSIBILITY. (L.S.E. Research Monographs No. 8.) By Francis G. Jacobs, Formerly Lecturer in Law at the London School of Economics. With a Preface by H. L. A. Hart, Professor of Jurisprudence in the University of Oxford, Weidenfeld & Nicolson, 5 Winsley Street, Cxford Circus, London. 1. 1971. Pp. xi & 188. Price £. 2-75.

The monograph under review is concerned to determine the extent to which the conception of the criminal responsibility of the individual, reflected in the legal doctrine of *mens rea*, has been displaced or modified by certain features of contemporary English Law. The effects of the introduction into the Law of murder of the idea of 'diminished responsibility', the scope and incidence of strict liability, the change made by the Mental Health Act, 1959 and by the legislation relating to the criminal responsibility of children and young persons, and the cultural and civil functions of juvenile courts, are complex and wide-ranging, and can be understood only by reference to previous history and the actual working of institutions.

2. At the outset the author shows that no consistent pattern can be traced in the conflict between a principle of absolute liability and a principle of liability dependent on fault in the historical evolution of English criminal law. However recent developments seem to have fundamental implications for the concept of responsibility, and the most important of these are examined in the present monograph. Regarding the problems raised by the mentally abnormal offenders, recent innovations in this area of the law raise the question whether it is possible to draw a distinction between those who are and those who are not responsible for their actions. These innovations are examined in their historical context and their significance is assessed for the concept of responsibility.

3. Next comes the young offender. Recent developments have blurred the edge of responsibility here too. Reforms have largely removed the differences between the criminal and civil jurisdictions of the juvenile courts. The measures available to the courts are often the same and have a remedial object, treatment rather than punishment being regarded as the solution to juvenile delinquency, and this attitude is reflected by the tendency to deprive the courts of the task of selecting the appropriate institution for training and by recent legislation extending provision for after-care. In an attempt to assess the doctrine of strict liability, a brief survey illustrates the ten-

dencies of the common law to place greater restrictions on the operation of the doctrine. The wider implications of the concept of responsibility are examined and it is shown that strict responsibility cannot on any view be equated with the complete elimination of responsibility.

4. The notion of objective liability is analysed, showing that this doctrine may take different forms and that the test of the 'reasonable man' applied in the modern law differs at a number of points from the theory of O. W. Holmes. Finally the author goes beyond these individual doctrines and considers the concept of responsibility in its wider aspects. He tries to show that at a number of points, much of the traditional debate about the concept of responsibility and the function of the criminal law has been misconceived, and it would appear that both the advocates of *mens rea* and their opponents have used arguments which fail to establish their case. It is the aim of the author to supply the principle of *mens rea* with a solid foundation in terms of the social purposes of modern law.

5. Published jointly with the London School of Economics and Political Science, the L.S.E. Research Monographs aim to provide a continuing outlet for serious scholarly work and relatively quick publication. They should be of interest to specialists in the various fields, whether in Universities, or Government departments, or elsewhere, as well as to libraries. The present monograph, with its Notes and index, for example, should be instructive not only to the lawyer but also the philosopher and political scientist.

R.S.S.

IX CONGRESS OF THE INTERNATIONAL ASSOCIATION OF DEMOCRATIC LAWYERS. Published by IADL, 49 Avenue Jupiter, 1190 Brussels, Belgium. Price 100 Belg. Fr. or U. S. \$ 2.

The 9th Congress of the International Association of Democratic Lawyers was held in Helsinki from the 15th to the 19th of July 1970. Three hundred and twentyone lawyers from fifty-five countries took part in the Congress and twelve international organisations, including the International Commission of Jurists, were also represented by observers. There were four plenary sessions including those on Indo-China and the Middle East, four Commissions, and the General Assembly of IADL. The Congress elected a Presidential Committee, of which Mr. V. K. Krishna Menon, M. P., former Minister and President

of the Indian Association of Lawyers for Peace, was a member. The General Assembly of the IADL then elected Mr. D. N. Pritt, Q. C. (Britain) as Honorary President and Pierre Cot, Professor at the Faculty of Law, Paris, as President. Among the Vice-Presidents and Secretaries elected were Mr. V. K. Krishna Menon, and Mr. Haris Chandra, Secretary of the Indian Association of Lawyers for Peace.

2. Four Commissions were appointed covering the subjects of legal aspects of certain problems of national independence, peace, international security and the struggle against imperialism in the contemporary world; certain legal problems of the developing countries; legal aspects of safeguarding the fundamental human rights; and technical progress and human rights. The first Commission was concerned with problems of self-determination and sovereignty and the fundamental principles of friendly relations and peaceful co-existence among nations. As observed by President Pierre Cot, the most important question before the first Commission concerned the necessity for a new European Security Organisation. It adopted resolutions on the Middle-East and the Palestinian problem, the Portuguese Colonies, European Security and Co-operation, Korea, and the Okinawa problem.

3. The questions which faced the second Commission related to political and economic independence in the struggle against neo-colonialism, regional, political and economic co-operation, the rights of the people freely to dispose of national resources, and the development of law as a vehicle of progress. Besides a general resolution, it adopted a resolution, against the economic blockade of Cuba. The President emphasised the need for these countries to become involved in an international law system which for years has been forged without them.

4. The third Commission considered the problems of measures for the elimination of all forms of racial discrimination, universal implementation of covenants on civil, political, economic, social and cultural rights, and human rights and emergency laws. As long as there are States and Courts of justice, legal errors and abuses of authority are possible, and lawyers must continue to exercise their vigilance where political rights are concerned. The questions with which the fourth Commission was concerned included the protection of personal privacy in view of the advancement of biology, medicine and biochemistry; the use of electronic devices in the juridical field; and legal protection against pollution and deterioration of the human environment.

5. The IADL publishes twice a year, in a French and English Edition, the *Review of Contemporary Law* (Annual subscription: 150 Belg. Fr. or \$ 3; Single copy 100 Belg. Fr. or 2 \$). Each issue of the Review will contain articles and documents on the major legal problems of the present time. Finland's policy of security, Lenin's ideas on Soviet law and socialist legality, Legal data processing and human rights, the use of cybernetic in law in the U. S. S. R., and trade unionism in India were among the contributions in the last issue, which included also a couple of documents on war crimes and the Greek case; report of the European Commission of Human rights. In the next issue the Review will publish reports and papers presented in Helsinki at the IX International Congress of the IADL.

R.S.S.

HANDWRITING EVIDENCE (A Guide in Disputed Documents Trial) 1971. By K. S. Ramamurti, Handwriting Expert, Madras. K. Sivaprasad, 8, III Main Road, Gandhi Nagar, Madras. 20. Pp. xii & 381. Price Rs. 30.

The work before us reviews the subject of handwriting evidence from various angles and explains clearly the principles of the science. Sections 45, 47 and 73 of the Indian Evidence Act are concerned with the subject. According to S. 45, when the Court has to form an opinion as to the identity of handwriting (or finger impression) the opinions upon the point of persons specially skilled in questions as to the identity of handwriting or finger impressions are relevant facts, and such persons are called experts. They are taught by study and practice, having a facility of performance from experience. Section 47 lays down that, when the Court has to form an opinion as to the person by whom anything was written, the opinion of any other person acquainted with handwriting of that person is a relevant fact. Under S. 73, in order to ascertain whether any writing is that of the person alleged, any writing admitted or proved to the satisfaction of the court to have been written by that person may be compared with the one which is to be proved.

2. It is believed that Sections 45 & 47 of the Evidence Act deserve proper amendment to prevent any sort of person coming forward as an expert. Section 73 provides for comparison of the handwriting by the trial judge, but the Privy Council considers that it is unsatisfactory and dangerous to determine the genuineness of a signature by mere comparison with admitted signatures without the

aid of expert advice. In spite of S. 45, the evidence of persons examined under S. 47 is preferred to that of experts. It is thought that under present conditions S. 47 is superfluous, and S. 45 can be suitably amended, as well as S. 73.

3. In the chief examination of an expert what is needed is to make his opinion intelligible and understandable. Fortified by reasons, his opinions would be more helpful than the mere asking for his opinion, which leaves him to the tender mercies of the cross-examiner. Cross-examination is more difficult. Cross-examination of an expert by another expert would be helpful, because the lawyer may not be well-versed in the subject; in any case, it is upto the trying judge to weigh the pros and cons of the rival expert witnesses and arrive at his own independent judgment.

4. Evolution of writing, writing characteristics or writing habits, study and comparison of numerals, photograph, inks, variations, standards, forgery and the science of detection, comparison, age of documents and writings, are among the topics covered by the present work. It includes more than 50 illustrations and photographs of signatures in various languages, and nearly 80 examples of reports and evidences take up much the greater part of the book.

5. In all cases of forgery and disputed documents, the identification and proof of hand-writing, especially signatures, is of vital importance, and the evidence of a hand-writing expert, though not always conclusive, is useful in testing the validity of other evidence. This identification occupies an important place in the administration of justice, where the rights and liabilities of persons depend upon the genuineness of questioned documents as established in Courts of law. In trials relating to disputed documents, therefore, the Bench, the Bar, and the litigant public should find the book an invaluable guide.

R.S.S.

SECULARISM AND THE CONSTITUTION OF INDIA. By P. B. Gajendragadkar. K. T. Telang Endowment Lecture of the University of Bombay, Fort, Bombay 32. 1st Edition. 1971. Pp. 179. Price, Rs. 18.

The Constitution of India declares that the people of India have resolved to constitute India into a sovereign democratic republic and to secure to all her citizens justice, social, economic, and political; liberty of thought, expression, belief, faith, and worship; equality of status and of opportunity. These provisions

involve a commitment to the ideal of creating a new social order based on social equality and political and economic justice. That is to be done in a democratic way, consistently with the fundamental rights guaranteed to the citizens.

2. In the lectures before us Dr. Gajendragadkar analyses the essential qualities of secularism and discusses its relevance to Indian life and law. Is the new society which the Constitution visualises a secular society? Is the sovereign democratic republic of India a secular State? What are the distinguishing features of Indian secularism as contemplated by the Constitution? In undertaking these and other enquiries, Dr. Gajendragadkar focuses the reader's attention on the basic philosophy of Indian secularism against the background of Indian history, tradition, and development of social thought.

3. According to the author, the Republic of India, which has evolved as a result of the provisions of the Constitution, can well be described as a secular State. The word 'secular,' in the context of the Constitution and in the light of our historical and philosophic background, has a somewhat different meaning from that associated with it in the Christian world. Indian secularism is not anti-God or anti-religion. It recognises that religion has relevance and validity in the lives of many citizens; but it emphasises that religion cannot hamper or frustrate the progress of Indian democracy in its allotted task of creating a new secular order. While the Constitution guarantees full freedom to all religions in India, it is subject to certain basic limitations. This guarantee of religious freedom applies to citizens as well as foreigners. As the distinguished author observes, "whether one emphasises the width of the guarantee or the width of the limitations imposed upon that guarantee would depend upon the approach one adopts in dealing with the problem". If we look for freedom of religion, we must emphasise the breadth and width of the guarantee enshrined in Articles 25 and 26. If, on the other hand, we are emphasising the doctrine of secularism, dedicated to the cause of creating a new social order founded on justice, social, economic, and political, we should be laying stress on the limitations, imposed upon the right to exercise freedom of religion.

4. According to the author, it is impossible to superimpose a secular state on a tradition-bound and superstition-ridden society. A secular state presupposes the existence of a secular society. India awaits a profound social change, whose pace must be accelerated by

education and law and in which processes progressive intellectuals must play an increasingly important part. Dr. Gajendragadkar takes stock of what and how much has been achieved in this respect. He has briefly referred to some of the notable revolutionaries who assisted the cause of social reform and social change and made a good section of the Hindu community responsive to the needs of changing times and changing circumstances.

5. The author sees the enactment of the Hindu Code as an important step towards secularism. But he feels that the process of secularisation of the law must be undertaken without further delay. According to him a common civil code is a must. The demand for a total ban on the slaughter of cows or resistance to change in the Muslim personal law are seen as challenges to Indian secularism. The author analyses in detail the causes of communal violence and suggests ways for providing a harmonious community.

6. The publication is provided with a useful bibliography and with tables of statements regarding communal violence, both Statewise and yearwise.

R.S.S.

THE PRESS COUNCIL OF INDIA Fifth Annual Report, 1970.

The twin objects of the Press Council of India are the preservation of the freedom of the press and the maintenance and improvement of the standards of newspapers in India. In both respects the record of work of the Council for the last four years has been such as to belie the fears of those who were inclined to be pessimistic about the outcome of this novel experiment of a statutory body shouldering the responsibility for what should be essentially a self-regulating mechanism. The fifth annual report opens with a Foreward by the Chairman, Justice N. Rajagopala Ayyangar, and reviews the complaints against newspapers and the complaints against Governments, and presents its statement of accounts. The Appendices give the text of the Press Council Act, 1965, Press Council (Amendment) Act 1970, Press Council (Procedure for Enquiry) Regulations 1967, and the Press Note on the presentation of grievances against the press.

2. The year 1970 saw the termination of the first Press Council, set up under the Press Council Act 1965, and the reconstitution of the second. As it is the last annual document recording the activities of the first Council, facts and figures called and collected from separate annual reports are set out here in a nutshell to enable the readers to have a comprehensive picture of what has been achieved.

The first Council considered a number of issues of vital concern to the Press, enunciated principles for the freedom of newspapers being safeguarded, and admonished encroachments on their independence. By its decisions it laid down norms for the conduct of the Press and condemned instances of abnormality.

3. The Council has drawn up 'guidelines' laying down the broad principles which should be followed while reporting or commenting on communal or regional issues. Its adjudication helped in setting out a few tenets of journalism and building up a case-law. The Council's monograph on 'Parliamentary Privileges and the Press' received good notice in the country. While functioning as a quasi-judicial body adjudicating on complaints against newspapers, it has also looked into the grievances of papers against Governments and others, particularly those involving infringements on their right to function freely and fearlessly. It expressed its displeasure over the action of the State authorities when they utilised the distribution of advertisements as a lever for influencing editorial policy. The recent decision of the Council in this regard arising out of a complaint by the Tribune of Chandigarh against the Government of Haryana has aroused wide-spread interest and attracted the notice of Parliament.

4. The Council drew up a scheme for a Newspaper Finance Corporation which could be set up by an Act of Parliament with a financial capital of Rs. 3 crores for assisting ailing, but economically viable, small and medium newspapers, and the present Bill in Parliament is based upon the Council's scheme. The Council suggested that the provisions of the Indian Telegraph Act, 1885 for intercepting press telegrams should come into force only after an emergency has been declared by Government and that the offence should be made non-cognisable in the case of accredited correspondents. It made suitable recommendations regarding the revision of the Indian Postal Act also. It scrutinised the Contempt of Courts Bill, 1968, particularly the provisions likely to affect the free function of the Press, and the Criminal and Election laws (Amendment) Bill, 1968.

5. In the matter of training journalists, the Council carried out a survey of the existing facilities for institutional training in journalism. Information on the syllabi followed and particulars of the scope of practical training in the different universities, colleges and schools of journalism have been collected.

R.S.S.

END

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NOMINAL TABLE

Burns and Roe Inc. v. Local 825, International Union of Operating Engineers	(Apr) 45	James Melvin Kitchens v. S. Lamont Smith, Warden	(Dec) 87
Calvin Turner v. W. W. Fouche	(June) 49	National Labor Relations Board v. Local, 825, International Union of Operating Engineers	(Apr) 45
Camillo Molinaro v. New Jersey	(Apr) 40		
Clemon Barlow v. B. L. Collins	(Feb) 32		
City of Chicago v. United States	(Jan) 1		
Della Hadley v. Junior College District of Metropolitan Kansas City Missouri	(Jan) 3	United States v. Lelord Kordel	(Feb) 20
Donald Bachellar v. State of Maryland	(June) 57	—— v. Maryland Savings Share Insurance Corporation	(June) 61
Evans, E. S. v. Guyton G. Abney	(Jan) 11	—— v. W. G. Reynolds	(Feb) 21
Fred W. Woodward v. Commissioner of Internal Revenue	(Apr) 42	Willie E. Williams v. State of Illinois	(June) 63
		William P. Rogers v. Aldo Mario Bellei	(Oct) 73

SUBJECT INDEX

Citizenship Act (57 of 1955), S. 4 — See Constitution of India, Art. 5 (Oct) 73
 —S. 6—See Constitution of India, Art. 5 (Oct) 73
 —S. 9—See Constitution of India, Art. 5 (Oct) 73

Civil Procedure Code (5 of 1908), S. 9 — (Case from U. S. A.) Constitution of U. S. A., Art. 3 — Judicial review of administrative action adjudicating private rights — Review is the rule and non-reviewability exception (Feb) 32
 —S. 92—Cy pres — See Constitution of India, Art. 14 (Jan) 11A
 —S. 92 — Succession Act (1925), S. 118 — Cy pres doctrine of — Case from America (Jan) 11B

Constitution of America, Art. 3—See Civil P. C. (1908), S. 9 (Feb) 32
 —Fourteenth Amendment—See also (1) Constitution of India, Art. 14

(Jan) 11A;
(June) 49A

Constitution of India, Pre. — A statute is not constitutionally infirm simply because the legislature could have achieved the same result by some other means (June) 63A

—Pre.—While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, such factors should be weighed in the balance (June) 33D

—Arts. 5, 10 — Citizenship Act (1955), Ss. 4, 6, 9—(U. S. A. Case) Constitution of United States of America — Fourteenth Amendment—(U. S. A.) Immigration and Nationality Act (1952)—(8 U. S. C. S. 1401 (b) S. 301 (a) (7) and (b))—Citizenship by birth and by naturalisation — Birth outside United States in Italy — Mother American national and father Italian — Prerequisites of S. 301 (b) not complied with — Such person loses American Citizenship — S. 301 (b) is constitutionally valid (Oct) 73

—Art. 10—See *ibid.* Art. 5 (Oct) 73

—Art. 14—(American decision)—Fourteenth Amendment of the Constitution of U. S. A.—Equal protection — Election of persons performing governmental functions—Each qualified voter must be given equal opportunity to participate in the election (Jan) 3

Constitution of India (contd.)

—Art. 14—Case from America—Racial discrimination — Testator bequeathing land to city for creating park exclusively for white persons — After Supreme Court rulings upon segregation intention incapable of being carried out — Property reverts to estate — Cy pres doctrine does not apply (Jan) 11A

—Art. 14—Equal protection of law — Case from America — Education Board requiring members to be freeholders — Equal protection clause is violated

(June) 49A

—Art. 14—(American decision) — Normally a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the Courts (June) 61A

—Art. 14 — (American decision) — The cut off date of 1-9-1957 provided in S. 501 (c) (14) (B) of Internal Revenue Code of 1954 which exempts from tax non-profit corporation but only if organised before 1-9-1957 is not arbitrary as the Congress had rational basis for declining to broaden the exemption because multiplication of newly formed corporations might burden otherwise valid federal programmes and hence the section cannot be held to be unconstitutional on the ground of discrimination (June) 61B

—Art. 14—(Case from U. S. A.) — When the aggregate imprisonment of an indigent state prisoner exceeds the maximum period fixed by the statute governing the offence involved and results directly from an involuntary non-payment of a fine or Court costs, there is an impermissible discrimination which rests on ability to pay, violative of the equal protection clause of the Fourteenth Amendment (June) 63B
 —Art. 14—(Case from U. S. A.) — A law non-discriminatory on its face may be grossly discriminatory in its operation

(June) 63C

—Art. 16 — Right to hold office — Case from America—Person cannot be denied privilege of holding public office, which is extended to others on basis of distinctions violating Constitutional guarantees

(June) 49B

—Art. 19 (1) (a) & (2) — Freedom of speech and expression—Case from U. S. A. — Anti-war demonstrations — Conviction for disorderly conduct — Setting aside when there is likelihood of its being based on unconstitutional ground (June) 57

Constitution of India (contd.)

—Art. 20 (3) (American decision)—Constitution of U. S. A.—Fifth Amendment—Privilege against self-incrimination—Civil condemnation proceedings for violation of Federal Food, Drug and Cosmetic Act—Use of evidence obtained through interrogatories in Criminal proceedings—Held, such use did not violate Fifth Amendment privilege of accused (Feb) 26

—Art. 22—(American Case)—Constitution of U. S. A.—Sixth Amendment—Right to be furnished counsel—Where the assistance of counsel is constitutional requisite right to be furnished counsel does not depend on a request by accused for such assistance (Dec) 87

—Art. 31 (2)—(American decision)—Fifth Amendment of the Constitution of U. S. A.—“Just compensation”—Meaning of—Means full monetary equivalent of the property taken (Feb) 21

—Art. 32—Case from America—Responsibility of Supreme Court (of United States of America) is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on basis of its own personal inclinations—Interpretation of Statutes (Jan) 11C

—Art. 134—Case from U. S. A.—Practice of Supreme Court of U. S. A.—Appeal from conviction—Appellant on bail not surrendering himself to authorities upon conviction—Supreme Court will not adjudicate appeal (Apr) 40

—Art. 226—See Civil P. C (1908), S. 9 (Feb) 32

—Art. 226—Case from U. S. A.—Ad-

Constitution of India (contd.)

ministrative orders—Review of—Discretionary matters not reviewable (Jan) 1

Cy pres—See

(1) Civil P. C. (1908), S. 92

(2) Succession Act (1925), S. 118

Immigration and Nationality Act (1952), (8 U.S.S.C.), Ss. 301 (a) (7) & (b) and 1401 (b)—See Constitution of India, Art. 5 (Oct) 73

Income Tax Act (43 of 1961), S. 37—(American Case)—Capital or revenue expenditure—Appraisal litigation expenses—If allowable deduction (Apr) 42

Internal Revenue Code (26 U. S. C.), Ss. 162 & 212—See Income Tax Act (1961), S. 37 (Apr) 42

Interpretation of Statutes—See also

(1) Constitution of India, Pre. (June) 63A

(2) Constitution of India, Art. 32 (Jan) 11C

National Labour Relations Act, S. 8 (b) (4) (B) and (D)—See Trade Unions Act (1926), S. 28J (Apr) 45

Succession Act (39 of 1925), S. 118—See also (1) Civil P. C. (1908), S. 92 (Jan) 11B (2) Constitution of India, Art. 14 (Jan) 11A

—S. 126—See Constitution of India, Art. 14 (Jan) 11A

Trade Unions Act (1926), S. 28J—Unfair labour practice—(American decision)—National Labour Relations Act, S. 8 (b) (4) (B) and (D)—Neither of the two provisions has exclusive operation (Apr) 45

COMPARATIVE TABLE**A. I. R. 1971 U. S. S. C. = Other Journals**

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1	('69) 24 Law Ed 2d 340	32	25 Law Ed 2d 192	49	('69) 24 Law Ed 2d 587	63	('70) 26 Law Ed 2d 586
3	25 Law Ed 2d 45	40	('69) 24 Law Ed 2d 586	57	('69) 24 Law Ed 2d 576	73	(1971) 28 Law Ed 2d 499
11	24 Law Ed 2d 634	42	('70) 25 Law Ed 2d 577	81	('70) 27 Law Ed 2d 4	87	(1971) 28 Law Ed 2d 519
21	25 Law Ed 2d 12	45	(1971) 31 Law Ed 2d 473				
26	25 Law Ed 2d 1						

THE All India Reporter 1971

U. S. Supreme Court

AIR 1971 U. S. S. C. 1 (V 58 C 1)
(V 58 C 1)

(1969-24 Law Ed 2d 340)*

DOUGLAS, J.

City of Chicago et al., Appellants v.
United States et al., Respondent.

(Nos. 101 and 102) Dec. on 9-12-1969.

† Constitution of India, Art. 226 — Case
from U.S.A. — Administrative orders —
Review of — Discretionary matters not
reviewable.

A decision of Interstate Commerce
Commission under Interstate Commerce
Act 72 Stat. 571, to terminate its investi-
gation of a rail carrier's proposed discon-
tinuance of the operation of an inter-
State passenger train is subject to judi-
cial review on a complaint of aggrieved
person. Such a decision is an 'order.'

(Para 1)

Administrative decisions are review-
able unless there is persuasive reason to
believe that the legislature had no such
purpose.

(Para 6)

A matter which is within discretion of
the Commission is not reviewable.

(Para 8)

Cases Referred: Chronological Paras

(1969) 395 US 957	5
(1966) 387 US 136, Abbott Labo- ratories v. Gardner	6
(1963) 376 US 93, Southern R. Co. v. North Carolina	7
(1958) 359 US 27, New Jersey v. United States	8
(1938) 307 US 125, Rochester Telephone Corp. v. United States	8

* Reproduced from 1969-24 Law Ed 2d 340
with kind permission of the publishers.

† Reference is given to a parallel Indian
provision for the convenience of Indian
Lawyers.

168 F Supp 324, State of New Jer-
sey v. United States
294 F Supp 1103

8
5

Gordon P. MacDougall and Howard E.
Shapiro, for Appellants; James W. Hoe-
land, for Respondent.

SUMMARY

Upon determining that the continued
operation of four interstate passenger
trains was not required by public conve-
nience and necessity and would unduly
burden inter-State commerce, the Inter-
state Commerce Commission entered
orders terminating its investigation of the
proposed discontinuances (331 ICC 447;
333 ICC 720). In the United States Dis-
trict Court for the Northern District of
Illinois, various cities, State regulatory
agencies, and other interested parties
brought suit before a three-judge court
to review the Commission's decisions.
The District Court dismissed the cases for
lack of jurisdiction, holding that the
Commission's decisions to terminate its
investigations were not "orders" within
the meaning of 28 USC § 1336(a), which
gives the District Courts jurisdiction to
review any "order" of the Commission
(294 F Supp 1103).

On direct appeal, the United States
Supreme Court reversed. In an opinion
by Douglas, J., expressing the unanimous
view of the court, it was held that the
Commission's decision to terminate its
investigations were "orders" which were
judicially reviewable on the complaint of
aggrieved persons.

OPINION OF THE COURT

Mr. JUSTICE DOUGLAS delivered the
opinion of the Court.

The question in these cases is whe-
ther orders of the Interstate Commerce
Commission discontinuing investigations
respecting the notice of rail carriers to
terminate or change the operation or ser-

[vices of inter-State passenger trains are judicially reviewable on the complaint of aggrieved persons.

2. Section 13a(1) of the Inter-State Commerce Act, 72 Stat 571, 49 USC Section 13a(1) provides, with details not important here, that a rail carrier may file notice of such discontinuance or change with the Commission and that within 30 days the Commission may make an investigation of the proposed discontinuance or change. Apart from interim relief, the Commission may order continuance of the operation and service for a period not to exceed one year(i). One of the present cases involves two inter-State passenger trains between Chicago and Evansville, Indiana, discontinued by the Chicago & Eastern Illinois R. Co. (331 ICC 447) and the other two inter-State passenger trains between New Orleans and Cincinnati discontinued by the Louisville & Nashville R. Co., 333 ICC 720.

3. In each case the Commission, addressing itself to the standards in S. 13a(1) found that continued operation of the trains was not required by public convenience and necessity and that continued operation would unduly burden inter-State commerce. It thereupon entered in each case an order terminating its investigation of the proposed discontinuance.

4. Appellants in each case — cities, State regulatory agencies, and other interested parties — brought these suits before the same three-judge court to review the Commission's decisions. It is provided by 28 USC S. 1336(a):

"Except as otherwise provided by Act of Congress, the district courts shall have jurisdiction of any civil action to enforce, enjoin, set aside, annul or suspend, in whole or in part, any order of the inter-State Commerce Commission."

5. The District Court held that decisions terminating investigations under S. 13a(1) are not "orders" within the meaning of 28 USC S. 1336(a),(ii) 294 F

(i) Section 13a(2), applicable to discontinuance of intrastate trains, provides that where a State bars discontinuance or change in operation or service of a train, or where the State authority has not acted on a carrier's application for such discontinuance change within 120 days, the carrier may petition the Commission for a grant of such authority.

(ii) There is a conflict among the District Courts. *Minnesota v. United States*, 238 F Supp 107, and *New Hampshire v. Boston & Maine Corp.* 251 F Supp 421, are in accord with the District Court in the instant cases. Opposed to that view are *Vermont v. Boston & Maine Corp.* 269 F Supp 80, and *New York v. United States*, 299 F Supp 989. And see *City of Williamsport*

Supp 1103, 1106. The cases are here on direct appeal, 28 USC Ss. 1253, 2325, and we noted probable jurisdiction, (1969) 395 US 957, 23 L Ed 2d 744, 89 S Ct 2103.

6. As stated in *Abbott Laboratories v. Gardner*, (1966) 387 US 136, 140, 18 L Ed 2d 681, 140, 87 S Ct 1507, we start with the presumption that aggrieved persons may obtain review of administrative decisions unless there is "persuasive reason to believe" that Congress had no such purpose. Certainly under S. 13a(1) the carrier if overruled by the Commission, could obtain review. We can find no talismanic sign indicating that Congress desired to deny review to opponents of inter-State discontinuances alone.

7. Section 13a in its present form came into the Act in 1958 and was designed to supersede the prior confused and delayed procedure under which the States supervised the discontinuance of passenger trains. Accordingly, Congress provided a uniform federal scheme to take the place of the former procedure.(iii) A single federal standard was to govern train discontinuances whether inter-State or intrastate, though the procedure of

v. United States, 273 F Supp 899, 282 F Supp 46, affd. 392 US 642, 20 L Ed 2d 1348, 88 S Ct 2286.

(iii) "Without reciting individual cases the sub-committee is satisfied that State regulatory bodies all too often have been excessively conservative and unduly repressive in requiring the maintenance of uneconomic and unnecessary services and facilities. Even when allowing the discontinuance or change of a service or facility, these groups have frequently delayed decisions beyond a reasonable time limit. In many such cases, State regulatory commissions have shown a definite lack of appreciation for the serious impact on a rail-road's financial condition resulting from prolonged loss-producing operations.

"To improve this situation, the sub-committee proposes to give the Inter-State Commerce Commission jurisdiction in the field of discontinuance or change of rail services and facilities similar to the jurisdiction it now has over intrastate rates under Section 13 of the Inter-State Commerce Act so that when called upon to do so it may deal with such matters that impose an undue burden on inter-State commerce. This, the sub-committee believes, would protect and further the broad public interest in a sound transportation system and would prevent undue importance being attached to matters of a local nature." S Rep No. 1647, 85th Cong, 2d Sess, p 22. For a review of the legislative history of S. 13a(2) see *Southern R. Co. v. North Carolina*, 376 US 93, 100-103, 11 L Ed 2d 541, 547, 548, 84 S Ct 564.

S. 13a(1) for discontinuance of an inter-State train was made somewhat different from the procedure for discontinuance of intrastate trains.(iv) But the Commission is to have the final say in each case and "precisely the same substantive standard" now governs discontinuance of either inter-State or intrastate operations. *Southern R. Co. v. North Carolina*, (1963) 376 US 93, 103, 11 L Ed 2d 541, 548, 84 S Ct 564.

8. Whether the Commission should make an investigation of a S. 13a(1) discontinuance is of course within its discretion, a matter which is not reviewable. *State of New Jersey v. United States*, 168 F Supp 324, affirmed, (1958) 359 US 27, 3 L Ed 2d 625, 79 S Ct 607. But when the Commission undertakes to investigate, it is under a statutory mandate:

"Whenever an investigation shall be made by said Commission, it shall be its duty to make a report in writing in respect thereto, which shall state the conclusions of the Commission, together with its decision, order, or requirement in the premises" 49 USC S. 14(1).

A decision to investigate indicates that a substantial question exists under the statutory standards. The Commission's report therefore deals with the merits. We cannot say that an answer that discontinuance should not be allowed is agency "action," while an answer saying the reverse is agency "inaction." The technical form of the order is irrelevant. In each case the Commission is deciding the merits. The present cases are kin to the "negative orders"(v) which we dealt with in *Rochester Telephone Corp. v. United States*, (1938) 307 US 125, 142-143 = 83 L Ed 1147, 1159 = 59 S Ct 754:

"An order of the Commission dismissing a complaint on the merits and maintaining the status quo is an exercise of administrative function, no more and no

(iv) See n. 1, supra.

(v) The Administrative Procedure Act, 5 USC (Supp IV) S. 551(6) defines "order" as including a "negative" form of "a final disposition" by agency action. And that kind of "order" is subject to judicial review. 5 USC (Supp III) Ss. 551(13), 701 (b) (2), 702.

When carriers file new rates, the Commission has authority on its own initiative or on complaint to make an investigation either with or without suspension of the new rates. 49 USC S. 15(7). Where the Commission finds the proposed rates lawful, its order reads "the investigation proceedings [are] discontinued." See *Eastern Central Motor Carriers Ass'n v. Baltimore & O. R. Co.* 314 ICC 5, 51. Such orders are reviewable. *Cooper-Jarrett Inc. v. United States*, 226 F Supp 318; affirmed, 379 US 6, 13 L Ed 2d 21, 35 S Ct 49,

less, than an order directing some change in status. The nature of the issues foreclosed by the Commission's action and the nature of the issues left open, so far as the reviewing power of courts is concerned, are the same. . . .

"We conclude, therefore, that any distinction, as such, between 'negative' and 'affirmative' orders, as a touchstone of jurisdiction to review the Commission's orders, serves no useful purpose, and insofar as earlier decisions have been controlled by this distinction, they can no longer be guiding."

9. The District Court reasoned that since "the statute is self-implementing," only an "order" requiring action is reviewable. 294 F Supp, at 1106. But that theory is of the vintage we discarded in *Rochester Telephone*.

10. Reversed.

AIR 1971 U. S. S. C. 3 (V 58 C 2)

(1970-25 L Ed 2d 45)*

BLACK, J. (for majority) and

BURGER Ch. J., HARLAN, STEWART, JJ.

Della Hadley et al, Appellants v. The Junior College District of Metropolitan Kansas City, Missouri et al, Respondents.

No. 37 Decided on 25-2-1970.

†Constitution of India, Article 14 — (American decision) — Fourteenth Amendment of the Constitution of U. S. A. — Equal protection — Election of persons performing governmental functions — Each qualified voter must be given equal opportunity to participate in the election.

Per majority, Chief Justice Burger, Justice Harlan and Justice Stewart dissenting:—

As a general rule whenever a state or local government decides to select persons by popular election to perform governmental functions the equal protection clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure as far as is practicable that equal numbers of voters can vote for proportionally equal numbers of officials. (Para 5)

Junior College trustees perform important governmental functions within the districts and are government officials. (Para 5)

Under Missouri Statute (Mo Ann. Stat Sec. 178. 820 (1965) although the statutory scheme reflects to some extent a principle of

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† Reference is given to a parallel Indian Provision for the convenience of Indian Lawyers.

equal voting power it does so in a way that does not comport with constitutional requirements, because the Act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33 1/3%, 50% or 66 2/3% of the total enumeration it will always have proportionately fewer trustees than the small districts. Case law discussed. (Para 7)

Cases	Referred:	Chronological	Paras
(1969) 395 U. S. 621 = 23 L Ed 2d 583 = 89 S Ct 1886, Cf. Kramer v. Union Free School District			17
(1969) 395 U. S. 701 = 23 L Ed 2d 647 = 89 S Ct 1897, Cipriano v. City of Houma			17
(1969) 394 U. S. 526 = 22 L Ed 2d 519 = 89 S Ct 1225, Kirkpatrick v. Preisler			25
(1969) 394 U. S. 542 = 22 L Ed 2d 535 = 89 S Ct 1234, Wells v. Rockefeller			25, 26
(1969) 393 U. S. 1115 = 22 L Ed 2d 120 = 89 S Ct 991, Della Hadley v. Junior College District of Metropolitan Kansas City, Missouri			I
(1968) 390 U. S. 474 = 20 L Ed 2d 45 = 88 S Ct 1114, Avery v. Midland County			2, 5, 13, 15, 16, 18, 24
(1967) 387 U. S. 105 = 18 L Ed 2d 650 = 87 S Ct 1549, Sailors v. Bd. of Education			8, 17
(1967) 387 U. S. 112 = 18 L Ed 2d 656 = 87 S Ct 1554, Dusch v. Davis			8, 17
(1967) 385 U. S. 440 = 17 L Ed 2d 501 = 87 S Ct 569, Swann v. Adams			25, 26, 29
(1967) 421 SW 2d 235, Three Rivers Junior College District v. Statler			19
(1966) 385 U. S. 231 = 17 L Ed 2d 330 = 87 S Ct 446, Fortson v. Morris			8
(1964) 377 U. S. 533 = 12 L Ed 2d 506 = 84 S Ct 1362, Reynolds v. Sims			2, 7, 11, 15, 22, 25, 29
(1964) 376 U. S. 1 = 11 L Ed 2d 481 = 84 S Ct 526, Wesberry v. Sanders			2, 7
(1963) 372 U. S. 368 = 9 L Ed 2d 821 = 83 S Ct 801, Gray v. Sanders			9
(1941) 313 U. S. 299 = 85 L Ed 1368 = 61 S Ct 1031, United States v. Classic			2
(1939) 307 U. S. 268 = 83 L Ed 1281 = 59 S Ct 872, Lane v. Wilson			2
(1915) 238 U. S. 347 = 59 L Ed 1340 = 35 S Ct 926, Guinn v. United States			2

(1915) 238 U. S. 383 = 59 L Ed 1355 = 35 S Ct 904, United States v. Mosley	2
(1884) 110 U. S. 651 = 28 L Ed 274 = 4 S Ct 152, Ex Parte Yarbrough	2
(1880) 100 U. S. 371 = 25 L Ed 717, Ex Parte Siebold	2
Irving Achtenberg, for Appellants; William J., Burrell and Louis C. DeFeo Jr., for Respondents.	

OPINION OF THE COURT

MR. JUSTICE BLACK delivered the opinion of the Court.

This case involves the extent to which the Fourteenth Amendment and the "one man, one vote" principle applies in the election of local governmental officials. Appellants are residents and taxpayers of the Kansas City School District, one of eight separate school districts that have combined to form the Junior College District of Metropolitan Kansas City. Under Missouri law separate school districts may vote by referendum to establish a consolidated junior college district and elect six trustees to conduct and manage the necessary affairs of that district.(i) The state law also provides that these trustees shall be apportioned among the separate school districts on the basis of "school enumeration," defined as the number of persons between the ages of six and 20 years, who reside in each district.(ii) In the case of the Kansas City School District this apportionment plan results in the election of three trustees, or 50% of the total number, from that district. Since that district contains approximately 60% of the total school enumeration in the junior college district,(iii) appellants brought suit claiming that their right to vote for trustees was being unconstitutionally diluted in violation of the Equal Protection Clause of the Fourteenth Amendment. The Missouri Supreme Court upheld the trial Court's dismissal of the suit, stating that the "one man one vote" principle was not applicable in this case. 432 SW 2d 328. We noted probable jurisdiction of the appeal, (1969) 393 US 1115 = 22 L Ed 2d 120, and for the reasons set forth below we reverse and hold that the Fourteenth Amendment requires that the trustees of this junior college district be apportioned in a manner which does not deprive any voter of his right to have his own vote given as much weight, as far as is practicable, as that of any other voter in the junior college district.

2. In *Wesberry v. Sanders*, (1964) 376 US 1 = 11 L Ed 2d 481 = 84 S Ct 526, we held that the Constitution requires that

(i) Mo Ann Stat Ss. 178.800, 178.820 (1965).

(ii) Mo Ann Stat S. 167.011 (1965).

(iii) For the years 1963 through 1967, the actual enumeration in the Kansas City School District varied between 63.55% and 59.49%. App, at 38.

"as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Id.*, at 7-8, 11 L Ed 2d at 486, 487. Because of this requirement we struck down a Georgia statute which had glaring discrepancies among the populations in that State's congressional districts. In *Reynolds v. Sims*, (1964) 377 US 533 = 12 L Ed 2d 506 = 84 S Ct 1362, and the companion cases, (iv) we considered state laws which had apportioned state legislatures in a way that again showed glaring discrepancies in the number of people who lived in different legislative districts. In an elaborate opinion we there called attention to prior cases indicating that a qualified voter has a constitutional right to vote in elections without having his vote wrongfully denied, debased or diluted. *Ex parte Siebold*, (1880) 100 US 371 = 25 L Ed 717; *Ex parte Yarbrough*, (1884) 110 US 651 = 28 L Ed 274 = 4 S Ct 152; *United States v. Mosley*, (1915) 238 US 383 = 59 L Ed 1355 = 35 S Ct 904; *Guinn v. United States*, (1915) 238 US 347 = 59 L Ed 1340 = 35 S Ct 926; *Lane v. Wilson*, (1939) 307 US 268 = 83 L Ed 1281 = 59 S Ct 872; *United States v. Classic*, (1941) 313 US 299 = 85 L Ed 1368 = 61 S Ct 1031. Applying the basic principle of *Wesberry*, we therefore held that the various state apportionment schemes denied some voters the right guaranteed by the Fourteenth Amendment to have their votes given the same weight as that of other voters. Finally in *Avery v. Midland County*, (1968) 390 US 474 = 20 L Ed 2d 45 = 88 S Ct 1114, we applied this same principle to the election of Texas county commissioners, holding that a qualified voter in a local election also has a constitutional right to have his vote counted with substantially the same weight as that of any other voter in a case where the elected officials exercised "general governmental powers over the entire geographic area served by the body." *Id.*, at 485, 20 L Ed 2d at 53.

Appellants in this case argue that the junior college trustees exercised general governmental powers over the entire district and that under *Avery* the State was thus required to apportion the trustees according to population on an equal basis, as far as practicable. Appellants argue that since the trustees can levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by

condemnation, and in general manage the operations of the junior college, (v) their powers are equivalent for apportionment purposes, to those exercised by the county commissioners in *Avery*. We feel that these powers, while not fully as broad as those of the Midland County Commissioners, (vi) certainly show that the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.

3. This Court has consistently held in a long series of cases, (vii) that in situations involving elections, the States are required to insure that each person's vote counts as much, insofar as it is practicable, as any other person's. We have applied this principle in congressional elections, state legislative elections, and local elections. The consistent theme of those decisions is that the right to vote in an election is protected by the United States Constitution against dilution or debasement. While the particular offices involved in these cases have varied, in each case a constant factor is the decision of the government to have citizens participate individually by ballot in the selection of certain people who carry out governmental functions. Thus in the case now before us, while the office of junior college trustee differs in certain respects from those offices considered in prior cases, it is exactly the same in the one crucial factor — these officials are elected by popular vote.

4. When a Court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's

(v) *Mo Ann Stat Ss. 167.161, 171.011 177.031, 177.041, 178.770, 178.850—178.890 (1965).*

(vi) The Midland County Commissioners established and maintained the county jail, appointed numerous county officials, made contracts, built roads and bridges, administered the county welfare system, performed duties in connection with elections, set the county tax rate, issued bonds, adopted the county budget, built and ran hospitals, airports, and libraries, fixed school district boundaries, established a housing authority, and determined the election districts for county commissioners. *Avery*, *supra*, at 476-477, 20 L Ed 2d at 48, 49.

(vii) *Wesberry*, *supra*; *Reynolds*, *supra*; cases cited n. 4, *supra*; *Avery*, *supra*; *Gray v. Sanders*, 372 US 368 = 9 L Ed 2d 821 = 83 S Ct 801 (1963); *Burns v. Richardson*, 384 US 73 = 16 L Ed 2d 376 = 86 S Ct 1286 (1966); *Swann v. Adams*, 385 US 440 = 17 L Ed 2d 501 = 87 S Ct 569 (1967).

(iv) *WMCA Inc. v. Lomenzo*, 377 US 633, 12 L Ed 2d 568, 84 S Ct 1418 (1964); *Maryland Committee v. Tawes*, 377 US 656, 12 L Ed 2d 595, 84 S Ct 1429 (1964); *Davis v. Mann*, 377 US 678, 12 L Ed 2d 609, 84 S Ct 1441 (1964); *Roman v. Sincok*, 377 US 695, 12 L Ed 2d 620, 84 S Ct 1449 (1964); *Lucas v. Colorado Gen. Assembly*, 377 US 713, 12 L Ed 2d 632, 84 S Ct 1472 (1964).

vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much when he votes for a school board member as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.

If the purpose of a particular election were to be the determining factor in deciding whether voters are entitled to equal voting power, courts would be faced with the difficult job of distinguishing between various elections. We cannot readily perceive judicially manageable standards to aid in such a task. It might be suggested that equal apportionment is required only in "important" elections, but good judgment and common sense tell us that what might be a vital election to one voter might well be a routine one to another. In some instances the election of a local sheriff may be far more important than the election of a United States Senator. If there is any way of determining the importance of choosing a particular governmental official, we think the decision of the State to select that official by popular vote is a strong enough indication that the choice is an important one. This is so because in our country popular election has traditionally been the method followed when government by the people is most desired.

5. It has also been urged that we distinguish for apportionment purposes between elections for "legislative" officials and those for "administrative" officers. Such a suggestion would leave Courts with an equally unmanageable principle since governmental activities "cannot easily be classified in the neat categories favoured by civics texts," Avery, *supra*, (1968) 390 US 474 at 482 = 20 L Ed 2d 45 at 52, and it must also be rejected. We therefore hold today that as a general rule, whenever a state or local government decides to select persons by popular election to perform governmental functions, the Equal Protection Clause of the Fourteenth Amendment requires that each qualified voter must be given an equal opportunity to participate in that election, and when members of an elected body are chosen from separate districts, each district must be established on a basis which will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials. It is of course possible that there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately effect different groups that a popular election in com-

pliance with Reynolds, *supra*, might not be required, but certainly we see nothing in the present case which indicates that the activities of these trustees fit in that category. Education has traditionally been a vital governmental function, and these trustees, whose election the State has opened to all qualified voters, are governmental officials in every relevant sense of that term.

6. In this particular case the "one man one vote" principle is to some extent already reflected in the Missouri statute. That act provides that if no one or more of the component school districts has 33 1/3% or more of the total enumeration of the junior college district, then all six trustees are elected at large. If, however, one or more districts has between 33 1/3% and 50% of the total enumeration, each such district elects two trustees and the rest are elected at large from the remaining districts. Similarly if one district has between 50% and 66 2/3% of the enumeration it elects three trustees, and if one district has more than 66 2/3% it elects four trustees. (viii) This scheme thus allocates increasingly more trustees to large districts as they represent an increasing proportion of the total enumeration.

7. Although the statutory scheme reflects to some extent a principle of equal voting power, it does so in a way that does not comport with constitutional requirements. This is so because the act necessarily results in a systematic discrimination against voters in the more populous school districts. This discrimination occurs because whenever a large district's percentage of the total enumeration falls within a certain percentage range it is always allocated the number of trustees corresponding to the bottom of that range. Unless a particular large district has exactly 33 1/3%, 50% or 66 2/3% of the total enumeration it will always have proportionally fewer trustees than the small districts. As has been pointed out, in the case of the Kansas City School District approximately 60% of the total enumeration entitles that district to only 50% of the trustees. Thus while voters in large school districts may frequently have less effective voting power than residents of small districts, they can never have more. Such built-in discrimination against voters in large districts cannot be sustained as a sufficient compliance with the constitutional mandate that each person's vote count as much as another's, as far as practicable. Consequently Missouri cannot allocate the junior college trustees according to the statutory formula employed in this case. (ix) We would be faced with a

(viii) Mo Ann Stat S. 178.820 (1965).

(ix) There is some question in this case whether school enumeration figures, rather than actual population figures, can be used as a basis of apportionment. Cf. *Burns v. Richardson*, 384 US 73, 90-95, 16 L Ed 2d 376, 390-392, 86 S. Ct 1286 (1966). There is no need to decide this question at this time

different question if the deviation from equal apportionment presented in this case resulted from a plan that did not contain a built-in bias in favour of small districts, but rather from the inherent mathematical complications in equally apportioning a small number of trustees among a limited number of component districts. We have said before that mathematical exactitude is not required, *Wesberry*, supra, (1964) 376 US 1 at 18 = 11 L Ed 2d 481 at 492, *Reynolds*, supra, (1964) 377 US 533 at 577 = 12 L Ed 2d 506 at 536, but a plan that does not automatically discriminate in favour of certain districts is.

8. In holding that the guarantee of equal voting strength for each voter applies in all elections of governmental officials, we do not feel that the States will be inhibited in finding ways to insure that legitimate political goals of representation are achieved. We have previously upheld against constitutional challenge an election scheme which required that candidates be residents of certain districts which did not contain equal numbers of people. *Dusch v. Davis*, (1967) 387 US 112 = 18 L Ed 2d 656 = 37 S Ct 1554. Since all the officials in that case were elected at large, the right of each voter was given equal treatment.^(x) We have also held that where a State chooses to select members of an official body by appointment rather than election, and that choice does not itself offend the Constitution, the fact that each official does not "represent" the same number of people does not deny those people equal protection of the laws. *Sailors v. Bd. of Education*, (1967) 387 US 105 = 18 L Ed 2d 650 = 37 S Ct 1549; cf. *Fortson v. Morris*, (1966) 385 US 231 = 17 L Ed 2d 330 = 37 S Ct 446. And a State may, in certain cases, limit the right to vote to a particular group or class of people. As we said before, "(v)iable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation." *Sailors*, supra, at 110-111 = 18 L Ed 2d at 654, 655. But once a state has decided to use the process of popular election and "once the class of voters is chosen and their qualifications specified, we see no constitutional way by which equality of voting power may be evaded." *Gray v. Sanders*, (1963) 372 US 368, 381 = 9 L Ed 2d 821, 830 = 33 S Ct 801.

9. For the reasons set forth above the judgment below is reversed and the case is

since even if school enumeration is a permissible basis, the present statute fails to apportion trustees constitutionally even on that basis.

(x) The statute involved in this case provides that trustees who are elected from component districts rather than at large must be residents of the district from which they are elected. *Mo Ann Stat S. 178.820 (2)* (1965).

remanded to the Missouri Supreme Court for proceedings not inconsistent with this opinion.

10. Reversed and remanded.

SEPARATE OPINIONS

MR. JUSTICE HARLAN, with whom the Chief Justice and MR. JUSTICE STEWART join, dissenting.

11. Today's decision demonstrates, to a degree that no other case has, the pervasiveness of the federal judicial intrusion into state electoral processes that was unleashed by the "one man, one vote" rule of (1964) 377 US 533 = 12 L Ed 2d 506 = 34 S Ct 1362.

12. *Reynolds* established that rule for the apportionment of state legislatures, thereby denying States the right to take into account in the structuring of their legislatures any historical, geographical, economic, or social considerations, or any of the other many practical and subtle factors that have always been recognized as playing a legitimate part in the practice of politics.

13. Four years later, in (1968) 390 US 474 = 20 L Ed 2d 45 = 38 S Ct 1114, the "one man, one vote" rule was extended to many kinds of local governmental units, thereby affecting to an unknown extent the organizational integrity of some 80,000 such units throughout the country, and constricting the States in the use of the electoral process in the establishment of new ones.

14. And today, the Court holds the "one man, one vote" rule applicable to the various boards of trustees of Missouri's junior college system, and forebodes, if indeed the case does not decide, that the rule is to be applied to every elective public body, no matter what its nature.

15. While I deem myself bound by *Reynolds* and *Avery* — despite my continued disagreement with them as constitutional holdings (see my dissenting opinions in *Reynolds*, (1964) 377 US 533 at 589 = 12 L Ed 2d 506 at 543, and in *Avery*, (1968) 390 US 474 at 486 = 20 L Ed 2d 45 at 54) — I do not think that either of these cases, or any other in this Court, justifies the present decision. I therefore dissent, taking off from *Avery* in what is about to be said.

16. In *Avery* the Court acknowledged that "the states varied, pragmatic approach in establishing governments" has produced "a staggering number" of local governmental units. The Court noted that, "while special-purpose organizations abound, . . . virtually every American lives within what he and his neighbors regard as a unit of local government with general responsibility and power for local affairs." The Midland County Commissioners Court, the body whose composition was challenged in *Avery*, was found to possess a broad range of powers that made it "representative of most of the general governing bodies of American cities,

counties, towns, and villages," and the Court was at pains to limit its holding to such general bodies. (1968) 390 US 474 at 482-485 = 20 L Ed 2d 45 at 52-54. Today the Court discards that limitation, stating that "there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election." Ante, at (1970) 25 L Ed 2d 45 at p. 50 = (AIR 1971 USSC 3 at pp. 5, 6) I believe, to the contrary, that the need to preserve flexibility in the design of local governmental units that serve specialized functions, and must meet particular local conditions, furnishes a powerful reason to refuse to extend the Avery ruling beyond its original limits. If local units having general governmental powers are to be considered, like state legislatures, as having a substantial identity of function that justifies imposing on them a uniformity of elective structure, it is clear that specialized local entities are characterized by precisely the opposite of such identity. From irrigation districts to air pollution control agencies to school districts, such units vary in the magnitude of their impact upon various constituencies and in the manner in which the benefits and burdens of their operations interact with other elements of the local political and economic picture. Today's ruling will forbid these agencies from adopting electoral mechanisms that take these variations into account.

17. In my opinion, this ruling imposes an arbitrary limitation on the ways in which local agencies may be constituted. The Court concedes that the States may use means other than apportionment "to insure that legitimate political goals of representation are achieved." For example, officials elected at large may be required to be residents of particular areas that do not contain equal numbers of people, (1967) 387 US 112 = 18 L Ed 2d 656 = 87 S Ct 1554; the right to vote may be denied outright to persons whose interest in the function performed by the agency is non-existent or slight, cf. *Kramer v. Union Free School District*, (1969) 395 US 621 = 23 L Ed 2d 583 = 89 S Ct 1886; *Cipriano v. City of Houma*, (1969) 395 US 701 = 23 L Ed 2d 647 = 89 S Ct 1897; or the State may in many instances abandon the elective process altogether and allow members of an official body to be appointed, without any regard for the equal-population principle, (1967) 387 US 105 = 18 L Ed 2d 650 = 87 S Ct 1549. Since the Court recognizes the States' need for flexibility in structuring local units, I am unable to see any basis for its selectively denying to them one of the means to achieve such flexibility. If, as the Court speculates, other means will prove as effective as apportionment in the adaptation of local agencies to meet specific needs, presumably those other means will also enable the States just as effectively to accomplish whatever evils the Court thinks it is preventing by today's deci-

sion. The Court has not shown that, under the supervision of state legislatures that are apportioned according to Reynolds, flexible methods of apportionment of local official bodies carry any greater danger of abuse than these other means of achieving the desirable goal of specialization. The Court's imposition of this arbitrary limitation on the States can be justified only in the name of mathematical nicety.

18. I do not believe that even after Avery, such a result is compelled by the absence of "judicially manageable standards" for the "difficult job of distinguishing between various elections." Ante, at —, (1970) 25 L Ed 2d 45 at 50 = (AIR 1971 USSC 3 at pp. 5, 6). Before today, the Court's rule was that "one man, one vote" applied only to local bodies having "general governmental powers over the entire geographic area served by the body." (1968) 390 US 474 at 485 = 20 L Ed 2d 45 at 53. The Court in Avery professed no temerity about concluding that the Midland County Commissioners Court was such a body. The Court's mere recitation of the powers of that entity, ante, at —, n. 6, (1970) 25 L Ed 2d 45 at p. 49 = (AIR 1970 USSC 3 at p. 5) suffices to establish that conclusion. At the same time, it cannot be argued seriously that the Junior College District of Metropolitan Kansas City is the general governing body for the people of its area. The mere fact that the trustees, can, with restrictions, levy taxes, issue bonds, and condemn property for school purposes does not detract from the crucial consideration that the sole purpose for which the district exists is the operation of a junior college. If the Court adhered to the Avery line, marginal cases would of course arise in which the courts would face difficulty in determining whether a particular entity exercised general governmental powers, but such a determination would be no different in kind from many other matters of degree upon which courts must continually pass. The importance of ensuring flexibility in the organization of specialized units of government, and the uncertainty whether the rule announced today will further any important countervailing interest, convince me that the Court should not proceed further into the political thicket than it has already gone in Avery.

19. The facts of this case afford a clear indication of the extent to which reasonable state objectives are to be sacrificed on the altar of numerical equality. We are not faced with an apportionment scheme that is a historical relic, with no present-day justification, or one that reflects the stranglehold of a particular group that, having once attained power, blindly resists a redistribution. The structure of the Junior College District of Metropolitan Kansas City is based upon a state statute enacted in 1961. Prior to that date, the individual school boards had the power to create their own junior colleges,

as they still do, but there was apparently no authorization for cooperation among districts. The 1961 statute was enacted out of concern on the part of the legislature that Missouri's public educational facilities were not expanding at a satisfactory rate, see *Three Rivers Junior College District v. Statler*, 421 SV 2d 235, 237 (Mo. 1967). (i) The provisions of the statute evidence a legislative determination of the most effective means to encourage expansion through cooperation between districts.

20. The statutory provision for election of the six-man board of trustees, summarized by the Court, reflects a careful balancing of the desirability of population-based representation against the practical problems involved in the creation of new educational units. The statute does not by its own force create any junior college districts; this is left to the initiative of the residents of particular areas who are interested in providing public junior-college education for their children. In recognition of the fact that individual school districts may lack the funds or the population to support a junior college of their own, the state legislature has authorized them to make voluntary arrangements with their neighbors for joint formation of a junior college district. If one of the cooperating school districts greatly preponderates in size, it enters into the arrangement knowing that its representation on the board of trustees, while large, will be somewhat smaller than it would be if based strictly on relative school enumeration.

21. The features of this system are surely sensibly designed to facilitate creation of new educational bodies while guaranteeing to small school districts that they will not be entirely swallowed up by a large partner. The small districts are free to avoid alliance with a highly populated neighbor, if they prefer to link with enough others of their own size to provide a viable base for a junior college. At the same time, a very large school district is probably capable of forming a junior college on its own if it prefers not to consolidate, on the terms set by statute, with smaller neighbors. On the other hand, large and small districts may work together if they find this the most beneficial arrangement. (ii) The participation, as here, of seven smaller and one larger school district in the joint formation of a junior college

(i) Counsel for appellees informed the Court at oral argument that prior to the passage of this statute, when the law merely authorized each school district in the State to establish its own junior college, there were only seven such junior colleges, with a total enrollment of approximately 5,000 students. Today there are 12 junior college districts, in which nearly 120 individual school districts participate, with a total enrollment of over 80,000 students.

(ii) At the time this suit was filed, nine junior college districts had been formed pur-

district, represents a pragmatic choice by all concerned from among a number of possible courses of action.

22. I find it bizarre to conclude that such a voluntary arrangement effects an unconstitutional "dilution" of the votes of residents of the largest school district. When the Court, in *Reynolds*, rejected a proposed analogy between state legislatures and the Federal Congress, it relied heavily on the fact that state legislative districts "are merely involuntary political units of the State created by statute to aid in the administration of state government." 377 US 533 at 548 = 12 L Ed 2d at 519. In contrast, the National Government was created by the union of "a group of formerly independent States." The system of representation in Congress was "conceived out of compromise and concession" between the larger and smaller States. *Id.*, (1964) 377 US 533 at 574 = 12 L Ed 2d 506 at 534. The system struck down today shares much of this same character of voluntary compromise. It is true that the analogy would be even closer if the legislature had left the school districts free to negotiate their own apportionment terms, rather than imposing a uniform scale; but as I read the Court's opinion today, it would strike down the apportionment in this case even if the terms had resulted from an entirely free agreement among the eight school districts. Insistence upon a simplistic mathematical formula as the measure of compliance with the Equal Protection Clause in cases involving the electoral process has resulted in this instance in a total disregard of the salutary purposes underlying the statutory scheme.

23. Finally, I find particularly perplexing the portion of the Court's opinion explaining why the apportionment involved in this case does not measure up even under the "one man, one vote" dogma. The Court holds that the voters of the Kansas City School District, who elect 50% of the trustees, are denied equal protection of the laws because that district contains about 60% of the school enumeration. This is so because the statutory formula embodies a "built-in discrimination against voters in large districts." *Ante.* at —, 25 L Ed 2d 45 at 51. The Court seems to suggest that the same discrepancy among districts might pass muster if it could be shown to be mathematically unavoidable in the apportionment of the small number of trustees among the component districts; but the discrepancy is not permissible where it simply reflects the legislature's choice of a means to foster a legitimate state goal. This reasoning seems hard to follow and also disturbing on two scores.

suant to the statutory procedures. Of these, three did not contain a component district large enough to bring into play the fractional formula; the remaining six did contain such a district.

24. First, to apply the rule with such rigor to local governmental units, especially single-function units, is to disregard the characteristics that distinguish such units from state legislatures. As I noted in my dissent in *Avery*, (1968) 390 US 474 at 488-490 = 20 L Ed 2d 45 at 55, 56, there is a much smaller danger of abuses through malapportionment in the case of local units because there exist avenues of political redress that are not similarly available to correct malapportionment of state legislatures. Further, as noted above, the greater diversity of functions performed by local governmental units creates a greater need for flexibility in their structure. If these considerations are inadequate to stave off the extension of the *Reynolds* rule to units of local government, they at least provide a persuasive rationale for applying that rule so as to allow local governments much more play in the joints.

25. Such an approach is not foreclosed by the previous cases. In *Reynolds*, (1964) 377 US 533 at 577-581 = 12 L Ed 2d 506 at 536-538, the Court catalogued a number of considerations indicating that "somewhat more flexibility" might be permissible in state legislative apportionment than in congressional districting. Compare *Swann v. Adams*, (1967) 385 US 440 = 17 L Ed 2d 501 = 87 S Ct 569, with *Kirkpatrick v. Preisler*, (1969) 394 US 526 = 22 L Ed 2d 519 = 89 S Ct 1225 and *Wells v. Rockefeller*, (1969) 394 US 542 = 22 L Ed 2d 535 = 89 S Ct 1234. The need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single purpose local entity.

26. The disparities of representation in *Avery* were of an entirely different order from those here. In that case, each of the four districts elected one commissioner to the Commissioners Court, despite the fact that the population of one district was 67,906, while those of the remaining three were 852, 414, and 828. I think that the *Avery* rule, born in an extreme case, is being applied here with a rigidity that finds no justification in the considerations that gave it birth. (1969) 394 US 542 at 553 = 22 L Ed 2d 535 at 552 = 89 S Ct 1234 (White, J., dissenting). In this case the disparity of representation is relatively minor. Even more important, it is not an unexplained and unjustified deviation from equality, see (1967) 385 US 440 at 445-446 = 17 L Ed 2d 501 at 505, 506 = 87 S Ct 569 but reflects an enlightened state policy of encouraging individual school districts to join together voluntarily to expand the State's public junior college facilities.

27. Second, the Court leaves unexplored the premises underlying its conclusion that the apportionment here does not achieve equality, "as far as practicable." Ante, at —, (1970) 25 L Ed 2d 45 at p. 51 = (AIR 1970 USSC 3 at pp. 6, 10) Missouri is forbidden to use the statutory formula employ-

ed in this case because the percentage categories it creates will, in particular instances, only approximate equality, and because whatever discrepancy exists will always favor residents of the smaller districts. The Court does not suggest how a formula could be devised that would provide a general rule for application to all the various junior college districts but would not share these alleged faults. If a large district falling within a given percentage range were allocated the number of trustees corresponding to the top, rather than the bottom, of the range, that would also produce, on the Court's theory, a "built-in discrimination" against voters in small districts.

28. Thus, the result of the Court's holding may be that Missouri is forbidden to establish any formula of general application for apportionment of trustees, but must instead provide for the improvisation of an individual apportionment scheme for each junior college district after the contours of the district have been settled. But surely a State could reasonably determine that the mechanics of operating such a system would be so unduly burdensome that it would be better to apportion according to a statewide formula. Would not such considerations justify a conclusion that the statewide formula achieves equality "as far as practicable"? While the Court does not discuss the problem, its invalidation of this statutory formula seems to be based on the premise that such practical considerations, like a State's desire to encourage co-operation among districts, are constitutionally inadequate to justify any divergence from voting "equality."

29. The Court does not, however, spell out any rationale for concluding that such matters of administrative convenience deserves no weight in determining what is "practicable." This is especially incongruous in light of the Court's unexplained conclusion that deference can be given to legislative determinations that the Boards should have a small number of trustees and that the trustees in some instances should represent component school districts. Why does the Court not require that the number of trustees be increased from six, in order to reduce the roughness with which equality is approximated? Would a three-man board be unconstitutionally small? Why is the Court willing to accept inequality that derives from a desire to give representation to component school districts, when similar inequality in state legislative districting could probably not be justified by a desire to give representation to counties? (1964) 377 US 533 at 579-581 = 12 L Ed 2d 506 at 537, 538 = 84 S Ct 1362; (1967) 385 US 440 at 444 = 17 L Ed 2d 501 at 504 = 87 S Ct 569. If equality cannot be achieved when representation is by component districts, why does the "as far as practicable" standard not require at large election of trustees? Is there something about these considerations that

gives them a status under the Equal Protection Clause that is not possessed by a legislative desire to apportion by a formula of statewide application?

30. It seems to me that beneath the surface of the Court's opinion lie unspoken answers to these and other similar questions, questions that I can characterize only as matters of political judgment. The Court's adoption of a rigid, mathematical rule turns out not to have saved it from having to balance and judge political considerations, concluding that one does merit some weight in an apportionment scheme while another does not. The fact that the courts, rather than the legislatures, now are the final arbiters of such matters will continue, I fear, after the present decision to be the inevitable consequence of the shallow approach to the Equal Protection Clause represented by the "one man, one vote" theory. The Court could at least lessen the disruptive impact of that approach at the local level by approving this relatively minor divergence from strict equality on the ground that the legislature could reasonably have concluded that it was necessary to accomplish legitimate state interests.

31. I would affirm the judgment of the Supreme Court of Missouri. What our Court has done today seems to me to run far afield of the values embodied in the scheme of government ordained by the Constitution.

Mr. Chief Justice **BURGER**, dissenting.

32. I concur fully in the opinion of Mr. Justice Harlan. I add this comment to emphasize the subjective quality of a doctrine of constitutional law which has as its primary standard "a general rule, [that] whenever a state or local government decides to select persons by popular election . . .," the Constitution commands that each qualified voter must be given a vote which is equally weighted with the votes cast by all other electors.

33. The failure to provide guidelines for determining when the Court's "general rule" is to be applied is exacerbated when the Court implies that the stringent standards of "mathematical exactitude" which are controlling in apportionment of federal congressional districts need not be applied to smaller specialized districts such as the junior college district in this case. This gives added relevance to Mr. Justice Harlan's observation that "[t]he need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single-purpose local entity." Ante, at —, (1970) 25 L Ed 2d 45 at p. 57 = (AIR 1971 USSC 3 at p. 10). Yet the Court has given almost no indication of which nonpopulation interests may or may not legitimately be considered by a legislature in devising a constitutional apportionment scheme for a local, specialized unit of government.

34. Ultimately, only this Court can finally apply these "general rules" but in the inte-

rim all other judges must speculate as best they can when and how to apply them; with all deference I suggest the Court's opinion today fails to give any meaningful guidelines.
Case remanded.

AIR 1971 U. S. S. C. 11 (V 58 C 3)
(1969-24 L Ed 2d 834)*

BLACK, DOUGLAS, BRENNAN AND MARSHALL, JJ.

E. S. Evans et al., Petitioners v. Guyton G. Abney et al., Respondents.

(No. 60) Decided on 26-1-1970.

†(A) Constitution of India, Article 14 — Case from America — Racial discrimination — Testator bequeathing land to city for creating park exclusively for white persons — After Supreme Court rulings upon segregation, intention incapable of being carried out — Property reverts to estate — Cy pres doctrine does not apply — (Civil P. C. (1908), Section 92 — Cy pres) — (Succession Act (1925), Sections 118, 126 — Cy pres) — (Constitution of United States of America 14th Amendment).

A testator created a testamentary trust by which certain land was conveyed to the city for the express purpose of providing a park for white persons only. For some years the city so operated the park. But later on the Negroes were permitted. In a ruling in a proceeding in respect of this park, the Supreme Court of America had ruled that the public character of the park required that it be treated as public institution subject to the provisions of the 14th Amendment. Thereafter the Trustees applied for a motion that the object of the trust failed and had thus become unenforceable and had thus reverted to the testator's heirs. The Negroes contended that the doctrine of cy pres should be applied and thus the trust should be saved. The Court (Supreme Court of Georgia, affirming the trial Court) granted the motion and rejected the application of the Negroes for application of doctrine of cy pres. On certiorari, the Supreme Court of United States affirmed and:

Held that the trust failed not because of segregation but because of impossibility of fulfilling the testator's intention and that therefore the property reverted to the heirs of the testator. The trust could not be saved by applying doctrine of cy pres. Court had to determine the intention of the testator and since racial segregation was inseparable part, the intention could not be carried out. It was obvious that the testator would rather have had the

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† Reference is given to a Parallel Indian Provision for the Convenience of Indian Lawyers.

whole trust fail than have the part integrated. The ruling did not violate the 14th Amendment. (Paras 1, 8, 12)

Since there was no indication that the State Courts were motivated by discriminatory intent, in construing the will, there was no violation of equal protection clause by the Courts. (Paras 9, 11)

Even though the will did not provide for reverter, the decision of the Court did not involve a matter of choice and the Court's anti-Negro choice did not violate 14th Amendment. (Para 11)

(B) Civil P. C. (1908), Section 92 — Succession Act (1925), Section 118 — Cy pres doctrine of — Case from America.

The doctrine of cy pres is that when a valid charitable bequest is incapable for some reason, of execution in the exact manner provided by the testator, the Court of equity may carry it into effect in such a way as will as nearly as possible effectuate his general intention. The object is to allow the Court to carry out the general charitable intent of the testator where such intent might otherwise be thwarted by impossibility of the particular plan or scheme provided by the testator. This doctrine implies that it cannot be applied in certain class of cases e. g. where the particular intention of the testator is dominant, and he would not have created the trust but to carry out that intention and the intention for some reason is incapable of being carried out. In such a case the property reverts to the estate. (Para 5)

(C) Constitution of India, Article 32 — Case from America — Responsibility of Supreme Court (of United States of America) is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on basis of its own personal inclinations — Interpretation of Statutes. (Para 13)

Cases Referred : Chronological Paras

- (1969) 394 US 1012 = 23 L Ed 2d 38 = 89 S Ct 1628, E. S. Evans v. Guyton G. Abney 1
(1969) 393 U. S. 440 = 21 L Ed 2d 658 = 89 S Ct 601, Presbyterian Church v. Hull Church 8
(1969) 224 Eq. 826 = 165 S E 2d 160 22
(1967) 387 US 369 = 18 L Ed 2d 830 = 87 S Ct 1627, Reitman v. Mulkey 89
(1967) 280 F. Supp. 312, Sweet Briar Institute v. Button 38
(1966) 382 US 296 = 15 L Ed 2d 373 = 86 S Ct 486, Evans v. Newton 1, 2, 3, 4, 31, 37, 39, 40
(1966) 364 F 2d 177, Johnson v. Branch 82
(1964) 378 US 153 = 12 Law Ed 2d 771 = 84 S Ct 1693, Robinson v. Florida 41

- (1964) 376 US 254 = 11 Law Ed 2d 686 = 84 S Ct 710 = 95 ALR 2d 1412, New York Times v. Sullivan 8
(1964) 377 US 218 = 12 L Ed 2d 256 = 84 S Ct 1226, Griffin v. County School Board 33
(1963) 373 US 526 = 10 L Ed 2d 529 = 83 S Ct 1314, Watson v. Memphis 32
(1961) 365 US 715 = 6 L Ed 2d 45 = 81 S Ct 856, Cf. Burton v. Wilmington Parking Authority 41
(1960) 364 US 339 = 5 L Ed 2d 110 = 81 S Ct 125, Cf. Gomillion v. Lightfoot 32
(1957) 353 US 230 = 1 L Ed 2d 792 = 77 S Ct 806, Pennsylvania v. Board of Director 36
(1955) 350 US 877 = 100 L Ed 774 = 76 S Ct 133, Mayor and City Council of Baltimore v. Dawson 32
(1954) 347 US 483 = 98 L Ed 873 = 74 S Ct 686 = 38 ALR 2d 1180, Brown v. Board of Education 33
(1949) 339 US 629 = 94 L Ed 1114 = 70 S Ct 848, Sweat v. Painter 19
(1948) 334 US 1 = 92 L Ed 1161 = 68 S Ct 836 = 3 ALR 2d 441, Shelley v. Kraemer 10, 38
(1942) 194 Ga 263, Yerby v. Chandler 7
(1938) 305 US 188 = 83 L Ed 119 = 59 S Ct 155 = 119 ALR 410, Lyeth v. Hoey 8
(1938) 187 Ga 188, Moss v. Youngblood 5
(1917) 245 US 20 = 62 L Ed 124 = 38 S Ct 35, Pennsylvania Hospital v. City of Philadelphia 36
(1900) 111 Ga 493, Ford v. Thomas 7
(1896) 163 US 537 = 41 L Ed 256 = 16 S Ct 1138, Plessy v. Ferguson 19
(1880) 101 US 814 = 25 L Ed 1079, Stone v. Mississippi 36
(1855) 18 Ga 130, Adams v. Bass 7
392 F 2d 120, Pennsylvania v. Brown 36

James M. Nabrit, III, for Petitioners; Frank C. Jones, for Respondents; Louis F. Claiborne, for the United States, as amicus curiae by Spl. leave of Court.

SUMMARY

Under a testamentary trust, certain land was conveyed to the city of Macon, Georgia, for the express purpose of providing a park for white persons only, and the city so operated the park for some years, but in time permitted use by Negroes. In earlier proceedings, the Georgia state courts ruled in favor of the managers of the park who sought to have the city removed as trustee since it could not legally enforce racial segregation in the park, and to have private trustees appointed to whom title would be transferred, but the United States Supreme Court, ruling in favor of Negro citizens of Macon who had intervened, reversed, holding that the public character of the park re-

quired that it be treated as a public institution subject to the Fourteenth Amendment, regardless of who had title under state law (382 US 296 = 15 L Ed 2d 373 = 83 S Ct 486). Thereafter, a motion of trustees of the testator's estate for a ruling that the trust had become unenforceable and the trust property had thus reverted to the testator's heirs, was granted by the Georgia trial court, which rejected the argument of both the Negro intervenors and the Attorney General of Georgia that the trust should be saved by applying the cy pres doctrine to amend the terms of the will by striking the racial restrictions and permitting integration of the park. The Supreme Court of Georgia affirmed (224 Ga 826 = 165 SE2d 160).

On certiorari, the Supreme Court of the United States affirmed. In an opinion by Black, J., expressing the view of five members of the court, it was held that (1) the Fourteenth Amendment rights of the Negro intervenors were not violated by the ruling of the Georgia Supreme Court, which court did no more than apply well-settled principles of Georgia law in construing the will and in concluding that the cy pres doctrine could not be applied since racial segregation was an inseparable part of the testator's intent as indicated by the whole will, including provisions that under no circumstances was the property to be used for any purpose other than an all-white park and that the testator was not influenced by any unkindness of feeling for Negroes, but was of the opinion that in social relations the two races should be forever separate and should not have recreation grounds to be used in common, (2) the Georgia courts ruling did not violate the Federal Constitution as imposing a penalty on the city and its citizens by forcing the closing of the park, since the court, upon interpreting the will as embodying a preference for termination of the park rather than its integration, had no alternative but to end the trust under Georgia's long-standing and racially neutral trust laws, (3) there was no state action violative of the equal protection clause, since a private party had injected the racially discriminatory motivation, there being no indication that any of the Georgia judges involved were motivated by discriminatory intent of any sort in construing and enforcing the will, nor that the testator was induced to include the racial restrictions in his will by the fact that such restrictions were permitted by the Georgia trust statutes, and (4) even though the will did not expressly provide for a reverter in the event that the racial restrictions failed, the Georgia court's decision did not involve a matter of choice and that court's assertedly "anti-Negro choice" did not violate the Fourteenth Amendment, since there was no indication that the Georgia judges were motivated by any desire to discriminate against Negroes, and since the only choice the Georgia judges

either had or exercised was their judicial judgment in construing the will to determine the testator's intent, the Constitution imposing no requirements upon the Georgia court to approach the will any differently than it would approach any will creating any charitable trust of any kind.

DOUGLAS, J., dissented on the grounds that (1) since the testator's will did not leave any remainder or reversion in the park to his heirs but left all remainders and reversions to the city, giving the property to the heirs, rather than reserving it for some municipal use, violated the testator's intent as much as would converting the park to an all-Negro park, (2) even at the time the will was executed, under the separate-but-equal concept the municipal use projected by the will was not constitutionally permissible, since the beneficiaries were members of the white race only and like accommodations were not made for the Negro race, (3) the purpose of the will was to dedicate the land for some municipal use, and continuation of the use as a municipal park or for another municipal purpose would carry out a larger share of the testator's purpose than the complete destruction of such use, and (4) the Georgia decision should fail as the imposition of a penalty for obedience to a principle of national supremacy.

BRENNAN, J., dissented, expressing the view that the record clearly established the closing of a public facility for the sole reason that the public authority which owned and maintained it could not keep it segregated, which violated the equal protection clause, and that the closing of the park involved state action, since (1) the state, by the official action involved in the city's acceptance of the gift of the park, entered into an arrangement involving both the creation and the enforcement of a private right to compel the reversion of a public facility, (2) the Georgia court's enforcement of the racial restriction prevented willing parties from dealing with one another, there being no indication that city officials or its citizens were unwilling to have the park integrated, and the Georgia Attorney General having sought integration of the park, and (3) Georgia, 6 years before the testator's will was written, had enacted statutes expressly permitting dedication of land for use as a park open to only one race the state having thereby undertaken to facilitate racial restrictions as distinguished from all other kinds of restrictions on access to a public park.

MARSHALL, J., took no part in the decision of the case.

OPINION OF THE COURT

MR. JUSTICE BLACK delivered the opinion of the Court.

Once again this Court must consider the constitutional implications of the 1911 will of United States Senator A. O. Bacon of Georgia which conveyed property in trust

to Senator Bacon's home city of Macon for the creation of a public park for the exclusive use of the white people of that city. As a result of our earlier decision in this case which held that the park, Baconsfield, could not continue to be operated on a racially discriminatory basis, *Evans v. Newton*, (1966) 382 US 296 = 15 L Ed 2d 373 = 86 S Ct 486 the Supreme Court of Georgia ruled that Senator Bacon's intention to provide a park for whites only had become impossible to fulfill and that accordingly the trust had failed and the parkland and other trust property had reverted by operation of Georgia law to the heirs of the Senator. (1968) 165 SE 2d 160 Petitioners, the same Negro citizens of Macon who have sought in the courts to integrate the park, contend that this termination of the trust violates their rights to equal protection and due process under the Fourteenth Amendment. We granted certiorari because of the importance of the questions involved. (1969) 394 US 1012 = 23 L Ed 2d 38 = 89 S Ct 1628. For the reasons to be stated we are of the opinion that the judgment of the Supreme Court of Georgia should be, and it is, affirmed.

2. The early background to this litigation was summarized by Mr. Justice Douglas in his opinion for the Court in (1966) 382 US 296 at pp. 297-298 = 15 L Ed 2d 373 at p. 376;

"In 1911 United States Senator Augustus O. Bacon executed a will that devised to the Mayor and Council of the City of Macon, Georgia, a tract of land which, after the death of the Senator's wife and daughters, was to be used as "a park and pleasure ground" for white people only, the Senator stating in the will that while he had only the kindest feeling for the Negroes he was of the opinion that "in their social relations the two races (white and negro) should be forever separate." The will provided that the park should be under the control of a Board of Managers of seven persons, all of whom were to be white. The city kept the park segregated for some years but in time let Negroes use it, taking the position that the park was a public facility which it could not constitutionally manage and maintain on a segregated basis.

"Thereupon, individual members of the Board of Managers of the Park brought this suit in a state court against the City of Macon and the trustees of certain residuary beneficiaries of Senator Bacon's estate, asking that the city be removed as trustee and that the Court appoint new trustees, to whom title to the park would be transferred. The city answered, alleging it could not legally enforce racial segregation in the park. The other defendants admitted the allegation and requested that the city be removed as trustee.

"Several Negro citizens of Macon intervened, alleging that the racial limitation was

contrary to the laws and public policy of the United States, and asking that the Court refuse to appoint private trustees. Thereafter the city resigned as trustee and amended its answer accordingly. Moreover, other heirs of Senator Bacon intervened and they and the defendants other than the city asked for reversion of the trust property to the Bacon estate in the event that the prayer of the petition were denied.

"The Georgia Court accepted the resignation of the city as trustee and appointed three individuals as new trustees, finding it unnecessary to pass on the other claims of the heirs. On appeal by the Negro intervenors, the Supreme Court of Georgia affirmed, holding that Senator Bacon had the right to give and bequeath his property to a limited class, that charitable trusts are subject to supervision of a Court of equity, and that the power to appoint new trustees so that the purpose of the trust would not fail was clear. (1965) 220 Ga 280 = 138 SE2d 573."

3. The Court in *Evans v. Newton*, (1966) 382 US 296 = 15 L Ed 2d 373 supra. went on to reverse the judgment of the Georgia Supreme Court and to hold that the public character of Baconsfield "requires that it be treated as a public institution subject to the command of the Fourteenth Amendment, regardless of who now has title under state law." (1966) 382 US 296 at 302 = 15 L Ed 2d 373 at 379. Thereafter, the Georgia Supreme Court interpreted this Court's reversal of its decision as requiring that Baconsfield be henceforth operated on a non-discriminatory basis. "Under these circumstances," the state high court held, "we are of the opinion that the sole purpose for which the trust was created has become impossible of accomplishment and has been terminated." *Evans v. Newton*, (1966) 221 Ga 870. Without further elaboration of this holding, the case was remanded to the Georgia trial Court to consider the motion of Guyton G. Abney and others, successor trustees of Senator Bacon's estate, for a ruling that the trust had become unenforceable and that accordingly the trust property had reverted to the Bacon estate and to certain named heirs of the Senator. The motion was opposed by petitioners and by the Attorney General of Georgia, both of whom argued that the trust should be saved by applying the cy pres doctrine to amend the terms of the will by striking the racial restrictions and opening Baconsfield to all the citizens of Macon without regard to race or color. The trial Court, however, refused to apply cy pres. It held that the doctrine was inapplicable because the park's segregated, whites-only character was an essential and inseparable part of the testator's plan. Since the "sole purpose" of the trust was thus in irreconcilable conflict with the constitutional mandate expressed in our opinion in *Evans v. Newton*, the trial Court ruled that the Baconsfield trust had failed and that the trust property had by

operation of law reverted to the heirs of Senator Bacon. On appeal, the Supreme Court of Georgia affirmed.

4. We are of the opinion that in ruling as they did the Georgia Courts did no more than apply well settled general principles of Georgia law to determine the meaning and effect of a Georgia will. At the time Senator Bacon made his will and still today, Georgia cities and towns are authorized to accept devises of property for the establishment and preservation of "parks and pleasure grounds" and to hold the property thus received in charitable trust for the exclusive benefit of the class of persons named by the testator. Ga Code Ann, c. 69-5 (1959); Ga Code Ann Ss. 108-203, 207 (1959). These provisions of the Georgia Code explicitly authorized the testator to include, if he should choose, racial restrictions such as those found in Senator Bacon's will. The city accepted the trust with these restrictions in it. When this Court in (1966) 382 US 296 = 15 L Ed 2d 373 = 86 S Ct 486, held that the continued operation of Baconsfield as a segregated park was unconstitutional, the particular purpose of the Baconsfield trust as stated in the will failed under Georgia law. The question then properly before the Georgia Supreme Court was whether as a matter of state law the doctrine of cy pres should be applied to prevent the trust itself from failing. Petitioners urged that the cy pres doctrine allowed the Georgia courts to strike the racially restrictive clauses in Bacon's will so that the terms of the trust could be fulfilled without violating the Constitution.

5. The Georgia cy pres statutes upon which petitioners relied provide:

"When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a Court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga Code Ann S. 108-202 (1959).

"A devise or bequest to a charitable use will be sustained and carried out in this state; and in all cases where there is a general intention manifested by the testator to effect a certain purpose, and the particular mode in which he directs it to be done shall fail from any cause, a Court of chancery may by approximation, effectuate the purpose in a manner most similar to that indicated by the testator." Ga Code Ann S. 113-815 (1959).

The Georgia Courts have held that the fundamental purpose of these cy pres provisions is to allow the Court to carry out the general charitable intent of the testator where this intent might otherwise be thwarted by the impossibility of the particular plan or scheme provided by the testator. *Moss v. Youngblood*, (1938) 187 Ga 188. But this underlying logic of the cy pres doctrine implies that there is a certain class of cases in which the doctrine cannot be applied. Professor Scott

in his treatise on trusts states this limitation on the doctrine of cy pres which is common to many States(i) as follows:

"It is not true that a charitable trust never fails when it is impossible to carry out the particular purpose of the testator. In some cases it appears that the accomplishment of the particular purpose and only that purpose was desired by the testator and that he had no more general charitable intent and that he would presumably have preferred to have the whole trust fail if the particular purpose is impossible of accomplishment. In such a case the cy pres doctrine is not applicable." IV Scott, Trusts S. 399, at 3085 (1967).

6. In this case, Senator Bacon provided an unusual amount of information in his will from which the Georgia Courts could determine the limits of his charitable purpose. Immediately after specifying that the park should be for "the sole, perpetual and unending use, benefit and enjoyment of the white women, white girls, white boys and white children of the City of Macon," the Senator stated that "the said property under no circumstances (is) to be at any time for any reason devoted to any other purpose or use excepting so far as herein specifically authorised." And the Senator continued:

" I take occasion to say that in limiting the use and enjoyment of the property perpetually to white people, I am not influenced by an unkindness of feeling or want of consideration for the Negroes, or colored people. On the contrary I have for them the kindest feeling, and for many of them esteem and regard, while for some of them I have sincere personal affection.

"I am however, without hesitation in the opinion that in their social relations the two races should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common."

7. The Georgia Courts, construing Senator Bacon's will as a whole, *Yerby v. Chandler*, (1942) 194 Ga 263, concluded from this and other language in the will that the Senator's charitable intent was not "general" but extended only to the establishment of a segregated park for the benefit of white people. The Georgia trial Court found that "Senator Bacon could not have used language more clearly indicating his intent that the benefits of Baconsfield should be extended to white persons only, or more clearly indicating that this limitation was an essential and indispensable part of his plan for Baconsfield." App, at 519. Since racial separation was found to be an inseparable part of the testator's intent, the Georgia Court held that the State's cy pres doctrine could not be used to

(i) See e.g., *First Universalist Society v. Swett*, 90 A 2d 812 (Me 1953); *LaFond v. City of Detroit*, 357 Mich 362 (1959).

alter the will to permit racial integration. See *Ford v. Thomas*, (1900) 111 Ga 493; *Adams v. Bass*, (1855) 18 Ga 180. The Baconsfield trust was therefore held to have failed, and, under Georgia law, "[w]here a trust is expressly created, but (its) uses . . . fail from any cause, a resulting trust is implied for the benefit of the grantor, or testator, or his heirs." Ga Code Ann S. 108-106 (4) (1959). (ii) The Georgia Courts concluded, in effect, that Senator Bacon would have rather had the whole trust fail than have Baconsfield integrated.

8. When a city park is destroyed because the Constitution required it to be integrated, there is reason for everyone to be disheartened. We agree with petitioners that in such a case it is not enough to find that the State Court's result was reached through the application of established principles of state law. No state law or act can prevail in the face of contrary federal law, and the federal Courts must search out the fact and truth of any proceeding or transaction to determine if the Constitution has been violated. *Presbyterian Church v. Hull Church*, (1969) 393 US 440 = 21 L Ed 2d 658 = 89 S Ct 601, *New York Times v. Sullivan*, (1964) 376 US 254 = 11 L Ed 2d 686 = 84 S Ct 710 = 95

(ii) Although Senator Bacon's will did not contain an express provision granting a reverter to any party should the trust fail, S. 108-106 (4) of the Georgia Code quoted in the text makes such an omission irrelevant under state law. At one point in the Senator's will he did grant "all remainders and reversions" to the city of Macon, but the Supreme Court of Georgia showed in its opinion that this language did not relate in any way to what should happen upon a failure of the trust but was relevant only to the initial vesting of the property in the city. The Georgia Court said:

"Senator Bacon devised a life estate in the trust property to his wife and two daughters, and the language pointed out by the intervenors appears in the following provision of the will: 'When my wife, Virginia Lamar Bacon and my two daughters, Mary Louise Bacon Sparks and Augusta Lamar Bacon Curry, shall all have departed this life, and immediately upon the death of the last survivor of them, it is my will that all right, title and interest in and to said property hereinbefore described and bounded, both legal and equitable, including all remainders and reversions and every estate in the same of whatsoever kind, shall thereupon vest in and belong to the Mayor and Council of the City of Macon, and to their successors forever, in trust etc.' This language concerned remainders and reversions prior to the vesting of the legal title in the City of Macon, as trustee, and not to remainders and reversions occurring because of a failure of the trust, which Senator Bacon apparently did not contemplate, and for which he made no provision." 165 SE2d 160, 165 (1968).

ALR 2d 1412. Here, however, the action of the Georgia Supreme Court declaring the Baconsfield trust terminated presents no violation of constitutionally protected rights, and any harshness that may have resulted from the State Court's decision can be attributed solely to its intention to effectuate as nearly as possible the explicit terms of Senator Bacon's will.

9. Petitioners first argue that the action of the Georgia Court violates the United States Constitution in that it imposes a drastic "penalty," the "forfeiture" of the park, merely because of the city's compliance with the constitutional mandate expressed by this Court in *Evans v. Newton*. Of course, *Evans v. Newton* did not speak to the problem of whether Baconsfield should or could continue to operate as a park; it held only that its continued operation as a park had to be without racial discrimination. But petitioners now want to extend that holding to forbid the Georgia courts from closing Baconsfield on the ground that such a closing would penalize the city and its citizens for complying with the Constitution. We think, however, that the will of Senator Bacon and Georgia law provide all the justification necessary for imposing such a "penalty." The construction of wills is essentially a state-law question, *Lyeth v. Hoey*, (1938) 305 US 188 = 83 L Ed 119 = 59 S Ct 155 = 119 ALR 410, and in this case the Georgia Supreme Court, as we read its opinion, interpreted Senator Bacon's will as embodying a preference for termination of the park rather than its integration. Given this, the Georgia Court had no alternative under its relevant trust laws, which are long standing and neutral with regard to race, but to end the Baconsfield trust and return the property to the Senator's heirs.

10. A second argument for petitioners stresses the similarities between this case and the case in which a city holds an absolute fee simple title to a public park and then closes that park of its own accord solely to avoid the effect of a prior Court order directing that the park be integrated as the Fourteenth Amendment commands. Yet, assuming arguendo that the closing of the park would in those circumstances violate the Equal Protection Clause, that case would be clearly distinguishable from the case at bar because there it is the State and not a private party which is injecting the racially discriminatory motivation. In the case at bar there is not the slightest indication that any of the Georgia Judges involved were motivated by racial animus or discriminatory intent of any sort in construing and enforcing Senator Bacon's will. Nor is there any indication that Senator Bacon in drawing up his will was persuaded or induced to include racial restrictions by the fact that such restrictions were permitted by the Georgia trust statutes. Ante, at —, 24 L Ed 2d 634 at 641 = (AIR 1971 SC 11 at p. 15). On

the contrary, the language of the Senator's will shows that the racial restrictions were solely the product of the testator's own fall-blown social philosophy. Similarly, the situation presented in this case is also easily distinguishable from that presented in *Shelley v. Kraemer*, (1948) 334 US 1 = 92 L Ed 1161 = 68 S Ct 836 = 3 ALR 2d 441, where we held unconstitutional state judicial action which had affirmatively enforced a private scheme of discrimination against Negroes. Here the effect of the Georgia decision eliminated all discrimination against Negroes in the park by eliminating the park itself, and the termination of the park was a loss shared equally by the white and Negro citizens of Macon since both races would have enjoyed a constitutional right of equal access to the park's facilities had it continued.

11. Petitioners also contend that since Senator Bacon did not expressly provide for a reverter in the event that the racial restrictions of the trust failed, no one can know with absolute certainty that the Senator would have preferred termination of the park rather than its integration, and the decision of the Georgia Court therefore involved a matter of choice. It might be difficult to argue with these assertions if they stood alone, but then petitioners conclude: "Its [the Court's] choice, the anti-Negro choice, violates the Fourteenth Amendment, whether it be called a 'guess,' an item in 'social philosophy,' or anything else at all." We do not understand petitioners to be contending here that the Georgia Judges were motivated either consciously or unconsciously by a desire to discriminate against Negroes. In any case, there is, as noted above, absolutely nothing before this Court to support a finding of such motivation. What remains of petitioners' argument is the idea that the Georgia Courts had a constitutional obligation in this case to resolve any doubt about the testator's intent in favour of preserving the trust. Thus stated, we see no merit in the argument. The only choice the Georgia Courts either had or exercised in this regard was their judicial judgment in construing Bacon's will to determine his intent, and the Constitution imposes no requirement upon the Georgia Court to approach Bacon's will any differently than it would approach any will creating any charitable trust of any kind. Surely the Fourteenth Amendment is not violated where, as here, a state court operating in its judicial capacity fairly applies its normal principles of construction to determine the testator's true intent in establishing a charitable trust and then reaches a conclusion with regard to that intent which, because of the operation of neutral and non-discriminatory state trust laws, effectively denies everyone whites as well as Negroes, the benefits of the trust.

12. Another argument made by petitioners is that the decision of the Georgia

Court holding that the Baconsfield trust had "failed" must rest logically on the unspoken premise that the presence or proximity of Negroes in Baconsfield would destroy the desirability of the park for whites. This argument reflects a rather fundamental misunderstanding of Georgia law. The Baconsfield trust "failed" under that law not because of any belief on the part of any living person that whites and Negroes might not enjoy being together but, rather, because Senator Bacon who died many years ago intended that the park remain forever for the exclusive use of white people.

13. Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state Court from applying its *cy pres* rule in a case where the Georgia Court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.

14. In their lengthy and learned briefs, the petitioners and the Solicitor-General as *amicus curiae* have advanced several arguments which we have not here discussed. We have carefully examined each of these arguments, however, and find all to be without merit.

15. The judgment is Affirmed.

MR. JUSTICE MARSHALL took no part in the decision of this case.

SEPARATE OPINIONS

MR. JUSTICE DOUGLAS, dissenting.

16-17. Bacon's will did not leave any remainder or reversion in "Baconsfield" to his heirs. He left "all remainders and reversions and every estate in the same of whatsoever kind" to the City of Macon. He further provided that the property "under no circumstances, or by any authority whatsoever" should "be sold or alienated or disposed of, or at any time for any reason" be "devoted

to any other purpose or use excepting so far as herein specifically authorized."

18. Giving the property to the heirs, rather than reserving it for some municipal use, does therefore as much violence to Bacon's purpose as would a conversion of an "all-white" park into an "all-Negro" park.

19. No municipal use is of course possible where the beneficiaries are members of one race only. That was true in 1911 when Bacon made his will. *Plessy v. Ferguson*, 163 US 537 = 41 L Ed 256 = 16 S Ct 1138, decided in 1896, had held that while "separate" facilities could be supplied to each race, those facilities had to be "equal". The concept of "equal" in this setting meant not just another park for Negroes but one equal in quality and service to that municipal facility which is furnished to the whites. See *Sweatt v. Painter*, 339 US 629, 633-634 = 94 L Ed 1114, 1118, 1119 = 70 S Ct 848. It is apparent that Bacon's will projected a municipal use which at the time was not constitutionally permissible unless like accommodations were made for the Negro race.

20. So far as this record reveals, the day the present park was opened to whites it may, constitutionally speaking, also have been available to Negroes.

21. The Supreme Court of Georgia stated that the sole purpose for which the trust was created had become impossible. But it was impossible in those absolute terms even under the regime of *Plessy v. Ferguson*. As to cy pres, the Georgia statute provides:

"When a valid charitable bequest is incapable for some reason of execution in the exact manner provided by the testator, donor, or founder, a court of equity will carry it into effect in such a way as will as nearly as possible effectuate his intention." Ga Code Ann S. 108-202 (1959).

22. The Georgia court held that the doctrine of cy pres "cannot be applied to establish a trust for an entirely different purpose from that intended by the testator." (1969) 224 Ga 826, 830 = 165 SE 2d 160, 164. That however does not state the issue realistically. No proposal to bar use of the park by whites has ever been made, except the reversion ordered to the heirs. Continuation of the use of the property as a municipal park or, for another municipal purpose carries out a larger share of Bacon's purpose than the complete destruction of such use by the decree we today affirm.

23. The purpose of the will was to dedicate the land for some municipal use. That is still possible. Whatever that use, Negroes will of course be admitted, for such is the

constitutional command. But whites will also be admitted. Letting both races share the facility is closer to a realization of Bacon's desire than a complete destruction of the will and the abandonment of Bacon's desire that the property be used for some municipal purpose.

24. Bacon, in limiting the use of this park property "to white people", expressed the view that "in their social relations the two races (white and negro) should be forever separate and that they should not have pleasure or recreation grounds to be used or enjoyed, together and in common." Can we possibly say that test puts a curse on each and every municipal use — music festivals, medical clinics, hospitals?

25. Moreover, putting the property in the hands of the heirs will not necessarily achieve the racial segregation which Bacon desired. We deal with city real estate. If a theatre is erected, Negroes cannot be excluded. If a restaurant is opened, Negroes must be served. If office or housing structures are erected, Negro tenants must be eligible. If a church is erected, mixed marriage ceremonies may be performed. If a Court undertook to attach a racial use condition to the property once it became "private," that would be an unconstitutional covenant or condition.

26. Bacon's basic desire can be realized only by the repeal of the Fourteenth Amendment. So the fact is that in the vicissitudes of time there is no constitutional way to assure that this property will not serve the needs of Negroes.

27. The Georgia decision, which we today approve, can only be a gesture toward a state-sanctioned segregated way of life, now passe. It therefore should fail as the imposition of a penalty for obedience to a principle of national supremacy.

MR. JUSTICE BRENNAN, dissenting.

28. For almost half a century Bacon's field has been a public park. Senator Bacon's will provided that upon the death of the last survivor among his widow and two daughters title to Bacon's field would vest in the Mayor and Council of the City of Macon and their successors forever. Pursuant to the express provisions of the will, the Mayor and City Council appointed a Board of Managers to supervise the operation of the park, and from time to time these same public officials made appointments to fill vacancies on the Board. Senator Bacon also bequeathed to the city certain bonds which provided income used in the operation of the park.

29. The city acquired title to Bacon's field in 1920 by purchasing the interests of

Senator Bacon's surviving daughter and another person who resided on the land. Some \$46,000 of public money was spent over a number of years to pay the purchase price. From the outset and throughout the years the Mayor and City Council acted as trustees, Baconsfield was administered as a public park. T. Cleveland James, superintendent of city parks during this period testified that when he first worked at Baconsfield it was a "wilderness nothing there but just undergrowth everywhere, one road through there and that's all, one paved road." He said there were no park facilities at that time. In the 1930's Baconsfield was transformed into a modern recreational facility by employees of the Works Progress Administration, an agency of the Federal Government. WPA did so upon the city's representation that Baconsfield was a public park. WPA employed men daily for the better part of a year in the conversion of Baconsfield to a park. WPA and Mr. James and his staff cut underbrush, cleared paths, dug ponds, built bridges and benches, planted shrubbery, and, in Mr. James' words, "just made a general park out of it." Other capital improvements were made in later years with both federal and city money. The Board of Managers also spent funds to improve and maintain the park.

30. Although the Board of Managers supervised operations, general maintenance of Baconsfield was the responsibility of the city's superintendent of parks. Mr. James was asked whether he treated Baconsfield about the same as other city parks. He answered, "Yes, included in my appropriation." The extent of the city's services to Baconsfield is evident from the increase of several thousand dollars in the annual expenses incurred for maintenance by the Board of Managers after the Mayor and City Council withdrew as trustees in 1964.

31. The city officials withdrew after suit was brought in a Georgia court by individual members of the Board of Managers to compel the appointment of private trustees on the ground that the public officials could not enforce racial segregation of the park. The Georgia court appointed private trustees, apparently on the assumption that they would be free to enforce the racially restrictive provision in Senator Bacon's will. In (1966) 382 US 296 = 15 L Ed 2d 373 = 86 S Ct 486, we held that the park had acquired such unalterable indicia of a public facility that for the purposes of the Equal Protection Clause it remained "public" even after the city officials were replaced as trustees by a board of private citizens. Consequently, Senator Bacon's discriminatory purpose could not be enforced by anyone. This Court accordingly reversed the Georgia court's acceptance of the city officials' resignations and its appointment of private trustees. On remand the

Georgia courts held that since Senator Bacon's desire to restrict the park to the white race could not be carried out, the trust failed and the property must revert to his heirs. The Court today holds that that result and the process by which it was reached do not constitute a denial of equal protection. I respectfully dissent.

32. No record could present a clearer case of the closing of a public facility for the sole reason that the public authority which owns and maintains it cannot keep it segregated. This is not a case where the reasons or motives for a particular action are arguably unclear, cf. *Palmer v. Thompson*, — F2d — (CA 5th Cir, 1969) (en banc), nor is it one where a discriminatory purpose is one among other reasons, cf. *Johnson v. Branch*, 364 F2d 177 (CA 4th Cir 1966), nor one where a discriminatory purpose can be found only by inference, cf. *Gomillion v. Lightfoot*, (1960) 364 US 339 = 5 L Ed 2d 110 = 81 S Ct 125. The reasoning of the Georgia Supreme Court is simply that Senator Bacon intended Baconsfield to be a segregated public park, and because it cannot be operated as a segregated public park any longer, *Watson v. Memphis*, (1963) 373 US 526 = 10 L Ed 2d 529 = 83 S Ct 1314; see *Mayor & City Council of Baltimore v. Dawson*, (1955) 350 US 877 = 100 L Ed 774 = 76 S Ct 133, the park must be closed down and Baconsfield must revert to Senator Bacon's heirs. This Court agrees that this "city park is (being) destroyed because the Constitution require(s) it to be integrated." No one has put forward any other reason why the park is reverting from the City of Macon to the heirs of Senator Bacon. It is therefore quite plain that but for the constitutional prohibition on the operation of segregated public parks, the City of Macon would continue to own and maintain Baconsfield.

33. I have no doubt that a public park may constitutionally be closed down because it is too expensive to run or has become superfluous, or for some other reason, strong or weak, or for no reason at all. But under the Equal Protection Clause a State may not close down a public facility solely to avoid its duty to desegregate that facility. In *Griffin v. County School Board*, (1964) 377 US 218, 231 = 12 L Ed 2d 256, 265 = 84 S Ct 1226, we said, "whatever nonracial grounds might support a State's allowing a county to abandon its public schools, the object must be a constitutional one, and grounds of race and opposition to desegregation do not qualify as constitutional." In this context what is true of public schools is true of public parks. When it is as starkly clear as it is in this case that a public facility would remain open but for the constitutional command that it be operated on a non-segregated basis, the closing of that facility

conveys an unambiguous message of community involvement in racial discrimination. Its closing for the sole and unmistakable purpose of avoiding desegregation, like its operation as a segregated park, "generates (in Negroes) a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone." *Brown v. Board of Education*, (1954) 347 US 483, 494 = 98 L Ed 873, 880 = 74 S Ct 686 = 38 ALR 2d 1180. It is no answer that continuing operation as a segregated facility is a constant reminder of a public policy which stigmatizes one race, whereas its closing occurs once and is over. That difference does not provide a constitutional distinction. State involvement in discrimination is unconstitutional, however short-lived.

34. The Court, however, affirms the judgment of the Georgia Supreme Court on the ground that the closing of Baconsfield did not involve state action. The Court concedes that the closing of the park by the city "solely to avoid the effect of a prior Court order directing that the park be integrated" would be unconstitutional. However, the Court finds that in this case it is not the State or city but "a private party which is injecting the racially discriminatory motivation," *supra*, p —, (1969) 24 L Ed 2d 634 at p. 644 = (AIR 1971 USSC 11 at p. 16). The exculpation of the State and city from responsibility for the closing of the park is simply indefensible on this record. This discriminatory closing is permeated with state action: at the time Senator Bacon wrote his will Georgia statutes expressly authorized and supported the precise kind of discrimination provided for by him; in accepting title to the park, public officials of the City of Macon entered into an arrangement vesting in private persons the power to enforce a reversion if the city should ever incur a constitutional obligation to desegregate the park; it is a public park that is being closed for a discriminatory reason after having been operated for nearly half a century as a segregated public facility; and it is a state Court which is enforcing the racial restriction which keeps apparently willing parties of different races from coming together in the park. That is state action in overwhelming abundance. I need emphasize only three elements of the state action present here.

35. First, there is state action whenever a State enters into an arrangement which creates a private right to compel or enforce the reversion of a public facility. Whether the right is a possibility of reverter, a right of entry, an executory interest, or a contractual right, it can be created only with the consent of a public body or official, for example the official action involved in Macon's acceptance of the gift of Baconsfield. The State's involvement in the creation of such a

right is also involvement in its enforcement; the State's assent to the creation of the right necessarily contemplates that the State will enforce the right if called upon to do so. Where, as in this case, the State's enforcement role conflicts with its obligation to comply with the constitutional command against racial segregation the attempted enforcement must be declared repugnant to the Fourteenth Amendment.

36. Moreover, a State cannot divest itself by contract of the power to perform essential government functions. e.g., *Contributors to the Pennsylvania Hospital v. City of Philadelphia*, (1917) 245 US 20 = 62 L Ed 124 = 38 S Ct 35; *Stone v. Mississippi*, (1880) 101 US 814 = 25 L Ed 1079. Thus a State cannot bind itself not to operate a public park in accordance with the Equal Protection Clause, upon pain of forfeiture of the park. The decision whether or not a public facility shall be operated in compliance with the Constitution is an essential governmental decision. An arrangement which purports to prevent a State from complying with the Constitution cannot be carried out, *Evans v. Newton*, *supra*; see *Pennsylvania v. Board of Directors*, (1957) 353 US 230 = 1 L Ed 2d 792 = 77 S Ct 806. Nor can it be enforced by a reversion; a racial restriction is simply invalid when intended to bind a public body and cannot be given any effect whatever, cf. *Pennsylvania v. Brown*, 392 F2d 120 (CA 3d Cir).

37. Initially the City of Macon was willing to comply with its constitutional obligation to desegregate Baconsfield. For a time the city allowed Negroes to use the park, "taking the position that the park was a public facility which it could not constitutionally manage on a segregated basis." *Supra*, (1966) 382 US 296 at 297 = 15 L Ed 2d 373 at 376. But the Mayor and Council reneged on their constitutional duty when the present litigation began, and instead of keeping Baconsfield desegregated they sought to sever the city's connection with it by resigning as trustees and telling Superintendent James to stop maintaining the park. The resolution of the Mayor and Council upon their resignation as trustees makes it very clear that the probability of a reversion had induced them to abandon desegregation. Private interests of the sort asserted by the respondents here cannot constitutionally be allowed to control the conduct of public affairs in that manner.

38. A finding of discriminatory state action is required here on a second ground. (1948) 334 US 1 = 92 L Ed 1161 = 68 S Ct 836 = 3 ALR 2d 441, stands at least for the proposition that where parties of different races are willing to deal with one another a state Court cannot keep them from doing so by enforcing a privately authored racial restriction. See also *Sweet Briar In-*

stitute v. Button, 280 F Supp 312 (DC WD Va 1967) (state attorney general enjoined from enforcing privately authored racial restriction). Nothing in the record suggests that after our decision in *Evans v. Newton*, supra, the City of Macon retracted its previous willingness to manage Baconsfield on a nonsegregated basis or that the white beneficiaries of Senator Bacon's generosity were unwilling to share it with Negroes, rather than have the park revert to his heirs. Indeed, although it may be that the city would have preferred to keep the park segregated, the record suggests that, given the impossibility of that goal, the city wanted to keep the park open. The resolution by which the Mayor and Council resigned as trustees prior to the decision in *Evans v. Newton*, supra, reflected not opposition to the admission of Negroes into the park, but a fear that if Negroes were admitted the park would be lost to the city. The Mayor and Council did not participate in this litigation after the decision in *Evans v. Newton*. However, the Attorney General of Georgia was made a party after remand from this Court, and, acting "as parens patriae in all legal matters pertaining to the administration and disposition of charitable trusts in the State of Georgia in which the rights of beneficiaries are involved," he opposed a reversion to the heirs and argued that Baconsfield should be maintained "as a park for all the citizens of the State of Georgia." Thus, so far as the record shows, this is a case of a state Court's enforcement of a racial restriction to prevent willing parties from dealing with one another. The decision of the Georgia Courts thus, under (1948) 334 US 1 = 92 L Ed 1161 = 68 S Ct 836, constitutes state action denying equal protection.

39. Finally, a finding of discriminatory state action is required on a third ground. In *Reitman v. Mulkey*, (1967) 387 US 369 = 18 L Ed 2d 830 = 87 S Ct 1627, this Court announced the basic principle that a State acts in violation of the Equal Protection Clause when it singles out racial discrimination for particular encouragement, and thereby gives it a special preferred status in the law, even though the State does not itself impose or compel segregation. This approach to the analysis of state action was foreshadowed in Mr. Justice White's concurring opinion in *Evans v. Newton*, supra. There Mr. Justice White comprehensively reviewed the law of trusts as that law stood in Georgia in 1905, prior to the enactment of Ss. 69-504 and 69-505 of the Georgia Code. He concluded that prior to the enactment of those statutes "it would have been extremely doubtful" whether Georgia law authorized "a trust for park purposes when a portion of the public was to be excluded from the park." (1966) 382 US 296 at 310 = 15 L Ed 2d 373 at 383. Sections 69-504 and 69-505 removed this doubt by expressly permitting dedication of land to the public for use as a

park, open to one race only. Thereby Georgia undertook to facilitate racial restrictions as distinguished from all other kinds of restriction on access to a public park. *Reitman* compels the conclusion that in doing so Georgia violated the Equal Protection Clause.

40. In 1911, only six years after the enactment of Ss. 69-504 and 69-505, Senator Bacon, a lawyer, wrote his will. When he wrote the provision creating Baconsfield as a public park open only to the white race, he was not merely expressing his own testamentary intent, but was taking advantage of the special power Georgia had conferred by Ss. 69-504 and 69-505 on testators seeking to establish racially segregated public parks. As Mr. Justice White concluded in *Evans v. Newton*, "the State through its regulations has become involved to such a significant extent in bringing about the discriminatory provision in Senator Bacon's trust that the racial restriction 'must be held to reflect . . . state policy and therefore to violate the Fourteenth Amendment.'" (1966) 382 US 296 at 311 = 15 L Ed 2d 373 at 384. This state-encouraged testamentary provision is the sole basis for the Georgia court's holding that Baconsfield must revert to Senator Bacon's heirs. The Court's finding that it is not the State of Georgia but "a private party which is injecting the racially discriminatory motivation" inexcusably disregards the State's role in enacting the statute without which Senator Bacon could not have written the discriminatory provision.

41. This then is not a case of private discrimination. It is rather discrimination in which the State of Georgia is "significantly involved", and enforcement of the reverter is therefore unconstitutional. Cf. *Burton v. Wilmington Parking Authority*, (1961) 365 US 715 = 6 L Ed 2d 45 = 81 S Ct 856; *Robinson v. Florida*, (1964) 378 US 153 = 12 L Ed 2d 771 = 84 S Ct 1693.

42. I would reverse the judgment of the Supreme Court of Georgia.

AIR 1971 U. S. SUPREME COURT 21
(V 58 C 4)

(1969-25 L Ed 2d 12)*

United States, Petitioner v. W. G. Reynolds et ux., Respondent.

(No. 88) decided on 24-2-1970.

† Constitution of India, Art. 31 (2) — (American decision) — Fifth Amendment of the Constitution of U. S. A. — "Just

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compensation" — Meaning of — Means full monetary equivalent of the property taken.

"Just compensation" means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken. The "market value" of property condemned can be affected, adversely or favourably, by the imminence of the very public project that makes the condemnation necessary. To permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires. On the other hand, the development of a public project may also lead to enhancement in the market value of neighbouring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.

If farm land taken for recreational facilities as part of a federal reservoir project is within the original scope of the project, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage is outside the original scope of the project, its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property. (Paras 2, 3, 5)

Cases Referred: Chronological Paras
 (1969) 396 U. S. 814 = 24 L Ed 2d 66 = 90 S Ct 54 1
 (1942) 317 U. S. 369 = 37 L Ed 336 = 63 S Ct 276, United States v. Miller 4
 (1897) 167 U. S. 548 = 42 L Ed 270 = 17 S Ct 966, Bauman v. Ross 6
 (1670) 6 How St. Tr. 999, Bushell's Case 15
 402 F2d 762, Wardy v. United States 8

Shiro Kashiwa, for Petitioner; Erwin S. Solomon, for Respondent.

SUMMARY

The United States brought suit in the United States District Court for the Western District of Kentucky to condemn more than 250 acres of the respondents' land for a reservoir project. A jury awarded the respondents \$20,000 as just compensation for all the land taken. Although the Court of Appeals for the Sixth Circuit reversed on another ground (404 F2d 303), the trial and appellate courts were in agreement in rejecting the government's

contention that the trial judge, rather than the jury, should have decided whether, for purposes of determining just compensation, 78 of the 250 acres, taken for construction of recreation facilities adjacent to the reservoir, had been probably within the original scope of the project.

On certiorari, the United States Supreme Court vacated the judgment of the Court of Appeals and remanded the case to the District Court. In an opinion by Stewart, J., expressing the view of six members of the court, it was held that under Rule 71A (h) of the Federal Rules of Civil Procedure, which provides (with certain exceptions) that any party to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation," it was for the trial judge and not the jury to decide whether the condemned property was probably within the project's original scope.

DOUGLAS, J., joined by BLACK, J., dissented, saying that there was no reason why the jury, chosen by Congress to decide the final issue of "just compensation," should be denied the power to determine the subordinate issues of fact upon which the jury's final verdict must rest.

OPINION OF THE COURT

Mr. JUSTICE STEWART delivered the opinion of the Court.

The United States brought this suit in the Western District of Kentucky to condemn more than 250 acres of the respondents' land for a federal development known as the Nolin Reservoir Project located in that State. An important issue in the case was raised by the respondents' claim that 78 acres of the land, taken for construction of recreational facilities adjacent to the reservoir, had not been within the original scope of the project. (i) A jury awarded the respondents \$20,000 as just compensation for all the land taken. Upon an appeal by the respondents, the Court of Appeals for the Sixth

(i) Congress authorized the Nolin Reservoir Project in 1938 as part of a comprehensive flood control plan for the Ohio and Mississippi Rivers. See Act of June 28, 1938, § 4, 52 Stat 1217. Congress first appropriated funds for the planning stage of the project in 1956. See Public Works Appropriation Act of 1957, 70 Stat 479-480. In July 1958 the Chief of Army Engineers approved a general design memorandum contemplating the construction of recreational areas in connection with the project, but evidently not specifying where they would be. The first funds for construction were appropriated in 1958. See Public Works Appropriation Act of 1959, 72 Stat 1573. Construction began in January 1959.

Circuit reversed the judgment and ordered a new trial, finding that the District Judge in his instructions to the jury had erroneously referred to matters disclosed outside the jury's presence.(ii) The trial and appellate courts were in agreement, however, in rejecting the Government's contention that the "scope of the project" issue was for the trial judge to decide and should not, therefore, have been submitted to the jury at all. There being a conflict between the circuits on this question,(iii) we granted certiorari to consider a recurring problem of importance in federal condemnation proceedings. (1969) 396 US 814 = 24 L Ed 2d 66 = 90 S Ct 54.

2. The Fifth Amendment provides that private property shall not be taken for public use without just compensation. And "just compensation" means the full monetary equivalent of the property taken.(iv) The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken.(v) In enforcing the constitutional mandate, the Court at an early date adopted the concept of market value: the owner is entitled to the fair market value of the property(vi) at the time of

Most of the respondents' acreage condemned by the Government was taken because it would be inundated by the reservoir, and there is no question that this land was within the original scope of the project. But 78 acres of the tract were taken for the construction of recreational facilities adjacent to the reservoir itself. These 78 acres were not referred to in a design memorandum submitted in June 1959. They were, however, designated for taking in a memorandum approved in October of that year. It has been Government policy to build recreational areas in conjunction with federal reservoir projects since 1944. Act of December 22, 1944, § 4, 58 Stat 889.

(ii) United States v. 811.92 Acres of Land, 404 F2d 303.

(iii) The Court of Appeals for the Fifth Circuit has held that the "scope of the project" issue is to be determined by the trial judge. *Wardy v. United States*, 402 F2d 762, 763.

(iv) *Monongahela Navigation Co. v. United States*, 148 US 312, 326, 37 L ED 463, 468, 13 S Ct 622.

(v) *United States v. New River Collieries Co.*, 262 US 341, 343, 67 L Ed 1014, 1017, 42 S Ct 565; *Seaboard Air Line R. Co. v. United States*, 261 US 299, 302, 67 L Ed 664, 669, 43 S Ct 354.

(vi) *New York v. Sage*, 239 US 57, 61, 60 L Ed 143, 146, 36 S Ct 25; *Boom Co. v. Patterson*, 98 US 403, 408, 25 L Ed 206, 208.

the taking.(vii) But this basic measurement of compensation has been hedged with certain refinements developed over the years in the interest of effectuating the constitutional guarantee. It is one of these refinements that is in controversy here.

3. The Court early recognized that the "market value" of property condemned can be affected, adversely or favourably, by the imminence of the very public project that makes the condemnation necessary.(viii) And it was perceived that to permit compensation to be either reduced or increased because of an alteration in market value attributable to the project itself would not lead to the "just compensation" that the Constitution requires.(ix) On the other hand, the development of a public project may also lead to enhancement in the market value of neighboring land that is not covered by the project itself. And if that land is later condemned, whether for an extension of the existing project or for some other public purpose, the general rule of just compensation requires that such enhancement in value be wholly taken into account, since fair market value is generally to be determined with due consideration of all available economic uses of the property at the time of the taking.(x)

4. In *United States v. Miller*, 317 US 369, 87 L Ed 336, 63 S Ct 276, 147 ALR 55, the Court gave full articulation to these principles:

"If a distinct tract is condemned, in whole or in part, other lands in the neighborhood may increase in market value due to the proximity of the public improvement erected on the land taken. Should the Government, at a later date, determine to take these other lands, it must pay their market value as enhanced by this factor of proximity. If, however, the public project from the beginning included the taking of certain tracts but only one of them is taken in the first instance, the owner of the other tracts should not be allowed an increased value for his lands which are ultimately to be taken any more than the owner of the tract first condemned is entitled to be

(vii) *Kerr v. South Park Commissioners*, 117 US 379, 386, 29 L Ed 924, 927, 6 S Ct 801.

(viii) *Shoemaker v. United States*, 147 US 282, 304-305, 37 L Ed 170, 186, 187, 13 S Ct 361.

(ix) *United States v. Virginia Electric & Power Co.*, 365 US 624, 635-636, 5 L Ed 2d 838, 848, 849, 81 S Ct 784; *United States v. Cors*, 337 US 325, 332-334, 93 L Ed 1392, 1398, 1400, 69 S Ct 1086.

(x) *United States v. Chandler-Dunbar Water Power Co.*, 229 US 53, 81, 57 L Ed 1063, 1082, 33 S Ct 667; *Boom Co. v. Patterson*, supra.

allowed an increased market value because adjacent lands not immediately taken increased in value due to the projected improvement.

"The question then is whether the respondents' lands were probably within the scope of the project from the time the Government was committed to it. If they were not, but were merely adjacent lands, the subsequent enlargement of the project to include them ought not to deprive the respondents of the value added in the meantime by the proximity of the improvement. If, on the other hand, they were, the Government ought not to pay any increase in value arising from the known fact that the lands probably would be condemned. The owners ought not to gain by speculating on probable increase in value due to the Government's activities." (1942) 317 US 369, at Pp. 376-377 = 87 L Ed 336 at p. 344.

5. There is no controversy in the present case regarding these basic principles. The parties agree that if the acreage in issue "was probably within the scope of the project from the time the Government was committed to it," substantially less compensation is due than if it was not. For if the property was probably within the project's original scope, then its compensable value is to be measured in terms of agricultural use. If, on the other hand, the acreage was outside the original scope of the project, its compensable value is properly measurable in terms of its economic potential as lakeside residential or recreational property.

6. The issue between the parties is simply whether the "scope of the project" question is to be determined by the trial judge or by the jury. There is no claim that the issue is of constitutional dimensions. For it has long been settled that there is no constitutional right to a jury in eminent domain proceedings. See *Bauman v. Ross*, (1897) 167 US 548, 593 = 42 L Ed 270, 289 = 17 S Ct 966. As Professor Moore has put the matter:

"The practice in England and in the colonies prior to the adoption in 1791 of the Seventh Amendment, the position taken by Congress contemporaneously with, and subsequent to, the adoption of the Amendment, and the position taken by the Supreme Court and nearly all of the lower federal courts lead to the conclusion that there is no constitutional right to jury trial in the federal courts in an action for the condemnation of property under the power of eminent domain."(xi)

7. It is not, therefore, to the Seventh Amendment that we look in this

(xi) 5 Moore's Federal Practice Para 38.32 [1], at 239 (2d ed. 1969). (Footnote omitted.)

case, but to the Federal Rules of Civil Procedure. Rule 71A (h) provides that, except in circumstances not applicable here, "any party" to a federal eminent domain proceeding "may have a trial by jury of the issue of just compensation," unless the court in its discretion orders that that issue "shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court."(xii) The Rule thus provides that, except for the single issue of just compensation, the trial judge is to decide all issues, legal and factual, that may be presented. The critical inquiry is thus whether "the issue of just compensation," as that phrase is used in the Rule, is broad enough to embrace the question whether the condemned property was probably within the scope of the federal project.(xiii)

(xii) The full text of Rule 71A (h) is as follows:

"If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for the determination of that issue; but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed for answer or within such further time as the court may fix, unless the court in its discretion orders that, because of the character, location, or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it. If a commission is appointed it shall have the powers of a master provided in subdivision (c) of Rule 53 and proceedings before it shall be governed by the provisions of paragraphs (1) and (2) of subdivision (d) of Rule 53. Its action and report shall be determined by a majority and its findings and report shall have the effect, and be dealt with by the court in accordance with the practice, prescribed in paragraph (2) of subdivision (e) of Rule 53. Trial of all issues shall otherwise be by the court."

(xiii) In *United States v. Miller*, supra, it appears that that question was decided by the trial judge, who excluded all evidence of enhanced value attributable to the project. 317 US, at 372-373, 87 L Ed at 341, 342. While this Court's opinion in *Miller* approved of that procedure, it is to be remembered that the case was decided before the adoption of Rule 71A (h) in 1951, at a time when federal courts in condemnation proceedings followed the procedures of the States in which they

8. Although the matter could be decided either way without doing violence to the language of Rule 71A (h), we think the Rule's basic structure makes clear that a jury in federal condemnation proceedings is to be confined to the performance of a single narrow but important function—the determination of a compensation award within ground rules established by the trial judge. The Rule gives the trial court discretion to eliminate a jury entirely. And when a jury is afforded, the sweeping language of the final sentence of the Rule discloses a clear intent to give the district judge a role in condemnation proceedings much broader than he occupies in a conventional jury trial. It is for him to decide "all issues" other than the precise issue of the amount of compensation to be awarded. It follows that it is for the judge to tell the jury the criteria it must follow in determining what amount will constitute just compensation, and that in order to do so he must decide the "scope of the project" issue as a preliminary matter. We therefore approve and adopt the procedural rule announced by the Court of Appeals for the Fifth Circuit in *Wardy v. United States*, 402 F2d 762, and hold that it is for the judge and not the jury to decide whether the property condemned was probably within the project's original scope.(xiv)

9. Finally, the Government asks us to take this occasion to "clarify" the "scope of the project" test. We think the test was stated with admirable clarity by a unanimous Court in *Miller*: if the "lands were probably within the scope of the project from the time the Government was committed to it," no enhancement in value attributable to the project is to be considered in awarding compensation. As with any test that deals in

were located. See Advisory Committee Notes to Rule 71A; 7 Moore, *supra*, Para 71A.03, at 2716.

(xiv) "The question was whether appellants' lands were probably within the scope of the project from the time the Government was committed to it." . . . Appellants contend that the jury should have been allowed to answer this question. Under Rule 71A (h) the jury's function is limited to determining 'just compensation.' It is the duty of the court to decide the legal issues, as well as all other fact issues. [Citations omitted.] Thus instead of infringing on the jury's functions, the judge merely decided a legal question which limited the factors necessary to the determination of 'just compensation.'" *Wardy v. United States*, 402 F2d, at 763. See also *Scott Lumber Co. v. United States*, 390 F2d 388, 392 (CA9th Cir.); *United States v. 91.69 Acres of Land*, 334 F2d 229, 231-232 (CA4th Cir.).

probabilities, its application to any particular set of facts requires discriminating judgment.(xv) The rule does not require a showing that the land ultimately taken was actually specified in the original plans for the project. It need only be shown that during the course of the planning or original construction it became evident that land so situated would probably be needed for the public use.

10. The judgment of the Court of Appeals is vacated, and the case is remanded to the United States District Court for the Western District of Kentucky for further proceedings consistent with this opinion.

11. It is so ordered.

SEPARATE OPINION

Mr. JUSTICE DOUGLAS, with whom Mr. JUSTICE BLACK concurs, dissenting.

12. All constitutional questions aside, there was in the present case a right to trial by jury on "the issue of just compensation" as provided in Rule 71A (h). I do not see how "the issue of just compensation" can be decided without considering whether or not the property was probably within or not within the project's original scope. As the opinion of the Court makes plain, important questions of value turn on that decision. In this case it is seen in the difference between the value of the property as agricultural land and its value as potential lakeside residential or recreational property.

13. If it were certain beyond doubt that the property was within the original scope of the project, a different question might be presented. But there is nothing in this record to show that respondent's property was included in the original design. We deal here with probabilities or perhaps with possibilities. If the property were not within the original design, a purchaser could reasonably anticipate that he would be able to devote the land to its highest economic use reflected in part by its proximity to the Government's project. Henry George(i) would have it otherwise; but that has not been the direction of our economy. Hence what we are talking about is market value and that in turn includes all of the ingredients that make up price. The most central element of price in the area now litigated was the relation of the land to the original project and that issue was one of fact. The "issue of just compen-

(xv) Compare *John L. Roper Lumber Co. v. United States*, 150 F2d 329, 332; with *Scott v. United States*, 146 F2d 131, 132-133.

(i) *Progress and Poverty* Book VI (15th Ann. ed. 1945).

sation"(ii) as used in Rule 71A (h) truly cannot be resolved without considering that question.

14. There seems to be no reason why the jury chosen by Congress to decide the final issue of "just compensation" should be denied the power to determine the subordinate issues of fact upon which the jury's final verdict must rest.

15. There are powerful forces loose in this country that deprecate the use of juries. The Department of Justice and other federal agencies(iii) often seem to dislike juries in condemnation cases. In my Circuit, juries have unexpectedly risen up in favor of homeowners and against Washington, D. C., and granted "just compensation" in large sums, in retaliation, it is believed, against hardnose officials who, with all the power of the Central Government, seek to plow them under. At other times the jury has acted

(ii) In *United States v. Certain Lands*, 144 F Supp 206, a road was taken and the question of "just compensation" turned on whether the construction of a substitute facility was necessary. The court held that that issue of necessity was properly left to the jury:

"In the average condemnation proceeding, many factors must be considered in arriving at just compensation, factors which are only established and available after the exercise of a fact-finding process. There appears to be no reason for introducing a trial by jury into condemnation proceedings unless the jury's province is broad enough to include the weighing of evidence which directly relates to the issue of compensation. It would seem that in this case the determination as to whether any substitute facilities are required at all is indeed a part of the 'issue of just compensation,' one of the factors to be taken into account by the jury in reaching its verdict." *Id.*, at 214.

(iii) The present Rule 71A, which in absence of an Act of Congress gives the courts discretion to have the issue of compensation decided by a commission of three, was inspired by the Act governing condemnations by the TVA. See Notes of Advisory Committee, 28 USC, following Rule 71A. But that Act was amended in 1967. See 16 USC S. 831X (Supp. IV). Under the amendment either party has on demand "an absolute right to a trial by jury." S. Rep. No. 930, 90th Cong., 1st Sess., 2. "Proponents of the legislation indicated that no landowner should be denied his basic right to a trial by jury involving the condemnation of his property. In addition, it was indicated that the absence of a right to a jury trial had generated friction between TVA and landowners which was seriously affecting the public relations of that agency." *Ibid.*

differently and cut down the award.(iv) Juries in these condemnation cases perform, in other words, an historic restraint on both executive and judicial power. See *Bushell's case*. 6 How St Tr 999, decided in 1670.

The Senate Committee stated: "While the committee makes no judgment as to the benefits of either the commissioner or jury-trial system, it does feel that a right to trial-by-jury is basic to our American way of life, and accordingly recommends adoption of this legislation." *Id.*, at 3.

(iv) See *John L. Roper Lbr. Co. v. United States*, 150 F2d 329, where the jury refused the land owner any increment of value occasioned by the land's proximity to the project.

AIR 1971 U.S.S.C. 26 (V 58 C 5)

(1969-25 L Ed 2d 1)*

United States, Petitioner v. Lelord Kordel and another, Respondents.

No. 87, Decided on 24-2-1970.

† Constitution of India, Art. 20 (3) (American decision) — Constitution of U. S. A. — Fifth Amendment — Privilege against self-incrimination — Civil condemnation proceedings for violation of Federal Food, Drug and Cosmetic Act — Notice of contemplated Criminal proceeding also given — Service of interrogatories in Civil action — No claim of Fifth Amendment privilege asserted by defendants — Use of evidence obtained through interrogatories in Criminal proceedings — Held such use did not violate Fifth Amendment privilege of accused.

The Government instituted Civil condemnation proceedings under the Federal Food, Drug and Cosmetic Act against a Corporation and its president and vice-president and served interrogatories on the Corporation to obtain evidence in respect of certain products. Upon being notified by the Food and Drug Administration that Criminal proceedings were contemplated against the Corporation and its officers the Corporation moved to stay further proceedings in the Civil action or in the alternative to extend time to answer the interrogatories until after disposition of the Criminal proceedings on the ground that the Government would improperly obtain evidence for the Criminal prosecution. The Corporation how-

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ever did not raise any claim of the Fifth Amendment compulsory self-incrimination with respect to its president and vice-president. This motion was rejected. The President and Vice-President and the Corporation were subsequently prosecuted for the violations of the provisions of the F.D.C. Act and convicted.

Held that the use of the evidence obtained through the interrogatories by the Government against the President and the Vice-President of the Corporation in the Criminal proceedings did not violate their Fifth Amendment privilege since they never asserted such a claim though they were notified of the contemplated Criminal proceedings and the Government's use of the interrogatories did not show any unfairness or want of consideration for justice so as to violate due process or constitute a departure from proper standards in the administration of justice.

(Paras 11, 14, 16)

Lawrence G. Wallace, for Petitioner;
Soloman H. Friend, for Respondents.

SUMMARY

Upon trial in the United States District Court for the Eastern District of Michigan, the respondents, who were the president and the vice-president of a corporation, were convicted, along with the corporation, for violations of the Federal Food, Drug, and Cosmetic Act. Prior to the criminal prosecution, the Government had instituted civil condemnation proceedings under the Act and had served interrogatories on the corporation to obtain evidence as to certain of its products. Upon being notified by the Food and Drug Administration that criminal proceedings were contemplated against the corporation and its officers, the corporation sought to stay the civil action, or extend the time for answering the interrogatories until after disposition of any criminal proceedings, on the ground that otherwise the Government would improperly obtain evidence for the criminal prosecution by the use of civil discovery proceedings, no claim of the Fifth Amendment privilege against self-incrimination having been asserted with respect to the corporate officers, however. The corporation's motion was denied, and the corporation's vice-president then answered the interrogatories without asserting his Fifth Amendment privilege. In the subsequent criminal prosecution, which was based on an indictment returned after settlement of the civil case, the District Court denied the respondents' pretrial motion to suppress evidence obtained through the interrogatories, holding that the record showed that the Government had not acted in bad faith in filing the interrogatories. On appeal, the United States Court of Appeals for the Sixth Circuit reversed the convictions of the corpo-

rate officers, on the ground that the Government's use of interrogatories to obtain evidence in the nearly contemporaneous civil condemnation proceedings violated the corporate officers' Fifth Amendment privilege against self-incrimination (407 F2d 570).

On certiorari, the Supreme Court of the United States reversed the judgment of the Court of Appeals, and remanded the case. In an opinion by Stewart, J., expressing the unanimous view of the court, it was held that (1) the record supported the District Court's finding that the Government had not acted in bad faith in filing the interrogatories in the civil action, (2) the Government's use in the criminal prosecution of evidence obtained through the interrogatories did not violate the corporate officers' Fifth Amendment privilege against self-incrimination, since the officers had been notified of contemplated criminal proceedings, but no assertion of the Fifth Amendment privilege had been made either by the vice-president, who was represented by counsel and who answered the interrogatories, or by the president, or by anyone associated with the corporation, and (3) the Government's use of the interrogatories under the circumstances of the case, did not reflect such unfairness or want of consideration for justice as to violate due process or constitute a departure from proper standards in the administration of justice so as to require the exercise of the Supreme Court's supervisory power.

BLACK, J., did not take part in the decision of the case.

OPINION OF THE COURT

Mr. JUSTICE STEWART delivered the opinion of the Court.

The respondents are the president and vice-president, respectively, of Detroit Vital Foods, Inc. They were convicted in the United States District Court for the Eastern District of Michigan, along with the corporation, for violations of the Federal Food, Drug and Cosmetic Act. (i) The Court of Appeals for the Sixth Circuit reversed the respondents' convictions on the ground that the Government's use of interrogatories to obtain evidence from the respondents in a nearly contemporaneous civil condemnation proceeding operated to violate their Fifth Amendment privilege against compulsory self-incrimination. (ii) We granted certi-

(i) 21 USC S. 301 et seq.

(ii) United States v. Detroit Vital Foods, Inc., 407 F2d 570. The Court of Appeals initially reversed the judgments of conviction of all three defendants, but on the Government's petition for rehearing it affirmed with respect to the corporation.

orari to consider the questions raised by the Government's invocation of simultaneous civil and criminal proceedings in the enforcement of federal law.(iii)

2. In March 1960 the Division of Regulatory Management of the Food and Drug Administration (hereafter "FDA") instructed the agency's Detroit office to investigate the respondents' possible violations of the Food, Drug, and Cosmetic Act. Within a month the Detroit office recommended to the Division a civil seizure of two of the respondents' products, "Korleen" and "Frutex"; within another month the Division similarly recommended seizure to the FDA's General Counsel. On June 6, 1960, the General Counsel requested the United States Attorney for the Eastern District of Michigan to commence an in rem action against these products of the corporation, and the United States Attorney filed a libel three days later. The corporation, appearing as the claimant, answered the libel on September 12, 1960. An FDA official in the Division of Regulatory Management then prepared extensive interrogatories to be served on the corporation in this civil action. The United States Attorney filed the agency's interrogatories on January 6, 1961, pursuant to Rule 33 of the Federal Rules of Civil Procedure.(iv)

3. After the Division official had drafted the interrogatories, he recommended that pursuant to S. 305 of the Food, Drug, and Cosmetic Act the FDA serve upon the corporation and the respondents a notice that the agency contemplated a criminal proceeding against them with respect to the transactions that were the subject of the civil action.(v) On January 9, 1961, three days after the filing of the interrogatories in the civil action, the Detroit office received an instruction from the Division to serve the statutory notice. The Detroit office com-

(iii) 395 US 932, 23 L Ed 2d 447, 89 S Ct 1998.

(iv) R. 33 provides in pertinent part: "Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association, by any officer or agent, who shall furnish such information as is available to the party."

(v) Section 305 of the Act, 21 USC § 335, provides,

"Before any violation of [the Act] . . . is reported by the Secretary [of the Department of Health, Education, and Welfare] to any United States attorney for institution of a criminal proceeding, the person against whom such proceeding is contemplated shall be given appropriate notice and an opportunity to present his

plied 10 days later, and on March 8, 1961, the agency held a hearing on the notice.

4. On April 10, the corporation, having received the FDA's interrogatories but not yet having answered them, moved to stay further proceedings in the civil action or, in the alternative, to extend the time to answer the interrogatories until after disposition of the criminal proceeding signaled by the § 305 notice. The motion was accompanied by the affidavit of counsel. The moving papers urged the District Court to act under Rule 33 "in the interest of substantial justice" and as a "balancing of hardship and equities of the respective parties . . ." Permitting the Government to obtain proof of violations of the Act by resort to civil discovery procedures, the movant urged, would be "improper" and would "work a grave injustice against the claimant"; it would also enable the Government to have pretrial discovery of the respondents' defenses to future criminal charges. Counsel expressly disavowed any "issue of a self-incrimination privilege in favour of the claimant corporation." And nowhere in the moving papers did counsel raise a claim of the Fifth Amendment privilege against compulsory self-incrimination with respect to the respondents.

5. On June 21, 1961, the District Court denied the motion upon finding that the corporation had failed to demonstrate that substantial prejudice and harm would result from being required to respond to the interrogatories. The court reasoned that the § 305 notice did not conclusively indicate the Government would institute a criminal proceeding, that six to 12 months could elapse from the service of the statutory notice to initiation of a criminal prosecution, and that the Government could obtain data for a prosecution from the testimony in the civil action or by subpoenaing the books and records of the corporation. Accordingly, the court concluded, the interests of justice did not require that the Government be denied the information it wanted simply because it had sought it by way of civil-discovery procedures. On September 5, 1961, in compliance with the court's directive, the corporation, through the respondent Feldten, answered the Government's interrogatories.

views, either orally or in writing, with regard to such contemplated proceeding." Service of the statutory notice did not necessarily mean that a criminal prosecution would follow; the testimony before the District Court on the respondents' pretrial motion to suppress evidence indicated that fewer than 10% of the matters involving a § 305 notice reach the stage of either indictment or information.

6. On July 28, 1961, five weeks after the District Court's order but more than a month before receipt of the answers to the interrogatories, the Director of the FDA's Detroit office recommended a criminal prosecution to the Division. The Division forwarded the recommendation to the General Counsel on August 31, 1961, still prior to receipt of Feldten's answers. While the matter was pending in the General Counsel's office, the Division officer who had originally drafted the proposed interrogatories recommended that additional violations of the statute be alleged in the indictment. On June 13, 1962, the Department of Health, Education, and Welfare requested the Department of Justice to institute a criminal proceeding, and about two months after that the latter department instructed the United States Attorney in Detroit to seek an indictment. The civil case, still pending in the District Court, proceeded to settlement by way of a consent decree in November 1962, and eight months later the Government obtained the indictment underlying the present judgments of conviction.

I

7. At the outset, we assume that the information Feldten supplied the Government in his answers to the interrogatories, if not necessary to the proof of the Government's case in the criminal prosecution, as the Court of Appeals thought, at least provided evidence or leads useful to the Government.(vi) However, the record amply supports the express finding of the District Judge who presided at the criminal trial, and who held an extensive evidentiary hearing on the respondents' pretrial motion to suppress evidence, that the Government did not act in bad faith in filing the interrogatories. Rather, the testimony before the trial court demonstrated that the Division of Regulatory Management regularly prepares such interrogatories upon the receipt of claimants' answers to civil libels, and files them in over three-fourths of such cases, to hasten their disposition by securing admissions and laying the foundation for summary judgments.

8. The Court of Appeals thought the answers to the interrogatories were involuntarily given. The District Judge's order denying the corporation's motion to defer the answers to the interrogatories, reasoned the court, left the respondents with three choices: they could have refused to answer, thereby forfeiting the corporation's property that was the subject of the libel; they could have given false answers to the interrogatories, thereby subjecting themselves to the risk of a prosecution for perjury; or they could

have done just what they did—disclose the requested information, thereby supplying the Government with evidence and leads helpful in securing their indictment and conviction.(vii)

9. In this analysis we think the Court of Appeals erred. For Feldten need not have answered the interrogatories. Without question he could have invoked his Fifth Amendment privilege against compulsory self-incrimination.(viii) Surely Feldten was not barred from asserting his privilege simply because the corporation had no privilege of its own.(ix) nor because the proceeding in which the Government sought information was civil rather than criminal in character.(x)

(vii) *Id.*, at 573.

(viii) *Wilson v. United States*, 221 US 361, 377, 385, 55 L Ed 771, 778, 781, 31 S Ct 538; *Boyd v. United States*, 116 US 616, 633-635, 29 L Ed 746, 752, 6 S Ct 524; cf. *United States v. 42 Jars* . . . "Bee Royale Capsules," 162 F Supp 944, 946, aff'd, 264 F2d 666.

[4] (ix) *Curcio v. United States*, 354 US 118, 124, 1 L Ed 2d 1225, 1230, 77 S Ct 1145; *Wilson v. United States*, supra, at 385, 55 L Ed at 781; *United States v. 3963 Bottles* . . . of "Enerjol Double Strength," 265 F2d 332, 335-336, cert. denied, 360 US 931, 3 L Ed 2d 1544, 79 S Ct 1448; *United States v. 30 Individually Cartoned Jars* . . . "Ahead Hair Restorer" . . . , 43 FRD 181, 187; cf. *Shapiro v. United States*, 335 US 1, 27, 92 L Ed 1787, 1804, 68 S Ct 1375. That the corporation has no privilege is of course long-established, and not disputed here. See *George Campbell Painting Corp. v. Reid*, 392 US 286, 288-289, 20 L Ed 2d 1094, 1096, 1097, 88 S Ct 1978; *Oklahoma Press Pub. Co. v. Walling*, 327 US 186, 196, 208, 209-210, 90 L Ed 614, 622, 629, 630, 66 S Ct 494, 166 ALR 531; *United States v. Bausch & Lomb Optical Co.*, 321 US 707, 726-727, 88 L Ed 1024, 1037, 64 S Ct 805; *Essgee Co. v. United States*, 262 US 151, 155-156, 67 L Ed 917, 920, 43 S Ct 514; *Wheeler v. United States*, 226 US 478, 489-490, 57 L Ed 309, 313, 33 S Ct 158; *Baltimore & Ohio R. Co. v. ICC*, 221 US 612, 622-623; 55 L Ed 878, 884, 31 S Ct 621; *Hale v. Henkel*, 201 US 43, 74-75, 50 L Ed 652, 665, 26 S Ct 370; cf. *Curcio v. United States*, supra; *White v. United States*, 322 US 694, 698, 705, 88 L Ed 1542, 1545, 1549, 64 S Ct 1248, 152 ALR 1202.

(x) *Gardner v. Broderick*, 392 US 273, 276, 20 L Ed 2d 1082, 1085, 88 S Ct 1913; *McCarthy v. Arndstein*, 266 US 34, 40, 69 L Ed 158, 160, 45 S Ct 16; *Counselman v. Hitchcock*, 142 US 547, 562, 563-564, 35 L Ed 1110, 1114, 12 S Ct 195; *Boyd v. United States*, supra; *United States v. The Saline Bank*, 1 Pet 100, 104; 8 J. Wigmore on Evidence § 2257, at 339-

(vi) Compare 407 F2d, at 575, with *Id.*, at 572.

10. To be sure, service of the interrogatories obliged the corporation to "appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation." (xi) The corporation could not satisfy its obligation under Rule 33 simply by pointing to an agent about to invoke his constitutional privilege. "It would indeed be incongruous to permit a corporation to select an individual to verify the corporation's answers, who because he fears self-incrimination may thus secure for the corporation the benefits of a privilege it does not have." (xii) Such a result would effectively permit the corporation to assert on its own behalf the personal privilege of its individual agents. (xiii)

11. The respondents press upon us the situation where no one can answer the interrogatories addressed to the corporation without subjecting himself to a "real and appreciable" risk of self-incrimination. (xiv) For present purposes we may assume that in such a case the appropriate remedy would be a protective order under Rule 30(b), postponing civil discovery until termination of the criminal action. (xv) But we need not decide this troublesome question. For the record before us makes clear that even though the respondents had the burden of showing that the Government's interrogatories were improper, (xvi) they never even asserted, let alone demonstrated,

340 (McNaughten ed. 1961); C. McCormick on Evidence § 123, at 259 (1954).

(xi) *United States v. 3963 Bottles*, . . . of . . . "Enerjol Double Strength," supra, at 336; cf. *United States v. 48 Jars*, . . . "Tranquilease," 23 FRD 192, 195, 196; 2A W. Barron & A. Holtzoff, Federal Practice and Procedure § 651, at 101 (1961).

(xii) *United States v. 3963 Bottles*, . . . of . . . "Enerjol Double Strength," supra.

(xiii) Cf. *George Campbell Painting Corp. v. Reid*, supra, at 289, 20 L Ed 2d at 1097; *Hale v. Henkel*, supra, at 69-70, 50 L Ed at 663.

(xiv) Cf. *Minor v. United States*, 396 US 87, 24 L Ed 2d 283, 90 S Ct —; *Leary v. United States*, 395 US 6, 16, 23 L Ed 2d 57, 70, 89 S Ct 1532; *Marchetti v. United States*, 390 US 39, 48, 19 L Ed 2d 889, 897, 88 S Ct 697; *Mason v. United States*, 244 US 362, 365, 61 L Ed 1198, 1199, 37 S Ct 621.

(xv) See *Paul Harrigan & Sons v. Enterprise Animal Oil Co.* 14 FRD 333.

(xvi) *Luey v. Sterling Drug, Inc.* 240 F Supp 632, 634; *Glick v. McKesson & Robbins, Inc.* 10 FRD 477, 479, 480; *Bowles v. Safeway Stores, Inc.* 4 FRD 469, 470; *Blanc v. Smith*, 3 FRD 182,

that there was no authorized person who could answer the interrogatories without the possibility of compulsory self-incrimination. (xvii) To the contrary, the record shows that nobody associated with the corporation asserted his privilege at all. The respondents do not suggest that Feldten, who answered the interrogatories on behalf of the corporation, did so while unrepresented by counsel or without appreciation of the possible consequences. His failure at any time to assert the constitutional privilege leaves him in no position to complain now that he was compelled to give testimony against himself. (xviii)

12. Kordel's claim of compulsory self-incrimination is even more tenuous than Feldten's. Not only did Kordel never assert the privilege; he never even answered any interrogatories. The Court of Appeals nevertheless reversed his conviction because it thought it "clear from the record that Detroit Vital Foods, Inc., was merely the corporate device through which Kordel sold his products. The Government naturally wanted to cut through the facade and get to Kordel who was the president and dominant persona-

183. The respondents, urging that the Government had the burden of establishing the availability of an agent to answer for the corporation, rely upon the decision of the Court of Appeals for the District of Columbia Circuit in *Communist Party v. United States*, 118 US App DC 61, 331 F2d 807, cert. denied, 377 US 968, 12 L Ed 2d 737, 84 S Ct 1646. But there the court departed from the customary allocation of the burden on the ground that the mere act of volunteering the information sought, or even of showing that an effort had been made to find someone who would answer, was itself potentially incriminatory. *Id.*, at 68-69, 331 F2d, at 814-815.

(xvii) See *United States v. American Radiator & Standard Sanitary Corp.*, 388 F2d 201, 204, cert. denied, 390 US 922, 19 L Ed 2d 983, 88 S Ct 858; *United States v. Simon*, 373 F2d 649, 653, cert. granted sub nom. *Simon v. Wharton*, 386 US 1030, 18 L Ed 2d 591, 87 S Ct 1485, vacated as moot, 389 US 425, 19 L Ed 2d 653, 88 S Ct 577; but see *Nat'l Discount Corp. v. Holzbaugh*, 13 FRD 236, 237.

(xviii) *Gardner v. Broderick*, 392 US 273, 276, 20 L Ed 2d 1082, 1085, 88 S Ct 1913; *Rogers v. United States*, 340 US 367, 372-375, 95 L Ed 344, 348-350, 71 S Ct 438, 19 ALR2d 378; *United States v. Monia*, 317 US 424, 427, 87 L Ed 376, 379, 63 S Ct 409; *Vajtauer v. Commissioner of Immigration*, 273 US 103, 113, 71 L Ed 560, 566, 47 S Ct 302; *Brown v. Walker*, 161 US 591, 597, 40 L Ed 819, 821, 16 S Ct 644.

lity in the corporation.”(xix) We disagree. The Government brought its libel against the goods; the corporation, not Kordel, appeared as claimant. The Government subsequently prosecuted Kordel as an officer of the company. If anyone has sought to cut through the corporate facade so far as the Fifth Amendment privilege is concerned, it is Kordel: he has, in effect, attempted to fashion a self-incrimination claim by combining testimony that he never gave and an assertion of the privilege that he never made with another assertion of the privilege that his company never had.

13. The Court of Appeals thought that Kordel must go free in any event because the Government had used Feldten's admissions in proving its criminal case against both respondents, in violation of the rule in *Bruton v. United States*, xxx) This too was error. Feldten's admissions were never introduced in evidence at the trial, and thus Kordel cannot maintain that the reception in evidence of a co-defendant's inculpatory statements violated his Sixth Amendment right to confrontation.(xxi)

II

14. The respondents urge that even if the Government's conduct did not violate their Fifth Amendment privilege against compulsory self-incrimination, it nonetheless reflected such unfairness and want of consideration for justice as independently to require the reversal of their convictions. On the record before us, we cannot agree that the respondents have made out either a violation of due process or a departure from proper standards in the administration of justice requiring the exercise of our supervisory power. The public interest in protecting consumers throughout the Nation from misbranded drugs requires prompt action by the agency charged with responsibility for administration of the federal food and drug laws. But a rational decision whether to proceed criminally against those responsible for the misbranding may have to await consideration of a fuller record than that before the agency at the time of the civil seizure of the offending products. It would stultify enforcement of federal law to require a governmental agency such as the FDA invariably to choose either to forgo recommendation of a criminal prosecution once it seeks civil relief, or to defer civil proceedings pending the ultimate outcome of a criminal trial.(xxii)

(xix) 407 F2d, at 575.

(xx) 391 US 123, 20 L Ed 2d 476, 88 S Ct 1620. See 407 F2d, at 575.

(xxi) See *Bruton v. United States*, supra, at 126, 20 L Ed 2d at 479.

(xxii) Cf. *Standard Sanitary Mfg Co. v. United States*, 226 US 20, 51-52, 57 L Ed 107, 118, 33 S Ct 9 (Sherman Act).

15. We do not deal here with a case where the Government has brought a civil action solely to obtain evidence for its criminal prosecution (xxiii) or has failed to advise the defendant in its civil proceeding that it contemplates his criminal prosecution;(xxiv) nor with a case where the defendant is without counsel(xxv) or reasonably fears prejudice from adverse pretrial publicity or other unfair injury;(xxvi) nor with any other special circumstances that might suggest the unconstitutionality or even the impropriety of this criminal prosecution.(xxvii)

16. Overturning these convictions would be tantamount to the adoption of a rule that the Government's use of interrogatories directed against a corporate defendant in the ordinary course of a civil proceeding would always immunize the corporation's officers from subsequent criminal prosecution. The Court of Appeals was correct in stating that "the Government may not use evidence against a defendant in a criminal case which has been coerced from him under penalty of either giving the evidence or suffering a

(xxiii) Cf. *United States v. Procter & Gamble Co.*, 356 US 677, 683-684, 2 L Ed 2d 1077, 1082, 1083, 78 S Ct 983; *United States v. Pennsalt Chemicals Corp.*, 260 F Supp 171; and see *United States v. Thayer*, 214 F Supp 929; *Beard v. New York Cent. R. Co.*, 20 FRD 607.

(xxiv) See *Smith v. Katzenbach*, 122 US App DC 113, 114-116; 351 F2d 810, 811-813; *United States v. Lipshitz*, 132 F Supp 519, 523; *United States v. Guerrina*, 112 F Supp 126, 128.

(xxv) Cf. *Nelson v. United States*, 93 US App DC 14, 19; 21, and n. 19, 208 F2d 505, 510, 512, and n. 19, cert. denied, 346 US 827, 98 L Ed 352, 74 S Ct 48.

(xxvi) Cf. *United States v. America Radiator & Standard Sanitary Corp.*, 388 F2d 201, 204-205, cert. denied, 390 US 922, 19 L Ed 2d 983, 88 S Ct 858.

(xxvii) Federal courts have deferred civil proceedings pending the completion of parallel criminal prosecutions when the interests of justice seemed to require such action, sometimes at the request of the prosecution, *Campbell v. Eastland*, 307 F 2d 478, cert. denied, 371 US 955, 9 L Ed 2d 502, 83 S Ct 502; *United States v. Bridges*, 86 F Supp 931, 933; *United States v. 30 Individually Cartoned Jars . . . "Ahead Hair Restorer . . ."*, 43 FRD 181, 187 n. 8; *United States v. One 1964 Cadillac Coupe De Ville*, 41 FRD 352, 353-354; *United States v. \$2,437 United States Currency*, 36 FRD 257; *United States v. Steffes*, 35 FRD 24; *United States v. Maine Lobstermen's Assn.*, 22 FRD 199; *United States v. Cigarette Merchandisers Assn.*, 18 FRD 497; *United States v. Linen Supply Institute*, 18 FRD 452, sometimes at the request of the defense,

forfeiture of his property.”(xxviii) But on this record there was no such violation of the Constitution, and no such departure from the proper administration of criminal justice.

17. Accordingly, the judgment of the Court of Appeals is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.

18. It is so ordered.

19. Mr. Justice Black did not take part in the decision of this case.

Kaeppler v. Jas. H. Matthews & Co., 200 F Supp 229; Perry v. McGuire, 36 FRD 272; cf. Nichols v. Philadelphia Tribune Co., 22 FRD 89, 92.

(xxviii) 407 F2d, at 575-576.

AIR 1971 U. S. SUPREME COURT 32 (V 58 C 6)

(1969-25 L Ed 2d 192)*

Clemon Barlow et al., Petitioners v. B. L. Collins, etc., et al., Respondents. No. 249, Decided on 3-3-1970.

† Civil P. C. (1908), S. 9 — (Case from U. S. A.) Constitution of U. S. A., Art. 3 — Judicial review of administrative action adjudicating private rights — Review is the rule and non-reviewability exception—(Constitution of India, Article 226).

Preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. Indeed, judicial review of such administrative action is the rule and non-reviewability an exception which must be demonstrated. A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. It is however only upon a showing of clear and convincing evidence of a contrary legislative intent that the Courts should restrict access to judicial review. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realised. Case law discussed. (Para 11)

Paras. Referred: Chronological Paras (1969) 25 L Ed 2d 184, Data Processing Service v. Camp. 5, 11

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† Reference is given to a Parallel Indian Provision for the convenience of Indian Lawyers.

JN/JN/D922/70/DHZ/M

- (1969) 395 US 958 = 23 L Ed 2d 744 = 89 S Ct 2108, Clemon Barlow v. B. L. Collins 4
- (1968) 390 US 1 = 19 L Ed 2d 787 = 88 S Ct 651, Hardin v. Kentucky Utilities Co. 10, 11, 22
- (1968) 392 US 83 = 20 L Ed 2d 947 = 88 S Ct 1942, Flast v. Kohen 16, 19, 26
- (1968) 395 F2d 920, Norwalk Core v. Norwalk Redevelopment Agency 22
- (1967) 387 US 136 = 18 L Ed 2d 681 = 87 S Ct 1507, Abbott Laboratories v. Gardner 11, 21, 22, 23
- (1962) 369 US 186 = 7 L Ed 2d 663 = 82 S Ct 691, Baker v. Carr 19, 20
- (1960) 363 US 666 = 4 L Ed 2d 1478 = 80 S Ct 1283, Schilling v. Rogers 21
- (1959) 363 US 263 = 4 L Ed 2d 1203 = 80 S Ct 1122, Texas Gas Transmission Corp. v. Shell Oil Co. 10
- (1958) 357 US 77 = 2 L Ed 2d 1174 = 78 S Ct 1063, Chicago v. Atchison, T. and S. F. R. Co. 19
- (1958) 358 US 184 = 3 L Ed 2d 210 = 79 S Ct 180, Leedom v. Kyne 11
- (1957) 355 US 579 = 2 L Ed 2d 503 = 78 S Ct 433, Harmon v. Brucker 11
- (1943) 320 US 297 = 88 L Ed 61 = 64 S Ct 95, Switchmen's Union v. Mediation Board 11
- (1943) 321 US 288 = 88 L Ed 733 = 64 S Ct 559, Stark v. Wickard 11
- (1924) 264 US 258 = 68 L Ed 667 = 44 S Ct 317, Chicago Junction Case 11, 22
- (1902) 187 US 94 = 47 L Ed 90 = 23 S Ct 33, American School of Magnetic Healing v. McAnnulty 11

Harold Edgar, for Petitioners; pro hac vice, by special leave of court. Peter L. Strauss, for Respondents.

SUMMARY

Tenant farmers, who were eligible for payments under the Upland Cotton Program of the Food and Agriculture Act of 1965, instituted an action in the United States District Court for the Middle District of Alabama against various persons, including the Secretary of Agriculture, to challenge the validity of the Secretary's amended regulation which permitted participants in the cotton program to assign payments thereunder to secure the payment of cash rent for farmland, such amendment having changed former provisions of the regulation which had excluded such assignments from those permitted to finance "making a crop" within the meaning of S. 8(g) of the Soil Conservation and Domestic Allotment Act. The plaintiffs alleged that the amended regulation provided their landlord with the opportunity to demand assignment of cotton program benefits in advance as a condition to obtaining a lease, which resulted in the further need of the tenants, who lacked cash and credit prior

to harvesting their crops, to finance all of their other farm needs with the landlord at high prices and interest rates, and which also resulted in the inability of the tenants to use advance subsidy payments to form co-operatives to buy supplies elsewhere. The District Court held that the plaintiffs lacked standing to maintain the action. The United States Court of Appeals for the Fifth Circuit affirmed, holding that the plaintiffs lacked standing not only because they failed to allege invasion of a legally protected interest, but also because there was no statutory provision expressly or impliedly giving the plaintiffs standing to challenge the administrative regulation or giving the courts authority to review such administrative action (398 F2d 398).

On certiorari, the Supreme Court of the United States vacated the lower courts' judgments, and remanded the case to the District Court. In an opinion by Douglas, J., expressing the view of six members of the court, it was held that (1) the plaintiffs had standing to challenge the validity of the Secretary's regulation, since they had the personal stake and interest that imparted the concrete adverseness required by Article 3 of the Constitution, their allegations demonstrating injury in fact from the operation of the regulation, and since they were clearly within the zone of interests protected by the statute, and (2) under provisions of the Administrative Procedure Act allowing judicial review of agency action except where statutes precluded such review or where agency action was committed to agency discretion by law, judicial review of the Secretary's regulation was not precluded.

Brennan, J., joined by White, J., concurred in the result in both the subject case and in *Association of Data Processing Service Organizations, Inc. v. Camp*, 1969-25 L Ed 2d 184, but dissented from the majority's treatment of the question of standing to challenge agency action, expressing the view that only the inquiry as to whether the plaintiff alleged injury in fact from the challenged action was needed to determine standing, and that the second inquiry as to whether the interest sought to be protected by the complainant was arguably within the zone of interests to be protected or regulated by the statute or constitutional guaranty involved was wholly unnecessary and inappropriate, tending to confuse the merits and reviewability of the claim with standing to challenge the action involved.

OPINION OF THE COURT

Mr. JUSTICE DOUGLAS delivered the opinion of the Court.

The question to be decided in this case is whether tenant farmers eligible for payments under the Upland Cotton Program enacted as part of the Food and

Agriculture Act of 1965, 79 Stat 1194, 7 USC (Supp IV) S. 1444(d), have standing to challenge the validity of a certain amended regulation promulgated by the respondent Secretary of Agriculture in 1966.

2. The Upland Cotton Program incorporates a 1938 statute, S. 8(g) of the Soil Conservation and Domestic Allotment Act, as amended, 52 Stat 35, 205, 16 USC S. 590h (g), thereby permitting participants in the program to assign payments only "as security for cash or advances to finance making a crop." (a) The regulation of the respondent Secretary of Agriculture in effect until 1966 defined "making a crop" to exclude assignments to secure "the payment of the whole or any part of a cash . . . rent for a farm." (1955) 20 Fed Reg 6512. (b) Following passage of the 1965 Act, however,

(a) The Secretary of Agriculture is authorized by 7 USC S. 1444 (d) (5) to pay a farmer in advance of the growing season up to 50% of the estimated benefits due him. Section 1444(d) (13) authorizes the farmer to assign such benefits subject to the limitations of S. 8(g) of the 1938 Act, 16 USC S. 590(g). Section 8(g) as enacted in 1938 and as it read in 1965 established an exception to the general prohibition against assignment of federal monies in the Anti-Assignment Act, 31 USC S. 203. Section 8(g) provided:

"A payment which may be made to a farmer under this section, may be assigned, without discount, by him in writing as security for cash or advances to finance making a crop. Such assignment shall be signed by the farmer and witnessed by a member of the county or other local committee . . . Such assignment shall include the statement that the assignment is not made to pay or secure any pre-existing indebtedness. This provision shall not authorize any suit against or impose any liability upon the Secretary . . . if payment to the farmer is made without regard to the existence of any such assignment." 52 Stat 35, 205 (1938), 16 USC S. 590h (g) (emphasis added).

Section 8(g) was amended by 80 Stat 1167 (1966) to permit assignments not only to finance "making a crop" but also to fund "handling or marketing an agricultural commodity, or performing a conservation practice."

(b) 20 Fed Reg 6512 (1955) provided:

"Payment may be assigned to finance making a crop. A payment which may be made to a farmer . . . under Section 8 of the Soil Conservation and Domestic Allotment Act, as amended, may be assigned only as security for cash or advances to finance making a crop for the current crop year. To finance making a crop means (a) to finance the planting,

and before any payments were made under it, the Secretary deleted the exclusion and amended the regulation expressly to define "making a crop" to include assignments to secure "the payment of cash rent for land used [for planting, cultivating or harvesting]." (1966) 31 Fed Reg 2815.(c)

3. Petitioners, cash rent tenant farmers suing on behalf of themselves and other farmers similarly situated, filed this action in the District Court for the Middle District of Alabama. They sought a declaratory judgment that the amended regulation is invalid and unauthorized by statute, and an injunction prohibiting the respondent federal officials from permitting assignments pursuant to the amended regulation.(d) Their

cultivating, or harvesting of a crop, including the purchase of equipment required therefor; (b) to provide food, clothing and other necessities required by the assignor or persons dependent upon the assignor; or (c) to finance the carrying out of soil or water conservation practices. Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a cash or fixed commodity rent for a farm."

(c) 32 Fed Reg 14921 (1967), 7 CFR S. 709.3 (1969) now provides:

"Purposes for which a payment may be assigned.

"(a) A payment which may be made to a producer under any program to which this part is applicable may be assigned only as security for cash or advances to finance making a crop, handling or marketing an agricultural commodity, or performing a conservation practice, for the current crop year. No assignment may be made to secure or pay any pre-existing indebtedness of any nature whatsoever.

"(b) To finance making a crop means (1) to finance the planting, cultivating, or harvesting of a crop, including the purchase of equipment required therefor and the payment of cash rent for land used therefor, or (2) to provide food, clothing, and other necessities required by the producer or persons dependent upon him.

"(c) Nothing contained herein shall be construed to authorize an assignment given to secure the payment of the whole or any part of the purchase price of a farm or the payment of the whole or any part of a fixed commodity rent for a farm."

(d) The respondents, in addition to the Secretary of Agriculture, are the State Executive Director of the Agricultural and Conservation Service in Alabama, and the administrator of that Ser-

vice in the U. S. Department of Agriculture. The complaint also included counts against petitioners' landlord alleging that he acted improperly to deprive them of their right to receive subsidy payments, and, further, that some of the petitioners had been illegally evicted because of their participation in litigation with respect to the cotton program, and, in the case of one petitioner, because of his candidacy for Alabama Agricultural and Conservation Service county committeeman. The District Court denied the landlord's motion to dismiss these counts and transferred them for trial to the Southern District of Alabama. That ruling is not before us.

complaint alleged that the petitioners are suffering irreparable injury under the amended regulation because it provides their landlord "with the opportunity to demand that [they] and all those similarly situated assign the [Upland Cotton Program] benefits in advance as a condition to obtaining a lease to work the land."(e) As a result, the complaint stated, the tenants are required to obtain financing of all their other farm needs—groceries, clothing, tools and the like—from the landlord as well, since prior to harvesting the crop they lack cash and any source of credit other than the landlord. He, in turn, the complaint alleges, levies such high prices and rates of interest on these supplies that the tenants' crop profits are consumed each year in debt payments. Petitioners contend that they can attain a "modest measure of economic independence" if they are able to use their "advance subsidy payments . . . [to] form co-operatives to buy [supplies] at wholesale and reasonable prices in lieu of the excessive prices demanded by [the landlord] of . . . captive consumers with no funds to purchase elsewhere". Thus, petitioners allege that they suffer injury in fact from the operation of the amended regulation.

4. The District Court, in an unreported opinion, held that the petitioners "lack standing to maintain this action against these [respondents] governmental officials," because the latter "have not taken any action which invades any legally protected interest of the plaintiffs." The Court of Appeals for the Fifth Circuit affirmed, one judge dissenting. 398 F2d 398. It held that petitioners lacked standing not only because they alleged no invasion of a legally protected

vice in the U. S. Department of Agriculture. The complaint also included counts against petitioners' landlord alleging that he acted improperly to deprive them of their right to receive subsidy payments, and, further, that some of the petitioners had been illegally evicted because of their participation in litigation with respect to the cotton program, and, in the case of one petitioner, because of his candidacy for Alabama Agricultural and Conservation Service county committeeman. The District Court denied the landlord's motion to dismiss these counts and transferred them for trial to the Southern District of Alabama. That ruling is not before us.

(e) The complaint stated that some of the petitioners "were denied the right to work the land" when they refused to execute assignments to their landlord. The complaint also alleged that "[p]laintiffs have been tenant farmers on this land from eleven to sixty-one years . . . and [two of them] have been on this land all their lives."

interest but also because petitioners "have not shown us, nor have we found any provision of the Food and Agriculture Act of 1965 which either expressly or impliedly gives [petitioners] standing to challenge this administrative regulation or gives the Courts authority to review such administrative action." *Id.*, 398 F2d 398 at 402. We granted certiorari. (1969) 395 US 958 = 23 L Ed 2d 744 = 89 S Ct 2108.

5. Our decision in *Data Processing Service v. Camp*, (1969) 25 L Ed 2d 184, leads us to reverse here.

6. First, there is no doubt that in the context of this litigation the tenant farmers, petitioners here, have the personal stake and interest that impart the concrete adverseness required by Art. III.

7. Second, the tenant farmers are clearly within the zone of interests protected by the Act.

8. Implicit in the statutory provisions and their legislative history is a congressional intent that the Secretary protect the interests of tenant farmers. Both of the relevant statutes expressly enjoin the Secretary to do so. The Food and Agriculture Act of 1965 states that "[t]he Secretary shall provide adequate safeguards to protect the interests of tenants. . . ." 79 Stat 1196, 7 USC (Supp IV) S. 1444(d) (10). (f) 7 USC (Supp IV) S. 1444(d) (13), as noted earlier, incorporates by reference S. 8(g), as amended, 52 Stat 35, 205, 16 USC S. 590h (g); S. 8(b) of that Act, in turn, provides that "the Secretary shall, as far as practicable, protect the interests of tenants. . . ." 52 Stat 32, 16 USC S. 590h(b). The legislative history of the "making a crop" provision, though sparse, similarly indicates a congressional intent to benefit the tenants.(g) They are persons "aggrieved by agency action within the

(f) In connection with the amended regulations, the Secretary issued under S. 1444(d)(10) various rules designed to ensure that tenants receive their fair share of the federal payments. 31 Fed Reg 4887-4888; 7 CFR 722.817, 794.3

(g) See the remarks of Rep. Fulmer, 82 Cong Rec 844 (1937), and of Senator Adams, *id.*, at 1756. The fact that assignments could be made at all indicated a congressional concern for the farmers' welfare, in light of the general statutory prohibition on assignment of federal claims embodied in the Anti-Assignment Act, 31 USC S. 203. This concern was noted in a letter from the Secretary of the Department of Agriculture to the President of the Senate in January 1952, in which the Secretary stated that S. 8(g) "was enacted for the purpose of creating additional credit to farmers to assist them in financing farming operations." S Rep No. 1305 (1952).

meaning of a relevant statute" as those words are used in 5 USC S. 702.

9. Third, judicial review of the Secretary's action is not precluded. The Court of Appeals rested its holding on the view that no provision of the Food and Agriculture Act of 1965 "expressly or impliedly . . . gives the Courts authority to review such administrative action." 398 F2d 398 at 402. Whether agency action is reviewable often poses difficult questions of congressional intent; and the Court must decide if Congress has in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion.

10. The Administrative Procedure Act, 80 Stat 392, 5 USC S. 701(a), allows judicial review of agency action except where "(1) statutes preclude judicial review or (2) agency action is committed to agency discretion by law." The amended regulation here under challenge was promulgated under 16 USC S. 590d (3) which authorizes the Secretary to "prescribe such regulations, as he may deem proper to carry out the provisions of this chapter." Plainly this provision does not expressly preclude judicial review, nor does any other provision in either the 1938 or 1965 Acts. Nor does the authority to promulgate such regulations "as he may deem proper" in S. 590d(3) constitute a commitment of the task of defining "making a crop" entirely to the discretionary judgment of the Executive Branch without the intervention of the courts. On the contrary, since the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the Secretary, but by judicial application of canons of statutory construction. See *Texas Gas Transmission Corp. v. Shell Oil Co.*, (1959) 363 US 263, 268-270 = 4 L Ed 2d 1208, 1211-1213 = 80 S Ct 1122. "The role of the courts should, in particular, be viewed hospitably where . . . the question sought to be reviewed does not significantly engage the agency's expertise . . . [W]here the only or principal dispute relates to the meaning of the statutory term' . . . [the controversy] presents issues on which courts, and not [administrators], are relatively more expert." *Hardin v. Kentucky Utilities Co.*, (1968) 390 US 1, 14 = 19 L Ed 2d 787, 797 = 88 S Ct 651 (Harlan, J., dissenting). Therefore the permissive term "as he may deem proper," by itself, is not to be read as a congressional command which precludes a judicial determination of the correct application of the governing canons.

11. The question then becomes whether non-reviewability can fairly be

inferred. As we said in *Data Processing Service*, (1969) 25 L Ed 2d 184, preclusion of judicial review of administrative action adjudicating private rights is not lightly to be inferred. See *Leedom v. Kyne*, (1958) 358 US 184 = 3 L Ed 2d 210 = 79 S Ct 180; *Harmon v. Brucker*, (1957) 355 US 579 = 2 L Ed 2d 503 = 78 S Ct 433; *Stark v. Wickard*, (1943) 321 US 288 = 38 L Ed 733 = 64 S Ct 559; *American School of Magnetic Healing v. McAnulty*, (1902) 187 US 94 = 47 L Ed 90 = 23 S Ct 33. Indeed, judicial review of such administrative action is the rule, and non-reviewability an exception which must be demonstrated. In *Abbott Laboratories v. Gardner*, (1967) 387 US 136, 140 = 18 L Ed 2d 681, 686 = 87 S Ct 1507, we held that "judicial review of final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." A clear command of the statute will preclude review; and such a command of the statute may be inferred from its purpose. *Switchmen's Union v. Mediation Board*, (1943) 320 US 297 = 88 L Ed 61 = 64 S Ct 95. It is, however, "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent" that the courts should restrict access to judicial review. *Supra*, (1967) 387 US 136 at 141 = 18 L Ed 2d 681 at 687. The right of judicial review is ordinarily inferred where congressional intent to protect the interests of the class of which the plaintiff is a member can be found; in such cases, unless members of the protected class may have judicial review the statutory objectives might not be realized. See the *Chicago Junction Case*, (1924) 264 US 258 = 68 L Ed 667 = 44 S Ct 317; (1968) 390 US 1 = 19 L Ed 2d 787 *supra*.

12. We hold that the statutory scheme at issue here is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action.

13. The judgments of the Court of Appeals and of the District Court are vacated and the case is remanded to the District Court for a hearing on the merits. It is so ordered.

SEPARATE OPINION

Mr. JUSTICE BRENNAN, with whom Mr. JUSTICE WHITE joins, concurring and dissenting.*

14. I concur in the result in both cases but dissent from the Court's treatment of the question of standing to challenge agency action.

15. The Court's approach to standing, set out in *Data Processing*, has two

* Editor's Note: This opinion also applies to *Association of Data Processing Service Organizations, Inc. v. Camp* (No. 85), p. 184, *supra*.

steps: (1) since "the framework of Article III . . . restricts judicial power to 'cases' and 'controversies,'" the first step is to determine "whether the plaintiff alleges that the challenged action has caused him injury in fact"; (2) if injury in fact is alleged, the relevant statute or constitutional provision is then examined to determine "whether the interest sought to be protected by the complainant is arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question."

16. My view is that the inquiry in the Court's first step is the only one which need be made to determine standing. I had thought we discarded the notion of any additional requirement when we discussed standing solely in terms of its constitutional content in *Flast v. Cohen*, (1968) 392 US 83 = 20 L Ed 2d 947 = 88 S Ct 1942. By requiring a second, non-constitutional step, the Court comes very close to perpetuating the discredited requirement that conditioned standing on a showing by the plaintiff that the challenged governmental action invaded one of his legally protected interests.^(h) *Barlow* is a typical illustration of the harm which resulted from that requirement. The only substantial issue in that case goes to the merits: does the statutory language "making a crop" create a legally protected interest for tenant farmers in the form of a prohibition against the assignment of their federal benefits to secure cash rent? By confusing the merits with the plaintiffs' standing to challenge the Secretary's action, both the District Court and the Court of Appeals denied the farmers the focused and careful decision on the merits to which they are clearly entitled. Although this Court properly reverses the Court of Appeals on that account, it encourages more *Barlow* decisions by engrafting its wholly unnecessary and inappropriate second step upon the constitutional requirement for standing.

17. Before the plaintiff is allowed to argue the merits, it is true that a canvass of relevant statutory materials must be made in cases challenging agency ac-

(h) Compare the language in *Associated Industries v. Ickes*, 134 F2d 694, *00 (CA2d Cir 1943): "In a suit in a federal court by a citizen against a Government officer, complaining of alleged past . . . unlawful conduct by the defendant, there is no justiciable 'controversy' . . . unless the citizen shows that such conduct . . . invades . . . a private substantive legally protected right of the plaintiff citizen; such invaded interest must be either of a 'recognized' character at 'common law' or a substantive private legally protected interest created by statute [or Constitution]".

tion. But the canvass is made not to determine 'standing' but to determine an aspect of 'reviewability,' that is whether Congress meant to deny or to allow judicial review of the agency action at the instance of the plaintiff.⁽ⁱ⁾ The Court in the present cases examines the statutory materials for just this purpose but only after making the same examination during the second step of its standing inquiry. Thus in *Data Processing* the Court determines that the plaintiffs have standing because they alleged injury in fact and because "S. 4 [of the Bank Service Corporation Act of 1962] arguably brings a competitor within the zone of interests protected by it." The Court then determines that the Comptroller's action is reviewable at the instance of the plaintiffs because "[b]oth [the Bank Service Corporation Act and the National Bank Act] are clearly 'relevant' statutes within the meaning of [the Administrative Procedure Act, 5 USC S. 702]. The Acts do not in terms protect a specified group. But their general policy is apparent; and those whose interests are directly affected by a broad or narrow interpretation of the Act are easily identifiable. It is clear that petitioners, as competitors of national banks which are engaging in data processing services, are within that class of 'aggrieved' persons who, under S. 702, are entitled to judicial review of 'agency action'." Again in *Barlow*, the plaintiff tenant farmers are found to have standing because they alleged injury in fact and because "tenant farmers are . . . within the zone of interests protected by the Act." Examination of the same statutory materials subsequently leads the Court to the conclusion that the tenant farmers are entitled to judicial review of the Secretary's action because "the statutory scheme . . . is to be read as evincing a congressional intent that petitioners may have judicial review of the Secretary's action."

18. I submit that in making such examination of statutory materials an element in the determination of standing, the Court not only performs a useless and unnecessary exercise but also encourages badly reasoned decisions, which may well deny justice in this complex field. When agency action is challenged standing reviewability, and the merits pose discrete,

(i) Reviewability has often been treated as if it involved a single issue: whether agency action is conclusive and beyond judicial challenge by anyone. In reality, however, reviewability is equally concerned with a second issue: whether the particular plaintiff then requesting review may have it. See the Administrative Procedure Act, 5 USC Ss. 701(a) and 702. Both questions directly concern the extent to which persons harmed by agency action may challenge its legality.

and often complicated, issues which can best be resolved by recognizing and treating them as such.

I

Standing

19. Although *Flast v. Cohen* was not a case challenging agency action, its determination of the basis for standing should resolve that question for all cases. We there confirmed what we said in *Baker v. Carr*, (1962) 369 US 186, 204 = 7 L Ed 2d 663, 678 = 82 S Ct 691, that the "gist of the question of standing" is whether the party seeking relief has "alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult . . . questions." "In other words," we said in *Flast*, "when standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue" and not whether the controversy is otherwise justiciable,⁽ⁱ⁾ or whether, on the merits, the plaintiff has a legally protected interest

(j) Other elements of justiciability are, for instance, ripeness, e.g., *Poe v. Ullman*, 367 US 497, 6 L Ed 2d 989, 81 S Ct 1752 (1961), mootness, e.g., *United States v. W. T. Grant Co.*, 345 US 629, 97 L Ed 1303, 73 S Ct 894 (1953), and the policy against friendly or collusive suits, e.g., *Chicago & Grand Trunk R. Co. v. Wellman*, 143 US 339, 36 L Ed 176, 12 S Ct 400 (1892); *United States v. Johnson*, 319 US 302, 87 L Ed 1413, 63 S Ct 1075 (1943). "Justiciability" is also the term of art used to refer to the constitutional necessity that courts not deal with certain issues lest they "intrude into areas committed to other branches of Government." *Flast*, supra, at 95, 20 L Ed 2d at 959. The political question doctrine has its analogue in the sphere of administrative law in the concept of non-reviewability. See, e.g., *Chicago & Southern Air Lines, Inc. v. Waterman Steamship Corp.*, 333 US 103, 92 L Ed 2d 568, 68 S Ct 431 (1948); *Schilling v. Rogers*, 363 US 666, 4 L Ed 2d 1478, 80 S Ct 1288 (1960). And, of course, federal courts may not decide questions over which they lack jurisdiction, e.g., *Brown Shoe Co. v. United States*, 370 US 294, 305, 8 L Ed 2d 510, 523, 82 S Ct 1502 (1962); *American Fire & Casualty Co. v. Finn*, 341 US 6, 17-18, 95 L Ed 702, 710, 71 S Ct 534, 19 ALR 2d 738 (1951). Thus, on many grounds other than an absence of standing, a court may dismiss a lawsuit without proceeding to the merits to determine whether the plaintiff presents a claim upon which relief may be granted, and, if so, whether he has borne his burden of proof.

which the defendant's action invaded. (1968) 392 US 83 at 99-100 = 20 L Ed 2d 947 at 961. The objectives of the Article III standing requirement are simple: the avoidance of any use of a "federal court as a forum [for the airing of] generalized grievances about the conduct of the government," and the creation of a judicial context in which "the questions will be framed with the necessary specificity, . . . the issues . . . contested with the necessary adverseness and . . . the litigation . . . pursued with the necessary vigor to assure that the . . . challenge will be made in a form traditionally thought to be capable of judicial resolution." *Id.*, at 106, 20 L Ed 2d at 965. Thus, as we held in *Flast*, "the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution." *Id.*, at 101, 20 L Ed 2d at 962.(k) See also *Chicago v. Atchison, T. & S. F. R. Co.*, (1958) 357 US 77, 83-84 = 2 L Ed 2d 1174, 1180 = 78 S Ct 1063.

20. In light of *Flast*, standing exists when the plaintiff alleges, as the plaintiffs in each of these cases alleged, that the challenged action has caused him injury in fact, economic or otherwise.(l) He thus shows that he has the requisite

(k) It is true, of course, that in certain types of litigation parties may properly request judicial resolution of issues not "presented in an adversary context." See *Davis, Standing: Taxpayers and Others*, 35 U Chi L Rev 601, 607 (1968). But in most instances, among them private challenges to agency action, the plaintiff must establish his adverseness to obtain standing.

(l) Thus, for purposes of standing, it is sufficient that a plaintiff allege *damnum absque injuria*, that is, he has only to allege that he has suffered harm as a result of the defendant's action. Injury in fact has generally been economic in nature, but it need not be. See, e.g., *Scenic Hudson Preservation Conf. v. FPC*, 354 F2d 608 (CA2d Cir 1965); *Office of Communication of the United Church of Christ v. FCC*, 359 F2d 994 (CA DC Cir 1966). The more "distinctive or discriminating" the harm alleged and the more clearly it is linked to the defendant's action, the more easily a plaintiff may meet the constitutional test. See *Jaffe, Judicial Control of Administrative Action* 501 (1965). The plaintiffs in the present cases alleged distinctive and discriminating harm, obviously linked to the agency action. Thus, I do not consider what must be alleged to satisfy the standing requirement by parties who have sustained no special harm themselves but sue rather as taxpayers or citizens to vindicate the interests of the general public.

"personal stake in the outcome" of his suit. *Supra*, (1962) 369 US 186 at 204 = 7 L Ed 2d 663 at 678. We may reasonably expect that a person so harmed will, as best he can, frame the relevant questions with specificity, contest the issues with the necessary adverseness, and pursue the litigation vigorously.(m) Recognition of his standing to litigate is then consistent with the Constitution, and no further inquiry is pertinent to its existence.

II

Reviewability

21. When the legality of administrative action is at issue, standing alone will not entitle the plaintiff to a decision on the merits. Pertinent statutory language, legislative history and public policy considerations must be examined to determine whether Congress precluded all judicial review, and, if not, whether Congress nevertheless foreclosed review to the class to which the plaintiff belongs. Under the Administrative Procedure Act (APA), "statutes [may] preclude judicial review" or "agency action [may be] committed to agency discretion by law." 5 USC S. 701(a). In either case, the plaintiff is out of court, not because he had no standing to enter, but because Congress has stripped the judiciary of authority to review agency action. Review may be totally foreclosed, as in *Schilling v. Rogers*, (1960) 363 US 666 = 4 L Ed 2d 1478, = 80 S Ct 1288, or, if permitted, it may nonetheless be denied to the plaintiff's

(m) Past decisions of this Court indicate that a person who has suffered injury in fact meets the relevant Article III requirement. See, for example, *FCC v. Sanders Bros. Radio Station*, 309 US 470, 476-477, 84 L Ed 869, 874, 875, 60 S Ct 693 (1940); *Scripps-Howard Radio, Inc. v. FCC*, 316 US 4, 86 L Ed 1229, 62 S Ct 875 (1942). In these decisions the Court permitted parties economically harmed by administrative action to challenge it although no legal interest of the parties was found to have been invaded by the action. The Court stated in *Scripps-Howard Radio*, *supra*, at 14, 86 L Ed at 1236, that "[t]he Communications Act of 1934 did not create new private rights. The purpose of the Act was to protect the public interest in communications. By S. 402(b)(2) Congress gave the right of appeal to persons 'aggrieved or whose interests are adversely affected by Commission action'." Accordingly, since Congress cannot expand the Article III jurisdiction of federal courts, *Muskrat v. United States*, 219 US 346, 55 L Ed 246, 31 S Ct 250 (1911), it follows that injury in fact renders a party adverse under the Constitution. Cf. *Davis*, 3 Administrative Law Treatise S. 22.02, at 211 (1958); *Jaffe, supra*, n. 5, at 336.

class. But the governing principle laid down in (1967) 387 US 136, 140 = 18 L Ed 2d 681, 686 = 87 S Ct 1507, is that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress."

22. The APA provides that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." 5 USC S. 702. Congressional intent that a particular plaintiff have review may be found either in express statutory language granting it to the plaintiff's class,⁽ⁿ⁾ or, in the absence of such express language, in statutory indicia from which a right to review may be inferred.^(o) Where, as in the instant cases, there is no express grant of review, reviewability has ordinarily been inferred from evidence that Congress intended the plaintiff's class to be a beneficiary of the statute under which the plaintiff raises his claim. See, for example, the Chicago Junction Case, (1924) 264 US 258 = 68 L Ed 667 = 44 S Ct 317; (1968) 390 US 1 = 19 L Ed 2d 787 = 88 S Ct 651; *Norwalk Core v. Norwalk Redevelopment Agency*, 395 F2d 920 (CA2d Cir 1968). In light of *Abbott Laboratories*, (1967) 387 US 136 = 18 L Ed 2d 681 slight indicia that the plaintiff's class is a beneficiary will suffice to support the inference.^(p)

III

The Merits

23. If it is determined that a plaintiff who alleged injury in fact is entitled

(n) See, e. g., the Securities Act, which provides that "[a]ny person aggrieved by an order of the Commission may obtain a review," 15 USC S. 77i (a), and the Federal Power Act which grants review to "[a]ny party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding" 16 USC S. 825l (b).

(o) Section 702 also provides that "[a] person suffering legal wrong because of agency action . . . is entitled to judicial review thereof." Though a person suffering such wrong is clearly entitled to review, he need not show the existence of a legally protected interest to establish either his standing or his right to review. The existence of that interest is a question of the merits.

(p) This is particularly the case when the plaintiff is the only party likely to challenge the action. Refusal to allow him review would, in effect, commit the action wholly to agency discretion, thus risking frustration of the statutory objectives.

to judicial review, inquiry proceeds to the merits — to whether the specific legal interest claimed by the plaintiff is protected by the statute and to whether the protested agency action invaded that interest.^(q) It is true, of course, that matters relevant to the merits will already have been touched tangentially in the determination of standing and, in some cases, in the determination of reviewability. The aspect of the merits touched in establishing standing is the identification of injury in fact, the existence of which the plaintiff must prove. The merits are also touched in establishing reviewability in cases where the plaintiff's right to review must be inferred from evidence that his class is a statutory beneficiary. The same statutory indicia that afford the plaintiff a right to review also bear on the merits, because they provide evidence that the statute protects his class, and thus that he is entitled to relief if he can show that the challenged agency action violated the statute. Evidence that the plaintiff's class is a statutory beneficiary, however, need not be as strong for the purpose of obtaining review as for the purpose of establishing the plaintiff's claim on the merits. Under *Abbott Laboratories*, (1967) 387 US 136 = 18 L Ed 2d 681 slight beneficiary indicia will suffice to establish his right to have review and thus to reach the merits.

IV

24. To reiterate, in my view alleged injury in fact, reviewability, and the merits pose questions that are largely distinct from one another, each governed by its own considerations. To fail to isolate and treat each inquiry independently of the other two, so far as possible, is to risk obscuring what is at issue in a given case, and thus to risk uninformed, poorly reasoned decisions which may result in injustice. Too often these various questions have been merged into one confused inquiry, lumped under the general rubric of "standing." The books are full of opinions which dismiss a plaintiff for lack of "standing" when dismissal, if proper at all, actually rested either upon the plaintiff's failure to prove on the merits the existence of the legally protected interest which he claimed,^(r) or on his failure to prove that the challenged

(q) If the alleged legal interest is clearly frivolous, or proof to substantiate the alleged injury in fact is wholly lacking, the plaintiff can be hastened from court by summary judgment.

(r) E. g., *Tennessee Electric Power Co. v. TVA*, 306 US 118, 83 L Ed 543, 59 S Ct 366 (1939); *Association of Data Processing Service Organizations, Inc. v. Camp*, 406 F2d 837, 843 (CA8th Cir 1969); *Barlow v. Collins*, 398 F2d 398, 401 (CA 5th Cir 1968).

agency action was reviewable at his instance.(s)

25. The risk of ambiguity and injustice can be minimized by cleanly severing, so far as possible, the inquiries into reviewability and the merits from the determination of standing. Today's decisions, however, will only compound present confusion and breed even more litigation over standing. In the first place, the Court's formulation of its non-constitutional element of standing is obscure. What precisely must a plaintiff do to establish that "the interest sought to be protected . . . is arguably within the zone of interests to be protected or regulated by the statute"? How specific an "interest" must he advance? Will a broad, general claim, such as competitive interest, suffice, or must he identify a specific legally protected interest? When, too, is his interest "arguably" within the appropriate "zone"? Does a mere allegation that it falls there suffice? If more than an allegation is required, is the plaintiff required to argue the merits? And what is the distinction between a "protected" and a "regulated" interest? Is it possible that a plaintiff may challenge agency action under a statute which unquestionably regulates the interest at stake, but which expressly excludes the plaintiff's class from among the statutory beneficiaries?

26. In the second place, though the Court insists that its non-constitutional standing inquiry does not involve a determination of the merits, I have grave misgivings on this score. The formulation of the inquiry most certainly bears a disquieting similarity to the erroneous notion that a plaintiff has no standing unless he can establish the existence of a legally protected interest. Finally, assuming that the inquiry does not, in fact, focus on the merits, then surely it serves only to determine whether the challenged agency action is reviewable at the instance of the plaintiff in cases where there is no express statutory grant of review to members of his class.(t) And, if this is so, it has no place in the determination of standing. In terms of treating related questions with one another, this inquiry is best made in the reviewability context. The Constitution requires for standing only that the plaintiff

(s) E. g., *Association of Data Processing Service Organizations, Inc. v. Camp*, supra, at 843; *Barlow v. Collins*, supra, at 401-402; *Harrison-Halsted Community Group, Inc. v. Housing & Home Finance Agency*, 310 F2d 99 (CA7th Cir 1962).

(t) In cases involving statutes that do expressly grant the plaintiff a right to review, there would be no need for the Court's second standing inquiry—unless it serves to provide a preview of the merits.

allege that actual harm resulted to him from the agency action. Investigation to determine whether the constitutional requirement has been met has nothing in common with the inquiry into statutory language, legislative history and public policy which must be made to ascertain whether Congress has precluded or limited judicial review.(u) More fundamentally, an approach which treats separately the distinct issues of standing, reviewability, and the merits, and decides each on the basis of its own criteria, assures that these often complex questions will be squarely faced, thus contributing to better reasoned decisions and to greater confidence that justice has in fact been done. The Court's approach does too little to guard against the possibility that judges will use standing to slam the court-house door against plaintiffs who are entitled to full consideration of their claims on the merits. The Court's approach must trouble all concerned with the function of the judicial process in today's world. As my Brother Douglas has said: "The judiciary is an indispensable part of the operation of our federal system. With the growing complexities of Government it is often the one and only place where effective relief can be obtained. . . . [W]here wrongs to individuals are done . . . it is abdication for courts to close their doors." Supra, (1968) 392 US 83 at 111 = 20 L. Ed 2d 947 at 968 (concurring opinion).

Case remanded.

(u) I would apply my view that all examination of statutory language and congressional intent, as they bear on the right of the plaintiff to challenge agency action, should be made only in the reviewability context even if the pertinent statutory material speaks of "standing" or "statutory aid to standing." Statutory materials, of course, would be properly consulted in the determination of standing if they purport to define what constitutes injury in fact.

AIR 1971 U.S.S.C. 40 (V 58 C 7)

(1969-24 Law Ed 2d 586)*

Camillo Molinaro, Appellant v. New Jersey, Respondent.

No. 663, Decided on 19-1-1970.

† Constitution of India, Art. 134 — Case from U.S.A. — Practice of Supreme

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† Reference is given to a Parallel Indian provision for the convenience of Indian Lawyers.

GN/GN/C488/70/RGD/T

Court of U.S.A. — Appeal from conviction — Appellant on bail not surrendering himself to authorities upon conviction — Supreme Court will not adjudicate appeal.

Where an accused who was on bail failed to surrender himself to authorities upon his conviction, with the result that the bail was revoked and the State considered him a fugitive from justice, the Supreme Court of United States in appeal against the conviction in the absence of anything to the contrary in the statute, under which the appeal is taken would decline to adjudicate the appeal.

(Para 2)

The Supreme Court would not adjudicate upon merits of a criminal case after the convict seeking of the judgment escapes from the restraints placed upon him on his conviction. But the escape only disentitles the accused to call upon the resources of the United States Supreme Court for determination of his claim. It does not, however, strip the case of its character as an adjudicable case or controversy.

(Para 2)

Cases Referred: Chronological Paras

(1954) 348 US 37 = 99 Law Ed 46 = 75 S Ct 92, National Union v. Arnold	2
(1949) 338 US 189 = 93 Law Ed 1897 = 69 S Ct 1453, Eisler v. United States	2
(1897) 166 US 138 = 41 Law Ed 949 = 17 S Ct 525, Allen v. Georgia	2
(1887) 125 US 692 = 31 Law Ed 854 = 8 S Ct 1390, Bonahan v. United States	2
(1877) 94 US 97 = 24 Law Ed 32, Smith v. United States	2

SUMMARY

A state prisoner whose conviction of abortion and conspiracy to commit abortion was being appealed was released on bail. When he failed to surrender himself to the state authorities, his bail was revoked, and the State considered him a fugitive from justice.

On appeal of the conviction from the New Jersey Supreme Court, the United States Supreme Court declined to adjudicate the case. In a per curiam opinion expressing the view of seven members of the court, it was held that in the absence of a specific provision to the contrary in the statute under which the appeal was taken [28 USC S. 1257(2)], the court had authority to dismiss the appeal on the ground that the fugitive had disentitled himself to call upon the resources of the court.

DOUGLAS, J., concurred in the result.

OPINION OF THE COURT

Per Curiam.

This case comes to the Court on appeal from the New Jersey State courts, which have affirmed appellant Molinaro's conviction for abortion and conspiracy to commit abortion. We are informed by both appellant's counsel and counsel for the State that Molinaro, who was free on bail, has failed to surrender himself to State authorities. His bail has been revoked, and the State considers him a fugitive from justice. Under these circumstances we decline to adjudicate his case.

2. The Court has faced such a situation before, in *Smith v. United States*, (1877) 94 US 97=24 Law Ed 32; and *Bonahan v. United States*, (1887) 125 US 692=31 Law Ed 854=8 S Ct 1390. In each of those cases, which were before the Court on writs of error, the Court ordered the case removed from the docket upon receiving information that the plaintiff in error had escaped from custody. In *Smith*, the case was dismissed at the beginning of the following term. See (1950) 18 Geo Wash L Rev 427, 430. In *Bonahan*, the case was stricken from the docket on the last day of the term in which it arose. See also *National Union v. Arnold*, (1954) 348 US 37, 43=99 Law Ed 46, 51=75 S Ct 92; *Eisler v. United States*, (1949) 338 US 189, 883=93 Law Ed 1897, 94 Law Ed 542, 69 S Ct 1453, 70 S Ct 181; *Allen v. Georgia*, (1897) 166 US 138, 41 Law Ed 949, 17 S Ct 525. No persuasive reason exists why this Court should proceed to adjudicate the merits of a criminal case after the convicted defendant who has sought review escapes from the restraints placed upon him pursuant to the conviction. While such an escape does not strip the case of its character as an adjudicable case or controversy, we believe it disentitles the defendant to call upon the resources of the Court for determination of his claims. In the absence of specific provision to the contrary in the statute under which Molinaro appeals, (1964) 28 USC S. 1257(2), we conclude, in light of the *Smith* and *Bonahan* decisions, that the Court has the authority to dismiss the appeal on this ground. The dismissal need not await the end of the term or the expiration of a fixed period of time, but should take place at this time.

3. It is so ordered.

4. Mr. JUSTICE DOUGLAS concurs in the result.

AIR 1971 U.S.S.C. 42 (V 58 C 8)

(1970-25 Law Ed 2d 577)*

Fred W. Woodward et al., Petitioners
v. Commissioner of Internal Revenue,
Respondent.

No. 412, Decided on 20-4-1970.

† **Income-Tax Act (1961). S. 37 —**
(American Case) — Capital or revenue
expenditure — Appraisal litigation ex-
penses — If allowable deduction — (In-
ternal Revenue Code (26 U.S.C.), Ss 162
and 212).

As a general matter costs incurred in the acquisition or disposition of a capital asset are to be treated as capital expenditures and are not deductible either as a 'business expense' or as 'expense of management, conservation or maintenance' for income-tax purposes under the Internal Revenue Code. (Paras 4, 5)

Expenses incurred by tax-payers in appraisal litigation for fixing the value of the corporate stock which the taxpayers, as majority stockholders voting for perpetual extension of the corporate charter were required by state law to purchase from a minority dissenting shareholders, constitute capital expenditure incurred in connection with acquisition of capital stock of a corporation and were properly treated as part of the cost of the stock which the taxpayers acquired. They are not deductible either under S. 162 or S. 212, of the Internal Revenue Code. (Para 9)

Cases Referred: Chronological Paras

(1970) 25 Law Ed 2d 585, United States v. Hilton Hotels Corpn.	1, 3
(1969) 396 US 875 = 24 Law Ed 2d 133 = 90 S Ct 153	3
(1965) 257 Iowa 1077 = 133 NW 2d 38, Woodward v. Quigley	2
(1963) 372 US 39 = 9 Law Ed 2d 570 = 83 S Ct 623, United States v. Gilmore	11
(1963) 323 F2d 913, Spangler v. Commissioner	6
(1960) 284 F2d 430, United States v. St. Joe Paper Co.	6
(1960) 284 F2d 639, Industrial Aggregate Co. v. United States	7
(1946) 158 F2d 764, Rassenfoss v. Commissioner	7
(1942) 315 US 626 = 86 Law Ed 1073 = 62 S Ct 777, Spreckels v. Commissioner	5
(1938) 305 US 79 = 83 Law Ed 52 = 59 S Ct 45, Helvering v. Winmill	5

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† Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

Donald P. Cooney, for Petitioners;
Johnnie McK. Walters, for Respondent.

SUMMARY

Taxpayers, as the owners of a majority of the common stock of a corporation, who voted for perpetual extension of the corporate charter, were required by Iowa law to purchase the stock of a minority stockholder who had voted against the charter extension. Having been unable to negotiate the price of the minority stock, the taxpayers instituted appraisal proceedings in a State court, and ultimately purchased the minority stock interest at a price fixed thereby. On their federal income-tax returns, the taxpayers claimed deductions for attorneys', accountants', and appraisers' fees for services rendered in connection with the appraisal litigation, asserting that such expenses were ordinary and necessary expenses paid for the management, conservation, or maintenance of property held for the production of income, deductible under S. 212 of the Internal Revenue Code of 1954, but the Commissioner of Internal Revenue disallowed the deduction on the ground that the fees represented capital expenditures incurred in connection with the acquisition of capital stock of the corporation. The Tax Court sustained the Commissioner's determination (49 T Ct 377), and the Court of Appeals for the Eighth Circuit affirmed (410 F2d 313).

On certiorari, the Supreme Court of the United States affirmed. In an opinion by Marshall, J., expressing the unanimous view of the court, it was held that the appraisal litigation expenses were not deductible under S. 212, but instead constituted capital expenditures to be treated as part of the cost of the stock, under a Treasury Regulation making the "cost of acquisition" of a capital asset a capital expense, it being immaterial that the taxpayers' primary purpose in incurring the litigation expenses was merely to fix the price of the stock and not to defend or perfect title thereto.

OPINION OF THE COURT

Mr. JUSTICE MARSHALL delivered the opinion of the Court.

This case, and *United States v. Hilton Hotels Corpn.*, (1970) 25 Law Ed 2d 585, involve the tax treatment of expenses incurred in certain appraisal litigation.

1. Taxpayers owned or controlled a majority of the common stock of the *Telegraph-Herald*, an Iowa publishing corporation. The *Telegraph-Herald* was incorporated in 1901, and its charter was extended for 20-year periods in 1921 and 1941. On June 9, 1960, taxpayers voted their controlling share of the stock of the corporation in favour of a perpetual extension of the charter. A minority stock-

holder voted against the extension. Iowa law requires "those stockholders voting for such renewal . . . [to] purchase at its real value the stock voted against such renewal." Iowa Code Ann. S. 491.25.

2. Taxpayers attempted to negotiate purchase of the dissenting stockholder's shares, but no agreement could be reached on the "real value" of those shares. Consequently, in 1962 taxpayers brought an action in State court to appraise the value of the minority stock interest. The trial court fixed a value, which was slightly reduced on appeal by the Iowa Supreme Court, *Woodward v. Quigley*, 257 Iowa 1077, 133 NW2d 38, on rehearing, 257 Iowa 1104, 136 NW2d 280 (1965). In July 1965, taxpayers purchased the minority stock interest at the price fixed by the court.

3. During 1963, taxpayers paid attorneys', accountants', and appraisers' fees of over \$25,000, for services rendered in connection with the appraisal litigation. On their 1963 federal income-tax returns, taxpayers claimed deductions for these expenses, asserting that they were "ordinary and necessary expenses paid . . . for the management, conservation, or maintenance of property held for the production of income" deductible under S. 212 of the Internal Revenue Code of 1954. The Commissioner of Internal Revenue disallowed the deduction "because the fees represent capital expenditures incurred in connection with the acquisition of capital stock of a corporation." The tax court sustained the Commissioner's determination, with two dissenting opinions, (1968) 49 TC 377, and the Court of Appeals affirmed, 410 F2d 313 (CA 8th Cir 1969). We granted certiorari, (1969) 396 US 875=24 Law Ed 2d 133=90 S Ct 153 to resolve the conflict over the deductibility of the costs of appraisal proceedings between this decision and the decision of the Court of Appeals for the Seventh Circuit in (1970) 25 Law Ed 2d 585, *supra*.(i) We affirm.

(i) Other federal court decisions on the point are in conflict. Compare *Boulder Building Corp'n. v. United States*, 125 F Supp 512 (DC WD Okla 1954) (holding appraisal proceeding costs capital expenditures), with *Smith Hotel Enterprises, Inc. v. Nelson*, 236 F Supp 303 (DC ED Wis 1964) (holding such costs deductible or ordinary and necessary business expense). And see *Walter S. Heller*, 3 TC 371 (1943), *affd sub nom Heller v. Commissioner*, 147 F2d 376 (CA9th Cir 1945) (holding dissenting stockholder's appraisal costs deductible under predecessor to S. 212).

See also *Naylor v. Commissioner*, 203 F2d 346 (CA5th Cir 1953), in which expenses of litigation to fix the purchase

4. Since the inception of the present federal income-tax in 1913, capital expenditures have not been deductible.(ii) See Internal Revenue Code of 1954, S. 263. Such expenditures are added to the basis of the capital asset with respect to which they are incurred, and are taken into account for tax purposes either through depreciation or by reducing the capital gain (or increasing the loss) when the asset is sold. If an expense is capital, it cannot be deducted as "ordinary and necessary," either as a business expense under S. 162 of the Code or as an expense of "management, conservation, or maintenance" under S. 212.(iii)

5. It has long been recognized, as a general matter, that costs incurred in the acquisition or disposition of a capital asset are to be treated as capital expenditures. The most familiar example of such treatment is the capitalization of brokerage fees for the sale or purchase of securities, as explicitly provided by longstanding Treasury regulation, *Treas Reg* 1.263(a)-2(e), and as approved by this Court in *Helvering v. Winmill*, (1933) 305 US 79 = 83 Law Ed 52 = 59 S Ct 45 and *Spreckels v. Commissioner*, (1942) 315 US 626=86 Law Ed 1073=62 S Ct 777. The Court recognized that brokers' commissions are "part of the acquisition cost of the securities," (1938) 305 US 79 *supra*, at p. 84=83 Law Ed 52 at p. 55, and relied on the Treasury regulation, which had been approved by statutory re-enactment, to deny deductions for such commissions even to a taxpayer for whom they were a regular and recurring expense in his business of buying and selling securities.

6. The regulations do not specify other sorts of acquisition costs, but rather provide generally that "the cost of acquisition . . . of . . . property having a price of stock sold pursuant to an option to purchase it at its net asset value on a certain date were held deductible under the predecessor to S. 212.

(ii) See S. II(B) of the Income-Tax Act of 1913, 38 Stat 114, 167.

[3] (iii) The two sections are in pari materia with respect to the capital-ordinary distinction, differing only in that S. 212 allows deductions for the ordinary and necessary expenses of non-business profit-making activities. See *United States v. Gilmore*, 372 US 39, 44-45, 9 Law Ed 2d 570, 574, 83 S Ct 623 (1963). *Walter S. Heller*, n. 1, *supra*, may have been based in part on the premise that the predecessor to S. 212 permitted the deduction of some expenses that would have been capitalized if incurred in the conduct of a trade or business.

useful life substantially beyond the taxable year" is a capital expenditure. Treas Reg 1.263(a)-2(a). Under this general provision, the courts have held that legal, brokerage, accounting and similar costs incurred in the acquisition or disposition of such property are capital expenditures. See, e. g., *Spangler v. Commissioner*, 323 F2d 913, 921 (CA 9th Cir 1963); *United States v. St. Joe Paper Co.*, 284 F2d 430, 432 (CA 5th Cir 1960). See generally 4A J. Mertens, *Law of Federal Income Taxation*, Ss. 25.25, 25.26, 25.40, 25A.15 (1966 ed). The law could hardly be otherwise, for such ancillary expenses incurred in acquiring or disposing of an asset are as much part of the cost of that asset as is the price paid for it.

7. More difficult questions arise with respect to another class of capital expenditures, those incurred in "defending or perfecting title to property". Treas Reg 1.263(a)-2(c). In one sense, any lawsuit brought against a taxpayer may affect his title to property — money, or other assets subject to lien.(iv) The courts, not believing that Congress meant all litigation expenses to be capitalized, have created the rule that such expenses are capital in nature only where the taxpayer's "primary purpose" in incurring them is to defend or perfect title. See, e. g., *Rassenfoss v. Commissioner*, 153 F2d 764 (CA 7th Cir 1946); *Industrial Aggregate Co. v. United States*, 284 F2d 639, 645 (CA 8th Cir 1960). This test hardly draws a bright line, and has produced a melange of decisions, which, as the Tax Court has noted, "it would be idle to suggest . . . can be reconciled." *Hermann F. Ruoff*, 30 TC 204, 208 (1952).(v)

8. Taxpayers urge that this "primary purpose" test, developed in the context of cases involving the costs of defending property, should be applied to costs incurred in acquiring or disposing of property as well. And if it is so applied, they argue, the costs here in question were properly deducted, since the legal proceedings in which they were incurred did not directly involve the question of title to the minority stock, which all agreed was to pass to taxpayers, but rather was concerned solely with the value of that stock.(vi)

(iv) See *Hochschild v. Commissioner*, 161 F2d 817, 820 (CA2d Cir 1947) (Frank, J., dissenting).

(v) A large number of these decisions are collected in 4A Mertens, *supra*, Ss. 25.24, 25A.16.

[6] (vi) Taxpayers argue at length that under Iowa law title to the stock passed before the appraisal proceeding. The Court of Appeals viewed Iowa law differently, and it seems to us that it was cor-

9. We agree with the Tax Court and the Court of Appeals that the "primary purpose" test has no application here. That uncertain and difficult test may be the best that can be devised to determine the tax treatment of costs incurred in litigation that may affect a taxpayer's title to property more or less indirectly, and that thus calls for a judgment whether the taxpayer can fairly be said to be "defending or perfecting title". Such uncertainty is not called for in applying the regulation which makes the "cost of acquisition" of a capital asset a capital expense. In our view application of the latter regulation to litigation expenses involves the simpler inquiry whether the origin of the claim litigated is in the process of acquisition itself.

10. A test based upon the taxpayer's "purpose" in undertaking or defending a particular piece of litigation would encourage resort to formalisms and artificial distinctions. For instance, in this case there can be no doubt that legal, accounting and appraisal costs incurred by taxpayers in negotiating a purchase of the minority stock would have been capital expenditures. See *Atzingen-Whitehouse Dairy, Inc.*, 36 TC 173 (1961). Under whatever test might be applied, such expenses would have clearly been "part of the acquisition cost" of the stock. *Helvering v. Winmill*, *supra*. Yet the appraisal proceeding was no more than the substitute which state law provided for the process of negotiation as a means of fixing the price at which the stock was to be purchased. Allowing deduction of expenses incurred in such a proceeding, merely on the ground that title was not directly put in question in the particular litigation, would be anomalous.

11. Further, a standard based on the origin of the claim litigated comports with this Court's most recent ruling on the characterization of litigation expenses for tax purposes. In *United States v. Gilmore*, (1953) 372 US 39=9 Law Ed 2d 570=83 S Ct 623, this Court held that the expense of defending a divorce suit was a non-deductible personal expense, even though the outcome of the divorce case would affect the taxpayer's property holdings, and might affect his business reputation. The Court rejected a test which looked to the consequences of the litigation, and did not even consider the taxpayer's motives or purposes in under-

rect in so doing. See *United States v. Hilton Hotels Corp.*, post, n. 2, 25 Law Ed 2d 585, 90 S Ct—. But resolution of this question of state law makes no difference and is not necessary for decision of the case, since, as we hold in *Hilton Hotels*, the sequence in which title passes and price is determined is irrelevant for purposes of the tax question involved here.

taking defence of the litigation, but rather examined the origin and character of the claim against the taxpayer, and found that the claim arose out of the personal relationship of marriage.

12. The standard here pronounced may, like any standard, present borderline cases, in which it is difficult to determine whether the origin of particular litigation lies in the process of acquisition. (vii) This is not such a borderline case. Here state law required taxpayers to 'purchase' the stock owned by the dissenters. In the absence of agreement on the price at which the purchase was to be made, litigation was required to fix the price. Where property is acquired by purchase, nothing is more clearly part of the process of acquisition than the establishment of a purchase price. (viii) Thus the expenses incurred in that litigation were properly treated as part of the cost of the stock which the taxpayers acquired.

Affirmed.

(vii) See, e. g., *Petschek v. United States*, 335 F2d 734 (CA2d Cir 1964), for a borderline case of whether legal expenses were incurred in the disposition of property.

[9] (viii) Taxpayers argue that "purchase" analysis cannot properly be applied to the appraisal situation, because the transaction is an involuntary one from their point of view—an argument relied upon by the District Court in the *Smith Hotel Enterprises* case, supra, n. 1. In the first place, the transaction is in a sense voluntary, since the majority holders know that under State law they will have to buy out any dissenters. More fundamentally, however, wherever a capital asset is transferred to a new owner in exchange for value either agreed upon or determined by law to be a fair quid pro quo, the payment itself is a capital expenditure, and there is no reason why the costs of determining the amount of that payment should be considered capital in the case of the negotiated price and yet considered deductible in the case of the price fixed by law. See *Isaac G. Johnson & Co. v. United States*, 149 F2d 851 (CA2d Cir 1945) (expenses of litigating amount of fair compensation in condemnation proceeding held capital expenditure).

AIR 1971 U.S.S.C. 45 (V 58 C 9)

(1971-31 Law Ed 2d 473)*

No. 40.

National Labor Relations Board, Petitioner v. Local 825, International Union

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AO/AO/A198/71/DHZ/C

of Operating Engineers, AFL-CIO, Respondent.

No. 42.

Burns and Roe Inc. et al, Petitioner v. Local 825, International Union of Operating Engineers, AFL-CIO, Respondent.

Nos. 40 and 42, decided on 12-1-1971.

†Trade Unions Act (1926), S. 28-J — Unfair Labour practice — (American decision) — National Labour Relations Act, S. 8(b) (4) (B) and (D)—Neither of the two provisions has exclusive operation.

The general contractor for a project A sub-contracted the work to B C and D. All the three employed operating engineers who were members of union X. B assigned the job of operating electric welding machine to the members of union Z. X intimated A that its members would go on strike unless A signed a contract binding on A and B C and D giving X jurisdiction over all power equipment. On refusal by A members of X went on strike.

Held (i) the clear implication of the demand of X was that A would be required either to force a change in B's policy or to terminate B's contract. This flagrant secondary conduct with the most serious disruptive effects was prohibited by S. 8(b) (4) (B). (Paras 14, 15)

(ii) Although S. 8(b) (4) (D) also applied to neutrals the basic purpose was different from that of S. 8(b) (4) (B). The practices were unfair under both sections. But there was no indication that Congress intended either section to have exclusive operation. (Para 16)

Cases Referred: Chronological Paras

(1969) 394 US 369 = 22 Law 2d 344, Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.	10
(1969) 407 F2d 804, N. L. R. B. v. Carpenters Dist. Council	15
(1967) 386 US 612 = 18 Law Ed 2d 357, National Woodworks Mfrs. Assn.	16
(1964) 376 US 492 = 11 Law Ed 2d 863, Steelworkers (Carrier Corp.) v. N. L. R. B.	9, 11, 13
(1961) 366 US 667 = 6 Law Ed 2d 592, Electrical Workers (General Electric) v. N. L. R. B.	9, 11, 13
(1960) 362 US 479 = 4 Law Ed 2d 896, Communications Workers v. N. L. R. B.	17
(1951) 341 US 675 = 95 Law Ed 1284, Labour Board v. Denver Building and Construction	20

† Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

(1951) 341 US 694 = 95 Law Ed
1299, Electrical Workers v. Labor
Board 20
(1941) 312 US 426 = 85 Law Ed
930, N. L. R. B. v. Express Pub-
lishing Co. 17
Marshall, J., Burger, C. J., Black,
Harlan, Brennan, White, Blackmun, JJ.,
Douglas J. filed a dissenting opinion, in
which Stewart J. joined.

Mr. JUSTICE MARSHALL delivered
the opinion of the Court.

2. In this case we are asked to
determine whether strikes by Operating
Engineers at the site of the construction
of a nuclear power generator plant at
Oyster Creek, New Jersey, violated S. 8
(b) (4) (B)(i) of the National Labor Rela-
tions Act. Although the National Labor
Relations Board found the strikes to be
in violation of this section, the Court of
Appeals refused to enforce the Board's
order.(ii) We believe the Court of Ap-
peals construed the Act too narrowly.
Accordingly, we reverse and remand the
case for consideration of the propriety of
the Board's order.

3. The general contractor for the
project, Burns and Roe, Inc., sub-contract-
ed all of the construction work to three
companies—White Construction Company,

(i) "Sec. 8(b) It shall be unfair labor
practice for a labor organization or its
agents—

"(4) (i) to engage in, or to induce or
encourage any individual employed by
any person engaged in commerce or in an
industry affecting commerce to engage
in, a strike or a refusal in the course of
his employment to use, manufacture, proc-
ess, transport, or otherwise, handle or
work on any goods, articles, materials, or
commodities or to perform any services;
or (ii) to threaten, coerce, or restrain any
person engaged in commerce or in an
industry affecting commerce, where in
either case an object thereof is—

"(B) forcing or requiring any person
to cease using, selling, handling, trans-
porting, or otherwise dealing in the pro-
ducts of any other producers, processor,
or manufacturer, or to cease doing busi-
ness with any other person, or forcing or
requiring any other employer to recog-
nize or bargain with a labor organization
as the representative of his employees
unless such labor organization has been
certified as the representative of such
employees under the provisions of Section
9: Provided, That nothing contained in
this clause (B) shall be construed to make
unlawful, where not otherwise unlawful,
any primary strike or primary picketing
..." 29 U.S.C. S. 158(b) (4) (B).

(ii) NLRB v. Local No. 825, Inter-
national Union of Operating Engineers,
410 F2d 5 (CA3 1969).

Chicago Bridge and Iron Company, and
Poirier and McClane Corporation. All
three employed operating engineers who
were members of Local 825, International
Union of Operating Engineers. But White,
unlike Chicago Bridge and Poirier, did
not have a collective-bargaining agree-
ment with Local 825.

4. In the latter part of September
1965, White installed an electric welding
machine and assigned the job of pushing
the buttons that operated the machine to
members of the Iron Workers' Union, who
were to perform the actual welding.
Upon learning of this work assignment,
Local 825's job steward and its lead engi-
neer threatened White with a strike if
operating engineers were not given the
work. White, however, refused to meet
the demand. On September 29, 1965, the
job steward and lead engineer met with
the construction manager for Burns, the
general contractor. They informed him
that the members of Local 825 working
at the jobsite had voted to strike unless
Burns signed a contract, which would be
binding(iii) on all three sub-contractors as
well as Burns, giving Local 825 jurisdic-
tion over all power equipment, including
electric welding machines, operated on
the jobsite. On October 1, after White
and Burns refused to accede to the de-
mands, the operating engineers employed
by Chicago Bridge and Poirier as well as
those employed by White walked off the
job. They stayed out from 8:00 a.m. to
1:00 p.m., returning to work when nego-
tiations over their demands started.

5. On October 6, Burns submitted
the work assignment dispute to the Na-
tional Joint Board for the Settlement of
Jurisdictional Disputes for the Construc-
tion Industry.(iv) The same day, Local
825 threatened Burns and all the sub-
contractors with another work stoppage

(iii) The proposed contract provided
in part:

"This Agreement shall bind all sub-
contractors while working for an Employ-
er who is a party to this Agreement. Any
Employer who sublets any of his work
must sublet the same subject to all the
terms and conditions of this Agreement.

"The Employer agrees that he will
not sub-contract any of his work, which
is covered by the terms of this Collective
Bargaining Agreement, to any sub-con-
tractor, unless said sub-contractor agrees
in writing to perform said work subject
to all terms and conditions of this Agree-
ment between the Employer and the
Union, including an agreement to submit
work jurisdictional disputes for determi-
nation as provided below."

(iv) A private organization establish-
ed by construction industry labor unions
to arbitrate jurisdictional disputes.

unless the contracts were signed and the work transferred to the operating engineers. The employers again refused, and the operating engineers walked off the project. This strike lasted from October 7 to October 11.

6. On October 20, the Joint Board notified the parties that there was no reason to change the assignment of the disputed work. Local 825 did not accept this resolution; and when the welding machine was started on November 4, the operating engineers surrounded the machine and physically prevented its operation. On November 8, the NLRB Regional Director obtained from the United States District Court a temporary injunction under S. 10(l) (v) of the Act restraining the union from coercing a cessation of business on the project or to compel White to change the work assignment. (v)

7. An unfair labor practice proceeding against Local 825 subsequently ensued. The Board found that the union had violated S. 8 (b) (4) (D)(vii) of the Act by inducing employees of White,

(v) 29 U.S.C. S. 160(l).

(vi) The Operating Engineer's activity did not stop with the issuance of the injunction. White's engineers struck again on November 17, this time ostensibly over a dispute concerning the number of employees assigned to operate a recently installed electrical pump. Local 825 representatives in a discussion with White said, however, that this walkout "was more or less because of the electric welding machine being in operation." The strike lasted until December 21. Of course the activity like that on November 4 did not involve S. 8 (b) (4) (B) violations since only the engineers working for White were involved.

(vii) "Sec. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

"(4) (i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case an object thereof is—

"(D) forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft or class rather than to employees in another labor organization or in another trade, craft or class, unless such employer is failing to conform to an order or certifi-

Chicago Bridge, and Poirier to strike to force White to take the disputed work away from the Ironworkers and assign it to the Operating Engineers. The Court of Appeals' approval of this finding is not questioned here. But the Board's finding that Local 825's encouragement of the Chicago Bridge and Poirier employees to strike and the union's coercion of Burns violated S. 8(b) (4) (B) of the Act was not approved by the Court of Appeals and is in issue here.

8. Congressional concern over the involvement of third parties in labor disputes not their own prompted S. 8(b) (4) (B). This concern was focused on "secondary boycotts," (viii) which was conceived of as pressure brought to bear not "upon the employer who is a party [to a dispute], but upon some third party who has no concern in it" (ix) with the objective of forcing the third party to bring pressure on the employer to agree to the union's demands. (x)

9. Section 8(b) (4) (B) is, however, the product of legislative compromise and also reflects a concern with protecting labor organizations' right to exert legitimate pressure aimed at the employer with whom there is a primary dispute. (xi) This primary activity is protected even though it may seriously affect neutral third parties. *Steelworkers (Carrier Corp'n.) v. NLRB*, (1964) 376 US 492, 502; *Electrical Workers (General Electric) v. NLRB*, (1961) 366 US 667, 673.

cation of the Board determining the bargaining representative for employees performing such work . . ." 29 U.S.C. S. 158 (b) (4) (D).

(viii) See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, 394 US 369, 386-390 (1969); *National Woodwork Mfrs. Assn. v. NLRB*, 386 US 612, 624 (1967).

(ix) *Electrical Workers, Local 501 v. NLRB*, 181 F2d 34, 37 (CA2 1950), *aff'd*, 341 US 694.

(x) The House Conference Report explained this idea:

"Thus it was made an unfair labor practice for a union to engage in a strike against employer A for the purpose of forcing that employer to cease doing business with employer B. Similarly it would not be lawful for a union to boycott employer A because employer A uses or otherwise deals in the goods of, or does business with employer B." H. R. Rep. No. 510, 80th Cong., 1st Sess., at 43 (1947).

(xi) The section contains a specific proviso, which was added in the 1959 amendment to the Act, that protects a "primary strike or primary picketing" that is "not otherwise unlawful." See n. 1, *supra*.

10. Thus there are two threads to S. 8 (b) (4) (B) that require disputed conduct to be classified as either "primary" or "secondary". And the tapestry that has been woven in classifying such conduct is among the labor law's most intricate. See *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.*, (1969) 394 US 369. But here the normally difficult task of classifying union conduct is easy. As the Court of Appeals said, the "record amply justifies the conclusion that [Burns and the neutral sub-contractors] were subjected to coercion in the form of threats or walkouts, or both." 410 F2d at 9. And as the Board said, it is clear that this coercion was designed "to achieve the assignment of [the] disputed work" to operating engineers. 162 N. L. R. B., at 1621.

11. Local 825's coercive activity was aimed directly at Burns and the sub-contractors that were not involved in the dispute. The union engaged in a strike against these neutral employers for the specific, overt purpose of forcing them to put pressure on White to assign the job of operating the welding machine to operating engineers. Local 825 was not attempting to apply the full force of primary action by directing its efforts at all phases of Burns' normal operation as was the case in (1964) 376 US 492 and (1961) 366 US 677. It was instead using a sort of pressure that was unmistakably and flagrantly secondary. *Labor Board v. Denver Building & Construction Trade Council*, (1951) 341 US 675.

12. The more difficult task is to determine whether one of Local 825's objectives was to force Burns and the other neutrals to "cease doing business" with White as S. 8(b) (4) (B) requires. The Court of Appeals concluded that the union's objective was to force Burns "to use its influence with the sub-contractor to change the sub-contractor's conduct, not to terminate their relationship" and that this was not enough. That court read the statute as requiring that the union demand nothing short of a complete termination of the business relationship between the neutral and the primary employer. Such a reading is too narrow.

13. Some disruption of business relationships is the necessary consequence of the purest form of primary activity. These foreseeable disruptions are, however, clearly protected. *Steelworkers (Carrier)*, (1964) 376 US at 492; *Electrical Workers (General Electric)*, (1951) 366 US 667 at p. 682. Likewise, secondary activity could have such a limited goal and the foreseeable result of the conduct could be, while disruptive, so slight that the "cease doing business" requirement is not met.

14. Local 825's goal was not so limited nor were the foreseeable consequences of its secondary pressure slight. The operating engineers sought to force Burns to bind all the sub-contractors on the project to a particular form of job assignments. The clear implication of the demands was that Burns would be required either to force a change in White's policy or to terminate White's contract. The strikes shut down the whole project. If Burns was unable to obtain White's consent, Local 825 was apparently willing to continue disruptive conduct that would bring all the employers to their knees.

15. Certainly, the union would have preferred to have the employers capitulate to its demands; it wanted to take the job of operating the welding machines away from the Ironworkers. It was willing, however, to try to obtain this capitulation by forcing neutrals to compel White to meet union demands. To hold that this flagrant secondary conduct with these most serious disruptive effects was not prohibited by S. 8(b) (4) (B) would be largely to ignore the original congressional concern. *NLRB v. Carpenters Dist. Council*, 407 F2d 804, 806 (CA5 1969).

16. In addition to its argument that S. 8(b) (4) (B) does not cover its conduct, Local 825 argues that S. 8(b) (4) (D) provides the exclusive remedy. Clearly, S. 8(b) (4) (D) is, as the Board and Court of Appeals held, applicable. But that section is aimed at protecting "the employer trapped between the . . . claims" of rival unions. *National Woodwork Mfgs. Assn.*, (1967) 386 US 612 at 625. Although S. 8(b) (4) (D) also applies to neutrals, the basic purpose is different from that of S. 8(b) (4) (B). The practices here were unfair under both sections and there is no indication that Congress intended either section to have exclusive application.

17. Since the Court of Appeals did not believe that S. 8(b) (4) (B) was applicable, it did not consider the propriety of the portion of Board's order relating to that section. But the order was not narrowly confined to the conduct involved here; so we must remand this case for the Court of Appeals to consider whether the order is necessary to further the goals of the Act. See *Communications Workers v. NLRB*, (1960) 362 US 479; *NLRB v. Express Publishing Co.*, (1941) 312 US 426.

Mr. JUSTICE DOUGLAS, with whom Mr. JUSTICE STEWART concurs, dissenting.

18. If we take the words of the Act, rather than what the courts have interpolated, and lay them alongside the

facts of the case, I do not see how we can fairly say that Local 825 engaged in an "unfair labor practice" within the meaning of S. 8(b) (4) (B). Local 825 did use coercion to get jobs from White for its workers. The Board termed it "causing a disruption of the business relationship among the various employees at the jobsite," which it held was within the ban of S. 8(b) (4) (B) since Local 825's aim, though not "a total cancellation of a business relationship" with White, constituted a "cease doing business" purpose. The Board said: "... an object of the Respondent was to force Burns to cease doing business with White, and to force Chicago Bridge and Poirier to cease doing business with Burns in order to compel Burns to cease doing business with White."

19. Yet as the Trial Examiner found "... Respondent never indicated it wanted White off the job—it wanted to harass White to gain compliance with its requests. Nor was any demand made upon Burns to cease doing business with White. . . . All Respondent wanted was the work, not a substitution of contractors nor a termination of contractual relationships between the contractors."

20. Our question turns not on the findings of fact but on the question of law which emerges, whether what was done had as its purpose to induce the general contractor and sub-contractor to "cease doing business" with White.

We held in (1951) 341 US 675 at p. 688, that an effort "to force" a sub-contractor in the position of White "off the job" satisfied the "cease doing business" test though that purpose was not the exclusive one. A strike to achieve that end, we held in *Electrical Workers v. Labor Board*, (1951) 341 US 694 at p. 700, also brought the coercive means within the same ban. And in (1964) 376 US 492 at p. 496, we held that a union on strike against its employer, Carrier, violated the "cease doing business" ban, when it picketed at an entrance used exclusively by railroad personnel "to induce the railroad to cease providing freight service to Carrier for the duration of the strike."

21. The case here is plainly different. The aim was not to freeze out White or to close him down for an hour or for the duration. It was merely to get the work, whose assignment he controlled, for members of Local 825. The case is therefore the classical jurisdictional conflict covered by S. 8(b) (4) (D) which makes "forcing or requiring any employer to assign particular work to employees in a particular labor organization" an unfair labor practice.

22. The Board properly issued a cease-and-desist order concerning the jurisdictional dispute condemned by S. 8

(b) (4) (D). The fact that (D) may be involved does not necessarily mean that (B) may not also be involved, as the two are not "mutually exclusive." Local 5, United Assoc. of Journeymen, 137 N. L. R. B. 828, 832.* But where the facts show only the jurisdictional dispute condemned by S. 8 (b) (4) (D) and no plan to close down White either permanently or for a day or even an hour, we should not only hold that S. 8(b) (4) (B) is not satisfied. We should also hold that (D) cannot do service for (B) where there is no element of "ceasing" to do business present.

Reversed and Remanded.

* And see Local 5, Plumbing & Pipe Fitting Industry, 145 N. L. R. B. 1580; Millwright Local 1102, 132 N. L. R. B. 217.

AIR 1971 U. S. S. C. 49 (V 58 C 10)

(1969-24 Law Ed 2d 567)*

Calvin Turner et al., Appellants v. W. W. Fouché et al., Respondent.

(No. 23) Decided on 19-1-1970.

‡ (A) Constitution of India, Art. 14 — Equal protection of law — Case from America — Education Board requiring members to be freeholders — Equal protection clause is violated. (Constitution of America, Fourteenth Amendment).

The requirements of a State Statute that members of county boards of education be freeholders, violates the equal protection clause of the Constitution, as measured by the traditional test of whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid State objective.

(Para 23)

(B) Constitution of India, Art. 16 — Right to hold office — Case from America — Person cannot be denied privilege of holding public office, which is extended to others on basis of distinctions violating Constitutional guarantees. (Para 24)

Cases Referred: Chronological Paras

(1969) 24 Law Ed 2d 549, Carter v.

Jury Comm'n of Greene County

1, 10

(1969) 395 US 701 = 23 Law Ed 2d

647 = 89 S Ct 1897, Cipriano v.

City of Houma

23

(1969) 395 US 621 = 23 Law Ed 2d

583 = 89 S Ct 1886, Kramer v.

Union Free School District

23

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‡ Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

FN/FN/C487/70/RGD/M

(1968) 393 US 1078 = 21 Law Ed

2d 770 = 89 S Ct 863, Turner v.

Fouche

8

Michael Meltsner, for Appellants;
 Alfred L. Evans, Jr., for Respondent.

SUMMARY

A class action by a Negro school-child and her father against members of the board of education of Taliaferro County, Georgia, the jury commissioners, and certain grand jurors, was instituted in the United States District Court for the Southern District of Georgia, challenging the constitutionality, on the ground of racial discrimination, of Georgia's constitutional and statutory procedure whereby the county board of education, consisting of five freeholders, was selected by the grand jury, which, in turn, was drawn from a jury list compiled by the county jury commission. Under Georgia law, the State Superior Court Judge of the county appointed the jury commissioners and was authorized to exclude anyone he deemed not "discreet," and the jury commissioners were authorized to eliminate from grand jury service anyone they found not "upright" and "intelligent." The relief sought by the plaintiffs included an injunction against enforcement of the provisions by which the board of education and grand jury were selected, and a declaration that such provisions were void on their face and as applied. After an evidentiary hearing which showed underrepresentation of Negroes on the grand jury list, the three-judge District Court adjourned for one month to enable the defendants to correct the situation, and a new list was prepared and a Negro was selected to fill a vacancy on the board of education. Thereafter, the District Court declined to hold the Georgia laws invalid on their face, found that Negroes had been systematically excluded from grand juries through token inclusion, but concluded that the new grand jury list was not unconstitutional (290 F Supp 648).

On direct appeal by the plaintiffs, the Supreme Court of the United States vacated the District Court's judgment, and remanded the cause. In an opinion by Stewart, J., expressing the unanimous view of the court, it was held that (1) the provisions of Georgia law conferring discretion on county officials in the selection of jury commissioners and prospective grand jurors were not unconstitutional on their face as providing the officials an opportunity to discriminate on the basis of race, the procedure not being inherently unfair or necessarily incapable of administration without regard to race, and the challenged provisions not referring to race, (2) the District Court had erred in upholding the new grand jury

list since the jury officials had failed to overcome the prima facie case of discrimination established by evidence showing that Negroes comprised only 37 per cent. of the 304-member list, whereas about 60 per cent. of the county population was Negro, that of 178 persons disqualified by the jury commissioners for lack of "intelligence" or "uprightness", 171 were Negro, and that 225 persons who were unknown to the commissioners and who constituted about 9 per cent. of the population of the county were eliminated from consideration because of lack of information, and (3) the requirement under Georgia law that members of county boards of education be freeholders violated the equal protection clause of the Fourteenth Amendment, there being no showing of any rational state interest underlying the freeholder requirement.

OPINION OF THE COURT

Mr. JUSTICE STEWART delivered the opinion of the Court.

1. This case, a companion to *Carter v. Jury Comm'n of Greene County*, (1969) 24 L Ed 2d 549, involves a challenge to the constitutionality of the system used in many counties of Georgia to select juries and school boards. The basic statutory scheme at issue is this. The county board of education consists of five freeholders. (i) It is selected by the grand jury, (ii) which in turn is drawn from a jury list selected by the six-member county jury commission. (iii). The commissioners are appointed by the judge of the state superior court for the circuit in which the county is located. (iv)

2. Some 2,500 to 3,000 people live in Taliaferro County, Georgia, of whom about 60% are Negroes. (v) The county

(i) Ga Const, Art. VIII, S. V, P. I, Ga Code Ann S. 2-6801 (1948). At the oral argument we were advised that under Georgia law a "freeholder" is any person who owns real estate.

(ii) Ga Const, Art. VIII, S. V, P. I, Ga Code Ann S. 2-6801 (1948). See also Ga Code Ann S. 32-902 (1969).

(iii) Ga Code Ann Ss. 59-101, 106 (1965 and Supp 1968).

(iv) Ga Code Ann Ss. 59-101 (1965). Prior to 1966 the superior court judges were elected by all the voters in the State, but now they are elected by the voters of the circuits over which they have jurisdiction. See Ga Const, Art. VI, S. III, P. II, Ga Code Ann S. 2-3802 (Supp 1968); *Stokes v. Fortson*, 234 F Supp 575.

(v) In its brief Georgia informs us that its Department of Public Health estimates that Taliaferro County now has about 1,500 Negro and 1,000 white citi-

school system consists of a grammar school and a high school, and all the students at both schools are Negroes, every white pupil having transferred elsewhere.(vi) Sandra and Calvin Turner, a Negro school child and her father who reside in that county, brought this class action against the members of the county board of education, the jury commissioners, and three named white grand jurors.(vii) Their complaint alleged that the board of education consisted entirely of white people; that it had been selected by a predominantly white grand jury, which in turn had been selected by the jury commissioners, all of whom were white people. The complaint charged that the board of education had deprived the Negro school children of text-books, facilities, and other advantages; also that the Turners and other Negro citizens had sought unsuccessfully to communicate their dissatisfaction to the board of education.

zens. According to the 1960 federal census, the county had a population of 3,370, of whom 2,096 were Negroes and 1,273 white people. U. S. Dept. of Commerce, Bureau of the Census, 1960 Census of Population, Vol. I, pt. 12, p. 12-83.

(vi) This state of affairs has arisen following litigation attacking the county's former dual school system. Prior to the fall of 1965 Taliaferro County had used one school building for Negroes and the other for whites. In that year, after 87 Negro pupils sought transfers to a desegregated school, the superintendent, knowing the white school would be closed, arranged for the transfer of the white pupils, at public expense, to public schools in adjoining counties. A three-judge District Court declared the arrangement illegal, placed the Taliaferro County school system in receivership under the State's superintendent of schools, and instructed him to prepare a plan that would allow those Negroes who wanted to transfer to a desegregated school the opportunity to do so. *Turner v. Goolsby*, 255 F Supp 724. It is undisputed that some white pupils now attend a private institution in the county. In addition, the appellants suggest that white children continue to attend public schools in neighbouring counties. Efforts to combine districts to avoid an all-Negro school system in Taliaferro County have proved unsuccessful.

[1] (vii) The District Court struck the grand jurors as parties defendant for failure of the appellants to state as against them a claim upon which relief could be granted. The appellants did not appeal from that portion of the judgment below, and the motion of the appellee grand jurors to dismiss the appeal as to them is granted.

3. According to the appellants, the members of the county grand jury, on which white people were perennially overrepresented and Negroes underrepresented, chose only white people as members of the board of education pursuant to the Georgia constitutional and statutory provisions governing the school-board selection. The complaint attacked those provisions as accounting for both the exclusion of Negroes and non-freeholders from the board of education, and for the merely token inclusion of Negroes on the grand juries. The appellants sought (1) an injunction prohibiting enforcement of the Georgia constitutional and statutory provisions by which the board of education and grand jury were selected; (2) a declaration that the provisions were void on their face and as applied; (3) a further declaration that the various positions on the board of education, grand jury, and jury commission were vacant; (4) the appointment of a receiver for the school system and a special master for the selection of the grand jurors; and (5) \$500,000 in ancillary damages.

4. A three-judge District Court was convened pursuant to 28 USC Ss. 2281 and 2284, and conducted extensive evidentiary hearings. The evidence showed that whenever a jury commissioner thought a voter from his area of the county qualified as a potentially good juror, he offered the name for consideration to his fellow commissioners; if all agreed, the name went on the master jury list. No name of a county resident was placed on the list unless he was personally known to at least one of the jury commissioners. The commissioners looked for "people that we felt would be capable of interpreting proceedings of court and . . . render[ing] a just verdict. . . ." The state superior court judge had instructed them to put Negroes on the list. Following the compilation of the list, the commissioners "picked the ones we thought were the very best people in the county" and put them on the grand-jury list. The superior court judge then drew the names of the grand jurors at random in open court. Only he could excuse from grand-jury service those whose names he drew; and he denied that Negroes were ever excused out of turn, or on account of their race.

5. At its first hearing, held in January 1968, the District Court voiced its concern that only 11 Negroes had found their way to the 130-member grand-jury list. The court adjourned for one month to enable the defendants to remedy the situation. It noted that two vacancies had opened up on the board of education and that, although the board had held an interim election, the grand

jury had not yet confirmed the new members. The court suggested that "[i]f those two men would willingly stand aside the other members might select two outstanding Negro citizens . . . to go on the Board." The court also advised counsel for the defendants to explain the law of jury discrimination to his clients, and expressed the hope that the jury commissioners would be "generous" in their recomposition of the panel.

6. At the adjourned hearing in February, it appeared that three days after the first hearing the State superior court judge had discharged the county grand jury and directed the jury commissioners to recompose the jury list. Working from the voter registration list at the last general election, (viii) the commissioners had prepared a new grand-jury list containing the names of 44 Negroes and 77 white people. From this list the superior court judge drew the names that led to the impaneling of a new grand jury of 23 members, of whom only six were Negroes. Meanwhile the board of education had elected a Negro and a white man to fill the two vacancies, and the new grand jury had confirmed the new members in their offices.

7. Following these developments, the District Court declined to invalidate on their face either the various provisions governing the school-board and grand-jury selections, or the freeholder requirement for school-board membership. It found that at the commencement of suit Negroes had been systematically excluded from the grand juries through token inclusion, but it concluded that the new grand-jury list, drawn following the January hearing, was not unconstitutional. *Turner v. Fouche*, 290 F Supp 648.(ix)

8. Subsequently the District Court entered a final judgment permanently enjoining the defendant jury commissioners and their successors from systematically excluding Negroes from the Taliaferro County grand-jury system. The appellants, complaining of the court's failure to hold the challenged provisions

(viii) Georgia has used the voter registration lists rather than the books of the tax receiver since our decision in *Whitus v. Georgia*, 385 US 545, 17 Law Ed 2d 599, 87 S Ct 643.

(ix) The District Court found that the appellants' claim that the board of education had deprived the Negro school children of text-books, facilities, and other advantages failed for want of proof. The court also declined to reach the appellants' claim for ancillary damages, leaving this question to single-judge inquiry. No issue concerning these rulings is presented on the appeal.

of Georgia law invalid on their face and as applied, took a direct appeal to this Court pursuant to 28 USC S. 1253, and we noted probable jurisdiction, (1968) 393 US 1078=21 Law Ed 2d 770=89 S Ct 863.(x)

(x) We reject the appellees' suggestion that we lack jurisdiction to entertain an appeal from the District Court on the theory that a court of three judges was not required under 28 USC S. 2281 because the appellants sought to enjoin only the acts of county officials. The jury commissioners and members of the board of education were "functioning pursuant to a Statewide policy and performing a State function," *Moody v. Flowers*, 387 US 97, 102, 18 Law Ed 2d 643, 647, 87 S Ct 1544; cf. *Spielman Motor Sales Co. v. Dodge*, 295 US 89, 92-95, 79 Law Ed 1322, 1324, 1325, 55 S Ct 678; and see *Dusch v. Davis*, 387 US 112, 114, 18 Law Ed 2d 656, 658, 87 S Ct 1554; *Sailors v. Bd. of Educ.*, 387 US 105, 107, 18 Law Ed 2d 650, 652, 87 S Ct 1549. The appellants cannot be denied a three-judge court below and direct review here simply because Georgia chooses to denominate as "local" or "county" the officials to whom it has entrusted the administration of the challenged constitutional and statutory provisions. *Rorick v. Bd. of Comm'rs*, 307 US 208, 212, 83 Law Ed 1242, 1244, 59 S Ct 808; cf. *City of Cleveland v. United States*, 323 US 329, 332, 89 Law Ed 274, 278, 65 S Ct 280.

Under Georgia law Taliaferro County may replace the constitutional and statutory arrangement by which the grand jury elects the board of education with the direct election of the board by the qualified voters of the county upon the enactment of a local or special law by the legislature and its approval in a referendum by a majority of the qualified voters. Ga Const, Art. VIII, S. V, P. 2; Ga Code Ann S. 2-6802 (Supp 1968). But Georgia does not suggest that so many counties have taken advantage of this provision that the present selection of the board by the grand jury in effect amounts to a local option.

The appellees also propose a distinction between attacks on statutes and attacks upon the results of their administration, and urge that the appellants' case comes within the latter category. But this argument overlooks the line, delineated by our past decisions, that falls between a petition for injunction on the ground of the unconstitutionality of a statute, either on its face or as applied, which requires a three-judge court, and a petition seeking an injunction on the ground of the unconstitutionality of the result obtained by the use of a statute not attacked as unconstitutional. *Louis-*

9. The appellants urge that the constitutional and statutory scheme by which the Taliaferro County grand jury selects the board of education is unconstitutional on its face. They point to the discretion of the State superior court judge to exclude anyone he deems not "discreet" from appointment to the jury commission, (xi) and of the jury commissioners to eliminate from grand-jury service anyone they find not "upright" and "intelligent." (xii) These provisions, the

ana v. United States, 380 US 145, 150 and n. 9, 13 Law Ed 2d 709, 712, 713, 85 S Ct 817; Query v. United States, 316 US 436, 489, 86 Law Ed 1616, 1619, 62 S Ct 1122; Ex parte Bransford, 310 US 354, 361, 84 Law Ed 1249, 1253, 60 S Ct 947; Stratton v. St. Louis S. W. Ry., 282 US 10, 15, 75 Law Ed 135, 138, 51 S Ct 8; Ex parte Hobbs, 280 US 168, 172, 74 Law Ed 353, 355, 50 S Ct 83.

Similarly, we reject the appellees' contention, ancillary to their basic attack on our jurisdiction, that the three-judge court was improperly convened because of the insubstantiality of the appellants' challenge to the Georgia laws. Swift & Co. v. Wickham, 382 US 111, 115, 15 Law Ed 2d 194, 198, 86 S Ct 258; Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 US 713, 715, 8 Law Ed 2d 794, 796, 82 S Ct 1294 (per curiam); California Water Service Co. v. City of Redding, 304 US 252, 255, 82 Law Ed 1323, 1325, 58 S Ct 865 (per curiam); Ex parte Poresky, 290 US 30, 32, 78 Law Ed 152, 153, 54 S Ct 3 (per curiam). Further, the District Court properly entertained the question whether the constitutional and statutory complex, even if not invalid on its face, was unconstitutionally administered. Without regard to whether that issue was one by itself warranting a three-judge court, see Ex parte Bransford, supra; Currie, The Three-Judge District Court in Constitutional Litigation, 32 U Chi L Rev 1, 37-50, it related to the appellants' claim that Georgia's school-board selection procedure was unlawful on its face. Flast v. Cohen, 392 US 83, 90-91, 20 Law Ed 2d 947, 955, 956, 88 S Ct 1942; Zemel v. Rusk, 381 US 1, 5-6, 14 Law Ed 2d 179, 183, 184, 85 S Ct 1271; United States v. Georgia Pub. Serv. Comm'n, 371 US 285, 287-288, 9 Law Ed 2d 317, 320, 83 S Ct 397; Paul v. United States, 371 US 245, 249-250, 9 Law Ed 2d 292, 296, 83 S Ct 426; Florida Lime & Avocado Growers, Inc. v. Jacobsen, 362 US 73, 75-85, 4 Law Ed 2d 568, 570-576, 80 S Ct 568; Louisville & N. R. R. v. Garrett, 231 US 298, 303-304, 58 Law Ed 229, 238, 239, 34 S Ct 48.

(xi) Ga Code Ann S. 59-101 (1965).

(xii) Ga Code Ann S. 59-106 (Supp 1968).

appellants say, provide the county officials an opportunity to discriminate exercised both before and after the commencement of this litigation. It is argued that the terms are so vague as to leave the judge and jury commissioners at large in the exercise of discretion, with their decisions "unguided by statutory or other guidelines." Only by excising the challenged terms from Georgia's laws, it is urged, can the jury discrimination revealed in the record of this case be eliminated.

10. Such arguments are similar to those advanced in (1969) 24 Law Ed 2d 549. Our decision in that case fairly controls disposition of the contentions here. Georgia's constitutional and statutory scheme for selecting its grand juries and boards of education is not inherently unfair, or necessarily incapable of administration without regard to race; the federal courts are not powerless to remedy unconstitutional departures from Georgia law by declaratory and injunctive relief. The challenged provisions do not refer to race; indeed, they impose on the jury commissioners the affirmative duty to supplement the jury lists by going out into the county and personally acquainting themselves with other citizens of the county whenever the jury lists in existence do not fairly represent a cross-section of the county's upright and intelligent citizens. (xiii)

(xiii) Ga Code Ann S. 59-106 (Supp 1968).

Our decisions in Avery v. Georgia, 345 US 559, 97 Law Ed 1244, 73 S Ct 891, and Whitus v. Georgia, 385 US 545, 17 Law Ed 2d 599, 87 S Ct 643, cannot aid the appellants. In Avery we reversed a judgment of conviction where the names of prospective petit jurors had been printed on differently colored tickets according to their race—white tickets for white people, and yellow tickets for Negroes. A State superior court judge drew the names from the jury box and handed them to the sheriff, who entrusted them to the court clerk for arranging the tickets and typing up the list of persons to be called to serve on the panel. We found that the use of the white and yellow tickets made it easier "for those to discriminate who are of a mind to discriminate," and that even if the judge had drawn the names without looking to see the color of the tickets, "opportunity was available to resort to [discrimination] at other stages in the selection process." 345 US, at 562, 97 Law Ed at 1248.

Whitus involved a refinement of the process we had condemned in Avery. In Whitus the jury commissioners made up the jury list from which both traverse and grand jurors were selected by refer-

11. But the appellants contend that even if the challenged provisions are not void on their face, they have been unconstitutional applied. The District Court found that prior to the commencement of suit Negroes had been excluded in the administration of the grand-jury system, and the appellees do not contest that finding here.(xiv) The District Court also concluded that the newly composed grand-jury list was constitutional, and the appellants challenge that ruling. Consideration of the issues thus presented requires a fuller statement of the events following the January hearing in the court below.

12. As noted above, after the District Court had held its first hearing, the state superior court judge discharged the grand jury then sitting and ordered the

ence to the tax digest, which was segregated into sections—one with white sheets for white people and the other with yellow sheets for Negroes—and to an old jury list required by former law to be made up from the tax digest. We concluded that "[u]nder such a system the opportunity for discrimination was present," and on the record before us we could not say that opportunity "was not resorted to by the commissioners." 385 US, at 552, 17 Law Ed 2d at 605.

In both *Avery* and *Whitus* we noted without comment the "upright and intelligent" requirement for jury membership. 385 US, at 552, 17 Law Ed 2d at 605; 345 US, at 562, 97 Law Ed at 1248. In *Avery* we expressly commented that Georgia law did not authorize the use of the potentially discriminatory process under review. 345 US, at 562, 97 Law Ed at 1247. In both cases we struck down the white-and-yellow system, however varied in design, because of the obvious danger of abuse. See *Williams v. Georgia*, 349 US 375, 382, 99 Law Ed 1161, 1169, 75 S Ct 814. We dealt in both cases with a physical, even mechanical aspect of the jury-selection process that could have no conceivable purpose or effect other than to enable those so disposed to discriminate against Negroes solely on the basis of their race. It is evident that the challenged provisions now before us contain no such defect. The appellants cannot contend that the present requirements serve no rational function other than to afford an opportunity to State officials to discriminate against Negroes if they desire to do so.

(xiv) Indeed, at the oral argument before this Court, counsel candidly conceded: "There is no question but that Georgia's jury selection statute is capable of being improperly administered. There is no question but that in Taliaferro County, Georgia, it has been misadministered."

jury commissioners to draw up a new jury list. The commissioners obtained the list of all persons registered to vote in the county in the last general election—some 2,152 names. To assist in the identification of all the people on the list, the commissioners consulted with "three Negroes that [they] brought in to work with [them] one afternoon" From the list the commissioners eliminated 374 people for poor health and old age; 79 as under 21 years old;(xv) 93 as dead; 514 as away from the county most of the time but maintaining a permanent place of residence there; 48 who requested that they be removed from consideration; 225 about whom the commissioners could obtain no information; 33 as duplicated names; and 178 "as not conforming to the statutory qualifications for juries either because of their being unintelligent or because of their not being upright citizens."

13. The process of elimination left 608 names. The commissioners arranged the names in alphabetical order and placed every other one on the list of potential jurors. At this point for the first time the commissioners classified the remaining 304 people by race: 113 were Negro, 191 white people. From this list the commissioners drew two-fifths of the names by lot for the grand-jury list; a check revealed 44 Negroes and 77 white people. The state superior court judge drew from this group nine Negroes and 23 white people by lot. He excused nine, leaving a 23-member grand jury of whom only six were Negroes.(xvi) It was this grand jury that the District Court determined had been constitutionally impaneled.

14. After the February hearing of the District Court, and at that court's request, the commissioners classified by race the persons eliminated from the voter list in arriving at the 608 persons eligible for jury service. The classification revealed that 171 of those rejected as unintelligent or not upright were Negroes—96% of the total removed for that

(xv) Although Georgia grants the franchise to its citizens at 18, Ga Const. Art. II, S. I, P. II, Ga Code Ann S. 2-702 (1948), the jury commissioners struck all persons under 21.

(xvi) At the adjourned hearing the superior court judge testified that he regularly excuses people from the traverse-jury lists as well as the grand-jury panel he draws in the courtroom. Whether the request to be excused was made in open court, in writing, or over the telephone, only the judge could excuse from grand-jury service those whose names he had drawn.

reason.(xvii) Although at the adjourned hearing the District Court recognized the potential for discrimination underlying the exclusion process, it did not reopen the matter following its receipt of the racial classification to consider the extraordinarily high percentage of Negroes eliminated as "unintelligent" or not "upright", or the large number of persons about whom the commissioners said they could obtain no information even though they were registered to vote in the county.

15. The appellants insist the District Court has erred. They say that since the grand jury selects the board of education, the situation must be viewed as one involving a distribution of voting power among the citizens of Taliaferro County in the manner of a voting apportionment case. A grand jury with only about 25% Negro membership, they say, constitutes the school-board "electorate" in a county whose population is about 60% Negro. The State must offer a compelling justification, it is argued, in support of its "fencing out" such a substantial proportion of the potential Negro "electors" in the county.

16. We do not find it necessary to consider the appellants' argument. Nor do we reach the premise upon which it rests—that the choice of the county board of education by the grand jury rather than delegates from local school boards turns the challenged procedure into an "election" for federal constitutional purposes.(xviii) For we think that even under long-established tests for racial discrimination in the composition of juries, the District Court erred in its determination that the new list before it had been properly compiled.

17. The undisputed fact was that Negroes comprised only 37% of the Taliaferro County citizens on the 304-member list from which the new grand jury was drawn. That figure contrasts sharply with the 60% of the representation that their percentage of the general Taliaferro County population would have led them to obtain in a random selection. In the absence of a countervailing explanation by the appellees, we cannot say that the underrepresentation reflected in these figures is so insubstantial as to warrant no corrective action by a federal court charged with the responsibility of enforcing constitutional guarantees.

(xvii) It also appeared that 191 of those stricken for poor health and old age were Negro (51%); 71 of those under 21 (90%); 263 of those away from the county (51%); and three who asked to be relieved from jury duty (6%).

(xviii) See *Sailors v. Bd. of Educ.*, 387 US 105, 106, 18 Law Ed 2d 650, 652, 87 S Ct 1549.

18. Specifically, we hold that the District Court should have responded to the elimination of 171 Negroes out of the 178 citizens disqualified for lack of "intelligence" or "uprightness". On the record as presently constituted, it is impossible to say that this purge of Negroes from the roster of potential jurors did not contribute in substantial measure to the ultimate underrepresentation. The retention of these 178 citizens might well have produced a jury list of at least an equal percentage of Negroes and white people, instead of the highly disproportionate list that actually materialized.

19. A second factor should have called itself to the District Court's attention: the lack of information respecting the 225 citizens named on the county's voting list but unknown to the jury commissioners or their assistants. Entirely apart from the question whether the commissioners' failure to inquire into the eligibility of the 225 voters comported with their statutory duty to ensure that the jury list fairly represent a cross-section of the county's intelligent and upright citizens,(xix) the court should not have passed without response the commissioners' elimination from consideration for jury service of about 9% of the population of the entire county. In the face of the commissioners' unfamiliarity with Negroes in the community and the informality of the arrangement by which they sought to remedy the deficiency in their knowledge upon recompiling the jury list, we cannot assume that inquiry would not have led to the discovery of many qualified Negroes.

20. In sum, the appellants demonstrated a substantial disparity between the percentages of Negro residents in the county as a whole and of Negroes on the newly constituted jury list. They further demonstrated that the disparity originated, at least in part, at the one point in the selection process where the jury commissioners invoked their subjective judgment rather than objective criteria. The appellants thereby made out a prima facie case of jury discrimination, and the burden fell on the appellees to overcome it.(xx)

(xix) Ga Code Ann S. 59-106 (Supp 1968).

(xx) See *Jones v. Georgia*, 389 US 24, 25, 19 Law Ed 2d 25, 26, 88 S Ct 4 (per curiam); *Coleman v. Alabama*, 389 US 22, 23, 19 Law Ed 2d 22, 23, 88 S Ct 2 (per curiam); *Avery v. Georgia*, 345 US 559, 562-563, 97 Law Ed 1244, 1247, 1248, 73 S Ct 891; *Patton v. Mississippi*, 332 US 463, 468-469, 92 Law Ed 76, 80, 68 S Ct 184, 1 ALR 2d 1286; *Hill v. Texas*, 316 US 400, 405-406, 86 Law Ed 1559, 1562, 1563, 62 S Ct 1159; *Norris v. Alabama*, 294 US

21. The testimony of the jury commissioners and the superior court judge that they included or excluded no one because of race did not suffice to overcome the appellants' *prima facie* case.(xxi) So far the appellees have offered no explanation for the overwhelming percentage of Negroes disqualified as not "upright" or "intelligent," nor for the failure to determine the eligibility of a substantial segment of the county's already registered voters. No explanation for this state of affairs appears in the record. The evidentiary void deprives the District Court's holding of support in the record as presently constituted. "If there is a 'vacuum' it is one which the State must fill, by moving in with sufficient evidence to dispel the *prima facie* case of discrimination."(xxii)

22. The appellants also urge that the limitation of school-board membership to freeholders violates the Equal Protection Clause of the Fourteenth Amendment.(xxiii) The District Court rejected this claim, finding no evidence before it "to indicate that such a qualification resulted in an invidious discrimina-

587, 594-596, 598, 79 Law Ed 1074, 1079, 1080, 1081, 55 S Ct 579.

(xxi) *Sims v. Georgia*, 389 US 404, 407, 19 Law Ed 2d 634, 637, 88 S Ct 523; *Whitus v. Georgia*, 385 US 545, 551, 17 Law Ed 2d 599, 604, 87 S Ct 643; *Eubanks v. Louisiana*, 356 US 584, 587, 2 Law Ed 2d 991, 994, 78 S Ct 970; *Hernandez v. Texas*, 347 US 475, 481-482, 98 Law Ed 866, 871, 872, 74 S Ct 667; *Avery v. Georgia*, *supra*, at 561; 97 Law Ed at 1247; *Norris v. Alabama*, *supra*, at 598, 79 Law Ed at 1081; *cf. Brown v. Allen*, 344 US 443, 481, 97 Law Ed 469, 501, 73 S Ct 397.

(xxii) *Avery v. Georgia*, *supra*, at 562, 97 Law Ed at 1248; *cf. Pierre v. Louisiana*, 306 US 354, 361-362, 83 Law Ed 757, 762, 59 S Ct 536; *Norris v. Alabama*, *supra*, at 594-595, 598-599, 79 Law Ed at 1079, 1081, 1082.

We reserve the question whether a State that for years has provided separate and inferior schools for Negroes may now disqualify them from jury service on the "impartial" ground of educational inadequacy, however defined. See *Gaston County v. United States*, 395 US 285, 297, 23 Law Ed 2d 309, 317, 89 S Ct 1720.

(xxiii) Georgia's contention that no appellant has standing to raise this claim is without merit. The appellant Calvin Turner is a freeholder, but the appellant Joseph Heath is not. Heath's motion to intervene was granted by the District Court for the express purpose of adding a party plaintiff to the case to ensure that the court could reach the merits of this issue. Georgia also argues that the ques-

tion against any particular segment of the community, based on race or otherwise."

23. Subsequent to the ruling of the District Court, this Court decided *Kramer v. Union Free School District*, (1969) 395 US 621, 23 Law Ed 2d 583, 89 S Ct 1886, and *Cipriano v. City of Houma*, (1969) 395 US 701, 23 Law Ed 2d 647, 89 S Ct 1897. The appellants urge that those decisions require Georgia to demonstrate a "compelling" interest in support of its freeholder requirement for school-board membership. The appellees reply that *Kramer* and *Cipriano* are inapposite because they involved exclusions from voting, not from office-holding. We find it unnecessary to resolve the dispute, because the Georgia freeholder requirement must fall even when measured by the traditional test for a denial of equal protection: whether the challenged classification rests on grounds wholly irrelevant to the achievement of a valid state objective.(xxiv)

24. We may assume that the appellants have no right to be appointed to the Taliaferro County board of education.(xxv) But the appellants and the members of their class do have a federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications.(xxvi) The State may not deny to some the privilege of holding public office that it extends to others on the basis of distinctions that violate federal constitutional guarantees.(xxvii)

25. Georgia concedes that "the desirability and wisdom of 'freeholder' relation is not properly before us because the record is devoid of evidence that the freeholder requirement actually has operated to exclude anyone from the Taliaferro County board of education. But the appellant Heath's allegation that he is not a freeholder is uncontested, and Georgia can hardly urge that her county officials may be depended on to ignore a provision of state law.

(xxiv) *McGowan v. Maryland*, 366 US 420, 425-426, 6 Law Ed 2d 393, 398, 399, 81 S Ct 1101; *Kotch v. Bd. of River Port Pilot Comm'rs*, 330 US 552, 556, 91 Law Ed 1093, 1096, 67 S Ct 910.

(xxv) *Cf. Snowden v. Hughes*, 321 US 1, 7, 88 Law Ed 497, 502, 64 S Ct 397.

(xxvi) *Cf. Anderson v. Martin*, 375 US 399, 402, 404, 11 Law Ed 2d 430, 432, 433, 84 S Ct 454; *Snowden v. Hughes*, *supra*, at 7-8, 88 Law Ed at 502.

(xxvii) *Cf. Carrington v. Rash*, 380 US 89, 91, 13 Law Ed 2d 675, 677, 85 S Ct 775; *Lassiter v. Northampton County Bd. of Elections*, 360 US 45, 50-51, 3 Law Ed 2d 1072, 1076, 79 S Ct 985; *Pope v. Williams*, 193 US 621, 632, 48 Law Ed 817, 822, 24 S Ct 573.

quirements for State or county political office may indeed be open to question. . . . But apart from its contention that prior decisions of this Court foreclose any challenge to the constitutionality of such "freeholder" requirements—a contention we think ill-founded(xxviii)—the sole argument Georgia advances in support of its statute is that nothing in its constitution or laws specifies any minimum quantity or value for the real property the freeholder must own. Thus, says Georgia, anyone who seriously aspires to county school-board membership "would be able to obtain a conveyance of the single square inch of land he would require to become a 'freeholder.'"

26. If we take Georgia at its word, it is difficult to conceive of any rational state interest underlying its requirement. But even absent Georgia's own indication of the insubstantiality of its interest in preserving the freeholder requirement, it seems impossible to discern any interest the qualification can serve. It cannot be seriously urged that a citizen in all other respects qualified to sit on a school board must also own real property if he is to participate responsibly in educational decisions, without regard to whether he is a parent with children in the local schools, a lessee who effectively pays the property taxes of his lessor as part of his rent, or a state and federal taxpayer contributing to the approximately 85% of the Taliaferro County annual school budget derived from sources other than the board of education's own levy on real property.

27. Nor does the lack of ownership of realty establish a lack of attachment to the community and its educational values. However reasonable the assumption that those who own realty do possess such an attachment, Georgia may not rationally presume that that quality is necessarily wanting in all citizens of the county whose estates are less than

(xxviii) Language to such effect may be found in *Strauder v. West Virginia*, 100 US 303, 310, 25 Law Ed 664, 666. But the passage relied upon by Georgia is no more than dictum. Later decisions invoking *Strauder* fall in the same category. *Gibson v. Mississippi*, 162 US 565, 580, 40 Law Ed 1075, 1078, 16 S Ct 904; *Neal v. Delaware*, 103 US 370, 386, 26 Law Ed 567, 570. *Vought v. Wisconsin*, 217 US 590, 54 Law Ed 895, 30 S Ct 694, is hardly apposite; there we dismissed an appeal for want of a meritorious question in a case where the appellant challenged a judgment of conviction arising from an indictment returned by a grand jury selected by commissioners required by statute to be freeholders.

freehold.(xxix) Whatever objectives Georgia seeks to obtain by its "freeholder" requirement must be secured, in this instance at least, by means more finely tailored to achieve the desired goal.(xxx) [Without excluding the possibility that other circumstances might present themselves in which a property qualification for office-holding could survive constitutional scrutiny, we cannot say, on the record before us, that the present freeholder requirement for membership on the county board of education amounts to anything more than invidious discrimination.

28. The judgment below is vacated, and the cause is remanded to the District Court for further proceedings consistent with this opinion.

29. It is so ordered.

(xxix) Cf. *Leary v. United States*, 395 US 6, 32-36, 23 Law Ed 2d 57, 79-81, 89 S Ct 1532; *Tot v. United States*, 319 US 463, 468, 87 Law Ed 1519, 1524, 63 S Ct 1241.

(xxx) Cf. *Carrington v. Rash*, supra, at 95-96, 13 Law Ed 2d at 679, 680.

[AIR 1971 U. S. S. C. 57 (V 58 C 11)]

(1969-24 Law Ed 2d 570)*

Donald Bachellar et. al., Petitioners
v. State of Maryland, Respondent.
No. 729, Decided on 20-4-1970.

† Constitution of India, Art. 19(1) (a) & (2) — Freedom of speech and expression — Case from U.S.A. — Anti-war demonstrations — Conviction for disorderly conduct — Setting aside when there is likelihood of its being based on unconstitutional ground.

Under the American Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers or simply because by-standers object to peaceful and orderly demonstrations. (Para 5)

The petitioners accused were tried and convicted for disorderly conduct in participating in Anti-Vietnam War demonstrations, in a State prosecution with the aid of jury which returned a general verdict of guilty.

Held that on the evidence on record petitioners' convictions could constitute

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† Reference is given to a parallel Indian provision for the convenience of Indian Lawyers.

KN/AO/D740/70/KSB/M

tionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. It was impossible to say, however, that either of these grounds was the basis for the verdict. On the contrary, it was equally likely that the verdict resulted "merely because petitioners' views about Vietnam were themselves offensive to some of their hearers." Thus, since petitioners' convictions may have rested on an unconstitutional ground, they must be set aside. (Para 11)

Cases Referred: Chronological Paras

- (1969) 394 US 576 = 22 Law Ed 572
= 89 S Ct 1354, *Street v. New York* 5, 10, 11
(1969) 396 US 816 = 24 Law Ed 68
= 90 S Ct 109 11
(1968) 3 Md App 626 = 240 A 2d 623 11
(1967) 354 US 298 = 1 Law Ed 2d 1356 = 77 S Ct 1064, *Yates v. United States* 10
(1965) 379 US 536 = 13 Law Ed 2d 471 = 85 S Ct 453, *Cox v. Louisiana* 3, 5, 11
(1965) 382 US 87 = 15 Law Ed 2d 176 = 86 S Ct 211, *Shuttlesworth v. Birmingham* 11
(1963) 372 US 229 = 9 Law Ed 2d 697 = 83 S Ct 894, *Edwards v. South Carolina* 5
(1949) 337 US 1 = 93 Law Ed 1131 = 69 S Ct 894, *Terminiello v. Chicago* 5, 10
(1942) 315 US 568 = 86 Law Ed 1031 = 62 S Ct 766, *Chaplinsky v. New Hampshire* 5
(1942) 317 US 287 = 87 Law Ed 279 = 63 S Ct 207, *Williams v. North Carolina* 10
(1931) 283 US 359 = 75 Law Ed 1117 = 51 S Ct 532, *Stromberg v. California* 10

Anthony G. Amsterdam, for Petitioners; H. Edgar Lentz, for Respondent.

SUMMARY

The defendants participated in an anti-Vietnam War demonstration in front of a United States Army recruiting station in downtown Baltimore, Maryland. As a result of their conduct in connection with this demonstration, they were prosecuted for disorderly conduct, tried before a jury in the Baltimore City Criminal Court, and convicted on the basis of the jury's general verdict of guilty. Among the trial judge's instructions to the jury was one which authorized them to return a guilty verdict if they found that the defendants had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same

area." The Maryland Court of Special Appeals affirmed the convictions, rejecting the defendants' contention that their conduct was constitutionally protected under the First and Fourteenth Amendments (3 Md App 626, 240 A 2d 623), and the Maryland Court of Appeals denied certiorari.

On certiorari, the United States Supreme Court reversed and remanded the case. In an opinion by Brennan, J., expressing the unanimous views of the court, it was held that (1) if the jury believed the prosecution's evidence, the defendants' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it, or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on, but it was impossible to say that either of these grounds was the basis for the verdict, and it was equally likely that the verdict resulted merely because the defendants' views about the Vietnam War, though not constituting "fighting words," were offensive to some of the onlookers, and (2) since the defendants' convictions might have rested on an unconstitutional ground, they had to be set aside.

OPINION OF THE COURT

Mr. JUSTICE BRENNAN delivered the opinion of the Court.

A jury in Baltimore City Criminal Court convicted petitioners of violating Md Code Ann. Art. 27, S. 123 (1967), (i) which prohibits "acting in a disorderly manner to the disturbance of the public peace, upon any public street . . . in any [Maryland] city . . ." (ii) The prosecution arose out of a demonstration protesting the Vietnam War which was staged between 3 and shortly after 5 O'clock on the afternoon of March 28, 1966, in front of a United States Army recruiting station located on a downtown Baltimore street. The Maryland Court of Special Appeals rejected petitioners' contention that their conduct was constitutionally protected under the First and Fourteenth Amendments and affirmed their convictions. (1968) 3 Md App 626 = 240 A2d 623. The Court of Appeals of Maryland denied certiorari in an unreported order. We granted certiorari. (1969) 396 US 816

(i) The trial in the Criminal Court was de novo upon appeal from a conviction in the Municipal Court of Baltimore. The Criminal Court judge sentenced each petitioner to 60 days in jail and a \$50 fine.

(ii) The statute was amended in 1968 but without change in the operative language involved in this case. See Md Code Ann. Art. 27, S. 123(c) (1969 Supp).

=24 Law Ed 2d 68=90 S Ct 109. We reverse.

2. The trial judge instructed the jury that there were alternative grounds upon which petitioners might be found guilty of violating S. 123. The judge charged, first, that a guilty verdict might be returned if the jury found that petitioners had engaged in "the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area." The judge also told the jury that "[a] refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct." (iii) So instructed, the jury returned a general verdict of guilty against each of the petitioners.

3. Since petitioners argue that their conduct was constitutionally protected, we have examined the record for ourselves. When "a claim of constitutionally protected right is involved, it

(iii) Both elements of the instruction were based on the Maryland Court of Appeals' construction of S. 123 in *Drews v. Maryland*, 224 Md 186, 192, 167 A2d 341, 343-344 (1961), vacated and remanded on other grounds, 378 US 547, 12 Law Ed 2d 1032, 84 S Ct 1900 (1964), reaffirmed on remand, 236 Md 349, 204 A2d 64 (1964), appeal dismissed and cert denied, 381 US 421, 14 Law Ed 2d 693, 85 S Ct 1576 (1965). The instruction was "that disorderly conduct is the doing or saying or both of that which offends, disturbs, incites or tends to incite a number of people gathered in the same area. It is conduct of such nature as to affect the peace and quiet of persons who may witness it and who may be disturbed or provoked to resentment because of it. A refusal to obey a policeman's command to move on when not to do so may endanger the public peace, may amount to disorderly conduct."

The trial judge refused to grant petitioners' request that the jury be charged to disregard any anger of onlookers that arose from their disagreement with petitioners' expressed views about Vietnam. For example, the Judge refused to instruct the jury that "if the only threat of public disturbance arising from the actions of these defendants was a threat that arose from the anger of others who were made angry by their disagreement with the defendants' expressed views concerning Viet Nam, or American involvement in Viet Nam, you must acquit these defendants. And if you have a reasonable doubt whether the anger of those other persons was occasioned by their disagreement with defendants' views on Viet Nam, rather than by the conduct of defendants in sitting or staying on the street, you must acquit these defendants."

'remains our duty . . . to make an independent examination of the whole record.' Cox v. Louisiana (I), (1965) 379 US 536, 545 n 8 = 13 Law Ed 2d 471, (478)=85 S Ct 453. We shall discuss first the factual situation that existed until shortly before 5 o'clock on the afternoon of the demonstration, since the pattern of events changed after that time. There is general agreement regarding the nature of the events during the initial period.

4. Baltimore law enforcement authorities had advance notice of the demonstration, and a dozen or more police officers and some United States marshals were on hand when approximately 15 protesters began peacefully to march in a circle on the sidewalk in front of the station. The marchers carried or wore signs bearing such legends as: "Peasant Emancipation, Not Escalation," "Make Love not War," "Stop in the Name of Love," and "Why are We in Viet Nam?" The number of protesters increased to between 30 and 40 before the demonstration ended. A crowd of onlookers gathered nearby and across the street. From time to time some of the petitioners and other marchers left the circle and distributed leaflets among and talked to persons in the crowd. The lieutenant in charge of the police detail testified that he "overheard" some of the marchers debate with members of the crowd about "the Viet Cong situation," and that a few in the crowd resented the protest; [o]ne particular one objected very much to receiving the circular." However, the lieutenant did not think that the situation constituted a disturbance of the peace. He testified that "[a]s long as the peace was not disturbed I wasn't doing anything about it."

5. Clearly the wording of the placards was not within that small class of "fighting words" which, under *Chaplinsky v. New Hampshire*, (1942) 315 US 568, 574=86 Law Ed 1031, (1036)=62 S Ct 766, are "likely to provoke the average person to retaliation, and thereby cause a breach of the peace," nor is there any evidence that the demonstrators' remarks to the crowd constituted "fighting words." Any shock effect caused by the placards, remarks, and peaceful marching must be attributed to the content of the ideas being expressed, or to the onlookers' dislike of demonstrations as a means of expressing dissent. But "[i]t is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers," *Street v. New York*, (1969) 394 US 576, (592)=22 Law Ed 2d 572, (585)=89 S Ct 1354; see also (1965) 379 US 536=13 Law Ed 2d 471=85 S Ct 453,

(supra); *Edwards v. South Carolina*, (1963) 372 US 229=9 Law Ed 2d 697=83 S Ct 680; *Terminiello v. Chicago*, (1949) 337 US 1=93 Law Ed 1131=69 S Ct 894, or simply because bystanders object to peaceful and orderly demonstrations. Plainly nothing that occurred during this period could constitutionally be the grounds for conviction under S. 123. Indeed, the State makes no claim that S. 123 was violated then.

6. We turn now to the events which occurred shortly before and after 5 o'clock. The petitioners had left the marchers after half past 3 to enter the recruiting station. There they had attempted to persuade the sergeant in charge to permit them to display their anti-war materials in the station or in its window fronting on the sidewalk. The sergeant had told them that Army regulations forbade him to grant such permission. The six thereupon staged a sit-in on chairs and a couch in the station.(iv) A few minutes before 5 o'clock the sergeant asked them to leave, as he wanted to close the station for the day. When petitioners refused, the sergeant called on United States marshals who were present in the station to remove them. After deputizing several police officers to help, the marshals undertook to eject the petitioners.(v)

7. There is irreconcilable conflict in the evidence as to what next occurred. The prosecution's witnesses testified that the marshals and the police officers "escorted" the petitioners outside, and that the petitioners thereupon sat or lay down, "blocking free passage of the sidewalk." The police lieutenant in charge stated that he then took over and three times ordered the petitioners to get up and leave. He testified that when they remained sitting or lying down he had each of them picked up bodily and removed to a patrol wagon. In sharp contrast, defense witnesses said that each petitioner was thrown bodily out the door of the station and landed on his back, that petitioners were not positioned so as to block the sidewalk completely, and that no police command was given to them to move away; rather, on the contrary, that as some of them struggled to get to their feet, they were held down by the police officers until they were picked up and thrown into the patrol wagon. The evidence is clear, however, that while

(iv) Petitioners' conduct in the station is not at issue in this case, since the State did not prosecute them for their conduct in that place.

(v) The local police officers were deputized as marshals because their local police powers did not extend to the federally operated recruiting station.

petitioners were on the sidewalk, they began to sing "We Shall Overcome" and that they were surrounded by other demonstrators carrying anti-war placards. Thus, petitioners remained obvious participants in the demonstration even after their expulsion from the recruiting station. (vi) A crowd of 50-150 people, including the demonstrators, was in the area during this period.

8. The reaction of the onlookers to these events was substantially the same as that to the earlier events of the afternoon. The police lieutenant added only that two uniformed marines in the crowd appeared angry and that a few other bystanders "were debating back and forth about Bomb Hanoi and different things and I had to be out there to protect these people because they wouldn't leave." Earlier too, however, some of the crowd had taken exception to the petitioners' protest against the Vietnam war.

9. On this evidence, in light of the instructions given by the trial judge, the jury could have rested its verdict on any of a number of grounds. The jurors may have found that petitioners refused "to obey a policeman's command to move on when not to do so [might have endangered] the public peace." Or they may have relied on a finding that petitioners deliberately obstructed the sidewalk, thus offending, disturbing and inciting the bystanders.(vii) Or the jurors may have credited petitioners' testimony that they were thrown to the sidewalk by the police and held there, and yet still have found them guilty of violating S. 123 because their anti-Vietnam protest amounted to "the doing or saying . . . of that which offends, disturbs, incites, or tends to incite a number of people gathered in the same area." Thus, on this record, we find that petitioners may have been found guilty of violating S. 123 simply because they advocated unpopular

(vi) The defense evidence indicated that petitioners were on the sidewalk after their removal from the recruiting station for only five minutes. A prosecution witness testified that they were there for 15 or 20 minutes.

(vii) Maryland states in its brief, at 41-42, that "[o]bstructing the sidewalk had the legal effect under these circumstances of not only constituting a violation . . . S. 123 . . . but also of Article 27, S. 121 of the Maryland Code, obstructing free passage." Had the State wished to ensure a jury finding on the obstruction question, it could have prosecuted petitioners under S. 121, which specifically punishes "[a]ny person who shall wilfully obstruct or hinder the free passage of persons passing along or by any public street or highway . . ."

ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions.

10. *Stromberg v. California*, (1931) 283 US 359=75 Law Ed 1117=51 S Ct 532=73 ALR 1484, is the controlling authority. There the jury returned a general verdict of guilty against an appellant charged under a California statute making it an offense publicly to display a red flag (a) "as a sign, symbol or emblem of opposition to organized government," (b) "as an invitation or stimulus to anarchistic action," or (c) "as an aid to propaganda that is of a seditious character." This Court held that clause (a) was unconstitutional as possibly punishing peaceful and orderly opposition to government by legal means and within constitutional limitations. The Court held that, even though the other two statutory grounds were severable and constitutional, the conviction had to be reversed, because the verdict did not specify the ground upon which it rested. As there were three purposes set forth in the statute, and the jury were instructed that their verdict might be given with respect to any one of them, independently considered, it is impossible to say under which clause of the statute the conviction was obtained. If any one of these clauses, which the State court has held to be separable, was invalid, it cannot be determined upon this record that the appellant was not convicted under that clause [The necessary conclusion from the manner in which the case was sent to the jury is that, if any of the clauses in question is invalid under the Federal Constitution, the conviction cannot be upheld.] (1931) 283 US 359 at p. 368=75 Law Ed 1117 at p. 1122. See also *Williams v. North Carolina*, (1942) 317 US 287=87 Law Ed 279=63 S Ct 207=143 ALR 1273; (supra), (1949) 337 US 1=93 Law Ed 1131=69 S Ct 894; *Fates v. United States*, (1967) 354 US 298=1 Law Ed 2d 1356=77 S Ct 1064; (1969) 394 US 576=22 Law Ed 572=89 S Ct 1354 (supra).

11. On this record, if the jury believed the State's evidence, petitioners' convictions could constitutionally have rested on a finding that they sat or lay across a public sidewalk with the intent of fully blocking passage along it or that they refused to obey police commands to stop obstructing the sidewalk in this manner and move on. See, e. g., *Cox v. Louisiana* (I), (1965) 379 US 536 at pp. 554-555=13 Law Ed 2d 471 at pp. 483, 484; *Shuttlesworth v. Birmingham*, (1965) 382 US 87, 90-91=15 Law Ed 2d 176, (179, 180)=86 S Ct 211. It is impossible to say, however, that either of these grounds was the basis for the verdict. On the contrary, so far as we can tell,

it is equally likely that the verdict resulted "merely because [petitioners' views about Vietnam were] themselves offensive to some of their hearers." (Supra) (1969) 394 US 576 at p. 592=22 Law Ed 2d 576 at p. 585. Thus, since petitioners' convictions may have rested on an unconstitutional ground, they must be set aside.

12. The judgment of the Maryland Court of Special Appeals is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Case remanded.

AIR 1971 U.S.S.C. 61 (V 58 C 12)

(1970-27 L Ed 2d 4)*

United States, Appellant v. Maryland Savings-Share Insurance Corporation, Respondent.

(No. 160) Decided on 19-10-1970.

† (A) Constitution of India, Art. 14 — (American decision) — Normally a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the Courts. (Para 5)

(B) Constitution of India, Art. 14 — (American decision) — The cut off date of 1-9-1957 provided in S. 501 (c) (14) (B) of Internal Revenue Code of 1954 which exempts from tax non-profit corporation but only if organised before 1-9-1957 is not arbitrary as the Congress had rational basis for declining to broaden the exemption because multiplication of newly formed corporations might burden otherwise valid federal programmes and hence the section cannot be held to be unconstitutional on the ground of discrimination. (Para 5)

Cases Referred: Chronological Paras

(1969) 394 US 802 = 22 L Ed 2d 739 = 89 S Ct 1404, <i>McDonald v. Board of Election Commrs.</i>	5
(1961) 366 US 420 = 6 L Ed 2d 393 = 81 S Ct 1101, <i>McGowan v. Maryland</i>	5
(1935) 295 US 76 = 79 L Ed 1311 = 55 S Ct 628, <i>Cf. Stanley v. Public Utilities Comm'n</i>	5
(1929) 279 US 582 = 73 L Ed 856 = 49 S Ct 430, <i>Standard Oil Co. v. City of Marysville</i>	5

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† Reference is given to a Parallel Indian Provision for the convenience of Indian Lawyers.

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(1929) 279 US 812 = 73 L Ed 971
= 49 S Ct 262, *Sampere v. New Orleans*

(1928) 166 La 776 = 117 So 827,
Sampere v. New Orleans

(1911) 220 US 502 = 55 L Ed 561
= 31 S Ct 490, *Sperry and Hutchinson Co. v. Rhodes*

(1910) 218 US 173 = 54 L Ed 987
= 30 S Ct 644, *Watson v. Maryland*

SUMMARY

A non-profit, mutual insurance corporation, chartered in 1962 by the Maryland Legislature for the purpose of insuring the accounts of share-holders of member savings and loan associations, instituted an action to recover federal income taxes in the United States District Court for the District of Maryland, attacking the constitutionality of the cutoff date of September 1, 1957, found in Section 501 (c) (14) (B) of the Internal Revenue Code of 1954 (26 USC S. 501 (c) (14) (B)), which grants an exemption from the payment of income taxes to organizations similar to the plaintiff corporation, but only if they were organized before the cutoff date provided in the statute. The District Court allowed recovery, holding that the statutory cutoff date was arbitrary and violative of the plaintiff's right to due process under the Fifth Amendment (308 F Supp 761).

On direct appeal, the United States Supreme Court reversed. In a per curiam opinion expressing the view of eight members of the court, it was held that the cutoff date provided in S. 501 (c) (14) (B) was not arbitrary or unconstitutional, since Congress had a rational basis relating to the protection of federal programs for its refusal to broaden the exemption by extending the cutoff date.

HARLAN, J., would have set the case for argument on the ground that the issues deserved plenary consideration.

OPINION OF THE COURT

Per Curiam.

This is a direct appeal by the United States from a district court judgment holding unconstitutional S. 501 (c) (14) (B) of the Internal Revenue Code of 1954, 26 USC S. 501 (c) (14) (B), on the ground that it arbitrarily discriminates between Maryland Savings-Share Insurance Corporation (MSSIC), the appellee, and other similar non-profit, mutual insurers.

2. MSSIC was established by the Maryland Legislature with the object of insuring the accounts of shareholders of member savings and loan associations. Although first chartered in 1962, it seeks the benefit of S. 501 (c) (14) (B), which exempts from tax non-profit corporations such as petitioner but only if organized

before September 1, 1957. (i) MSSIC's position is that September 1, 1957 is an arbitrary and unconstitutional cutoff date which must be excised from the section, leaving the section applicable to all corporations of the same nature as itself regardless of the date of their creation. We do not agree.

3. Prior to 1951, all savings and loan associations were exempt from taxation of income derived from their operations. Also exempt were non-profit corporations which insured the savings banks. In 1951, the savings bank exemption was discontinued, on findings that the industry had developed to a point comparable to that of commercial banks. The exemption for insurers, however, was continued, provided they were already in existence as of September 1, 1951. See Revenue Act of 1951, S. 313 (b), 65 Stat 490; S Rep No. 781, 82d Cong., 1st Sess, 2 US Code, Cong & Ad News 1969, 1991-1997 (1951). As of that date, three private insurers fell within the scope of the section—two of them in Massachusetts and one in Connecticut. Then, in 1956, a fourth such corporation was organized in Ohio, and four years later Congress moved the cutoff date forward to September 1, 1957. Act of April 22, 1960, 74 Stat 54.

4. In 1963, a similar bill, HR 3297, 88th Cong, 1st Sess, which would have moved the cutoff date forward to January 1, 1963, for the benefit of MSSIC, passed the House, but was never reported out by the Senate Finance Committee. Testimony before the committee indicated that continued forward movement of the date might lead to proliferation of state insurers that could hinder the operations and threaten the financial stability of the Federal Deposit Insurance Corporation and the Federal Savings and Loan Insurance Corporation. See Hearing before Senate Committee on Finance on H. R. 3297, 88th Cong., 2d Sess., 9-10 (1964).

5. Against this background, the District Court's invalidation of S. 501 (c) (14) (B) was error. The fact that Cong-

(i) Internal Revenue Code S. 501 (c) (14) (B), 26 USC S. 501 (c) (14) (B) provides:

"(B) Corporations or associations without capital stock organized before September 1, 1957, and operated for mutual purposes and without profit for the purpose of providing reserve funds for, and insurance of shares or deposits in—

"(i) domestic building and loan associations,

"(ii) co-operative banks without capital stock organized and operated for mutual purposes and without profit, or

"(iii) mutual savings banks not having capital stock represented by shares."

ress enacts a statute containing a "grandfather clause," which exempts from the general income-tax certain corporations organized prior to a specified date, does not of itself indicate that Congress has made an arbitrary classification. Cf. *Stanley v. Public Utilities Comm'n*, (1935) 295 US 76 = 79 L Ed 1311 = 55 S Ct 628; *Sperry and Hutchinson Co. v. Rhodes*, (1911) 220 US 502 = 55 L Ed 561 = 31 S Ct 490; *Watson v. Maryland*, (1910) 218 US 173 = 54 L Ed 987 = 30 S Ct 644; *Sampere v. New Orleans*, (1928) 166 La 776 = 117 So 827, aff'd per curiam, (1929) 279 US 812 = 73 L Ed 971 = 49 S Ct 262. Normally, a legislative classification will not be set aside if any state of facts rationally justifying it is demonstrated to or perceived by the courts. *McDonald v. Board of Election Comm'rs*, (1969) 394 US 802, 809 = 22 L Ed 2d 739, 745 = 89 S Ct 1404; *McGowan v. Maryland*, (1961) 366 US 420, 426 = 6 L Ed 2d 393, 399 = 81 S Ct 1101; *Standard Oil Co. v. City of Marysville*, (1929) 279 US 582, 586-587 = 73 L Ed 856, 860 = 49 S Ct 430. See also (1910) 218 US 173 supra, at 178 = 54 L Ed 987 at 990 = 30 S Ct 644. Here the legislative history of H. R. 3297 affirmatively discloses that Congress had a rational basis for declining in 1963 to broaden the exemption by extending the cutoff date of S. 501 (c) (14) (B). Just as a State may provide that after a specified date newly established common carriers must obtain state approval before entering into business so as to prevent proliferation of such carriers and excessive use of the State's highways, see *Stanley v. Public Utilities Comm'n*, supra, similarly Congress does not exceed its power to tax nor does it violate the Fifth Amendment when it refuses to exempt from tax newly formed corporations, the multiplication of which might burden otherwise valid federal programs. (ii)

Having noted probable jurisdiction by order of October 12, 1970, we now reverse the judgment of the District Court. So ordered.

(ii) The District Court's reliance on *Mayflower Farms, Inc. v. Ten Eyck*, 297 US 266, 80 L Ed 675, 56 S Ct 457 (1936), was misplaced, since, according to the Court in that case, the legislative record contained no affirmative showing of a valid legislative purpose. We thus need not pass upon the continuing validity of *Mayflower's* holding. We also find unpersuasive MSSIC's remaining argument that it is an instrumentality of the State and hence entitled to exemption from federal taxation under the doctrine of intergovernmental immunity and under S. 115 (a) (1) of the Code, 26 USC § 115 (a) (1). The District Court properly rejected these arguments.

Mr. JUSTICE HARLAN, considering that the issues in this case are deserving of plenary consideration, would set the case for argument.

AIR 1971 U.S.S.C. 63 (V 58 C 13)
(1970-26 L Ed 2d 586)*

Willie E. Williams, Appellant v.
State of Illinois, Respondent.
No. 1089, Decided on 29-6-1970.

† (A) Constitution of India, Pre. — A statute is not constitutionally infirm simply because the legislature could have achieved the same result by some other means (X-Ref. Interpretation of Statutes — Constitutionality of legislation).

(Para 5)

(B) Constitution of India, Art. 14 — (Case from U.S.A.) — When the aggregate imprisonment of an indigent state prisoner exceeds the maximum period fixed by the statute governing the offence involved and results directly from an involuntary non-payment of a fine or court costs, there is an impermissible discrimination which rests on ability to pay, violative of the equal protection clause of the Fourteenth Amendment. (Para 9)

The Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offence be the same for all defendants irrespective of their economic status. Under that clause an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum term authorised by the statute regulating the substantive offence. (Paras 10, 15)

A state statute which, with regard to a criminal conviction, authorizes the inclusion in the judgment of a provision ordering that if the defendant is in default of the payment of a fine at the expiration of his sentenced imprisonment, he shall remain in jail to "work off" the fine at the rate of \$ 5 per day — although non-discriminatory on its face since it does not distinguish between defendants on the basis of ability to pay fines, and since it extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying the money portion of the judgment — works an invidious discrimination as applied to an indigent unable to pay the fine, and in operative effect visits different consequences on two cate-

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† Reference is given to a Parallel Indian Provision for the convenience of Indian Lawyers.

64 U.S.S.C.	[Pr. 1]	Williams v. Illinois	A.I.R.
gories of persons, since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the fine. (Para 12) (C) Constitution of India, Art. 14 — (Case from U.S.A.) — A law non-discriminatory on its face may be grossly discriminatory in its operation. (Para 12) (D) Constitution of India, Pre. — While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, such factors should be weighed in the balance — (X-Ref. Interpretation of Statutes). (Para 7)			
Cases Referred: Chronological Paras (1970) 26 L Ed 2d 308, Welsh v. United States 34 (1970) 26 L Ed 2d 773, Phillip Morris v. Hiram Schoon-Field 1 (1970) 397 US 397 = 25 L Ed 2d 442 = 90 S Ct 1207, Cf. Rosado v. Wyman 34 (1970) 397 US 337 = 25 L Ed 2d 353 = 90 S Ct 1057, Illinois v. Allen 28 (1969) 394 US 618 = 22 L Ed 2d 600 = 89 S Ct 1322, Shapiro v. Thompson 21, 22, 25 (1969) 41 Ill 2d 511 = 244 NE 2d 197, People v. Williams 4 (1968) 391 US 367 = 20 L Ed 2d 672 = 88 S Ct 1673, United States v. O'Brien 27 (1968) 393 US 23 = 21 L Ed 2d 24 = 89 S Ct 5, Williams v. Rhodes 22 (1967) 385 US 440 = 17 L Ed 2d 501 = 87 S Ct 569, Swann v. Adams 25 (1967) 386 US 738 = 18 L Ed 2d 493 = 87 S Ct 1396, Anders v. California 24 (1966) 383 US 663 = 16 L Ed 2d 169 = 86 S Ct 1079, Shapiro Harper v. Board of Elections 22 (1966) 384 US 305 = 16 L Ed 2d 577 = 86 S Ct 1497, Rinaldi v. Yeager 18 (1964) 377 US 533 = 12 L Ed 2d 506 = 84 S Ct 1362, Reynolds v. Sims 24 (1963) 372 US 353 = 9 L Ed 2d 811 = 83 S Ct 814, Douglas v. California 22, 24 (1961) 367 US 497 = 6 L Ed 2d 989 = 81 S Ct 1752, Poe v. Ullman 21, 26, 28 (1961) 368 US 157 = 7 L Ed 2d 207 = 82 S Ct 248, Garner v. Louisiana 27 (1960) 363 US 603 = 4 L Ed 2d 1435 = 80 S Ct 1367, Flemming v. Nestor 21, 25, 26 (1958) 357 US 449 = 2 L Ed 2d 1488 = 78 S Ct 1163, NAACP v. Alabama 27 (1956) 351 US 12 = 100 L Ed 891 = 76 S Ct 585 = 55 ALR 2d 1055, Griffin v. Illinois 10, 12, 22			
(1950) 339 US 306 = 94 L Ed 865 = 70 S Ct 652, Cf. Mullane v. Central Hanover Trust Co. 30 (1949) 337 US 241 = 93 L Ed 1337 = 69 S Ct 1079, Williams v. New York 13 (1942) 316 US 535 = 86 L Ed 1655 = 62 S Ct 1110, Skinner v. Oklahoma 26 (1938) 303 US 444 = 82 L Ed 949 = 58 S Ct 666, Lovell v. City of Griffin 27 (1936) 298 US 460 = 80 L Ed 1283 = 56 S Ct 760, Hill v. United States 7 (1883) 110 US 516 = 28 L Ed 232 = 4 S Ct 111, Hurtado v. California 21 (1877) 96 US 727 = 24 L Ed 877, Ex Parte Jackson 7			
Stanley A. Bass, for Appellant; James R. Thompson, for Respondent.			
SUMMARY			
An indigent who had been convicted in an Illinois court for petty theft, and who had received the maximum sentence of 1 year's imprisonment and a \$500 fine plus \$5 in court costs, filed a post-conviction petition with the sentencing judge to vacate that portion of the judgment of conviction which, as permitted by state statute, directed that if the defendant was in default of the monetary payment at the expiration of his imprisonment term, he should remain in jail to "work off" the monetary obligations at the statutory rate of \$5 per day. The trial court denied the petition, and the Supreme Court of Illinois affirmed, holding that there was no denial of equal protection of the law by continuation of imprisonment upon the indigent's inability to pay the fine and court costs (41 Ill 2d 511, 244 NE2d 197, 31 ALR3d 920).			
On appeal, the Supreme Court of the United States vacated the judgment and remanded the case. In an opinion by Burger, Ch. J., expressing the view of seven members of the court, it was held that there was an impermissible discrimination, violative of the equal protection clause of the Fourteenth Amendment, when the aggregate imprisonment of an indigent state prisoner exceeded the maximum period fixed by the statute governing the offense involved, and resulted directly from an involuntary non-payment of a fine or court costs.			
HARLAN, J., concurred in the result, but stated that the matter should be governed by due process standards rather than by equal protection standards, and that when a state declared that its penal interest could be satisfied by a fine or a forfeiture in combination with a jail term, the administrative inconvenience in a judgment collection procedure providing for instalment payments did not, as a matter of due process, justify sending to			

jail or extending the jail term of individuals who possessed no accumulated assets.

BLACKMUN, J., did not participate.

OPINION OF THE COURT

Mr. CHIEF JUSTICE BURGER delivered the opinion of the Court.

1. This appeal from Illinois presents an important question involving a claim of discriminatory treatment based upon financial inability to pay a fine and court costs imposed in a criminal case. The narrow issue raised is whether an indigent may be continued in confinement beyond the maximum term specified by statute because of his failure to satisfy the monetary provisions of the sentence. We noted probable jurisdiction (i) and set the case for oral argument with *Morris v. Schoonfield*, (1970) 26 L Ed 2d 773.

2. On August 15, 1967, appellant was convicted of petty theft and received the maximum sentence provided by state law; one year imprisonment and a \$500 fine (ii). Appellant was also taxed \$5 in court costs. The judgment directed, as permitted by statute that if appellant was in default of the payment of the fine and court costs at the expiration of the one-year sentence, he should remain in jail pursuant to S. 1-7. (k) of the Ill Crim Code to "work off" the monetary obligations at the rate of \$5 per day (iii). Thus, whereas the maximum

(i) 396 US 1036, 24 L Ed 2d 680—90 S Ct 689.

(ii) Ill Rev Stat 1967, c 38, p 13-I, which proscribes theft of property not from the person and not exceeding \$150 in value.

(iii) Section 1-7(k) of the Criminal Code of 1961 provides:

"Working out Fines.

"A judgment of a fine imposed upon an offender may be enforced in the same manner as a judgment entered in a civil action; provided, however, that in such judgment imposing the fine the court may further order that upon non-payment of such fine, the offender may be imprisoned until the fine is paid, or satisfied at the rate of \$5.00 per day of imprisonment; provided, further, however, that no person shall be imprisoned under the first proviso hereof for a longer period than 6 months."

1971 U.S.S.C./5 X G—15A

term of imprisonment for petty theft was one year, the effect of the sentence imposed here required appellant to be confined for 101 days beyond the maximum period of confinement fixed by the statute since he could not pay the fine and costs of \$505.

3. On November 29, 1967, appellant, while still an inmate in the county jail, petitioned the sentencing judge (iv) to vacate that portion of the order requiring that he remain imprisoned upon expiration of his one year sentence because of non-payment of the fine and court costs. Appellant alleged that he was indigent at all stages of the proceedings, was without funds or property to satisfy the money portion of the sentence and that he would "be able to get a job and earn funds to pay the fine and costs if... released from jail upon expiration of his one year sentence." The State did not dispute the factual allegations (v) and the trial court granted the State's motion to dismiss the petitioner "... for the reason that [appellant] was not legally entitled at that time to the relief requested ... because he still has time to serve on his jail sentence and when that sentence has been served financial ability to pay a fine might not be the same as it was of the date [of sentencing]."

4. Appeal was taken directly to the Supreme Court of Illinois, which appears to have rejected any suggestion by the trial court that the petition was premature and wert on

(iv) The post-conviction petition was filed pursuant to S. 72 of the Illinois Civil Practice Act.

(v) Parenthetically we note that appellant was unable to post pretrial bail of \$2,000 and was therefore required to remain in custody.

On May 23, 1968 appellant completed service of his one year sentence less time off for time spent in custody prior to trial. He then began serving the period of incarceration required to satisfy the \$505 fine and cost. On May 28, 1968 however, the Supreme Court of Illinois, on motion of appellant's counsel, set bail pending appeal at \$500; the 10 % deposit was posted by the Civil Legal Aid Service. Appellant is free on bond, and since he has not yet served the full period of incarceration to satisfy the fine and costs the case is not moot.

to decide appellant's constitutional claim on the merits. It held that "there is no denial of equal protection of the law when an indigent defendant is imprisoned to satisfy payment of the fine." *People v. Williams* (1969) 41 Ill 2d 511, 517 = 244 NE 2d 197, 200 (vi).

5. In addition to renewing the constitutional argument rejected by the state courts, appellant advances a host of other claims(vii) which, in light of our disposition, we find unnecessary to reach or decide. Appellant challenges the constitutionality of S. 1-7 (k) of the Illinois Criminal Code and argues primarily that the Equal Protection Clause of the Fourteenth Amendment prohibits imprisonment of an indigent beyond the maximum term authorized by the statute governing the substantive offense when that imprisonment flows directly from his present inability to pay a fine and court costs. In response the State asserts its interest in the collection of revenues produced by payment of fines and contends that a "work off" system, as provided by S. 1-7 (k), is a rational means of implementing that policy. That interest is substantial and legitimate but for present purposes it is not unlike the State's interest in collecting a fine from an indigent person in circumstances where no imprisonment is included in the judgment. The State argues further that the statute is not constitutionally infirm simply because the legislature could have achieved the same result by some other means. With that general proposition we have no quarrel but that generality does not resolve the issue.

6. As noted earlier, appellant's incarceration beyond the statutory maximum stems from separate albeit related reasons: nonpayment of a fine

(vi) The Supreme Court of Illinois dealt exclusively with that portion of the unpaid sum stemming from the fine. Its opinion contains no discussion of the constitutionality of incarceration arising from failure to pay court costs even though the issue was tendered.

(vii) Appellant also argues that every instance of default imprisonment violates either the Equal Protection and/or Due Process Clause (s) of the Fourteenth Amendment. He also asserts that the \$5.00 per diem figure is unreasonable and irrational.

and nonpayment of court costs. We find that neither of those grounds can constitutionally support the type of imprisonment imposed here, but we treat the fine and costs together because disposition of the claim on fines governs our disposition on costs (viii).

7. The custom of imprisoning a convicted defendant for nonpayment of fines dates back to medieval England(ix) and has long been practiced in this country. At the present time all States and the Federal Government have statutes authorizing incarceration under such circumstances. Most States permit imprisonment beyond the maximum term allowed by law, and in some there is no limit on the length of time one may serve for nonpayment (x). While neither the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack, these factors should be weighed in the balance(xi). Indeed, in prior cases this Court seems to have tacitly approved incarceration

(viii) See n 20, *infra*.

(ix) See generally, 2 Holdsworth, *A History of England*, 43-44 (3rd ed 1923); Bishop on Criminal Law 940, p 693 (9th ed 1923); 1 Stephen, *A History of the Criminal Law of England* 57 (1883). See also, Note, Fine, Imprisonment, and the Poor, 57 Cal L Rev 778, 780-787 (1969).

(x) The National Legal Aid and Defender Association, as Amicus Curiae, has filed a brief containing an extensive appendix which includes all the state statutes with helpful annotations. We have reproduced this portion of their brief as an appendix to this opinion. The corresponding federal statutes are 18 USC Ss. 3565, 3569 (1964). See also Note, The Equal Protection Clause and Imprisonment of the Indigent for Nonpayment of Fines, 64 Mich L Rev 938 (1968).

(xi) See *Walz v. New York City Tax Comm'n*, — US —, 25 L Ed 2d 697, 707, 90 S Ct 1409, where we noted that "Nearly 50 years ago Mr. Justice Holmes stated:

"(I)f a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it." (*Jackman v. Rosenbaum*, 260 US 22, 31, (67 L Ed 107, 112, 43 S Ct 9) (1922)."

to "work off" unpaid fines. See *Hill v. United States*, 298 US 460, 80 L Ed 1283, 56 S Ct 760 (1936); *Ex parte Jackson*, (1877) 96 US 727 = 24 L Ed 877(xii).

8. The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country(xiii). Default imprisonment has traditionally been justified on the grounds that it is a coercive device to ensure obedience to the judgment of the court(xiv). Thus, commitment for failure to pay has not been viewed as a part of the punishment or as an increase in the penalty; rather, it has been viewed as a means of enabling the court to enforce collection of money which a convicted defendant was obligated by the sentence to pay. The additional imprisonment, it has been said, may always be avoided by payment of the fine(xv).

9. We conclude that when the aggregate imprisonment exceeds the maximum period fixed by the statute and results directly from an involuntary nonpayment of a fine or court costs we are confronted with an impermissible discrimination which rests on ability to pay, and accordingly, we reverse.

10. *Griffin v. Illinois*, (1956) 351 US 12 = 100 L Ed 891 = 76 S Ct 585 = 55 ALR 2d 1055 marked a significant effort to alleviate discrimination against those who are unable to meet the costs of litigation in the administration of criminal justice. In holding the failure to provide an indigent criminal defendant with a trial transcript at public expense in order to prosecute

(xii) We note, however, that neither in those cases, nor at any other time, were the constitutional issues flowing from lack of funds presented to this Court for resolution.

(xiii) See, e.g., I. Silverstein, *Defense of the Poor*, 123 (1965); Rubin, *Criminal Correction* 253 (1963).

(xiv) See, e.g., Chief Judge Desmond's excellent treatment of the historical development in *People v. Saffore*, 18 NY 2d 101, 271 NYS 2d 972, 218 NE 2d 618 (1966).

(xv) See, e.g., *Peeples v. District of Columbia*, 75 A 2d 845, 847 [DC Mun App 1950].

te an appeal was a violation of the Equal Protection Clause, this Court declared that "(t)here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.*, at 19 = 100 L Ed at 899 = 55 ALR 2d 1055. In the years since the *Griffin* case the Court has had frequent occasion to reaffirm allegiance to the basic command that justice be applied equally to all persons (xvi). Subsequent decisions of this Court have pointedly demonstrated that the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process (xvii). Applying the teaching of the *Griffin* case here, we conclude that an indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense.

11. A State has wide latitude in fixing the punishment for state crimes. Thus, appellant does not assert that Illinois could not have appropriately fixed the penalty, in the first instance, at one year and 101 days. Nor has the claim been advanced that the sentence imposed was excessive in light of the circumstances of the commission of this particular offense. However, once the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment beyond the statutory maximum solely by reason of their indigency.

12. It is clear, of course, that the sentence was not imposed upon appellant because of his indigency but because he had committed a crime. And the Illinois statutory scheme does not distinguish between defendants on the basis of ability to pay fines. But, as we said in (1956) 351 US 12 = 100 L Ed 891 *supra*, "a law nondiscriminatory on its face may be grossly discriminatory in its operation." *Id.*, at

(xvi) See, Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv L Rev 435 (1967).

(xvii) See, e.g., *Rinaldi v. Yeager*, 384 US 305, 16 L Ed 2d 577, 86 S Ct 1497 (1966); *Douglas v. California*, 372 US 353, 9 L Ed 2d 811, 83 S Ct 814 (1963); *Smith v. Bennett*, 365 US 708, 6 L Ed 2d 39, 81 S Ct 895 (1961).

17, n 11 = 100 L Ed at 898 = 55 ALR 2d 1055. Here the Illinois statute as applied to Williams works an invidious discrimination solely because he is unable to pay the fine. On its face the statute extends to all defendants an apparently equal opportunity for limiting confinement to the statutory maximum simply by satisfying a money judgment. In fact, this is an illusory choice for Williams or any indigent who, by definition, is without funds(xviii). Since only a convicted person, with access to funds can avoid the increased imprisonment the Illinois statute in operative effect exposes only indigents to the risk of imprisonment beyond the statutory maximum. By making the maximum confinement contingent upon one's ability to pay, the State has visited different consequences on two categories of persons since the result is to make incarceration in excess of the statutory maximum applicable only to those without the requisite resources to satisfy the money portion of the judgment(xix).

13. The mere fact that an indigent in a particular case may be imprisoned for a longer time than is a non-indigent convicted of the same offense does not, of course, give rise to a violation of the Equal Protection Clause. Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations which appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus it was that in *Williams v. New York*, (1949) 337 US 241, 247, 93 L Ed 1337, 1342, 69 S Ct 1079 we said "The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender."

(xviii) See, e. g., Goldberg, *Equality and Governmental Action*, 39 NYU L Rev 205, 221 (1964).

(xix) We wish to make clear that nothing in our decision today precludes imprisonment for willful refusal to pay a fine or court costs. See *Ex parte Smith*, 97 Utah 280, 92 P 2d 1098 (1939). Cf. *Illinois v. Allen*, 397 US 337, 25 L Ed 2d 353, 90 S Ct 1057 (1970).

14. Nothing in today's decision curtails the sentencing prerogative of a judge because, as noted previously, the sovereign's purpose in confining an indigent beyond the statutory maximum is to provide a coercive means of collecting or "working out" a fine. After having taken into consideration the wide range of factors underlying the exercise of his sentencing function, nothing we now hold precludes a judge from imposing on an indigent, as on any defendant, the maximum penalty prescribed by law.

15. It bears emphasis that our holding does not deal with a judgment of confinement for non-payment of a fine in the familiar pattern of alternative sentence of "\$30 or 30 days." We hold only that a State may not constitutionally imprison beyond the maximum duration fixed by statute a defendant who is financially unable to pay a fine. A statute permitting a sentence of both imprisonment and fine cannot be parlayed into a longer term of imprisonment than is fixed by the statute since to do so would be to accomplish indirectly as to an indigent that which cannot be done directly. We have no occasion to reach the question whether a State is precluded in any other circumstances from holding an indigent accountable for a fine by use of penal sanction. We hold only that the Equal Protection Clause of the Fourteenth Amendment requires that the statutory ceiling placed on imprisonment for any substantive offense be the same for all defendants irrespective of their economic status(xx).

(xx) What we have said regarding imprisonment for involuntary nonpayment of fines applies with equal force to imprisonment for involuntary nonpayment of court costs. Although the actual amounts prescribed for fines and court costs reflect quite different considerations, see generally, *Litigation Costs: The Hidden Barrier to the Indigent*, 56 Geo LJ 516 (1968), the purpose of incarceration appears to be the same in both instances: ensuring compliance with a judgment. Thus inability to pay court costs cannot justify imprisoning an indigent beyond the maximum statutory term since the Equal Protection Clause prohibits expanding the maximum term specified

16. The State is not powerless to enforce judgments against those financially unable to pay a fine; indeed, a different result would amount to inverse discrimination since it would enable an indigent to avoid both the fine and imprisonment for nonpayment whereas other defendants must always suffer one or the other conviction.

17. It is unnecessary for us to canvass the numerous alternatives to which the State by legislative enactment—or judges within the scope of their authority—may resort in order to avoid imprisoning an indigent beyond the statutory maximum for involuntary nonpayment of a fine or court costs. Appellant has suggested several plans, some of which are already utilized in some States, while others resemble those proposed by various studies(xxi). The State is free to choose from among the variety of solutions already proposed and, of course, it may devise new ones.(xxi)

18. We are not unaware that today's holding may place a further burden on States in administering criminal justice. Perhaps a fairer and more accurate statement would be that new cases expose old infirmities which apathy or absence of challenge have permitted to stand. But the constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of the status quo. "Any supposed administrative inconvenience would be by the statute simply because of inability to pay.

(xxi) Appellant has suggested that the fine and costs could be collected through an installment plan as is currently used in several States. E. g., Cal Pen Code S. 1205; Mich Stats Ann S 28.1075 (1959); Pa Stat Ann tit 19, Ss. 953-956 (1964). See also A. B. A. Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures (Approved Draft, 1968) S. 27 (b), pp. 117-123.

Appellant also suggests that the trial judge could impose a parole requirement on an indigent that he do specified work during the day to satisfy the fine. Cf. 50 USC App 456.

See also Model Penal Code S. 7.02 (3) (a). (Proposed Official Draft 1965).

(xxii) Cf. United States v. Wade, 388 US 218, 239, 18 L Ed 2d 1149, 1164, 87 S Ct 1926 (1967).

minimal since... [the unpaid portion of the judgement] could be reached through the ordinary processes of garnishment in the event of default". Rinaldi v. Yeager, (1966) 384 US 305, 310 = 16 L Ed 2d 577, 581 = 86 S Ct 1497.

19. Nothing we hold today limits the power of the sentencing judge to impose alternative sanctions permitted by Illinois law; the definition of such alternatives, if any, lies with the Illinois courts. We therefore vacate the judgment appealed from and remand to the Supreme Court of Illinois for further proceedings not inconsistent with this opinion.

It is so ordered.

Mr. Justice Blackmun took no part in the consideration or decision of this case.

APPENDIX

STATE STATUTORY PROVISIONS CONCERNING INCARCERA- TION FOR FAILURE TO PAY FINE

xx xx xx SEPARATE OPINION

MR. JUSTICE HARLAN, concurring in the result.

20. I concur in today's judgment, but in doing so wish to dissociate myself from the "equal protection" rationale employed by the Court to justify its conclusions.

21. The "equal protection" analysis of the Court is, I submit, a "wolf in a sheep's clothing," for that rationale is no more than a masquerade of a supposedly objective standard for 'subjective' judicial judgment as to what state legislation offends notions of "fundamental fairness." Under the rubric of "equal protection" this Court has in recent times effectively substituted its own "enlightened" social philosophy for that of the legislature no less than did in the older days the judicial adherents of the now discredited doctrine of "substantive" due process. I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this petitioner. Due process, as I noted in my dissenting opinion in Poe v. Ullman, (1961), 367 US 497, 522 = 6 L Ed 2d 989, 1007 = 81 S Ct 1752 is more than merely a procedural safeguard; it is also a "bulwar[k] . . .

against arbitrary legislation.' " *Hurtado v. California*, 110 US 516, 532 = 28 L Ed 232, 237 = 4 S Ct 111. See *Flemming v. Nestor*, (1960) 363 US 603 = 4 L Ed 2d 1435 = 80 S Ct 1367 and my dissenting opinion in *Shapiro v. Thompson*, (1969) 394 US 618, 655 = 22 L Ed 2d 600, 627 = 89 S Ct 1322.

22. The matrix of recent "equal protection" analysis is that the "rule that statutory classifications which either are based upon certain 'suspect' criteria, or affect 'fundamental rights' will be held to deny equal protection unless justified by a 'compelling' governmental interest," *Shapiro v. Thompson*, supra, (1969) 394 US 618 at 658 = 22 L Ed 2d 600 at 629 (Harlan, J., dissenting). In *Shapiro, Harper v. Board of Elections*, (1966) 383 US 663, 680 = 16 L Ed 2d 169, 180 = 86 S Ct 1079, and *Williams v. Rhodes*, (1968) 393 US 23, 41 = 21 L Ed 2d 24, 37 = 89 S Ct 5. I attempted, in dissent, to expose the weakness in the precedential and jurisprudential foundation upon which the current doctrine of "equal protection" sits. See also (1956) 351 US 12, 29, at 34-36 = 100 L Ed 891, 904, at 906-908 = 76 S Ct 585 = 55 ALR 2d 1055 (dissenting opinion); *Douglas v. California*, (1963) 372 US 353, 360 = 9 L Ed 2d 811, 816 = 83 S Ct 814 (dissenting opinion). I need not retrace the views expressed in these cases, except to object once again to this rhetorical preoccupation with "equalizing" rather than analyzing the 'rationality' of the legislative distinction in relation to legislative purpose.

23. An analysis under due process standards, correctly understood, is, in my view, more conducive to judicial restraint than an approach couched in slogans and ringing phrases, such as "suspect" classification or "invidious" distinctions, or "compelling" state interest, that blur analysis by shifting the focus away from the nature of the individual interest affected, the extent to which it is affected, the rationality of the connection between legislative means and purpose, the existence of alternative means for effectuating the purpose, and the degree of confidence we may have that the statute reflects the legislative concern for the purpose that would legitimately support the means chosen. Accordingly, I turn to the case at hand.

24. The State of Illinois has made the unquestionably legitimate determination that the crime of petty larceny should be punished by a jail term of days, up to one year, in combination with a fine of a dollar amount. Anyone who, in the judgment of the trial judge, should receive the stiffest penalty known to Illinois law for this crime may, if he possesses funds, satisfy the demands of the criminal law by paying the fine superimposed on the jail term. If he cannot pay his debt to society, it is surely not unequal, but, to the contrary, most equal, that some substitute sanction be imposed lest the individual of means be subjected to a harsher penalty than one who is impoverished. If equal protection implications of the Court's opinion were to be fully realized, it would require that the consequence of punishment be comparable for all individuals; the State would be forced to embark on the impossible task of developing a system of individualized fines, such that the total disutility of the entire fine, or the marginal disutility of the last dollar taken, would be the same for all individuals. Cf. Michelman, Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv L Rev 7 (1969). Today's holding, and those in the other so-called "equal protection" decisions, e.g., (1963) 372 US 353 = 9 L Ed 2d 811 = 83 S Ct 814 *Anders v. California*, (1967) 386 US 738 = 18 L Ed 2d 493 = 87 S Ct 1396 offer no pretense to actually providing such equal treatment. It cannot be argued that the requirement of counsel on appeal is the right to the most skilled advocate who is theoretically at the call of the defendant of means. However desirable and enlightened a theory of social and economic equality may be, it is not a theory that has the blessing of the Fourteenth Amendment. Not "every major social ill in this country can find its cure in some constitutional 'principle; and... this Court (is not equipped to) take the lead' in promoting reform when other branches fail to act. The Constitution is not a panacea for every blot upon the public welfare, nor should this Court, ordained as a judicial body, be thought of as a general haven for reform movements." See *Reynolds v. Sims*, (1964) 377 US 533, 589, at 624, 625, = 12 L

Ed 2d 506, 543, 562, 563 = 84 S Ct 1362 (dissenting opinion).

25. The reluctance of the Court to carry its "equal protection" approach to its most logical consequences accents what I deem to be the true considerations involved in this case, namely, whether the legislature has impermissibly affected an individual right or has done so in an arbitrary fashion. Cf. Michelman, *supra*. While legislation usually will not be deemed arbitrary if its means can arguably be supposed to be related to a legitimate purpose, see my dissenting opinion in (1969) 394 US 618 = 22 L Ed 2d 600, *supra*, and generally the burden of demonstrating the existence of a rational connection between means and ends is not borne by the State, see (1960) 363 US 603 = 4 L Ed 2d 1435 = 80 S Ct 1367 and my dissenting opinion in *Swann v. Adms.*, (1967) 385 US 440 447 = 17 L Ed 2d 501, 506 = 87 S Ct 569 the presumption of regularity that comes with legislative judgment is one that is not equally acceptable in all instances, blind to the nature of the interests affected.

26. Thus, as a due process matter I have subscribed to the admonition of *Skinner v. Oklahoma*, (1942) 316 US 535, 541 = 86 L Ed 1655, 1660 = 62 S Ct 1110, where the Court cautioned that "there are limits to the extent to which the presumption of constitutionality can be pressed" where a "basic liberty" is concerned. (1942) 316 US 535, 541, = 86 L Ed 1655, 1660 = 62 S Ct 1110. See my dissenting opinion in 1961 367 US 497, 522, at 543 = 6 L Ed 2d 989, 1007, at 1019 = 81 S Ct 1752. The same view point was implicit in (1960) 363 US 603 = 4 L Ed 2d 1435 = 80 S Ct 1367 where the Court remarked the breadth of latitude to be accorded to a legislative judgment when the interest was that of a "noncontractual benefit under a social welfare program." 363 US, at 611, 4 L Ed 2d at 1445. Thus while that "interest . . . is of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause," when that interest is the "withholding of a noncontractual benefit under a social welfare program. . . .", we must recognize that the Due Process Clause can be thought to interpose a bar only if the statute

manifests a patently arbitrary classification, utterly lacking in rational justification." 363 US, at 611, 4 L Ed 2d at 1445.

27. The implication of *Fleming* is, however, that the deference owed to legislative judgment is not the same in all cases. Thus legislation that regulates conduct but incidentally affects freedom of expression may, although it is a rational choice to effectuate a legitimate legislative purpose, be invalid because it imposes a burden on that right, or because other means, entailing less imposition, may exist. See *NAACP v. Alabama*, (1958) 357 US 449 = 2 L Ed 2d 1488 = 78 S Ct 1163 *Lovell v. City of Griffin* (1938) 303 US 444, 82 L Ed 949, 58 S Ct 666 *Garner v. Louisiana*, (1961) 368 US 157, 185 = 7 L Ed 2d 207, 226 = 82 S Ct 248 (concurring opinion); *United States v. O'Brien*, (1968) 391 US 367, 388, 20 L Ed 2d 672, 686, 88 S Ct 1673 (concurring opinion).

28. These decisions, by no means dispositive of the case before us, unquestionably show that this Court will squint hard at any legislation that deprives an individual of his liberty—his right to remain free. Cf. my dissenting opinion in (1961) 367 US 497, 6 L Ed 2d 989 *supra*. While the interest of the State, that of punishing one convicted of crime is no less substantial, cf. concurring opinion of Mr. Justice Brennan in *Illinois v. Allen*, (1970) 397 US 337 = 25 L Ed 2d 353 = 90 S Ct 1057 the "balance which our Nation, built upon postulates of respect for the liberty of the individual, has struck between that liberty and the demands of organized society" (1961) 367 US 337 at 542 = 6 L Ed 2d 989 at 1019, "having regard for what history teaches" is such that the State's interest here does not outweigh that of the individual's such as to bring into full play the application of the usual salutary presumption of rationality.

29. The State, by this statute, or any other statute fixing a penalty of a fine, has declared its penological interest—deterrence, retribution and rehabilitation — satisfied by a monetary payment, and disclaimed, as serving any penological purpose in such cases, a term in jail. While there can be no question that the State has a legitimate concern with punishing an

individual who cannot pay the fine, there is serious question in my mind whether, having declared itself indifferent to fine and jail, it can consistently with due process refrain from offering some alternative for payment on the installment plan.

30. There are two conceivable justifications for not doing so. The most obvious and likely justification for the present statute is administrative convenience. Given the interest of the individual affected, I do not think a State may, after declaring itself indifferent between a fine and jail, rely on the convenience of the latter as a constitutionally acceptable means for enforcing its interest, given the existence of less restrictive alternatives. Cf. *Mullane v. Central Hanover Trust Co.* (1950) 339 US 306 = 94 L Ed 865 = 70 S Ct 652.

31. The second conceivable justification is that the jail alternative serves a penological purpose that cannot be served by collection of a fine over time. It is clear that having declared itself satisfied by a fine, the alternative of jail to a fine serves neither a rehabilitative or retributive interest. The question is, then, whether the requirement of a lumpsum payment can be sustained as a rational legislative determination that deterrence is effective only when a fine is exacted at once after sentence and by lump sum, rather than over a term. This is a highly doubtful proposition, since, apart from the mere fact of conviction and the humiliation associated with it and the token of punishment evidenced by the forfeiture, the deterrent effect of a fine is apt to derive more from its pinch on the purse than the time of payment.

32. That the Illinois statutes represent a considered judgment, evincing the belief that jail is a rational and necessary trade-off to punish the individual who possesses no accumulated assets seems most unlikely, since the substitute sentence provision, phrased in terms of a judgment collection statute, does not impose a discretionary jail term as an alternative sentence, but rather equates days in jail with a fixed sum. Thus, given that the only conceivable justification for this statute that would satisfy due process—that a lump-sum fine is a better deterrent than one payable over

a period of time — is the one that is least likely to represent a considered legislative judgment, I would hold these statutes invalid.

33. The conclusion I reach is only that when a State declares its penal interest may be satisfied by a fine or a forfeiture in combination with a jail term the administrative inconvenience in a judgment collection procedure does not, as a matter of due process, justify sending to jail or extending the jail term of individuals who possess no accumulated assets.* I would reserve the question as to whether a considered legislative judgment that a lump-sum fine is the only effective kind of forfeiture for deterrence and that the alternative must be jail. It follows, a fortiori, that no conclusion reached herein casts any doubt on the conventional "\$30 or 30 days" if the legislature decides that should be the penalty for the crime. Note, *Discriminations Against the Poor and the Fourteenth Amendment*, 81 Harv L Rev 435 (1967). Such a statute evinces the perfectly rational determination that some individuals will be adequately punished by a money fine, and others, indifferent to money—whether by virtue of indigency or other reasons — can only be punished by a jail term. Still more patently nothing said herein precludes the State from punishing ultimately by jail individuals who fail to pay fines or imprisoning immediately individuals who, in the judgment of a court, will not undertake to pay their fines.

34. On these premises I join the Court's judgment vacating appellant's sentence and remanding to the Supreme Court of Illinois to afford it an opportunity to instruct the sentencing judge as to any permissible alternatives under Illinois law. It may be that Illinois courts have the power to fashion a procedure pending further consideration of this problem by the state legislature. Cf. *Rosado v. Wyman*, (1970) 397 US 397, 421, 422 =

*In this regard, unlike the Court, I see no distinction between circumstances where the State through its judicial agent determines that effective punishment requires less than the maximum prison term plus a fine, or a fine alone, and the circumstances of this case.

25 L Ed 2d 442, 460, 461, 90 S Ct 1207 and my concurring opinion in Welsh v. United States, (1970) 26 L Ed 2d 308, 321.

Case remanded.

AIR 1971 U. S. S. C. 73 (V 58 C 64)

((1971) 28 L. Ed. 2d 499)*

BLACKMUN, BLACK, DOUGLAS, MARSHALL AND BRENNAN JJ.

William P. Rogers, Secretary of State, Appellant v. Aldo Mario Bellei, Respondent.

(No. 24) Decided on 5-4-1971.

†Constitution of India, Arts. 5, 10 — Citizenship Act (1955), Ss. 4, 6, 9 — (U. S. A. Case) Constitution of United States of America — Fourteenth Amendment — (U. S. A.) Immigration and Nationality Act (1952). (8 U.S.C. S. 1401 (b) S. 301 (a) (7) and (b)) — Citizenship by birth and by naturalisation — Birth outside United States in Italy — Mother American national and father Italian — Prerequisites of S. 301 (b) not complied with — Such person loses American Citizenship — S. 301 (b) is constitutionally valid.

(Per Majority (Blackmun J. and 4 more)):

'B' a person born in Italy of an American mother and Italian father stayed in Italy for almost twenty-three years with occasional visits to United States for short periods. By virtue of S. 301 (a) (7) he had become a national and a citizen of the United States. Under the Fourteenth Amendment to the Constitution (U.S.A.) all persons born or naturalized in the United States and subject to the jurisdiction thereof are Citizen of the United States. 'B' being a foreign born child of an American parent not having complied with the condition of 5 years residence in the United States between the ages 14 and 28 under section 301 (b) had forfeited his American citizenship. 'B' therefore moved the Court that (1) the Secretary of

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†Reference is given to a Parallel Indian Provision for the Convenience of Indian Lawyers.

the State be enjoined from carrying out and enforcing S. 301 (b) and (2) a declaratory judgment that S. 301 (b) is unconstitutional and that (3) he is and has always been a native born United States Citizen.

Held, that the American law accepts the English concepts that the place of birth governs citizenship status except as modified by Statute. The definition envisaged by the 14th Amendment does not apply to acquisition of Citizenship by being born abroad of an American parent. Case of a person born abroad of an American parent and such other cases not covered by 14th Amendment were left to proper congressional action. The imposition of the condition of compulsory residence in the United States under S. 301 (b) was an exercise of the congressional power and the conditions imposed are neither unreasonable, arbitrary nor unlawful. Section 301 (b) has no constitutional infirmity. (Paras 31, 35, 46)

Per Contra (Douglas J. and 3 more):

The tests of "arbitrary" "unreasonable" or "unfair" nature do not appear in the Constitution. The Constitution written for ages, cannot rise or fall with a Court's notion of what is unfair, unreasonable or arbitrary. B no doubt had not acquired citizenship by birth but he certainly had acquired it by naturalisation. All means of acquiring citizenship which are dependant upon congressional enactment are forms of naturalisation. Once a person has become a citizen either by birth or by naturalisation he cannot be thrown out from citizenship unless he himself wants to give it up. Congressional enactment by imposing conditions of residence on a naturalized citizen cannot take away his citizenship. S. 301 (b) is therefore unconstitutional. (Paras 49, 50, 58)

Cases Referred: Chronological Paras

(1971) 400 U.S. 309 = 27 L Ed 2d 408 = 91 S Ct 381, Wyman v. James	63
(1971) 28 L Ed 2d 288, Labine v. Vincent	63
(1970) 397 U.S. 1060 = 26 L Ed 2d 267 = 90 S Ct 1834	8
(1969) 396 U.S. 811 = 24 L Ed 2d 64 = 90 S Ct 69, Rogers v. Bellei	8
(1969) 296 F Supp 1247, Bellei v. Rusk	8, 37

- (1967) 387 U.S. 253 = 18 L Ed
2d 757 = 87 S Ct 1660, Afroyim
v. Rusk 8, 12, 13, 14,
29, 42, 48, 55, 57, 63
- (1964) 377 U.S. 163 = 12 L Ed
2d 218 = 84 S Ct 1187, Schnei-
der v. Rusk 8, 10, 42, 54
- (1963) 372 U.S. 144 = 9 L Ed
2d 644 = 83 S Ct 554, Kennedy
v. Mendoza-Martinez 37
- (1961) 366 U.S. 308 = 6 L Ed
2d 313 = 81 S Ct 1336 Mon-
tana v. Kennedy 15, 17, 32
- (1958) 356 U.S. 44 = 2 L Ed 2d
603 = 78 S Ct 568, Perez v.
Brownell 12
- (1952) 344 U.S. 133 = 97 L Ed
146 = 73 S. Ct 135, Mandoli
v. Acheson 38
- (1952) 343 U.S. 717 = 96 L Ed
1249 = 72 S Ct 950, Kawakita
v. United States 37, 38
- (1950) 338 U.S. 491 = 94 L Ed
287 = 70 S Ct 292 = 15 ALR
2d 538, Sarorgnan v. United
States 36
- (1939) 307 U.S. 325 = 83 L Ed
1320 = 59 S Ct 884, Perkins
v. Elg. 38
- (1928) 278 U.S. 17 = 73 L Ed
156 = 49 S Ct 15, Maney v.
United States 32
- (1927) 274 U.S. 657 = 71 L Ed
1284 = 47 S Ct 772, Weedon
v. Chin Bow 15, 25, 41
- (1917) 245 U.S. 319 = 62 L Ed
321 = 38 S Ct 118, United
States v. Ness 32
- (1917) 243 U.S. 472 = 61 L Ed
853 = 37 S Ct 422, United
States v. Ginsberg 32
- (1898) 169 U.S. 649 = 42 L Ed
890 = 18 S Ct 456, United
States v. Wong Kim Ark 25, 30,
32, 56
- (1884) 112 U.S. 94 = 28 L Ed 643
= 5 S Ct 41, Elk v. Wilkins 57
- (1874) 88 U.S. 162 = 22 L Ed 627,
Minor v. Happersett 57
- (1872) 83 U.S. 36 = 21 L Ed 394,
Slougher-House Case 57
- (1824) 9 Wheat 738 = 6 L Ed
204, Osborn v. Bank of United
States 12

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Europeans and American Bar Associa-
tion, amicus curiae.

OPINION OF THE COURT

Mr. Justice **BLACKMUN** deliver-
ed the opinion of the Court.

2. Under constitutional chal-
lenge here, primarily on Fifth Amend-
ment due process grounds, but also on
Fourteenth Amendment grounds, is
S. 301 (b) of the Immigration and
Nationality Act of June 27, 1952, 66
Stat 163, 236, 8 USC S. 1401 (b).

3. Section 301 (a) of the Act,
8 USC S. 1401 (a), defines those per-
sons who "shall be nationals and citi-
zens of the United States at birth." Paragraph (7) of S. 301 (a) includes in
that definition a person born abroad
"of parents one of whom is an alien,
and the other a citizen of the United
States" who has met specified condi-
tions of residence in this country. Sec-
tion 301 (b), however, provides that
one who is a citizen at birth under
S. 301 (a) (7) shall lose his citizenship
unless, after age 14 and before age 28,
he shall come to the United States
and be physically present here con-
tinuously for at least five years. We
quote the statute in the margin (i).

4. The plan thus adopted by
Congress with respect to a person of
this classification was to bestow citizen-
ship at birth but to take it away upon
the person's failure to comply with a
post-age-14 and pre-age-28 residential
requirement. It is this deprivation of citi-

(i) "Sec. 301. (a) The following
shall be nationals and citizens of the
United States at birth:

"(1) a person born in the United
States, and subject to the jurisdiction
thereof;

.....
"(7) a person born outside the
geographical limits of the United Sta-
tes and its outlying possessions of
parents one of whom is an alien, and
other a citizen of the United States
who, prior to the birth of such per-
son, was physically present in the
United States or its outlying posses-
sions for a period or periods totaling
not less than ten years, at least five
of which were after attaining the age
of fourteen years; Provided. . .

"(b) Any person who is a national
and citizen of the United States at
birth under paragraph (7) of sub-sec-
tion (a) of this section, shall lose his
nationality and citizenship unless he
shall come to the United States prior
to attaining the age of twentythree
years and shall immediately following

zenship, once bestowed, that is under attack here.

5. The facts are stipulated:

1. The appellee, Aldo Mario Bellei (hereinafter the plaintiff), was born in Italy on December 22, 1939. He is now 31 years of age.

2. The plaintiff's father has always been a citizen of Italy and never has acquired United States citizenship. The plaintiff's mother, however, was born in Philadelphia in 1915 and thus was a native-born United States citizen. She has retained that citizenship. Moreover, she has fulfilled the requirement of S. 301 (a) (7) for physical presence in the United States for 10 years, more than five of which were after she attained the age of 14 years. The mother and father were married in Philadelphia on the mother's 24th birthday. March 14, 1939. Nine days later, on March 23, the newly-weds departed for Italy. They have resided there ever since.

3. By Italian law the plaintiff acquired Italian citizenship upon his birth in Italy. He retains that citizenship. He also acquired United States citizenship at his birth under RS S. 1993, as amended by the act of May 24, 1934, S. 1, 48 Stat 797, then in effect. (ii) That version of the statute,

any such coming be continuously physically present in the United States] for at least five years: Provided, That such physical presence follows the attainment of the age of fourteen years and precedes the age of twenty-eight years.

"(c) Sub-section (b) of this section shall apply to a person born abroad subsequent to May 24, 1934. . . ."

Section 301 (a) (7) was amended November 6, 1966, by Pub L 89-770, 80 Stat 1322, by way of additions to the proviso, omitted above; these have no relevancy here. Pub L 85-316, S. 16, 71 Stat 639, 644, 8 USC S. 1401b, enacted in September 1957, provides that absences of less than 12 months in the aggregate "shall not be considered to break the continuity of [the] physical presence" required by S. 301 (b).

(ii) "Any child hereafter born out of the limits and jurisdiction of the United States, whose father or mother or both at the time of birth of such child is a citizen of the United States, is declared to be a citizen of the Uni-

as does the present one, contained a residence condition applicable to a child born abroad with one alien parent.

4. The plaintiff resided in Italy from the time of his birth until recently. He currently resides in England, where he has employment as an electronics engineer with an organization engaged in the NATO defense program.

5. The plaintiff has come to the United States five different times. He was physically present here during the following periods:

April 27 to July 31, 1948

July 10 to October 5, 1951

June to October 1955

December 18, 1962 to February 13, 1963

May 26 to June 13, 1965.

On the first two occasions, when the plaintiff was a boy of eight and 11, he entered the country with his mother on her United States passport. On the next two occasions, when he was 15 and just under 23, he entered on his own United States passport and was admitted as a citizen of this country. His passport was first issued on June 27, 1952. His last application approval, in August 1961, contains the notation "Warned abt. 301 (b)." The plaintiff's United States passport was periodically approved to and including December 22, 1962, his 23rd birthday.

6. On his fifth visit to the United States, in 1965, the plaintiff entered with an Italian passport and as an alien visitor. He had just been married and he came with his bride to visit his maternal grandparents.

ted States; but the rights of citizenship shall not descend to any such child unless the citizen father or citizen mother, as the case may be, has resided in the United States previous to the birth of such child. In cases where one of the parents is an alien, the right of citizenship shall not descend unless the child comes to the United States and resides therein for at least five years continuously immediately previous to his eighteenth birthday, and unless, within six months after the child's twenty-first birthday, he or she shall take an oath of allegiance to the United States of America as prescribed by the Bureau of Naturalization."

7. The plaintiff was warned in writing by United States authorities of the impact of S. 301 (b) when he was in this country in January 1963 and again in November of that year when he was in Italy. Sometime after February 11, 1964, he was orally advised by the American Embassy at Rome that he had lost his United States citizenship pursuant to S. 301 (b). In November 1966 he was so notified in writing by the American Consul in Rome when the plaintiff requested another American passport.

8. On March 28, 1960, plaintiff registered under the United States Selective Service laws with the American Consul in Rome. At that time he already was 20 years of age. He took in Italy, and passed, a United States Army physical examination. On December 11, 1963, he was asked to report for induction in the District of Columbia. This induction, however, was then deferred because of his NATO defense program employment. At the time of deferment he was warned of the danger of losing his United States citizenship if he did not comply with the residence requirements. After February 14, 1964, Selective Service advised him by letter that, due to the loss of his citizenship, he had no further obligation for United States military service.

6. Plaintiff thus concededly failed to comply with the conditions imposed by S. 301 (b) of the Act.

7. The plaintiff instituted the present action against the Secretary of State in the Southern District of New York. He asked that the Secretary be enjoined from carrying out and enforcing S. 301 (b), and also requested a declaratory judgment that S. 301 (b) is unconstitutional as violative of the Fifth Amendment's Due Process Clause, the Eighth Amendment's Punishment Clause, and the Ninth Amendment, and that he is and always has been a nativeborn United States citizen. Because, under 28 USC S. 1391 (e), the New York venue was improper, the case was transferred to the District of Columbia. 28 USC S. 1406 (a).

8. A three-judge District Court was convened. With the facts stipulated, cross motions for summary judgment were filed. The District Court ruled that S. 301 (b) was unconstitutional, citing *Afroyim v. Rusk*,

(1967) 387 US 253 = 18 L Ed 2d 757 = 87 S Ct 1660 and *Schneider v. Rusk*, (1964) 377 US 163 = 12 L Ed 2d 218 = 84 S Ct 1187 and sustained the plaintiff's summary judgment motion. *Bellei v. Rusk*, 296 F Supp 1247 (DC 1969). This Court noted probable jurisdiction, *Rogers v. Bellei*, (1969) 396 US 811 = 24 L Ed 2d 64 = 90 S Ct 69 and, after argument at the 1969 Term, restored the case to the calendar for reargument. (1970) 397 US 1060 = 26 L Ed 2d 267 = 90 S Ct 1834.

9. The two cases primarily relied upon by the three-judge District Court are, of course, of particular significance here.

10. (1964) 377 US 163 = 12 L Ed 2d 218 = 84 S Ct 1187. *Mrs. Schneider*, a German national by birth, acquired United States citizenship derivatively through her mother's naturalization in the United States. She came to this country as a small child with her parents and remained here until she finished college. She then went abroad for graduate work, was engaged to a German national, married in Germany, and stayed in residence there. She declared that she had no intention of returning to the United States. In 1959, a passport was denied by the State Department on the ground that she had lost her United States citizenship under the specific provisions of S. 352 (a) (1) of the Immigration and Nationality Act, 8 USC S. 1484 (a) (1), by continuous residence for three years in a foreign state of which she was formerly a national. The Court, by a five-to-three vote, held the statute violative of Fifth Amendment due process because there was no like restriction against foreign residence by native-born citizens.

11. The dissent (Mr. Justice Clark, joined by Justices Harlan and White) based its position on what it regarded as the long acceptance of expatriating naturalized citizens who voluntarily return to residence in their native lands; possible international complications; past decisions approving the power of Congress to enact statutes of that type; and the Constitution's distinctions between native-born and naturalized citizens.

12. (1967) 387 US 253, 18 L Ed 2d 757, 87 S Ct 1660. *Mr. Afroyim*, a Polish national by birth, immigrated

to the United States at age 19 and after 14 years here acquired United States citizenship by naturalization. Twenty-four years later he went to Israel and voted in a political election there. In 1960 a passport was denied him by the State Department on the ground that he had lost his United States citizenship under the specific provisions of S. 349 (a) (5) of the Act, 8 USC S. 1481 (a) (5), by his foreign voting. The Court by a five-to-four vote, held that the Fourteenth Amendment's definition of citizenship was significant; that Congress has no "general power, express or implied, to take away an American citizen's citizenship without his assent," (1967) 387 US, at 257 = 18 L Ed 2d at p. 761; that Congress' power is to provide a uniform rule of naturalization and, when once exercised with respect to the individual, is exhausted, citing Mr. Chief Justice Marshall's well-known but not uncontroversial dictum in *Osborn v. Bank of the United States*, (1824) 9 Wheat 738, 827, 6 L Ed 204, 225 and that the "undeniable purpose" of the Fourteenth Amendment was to make the recently conferred "citizenship of Negroes permanent and secure" and "to put citizenship beyond the power of any governmental unit to destroy," (1967) 387 US, at p. 263 = 18 L Ed 2d at p. 764. *Perez v. Brownell* (1958) 356 US 44 = 2 L Ed 2d 603 = 78 S Ct 568 a five-to-four holding within the decade and precisely to the opposite effect, was overruled.

13. The dissent (Mr. Justice Harlan, joined by Justices Clark, Stewart, and White) took issue with the Court's claim of issue with the legislative history, would elucidate the Marshall dictum, and observed that the adoption of the Fourteenth Amendment did not deprive Congress of the power to expatriate on permissible grounds consistent with "other relevant commands" of the Constitution. (1967) 387 US at p. 292 = 18 L Ed 2d at p. 780.

14. It is to be observed that both Mrs. Schneider and Mr. Afroyim had resided in this country for years. Each had acquired United States citizenship here by the naturalization process (in one case derivative and in the other direct) prescribed by the National Legislature. Each, in short, was covered explicitly by the Fourteenth

Amendment's very first sentence: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside." This of course accounts for the Court's emphasis in *Afroyim* upon "Fourteenth Amendment citizenship." (1967) 387 US, at p. 262 = 18 L Ed 2d at p. 763.

15. The statutes culminating in S. 301 merit review:

1. The very first Congress, at its Second Session, proceeded to implement its power, under the Constitution's Article I, S. 8, cl. 4, to "establish a uniform rule of Naturalization" by producing the Act of March 26, 1790, 1 Stat 103. That statute, among other things, stated, "And the children of citizens of the United States, that may be born beyond sea, or out of the limits of the United States, shall be considered as natural born citizens: Provided, That the right of citizenship shall not descend to persons whose fathers have never been resident in the United States. . . ."

2. A like provision, with only minor changes in phrasing and with the same emphasis on paternal residence, was continuously in effect through three succeeding naturalization Acts. Act of January 29, 1795, S. 3, 1 Stat 414, 415; Act of April 14, 1802, S. 4, 2 Stat 153, 155; Act of February 10, 1855, S. 1, 10 Stat 604. The only significant difference is that the 1790, 1795, and 1802 Acts read retrospectively, while the 1855 Act reads prospectively as well. See *Weedin v. Chin Bow* (1927) 274 US 657, 664 = 71 L Ed 1284, 1287 = 47 S Ct 772 and *Montana v. Kennedy* (1961) 366 US 308, 311 = 6 L Ed 2d 313, 315 = 81 S Ct 1336.

3. Section 1 of the 1855 Act, with changes unimportant here, was embodied as S. 1993 of the Revised Statutes of 1878 (iii).

4. The Act of March 2, 1907, S. 6, 34 Stat 1228, 1229, provided that all children born abroad who were citi-

(iii) "All children heretofore born or hereafter born out of the limits and jurisdiction of the United States, whose fathers were or may be at the time of their birth citizens thereof, are declared to be citizens of the United States; but the rights of citizenship shall not descend to children whose fathers never resided in the United States."

zens under Rev Stat S. 1993 and who continued to reside elsewhere, in order to receive governmental protection, were to record at age 18 their intention to become residents and remain citizens of the United States and were to take the oath of allegiance upon attaining their majority (iv).

5. The change in S. 1993 effected by the Act of May 24, 1934, is reflected in n. 2, supra. This eliminated the theretofore imposed restriction to the paternal parent and prospectively granted citizenship, subject to a five-year continuous residence requirement and an oath, to the foreign-born child of either a citizen father or a citizen mother. This was the form of the statute at the time of plaintiff's birth on December 22, 1939.

6. The Nationality Act of 1940, S. 201, 54 Stat 1137, 1138-1139, contained a similar condition directed to a total of five years' residence in the United States between the ages of 13 and 21. (v)

(iv) "That all children born outside the limits of the United States who are citizens thereof in accordance with the provisions of section nineteen hundred and ninety-three of the Revised Statutes of the United States and who continue to reside outside the United States shall, in order to receive the protection of this Government, be required upon reaching the age of eighteen years to record at an American consulate their intention to become residents and remain citizens of the United States and shall be further required to take the oath of allegiance to the United States upon attaining their majority."

(v) "Sec. 201. The following shall be nationals and citizens of the United States at birth:

"(g) A person born outside the United States and its outlying possessions of parents one of whom is a citizen of the United States who, prior to the birth of such person, has had ten years residence in the United States or one of its outlying possessions, at least five of which were after attaining the age of sixteen years; the other being an alien; Provided, That in order to retain such citizenship, the child must reside in the United States or its outlying possessions for a period or periods totaling five years between the ages of thirteen and twenty-one years:

7. The Immigration and Nationality Act, by its S. 407, 66 Stat 281, became law in December 1952. Its Section 301 (b) contains a five years' continuous residence condition (alleviated, with the 1957 amendment, see n. 1, by an allowance for absences less than 12 months in the aggregate) directed to the period between 14 and 28 years of age.

16. The statutory pattern, therefore, developed and expanded from (a) one, established in 1790 and enduring through the Revised Statutes and until 1934, where citizenship was specifically denied to the child born abroad of a father who never resided in the United States; to (b), in 1907, a governmental protection condition for the child born of an American citizen father and residing abroad, dependent upon a declaration of intent and the oath of allegiance at majority; to (c), in 1934, a condition, for the child born abroad of one United States citizen parent and one alien parent, of five years' continuous residence in the United States before age 18 and the oath of allegiance within six months after majority; to (d), in 1940, a condition, for that child, of five years' residence here, not necessarily continuous, between ages 13 and 21; to (e), in 1952, a condition, for that child, of five years' continuous residence here, with allowance, between ages 14 and 28.

17. The application of these respective statutes to a person in plaintiff Bellei's position produces the following results:

1. Not until 1934 would that person have had any conceivable claim to United States citizenship. For more than a century and a half no statute

Provided further, That if the child has not taken up a residence in the United States or its outlying possessions by the time he reaches the age of sixteen years, or if he resides abroad for such a time that it becomes impossible for him to complete the five years' residence in the United States or its outlying possessions before reaching the age of twenty-one years, his American citizenship shall thereupon cease.

"(h) The foregoing provisions of sub-section (g) concerning retention of citizenship shall apply to a child born abroad subsequent to May 24, 1934."

was of assistance. Maternal citizenship afforded no benefit. One may observe, too, that if Mr. Bellei had been born in 1933, instead of in 1939, he would have no claim even today. (1961) 366 US 308 = 6 L. Ed. 2d 313 *supra*.

2. Despite the recognition of the maternal root by the 1934 amendment, in effect at the time of plaintiff's birth, and despite the continuing liberalization of the succeeding statutes, the plaintiff still would not be entitled to full citizenship because, although his mother met the condition for her residence in the United States, the plaintiff never did fulfill the residential condition imposed for him by any of the statutes.

3. This is so even though the liberalizing 1940 and 1952 statutes, enacted after the plaintiff's birth, were applicable by their terms to one born abroad subsequent to May 24, 1934, the date of the 1934 Act, and were available to the plaintiff. See *nn.* 5 and 1, *supra*.

18. Thus, in summary, it may be said fairly that, for the most part, each successive statute, as applied to a foreign-born child of one United States citizen parent moved in a direction of leniency for the child. For plaintiff Bellei the statute changed from complete disqualification to citizenship upon a condition subsequent, with that condition being expanded and made less onerous, and, after his birth, with the succeeding liberalizing provisions made applicable to him in replacement of the stricter statute in effect when he was born. The plaintiff nevertheless failed to satisfy any form of the condition.

19. It is evident that Congress felt itself possessed of the power to grant citizenship to the foreign-born and at the same time to impose qualifications and conditions for that citizenship. Of course, Congress obviously felt that way, too, about the two expatriation provisions invalidated by the decisions in *Schneider* and *Afroyim*.

20. We look again, then, at the Constitution and further indulge in history's assistance:

21. Of initial significance, because of its being the foundation stone of the Court's decisional structure in *Afroyim*, and, perhaps by a

process of after-the-fact osmosis, of the earlier *Schneider* as well, is the Fourteenth Amendment's opening sentence:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

22. The central fact, in our weighing of the plaintiff's claim to continuing and therefore current United States citizenship, is that he was born abroad. He was not born in the United States. He was not naturalized in the United States. And he has not been subject to the jurisdiction of the United States. All this being so, it seems indisputable that the first sentence of the Fourteenth Amendment has no application to plaintiff Bellei. He simply is not a Fourteenth-Amendment-first sentence citizen. His posture contrasts with that of Mr. *Afroyim*, who was naturalized in the United States, and with that of Mrs. *Schneider*, whose citizenship was derivative by her presence here and by her mother's naturalization here.

23. The plaintiff's claim thus must center in the statutory power of Congress and in the appropriate exercise of that power within the restrictions of any pertinent constitutional provisions other than the Fourteenth Amendment's first sentence.

24. The reach of congressional power in this area is readily apparent:

25. 1. Over 70 years ago the Court, in an opinion by Mr. Justice Gray, reviewed and discussed early English statutes relating to rights of inheritance and of citizenship of persons born abroad of parents who were British subjects. *United States v. Wong Kim Ark*, (1898) 169 US 649, 668-671 = 42 L. Ed. 890, 897, 898 = 18 S. Ct. 456. The Court concluded that "naturalization by descent" was not a common law concept but was dependent instead, upon statutory enactment. The statutes examined were 25 Edw. III (1350); 29 Car. II (1677), c. 6 S. 1; 7 Anne (1708), c. 5, S. 3; 4 Geo. II (1731), c. 21; and 13 Geo. III (1773), c. 21. Later Mr. Chief Justice Taft, speaking for a unanimous Court, referred to this "very learned and useful opinion of Mr. Justice Gray" and observed "that birth within the limits of the jurisdiction of the Crown, and of the United States, as the successor

of the Crown, fixed nationality, and that there could be no change in this rule of law except by statute. . . . "Weedin v. Chin Bow, supra, (1927) 274 US 657, 660 = 71 L Ed 1284, 1285 = 47 S Ct 772. He referred to the cited English statutes and stated, "These statutes applied to the colonies before the War of Independence."

26. We thus have an acknowledgment that our law in this area follows English concepts with an acceptance of the *jus soli*, that is, that the place of birth governs citizenship status except as modified by statute.

27. 2. The Constitution as originally adopted contained no definition of United States citizenship. However, it referred to citizenship in general terms and in varying contexts: Article I, S. 2, cl. 2, qualifications for members of the House; Article I, S. 3; cl. 3, qualifications for Senators; Article II, S. 1, cl. 4, eligibility for the office of President; Article III, S. 2, cl. 1, citizenship as affecting judicial power of the United States. And, as has been noted, Article I, S. 8, cl. 4, vested Congress with the power to "establish a uniform Rule of Naturalization." The historical reviews in the Afroyim opinions provide an intimation that the Constitution's lack of definitional specificity may well have been attributable in part to the desire to avoid entanglement in the then existing controversy between concepts of state and national citizenship and with the difficult question of the status of Negro slaves.

28. In any event, although one might have expected a definition of citizenship in constitutional terms, none was embraced in the original document or, indeed, in any of the amendments adopted prior to the War Between the States.

29. 3. Apart from the passing reference to the "natural born Citizen" in the Constitution's Article II, S. 1, cl. 4, we have, in the Civil Rights Act of April 9, 1866, 14 Stat 27, the first statutory recognition and concomitant formal definition of the citizenship status of the native-born: "[A]ll persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States. . . ." This, of course, found immediate expression in the Fourteenth Amendment, adopted

in 1868, with expansion to "All persons born or naturalized in the United States. . . ." As has been noted above, the Amendment's "undeniable purpose" was "to make citizenship of Negroes permanent and secure" and not subject to change by mere statute. Afroyim v. Rusk, supra, (1967) 387 US, at p. 263 = 18 L Ed 2d at p. 764. See Flack, Adoption of the Fourteenth Amendment 88-94 (1908).

30. Mr. Justice Gray has observed that the first sentence of the Fourteenth Amendment was "declaratory of existing rights, and affirmative of existing law," so far as the qualifications of being born in the United States, being naturalized in the United States, and being subject to its jurisdiction are concerned. United States v. Wong Kim Ark, supra, (1898) 169 US, at p. 688 = 42 L Ed at p. 905. Then follows a most significant sentence.

"But it [the first sentence of the Fourteenth Amendment] has not touched the acquisition of citizenship by being born abroad of American parents; and has left that subject to be regulated, as it had always been, by Congress, in the exercise of the power conferred by the Constitution to establish a uniform rule of naturalization."

31. Thus, at long last, there emerged an express constitutional definition of citizenship. But it was one restricted to the combination of three factors, each and all significant: birth in the United States, naturalization in the United States, and subjection to the jurisdiction of the United States. The definition obviously did not apply to any acquisition of citizenship by being born abroad of an American parent. That type, and any other not covered by the Fourteenth Amendment, was necessarily left to proper congressional action.

32. 4. The Court has recognized the existence of this power. It has observed, "No alien has the slightest right to naturalization unless all statutory requirements are complied with. . . ." United States v. Ginsberg, (1917) 243 US 472, 475 = 61 L Ed 853, 856 = 37 S Ct 422 See United States v. Ness, (1917) 245 US 319, = 62 L Ed 321 = 38 S Ct 118, Maney v. United States, (1928) 278 US 17, = 73 L Ed 156 = 49 S Ct 15. And the Court has specifically recognized the

power of Congress not to grant a United States citizen the right to transmit citizenship by descent. As hereinabove noted, persons born abroad, even of United States citizen fathers who, however, acquired American citizenship after the effective date of the 1802 Act, were aliens. Congress responded to that situation only by enacting the 1855 statute. *Montana v. Kennedy*, supra, (1961) 366 US at p. 311 = 6 L Ed 2d at p. 315. But more than 50 years had expired during which, because of the withholding of that benefit by Congress, citizenship by such descent was not bestowed. *United States v. Wong Kim Ark*, supra (1898) 169 US at pp. 673-674 = 42 L Ed at p. 899. Then, too, the Court has recognized that until the 1934 Act the transmission of citizenship to one born abroad was restricted to the child of a qualifying American father, and withheld completely from the child of a United States citizen mother and an alien father. *Montana v. Kennedy*, supra.

33. Further, it is conceded here both that Congress may withhold citizenship from persons like plaintiff Bellei (vi) and may prescribe a period of residence in the United States as a condition precedent without constitutional question. (vii)

34. Thus we have the presence of congressional power in this area, its exercise, and the Court's specific recognition of that power and of its having been properly withheld or properly used in particular situations.

35. This takes us, then, to the issue of the constitutionality of the exercise of that congressional power when it is used to impose the condition subsequent that confronted plaintiff Bellei. We conclude that its imposition is not unreasonable, arbitrary, or unlawful, and that it withstands the present constitutional challenge.

(vi) At oral argument plaintiff's counsel conceded that "Congress need not vest a person in his position with citizenship if it chooses not to do so." Transcript of Oral Argument, p. 27. Counsel for the amici sympathetic with the plaintiff's cause made a like concession. *Id.*, p. 36.

(vii) Transcript of Oral Argument, p. 26.

36. The Congress has an appropriate concern with problems attendant on dual nationality. *Sarongnan v. United States*, (1950) 338 US 491, 500 = 94 L Ed 287, 295 = 70 S Ct 292 = 15 ALR 2d 538 Bar-Yaacov, *Dual Nationality*, xi and 4 (1961). These problems are particularly acute when it is the father who is the child's alien parent and the father chooses to have his family reside in the country of his own nationality. The child is reared, at best, in an atmosphere of divided loyalty. We cannot say that a concern that the child's own primary allegiance is to the country of his birth and of his father's allegiance is either misplaced or arbitrary.

37. The duality also creates problems for the governments involved. Mr. Justice Brennan recognized this when, concurring in *Kennedy v. Mendoza-Martinez*, (1963) 372 US 144, 187 = 9 L Ed 2d 644, 671 = 83 S Ct 554, a case concerning nativeborn citizens, he observed: "We have recognized the entanglements which may stem from dual allegiance. . . ." In a famous case Mr. Justice Douglas wrote of the problem of dual citizenship. *Kawakita v. United States*, (1952) 343 US 717, 723-736 = 96 L Ed 1249, 1257 to 1264 = 72 S Ct 950. He noted that "[o]ne who has a dual nationality will be subject to claims from both nations, claims which at times may be competing or conflicting," p. 733; 96 L Ed p. 1263; that one with dual nationality cannot turn that status "into a fair-weather citizenship," p. 736 = 96 L Ed p. 1264; and that "[c]ircumstances may compel one who has a dual nationality to do acts which would not be compatible with the obligation of American citizenship," p. 736 = 96 L Ed p. 1264. The District Court in this very case conceded:

"It is a legitimate concern of Congress that those who bear American citizenship and receive its benefits have some nexus to the United States." (1969) 296 F Supp, at 1252.

38. There are at least intimations in the decided cases that a dual national constitutionally may be required to make an election. In *Perkins v. Elg*, (1939) 307 US 325, 329 = 83 L Ed 1320, 1323 = 59 S Ct 884 the Court observed that a native-born citizen who had acquired dual nationality during minority through his parents' foreign naturalization ab-

road did not lose his United States citizenship "provided that on attaining majority he elects to retain that citizenship and to return to the United States to resume its duties." In *supra*, (1952) 343 US, at p. 734 = 95 L Ed at p. 1263, the Court noted that a dual national "under certain circumstances" can be deprived of his American citizenship through an Act of Congress. In *Mandoli v. Acheson*, (1952) 344 US 133, 138 = 97 L Ed 146, 150 = 73 S Ct 135 the Court took pains to observe that there was no statute in existence imposing an election upon that dual national litigant.

39. These cases do not flatly say that a duty to elect may be constitutionally imposed. They surely indicate, however, that this is possible, and in *Mandoli* the holding was based on the very absence of a statute and not on any theory of unconstitutionality, and all three of these cases concerned persons who were born here, that is, persons who possessed Fourteenth Amendment citizenship they did not concern a person, such as plaintiff Bellei, whose claim to citizenship is wholly, and only, statutory.

40. The statutory development outlined in part IV above, by itself and without reference to the underlying legislative history, committee reports, and other studies, reveals a careful consideration by the Congress of the problems attendant upon dual nationality of a person born abroad. This was purposeful and not accidental. It was legislation structured with care and in the light of then apparent problems.

41. The solution to the dual nationality dilemma provided by the Congress by way of required residence surely is not unreasonable. It may not be the best that could be devised, but here, too, we cannot say that it is irrational or arbitrary or unfair. Congress first has imposed a condition precedent in that the citizen parent must have been in the United States or its possessions not less than 10 years, at least five of which are after attaining age 14. It then has imposed, as to the foreign-born child himself, the condition subsequent as to residence here. The Court already had emphasized the importance of residence in this country as the talisman of dedicated attachment, *supra*, (1927) 274 US, at

pp. 666-667 = 71 L Ed at p. 1288, and said:

"It is not too much to say, therefore, that Congress at that time [when Rev Stat S. 1993 was under consideration] attached more importance to actual residence in the United States as indicating a basis for citizenship than it did to descent from those who had been born citizens of the colonies or of the states before the Constitution. As said by Mr. Fish, when Secretary of State, to Minister Washburn, June 28, 1873, in speaking of this very proviso, 'the heritable blood of citizenship was thus associated unmistakably with residence within the country which was thus recognized as essential to full citizenship.' Foreign Relations of the United States, Pt. 1, 1873, p. 259." (1927) 274 US, at pp. 665-666 = 71 L Ed at pp. 1287, 1288. The same policy is reflected in the required period of residence here for aliens seeking naturalization. 8 USC S. 1427 (a).

42. We feel that it does not make good constitutional sense, or comport with logic, to say, on the one hand, that Congress may impose a condition precedent, with no constitutional complication, and yet be powerless to impose precisely the same condition subsequent. Any such distinction, of course, must rest, if it has any basis at all, on the asserted "premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive," *supra*, (1964) 377 US, at p. 165 = 12 L Ed 2d at p. 220, and on the announcement that Congress has no "power, express or implied, to take away an American citizen's citizenship without his assent," *supra* (1967) 387 US, at p. 257 = 18 L Ed 2d at p. 761. But, as pointed out above, these were utterances bottomed upon Fourteenth Amendment citizenship and that Amendment's direct reference to "persons born or naturalized in the United States." We do not accept the notion that those utterances are now to be judicially extended to citizenship not based upon the Fourteenth Amendment and to make citizenship an absolute. That it is not an absolute is demonstrated by the fact that even Fourteenth Amendment citizenship by naturalization, when unlawfully procured, may be set aside. *Afroyim v. Rusk*, *supra* (1967) 387 US, at p. 267 n. 23 = 18 L Ed 2d at p. 766.

43. A contrary holding would convert what is congressional generosity into something unanticipated and obviously undesired by the Congress. Our National Legislature indulged the foreign-born child with presumptive citizenship, subject to subsequent satisfaction of a reasonable residence requirement, rather than to deny him citizenship outright, as concededly it had the power to do, and relegate the child, if he desired American citizenship, to the more arduous requirements of the usual naturalization process. The plaintiff here would force the Congress to choose between unconditional conferment of United States citizenship at birth and deferment of citizenship until a condition precedent is fulfilled. We are not convinced that the Constitution requires so rigid a choice. If it does, the congressional response seems obvious.

44. Neither are we persuaded that a condition subsequent in this area impresses one with "second-class citizenship." That cliché is too handy and too easy, and, like most clichés, can be misleading. That the condition subsequent may be beneficial is apparent in the light of the conceded fact that citizenship to this plaintiff was fully deniable. The proper emphasis is on what the statute permits him to gain from the possible starting point of noncitizenship, not on what he claims to lose from the possible starting point of full citizenship to which he has no constitutional right in the first place. His citizenship, while it lasts, although conditional, is not "secondclass."

45. The plaintiff is not stateless. His Italian citizenship remains. He has lived practically all his life in Italy. He has never lived in this country; although he has visited here five times, the stipulated facts contain no indication that he ever will live here. He asserts no claim of ignorance or of mistake or even of hardship. He was warned several times of the provision of the statute and of his need to take up residence in the United States prior to his 23d birthday.

46. We hold that S. 301 (b) has no constitutional infirmity in its application to plaintiff Bellei. The judgment of the District Court is reversed.

SEPARATE OPINIONS

Mr. Justice Black, with whom

Mr. Justice Douglas and Mr. Justice Marshall join, dissenting.

47-48. Less than four years ago this Court held that "the Fourteenth Amendment was designed to, and does, protect every citizen of this Nation against a congressional forcible destruction of his citizenship, whatever his creed, colour, or race. Our holding does no more than to give to this citizen that which is his own, a constitutional right to remain a citizen in a free country unless he voluntarily relinquishes that citizenship." (1967). 387 US 253, 268 = 18 L Ed 2d 757 767=87 S Ct 1660.

The holding was clear. Congress could not, until today, consistently with the Fourteenth Amendment enact a law stripping an American of his citizenship which he has never voluntarily renounced or given up. Now this Court, by a vote of five to four through a simple change in its composition, overrules that decision.

49. The Court today holds that Congress can indeed rob a citizen of his citizenship just so long as five members of this Court can satisfy themselves that the congressional action was not "unreasonable, arbitrary," ante, (1971) 28 L Ed 2d at p. 510 = (AIR 1971 US SC at pp. 81, 82) "misplaced or arbitrary," ante, 28 L Ed 2d at 510 or "irrational or arbitrary or unfair," ante, (1971) 23 L Ed 2d at p. 511 = (AIR 1971 USSC at p. 82) My first comment is that not one of these "tests" appears in the Constitution. Moreover, it seems a little strange to find such "tests" as these announced in an opinion which condemns the earlier decisions it overrules for their resort to clichés, which it describes as "too handy and too easy, and, like most clichés, can be misleading." Ante, (1971) 28 L Ed at p. 512 = (AIR 1971 USSC at p. 83) That description precisely fits those words and clauses which the majority uses, but which the Constitution does not.

50. The Constitution, written for the ages, cannot rise and fall with this Court's passing notions of what is "fair," or "reasonable," or "arbitrary." The Fourteenth Amendment commands:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside."

Speaking of this very language, the Court held in *Afroyim* that no American can be deprived of his citizenship without his assent. Today, the Court overrules that holding. This precious Fourteenth Amendment American citizenship should not be blown around by every passing political wind that changes the composition of this Court. I dissent.

51. Bellei became an American citizen under the terms of S. 1993 of the Revised Statutes, as amended, (i) and he has neither renounced his American citizenship nor voluntarily assented to any governmental act terminating it. He has never given any indication of wanting to expatriate himself but, rather, has consistently maintained that he wants to keep his American citizenship. In my view, the decision in *Afroyim*, therefore, requires the Court to hold here that Bellei has been unconstitutionally deprived by S. 301 (b) of the Immigration and Nationality Act of 1952 (ii) of his right to be an American citizen. Since S. 301 (b) does not take into account in any way whether the citizen intends or desires to relinquish his citizenship, that section is inevitably inconsistent with the constitutional principles declared in *Afroyim*.

52. The Court today holds that the Citizenship Clause of the Fourteenth Amendment has no application to Bellei. The Court first notes that *Afroyim* was essentially a case construing the Citizenship Clause of the Fourteenth Amendment. Since the Citizenship Clause declares that "All persons born or naturalized in the United States... are citizens of the United States.....," the Court reasons that the protections against involuntary expatriation declared in *Afroyim* do not protect all American citizens, but only those "born or naturalized in the United States." *Afroyim*, the argument runs, was naturalized in this country so he was protected by the Citizenship Clause, but Bellei, since he acquired his American citizenship at birth in Italy as a foreign-born child of an American citizen, was neither born nor naturalized in the United States and, hence, falls outside the scope of the Fourteenth Amend-

(i) Section 1993 of the Revised Statutes, as amended by the Act of May 24, 1934, 48 Stat 797.

(ii) 8 USC S. 1401. (b).

ment guarantees declared in *Afroyim*. One could hardly call this a generous reading of the great purposes the Fourteenth Amendment was adopted to bring about.

53. While conceding that Bellei is an American Citizen, the majority states: "He simply is not a Fourteenth-Amendment — first — sentence citizen." Therefore, the majority reasons, the congressional revocation of his citizenship is not barred by the Constitution. I cannot accept the Court's conclusion that the Fourteenth Amendment protects the citizenship of some Americans and not others.

54. Indeed, the concept of a hierarchy of citizenship, suggested by the majority opinion, was flatly rejected in (1964) 377 US 163 = 12 L Ed 2d 218 = 84 S Ct 1187 "We start from the premise that the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Id.*, at 165, 12 L Ed 2d at 220. The Court there held that Congress could not deprive Mrs. Schneider of her citizenship, which she, like Mr. Bellei in the present case, acquired derivatively through her citizen mother. Consequently, the majority in its rush to overrule *Afroyim* must also, in effect, overrule *Schneider* as well.

55. Under the view adopted by the majority today, all children born to Americans while abroad would be excluded from the protections of the Citizenship Clause and would instead be relegated to the permanent status of second-class citizenship, subject to revocation at the will of Congress. The Court rejected such narrow, restrictive, and super-technical interpretations of the Citizenship Clause when it held in *Afroyim* that that Clause "was designed to, and does, protect every citizen of this Nation"(1967) 387 US, at pp. 267-268 = 18 L Ed 2d at pp. 766-767.

56. *Afroyim*'s broad interpretation of the scope of the Citizenship Clause finds ample support in the language and history of the Fourteenth Amendment. Bellei was not "born in the United States," but he was, constitutionally speaking, "naturalized in the United States." Although those Americans who acquire their citizenship under statutes conferring citizenship on the foreign-born children of

citizens are not popularly thought of as naturalized citizens, the use of the word "naturalize" in this way has a considerable constitutional history. Congress is empowered by the Constitution to "establish an uniform Rule of Naturalization," Art. I, S. 8. Anyone acquiring citizenship solely under the exercise of this power is, constitutionally speaking, a naturalized citizen. The first congressional exercise of this power, entitled "An Act to establish an uniform rule of naturalization," was passed in 1790 at the Second Session of the First Congress. It provided in part:

"And the children of citizens of the United States, that may be born beyond the sea, or out of the limits of the United States, shall be considered as natural-born citizens: Provided, that the right of citizenship shall not descend to persons whose fathers have never been resident in the United States." 1 Stat 103, 104. This provision is the earliest form of the statute under which Bellei acquired his citizenship. Its enactment as part of a "rule of naturalization" shows, I think, that the First Congress conceived of this and most likely all other purely statutory grants of citizenship as forms or varieties of naturalization. However, the clearest expression of the idea that Bellei and others similarly situated should for constitutional purposes be considered as naturalized citizens is to be found in (1898) 169 US 649 = 42 L Ed 890 = 18 S Ct 456:

"The Fourteenth Amendment of the Constitution . . . contemplates two sources of citizenship, and two only: birth and naturalization. Citizenship by naturalization can only be acquired by naturalization under the authority and in the forms of law. But citizenship by birth is established by the mere fact of birth under the circumstances defined in the Constitution. Every person born in the United States, and subject to the jurisdiction thereof, becomes at once a citizen of the United States, and needs no naturalization. A person born out of the jurisdiction of the United States can only become a citizen by being naturalized, either by treaty, as in the case of the annexation of foreign territory; or by authority of Congress, exercised either by declaring certain classes of persons to be citizens, as in

the enactments conferring citizenship upon foreign-born children of citizens, or by enabling foreigners individually to become citizens by proceedings in the judicial tribunals, as in the ordinary provisions of the naturalization acts." 169 US, at 702-703 = 42 L Ed at 909; 910. The Court in *Wong Kim Ark* thus stated a broad and comprehensive definition of naturalization. As shown in *Wong Kim Ark*, naturalization when used in its constitutional sense is a generic term describing and including within its meaning all those modes of acquiring American citizenship other than birth in this country. All means of obtaining American citizenship which are dependent upon a congressional enactment are forms of naturalization. This inclusive definition has been adopted in several opinions of this Court besides (1893) 169 US 649 = 42 L Ed 890, supra. Thus in *Minor v. Happersett*, (1874) 88 US 162, 167 = 22 L Ed 627, 628 the Court said: "Additions might always be made to the citizenship of the United States in two ways: first, by birth, and second, by naturalization. . . [N]ew citizens may be born or they may be created by naturalization." And in *Elk v. Wilkins*, (1884) 112 US 94, 28 L Ed 643, 5 S Ct 41 the Court took the position that the Fourteenth Amendment "contemplates two sources of citizenship and two sources only: birth and naturalization. . . . Persons not . . . subject to the jurisdiction of the United States at the time of birth cannot become so afterwards, except by being naturalized, either individually, as by proceedings under the naturalization acts, or collectively, as by force of a treaty by which foreign territory is acquired." 112 US, at pp. 101-102 = 28 L Ed at p. 646.

Moreover, this concept of naturalization is the only one permitted by this Court's consistent adoption of the view that the Fourteenth Amendment was intended to supply a comprehensive definition of American citizenship. In an opinion written shortly after the Fourteenth Amendment was ratified, the Court stated that one of the primary purposes of the Citizenship Clause was "to establish a clear and comprehensive definition of citizenship which should declare what should constitute citizenship of the United States, and also citizenship of a State." *Slaughter-House Cases*, (1872) 83 US

36, at p. 73 = 21 L Ed 394, at p. 407. In his study, *The Adoption of the Fourteenth Amendment*, Professor Flack similarly concluded that the Citizenship Clause "put beyond doubt and cavil in the original law who were citizens of the United States." H. Flack, *The Adoption of the Fourteenth Amendment* 89 (1908). And in *Afroyim* both majority and dissenting Justices appear to have agreed on the basic proposition that the scope of the Citizenship Clause, whatever its effect, did reach all citizens. The opinion of the Court in *Afroyim* described the Citizenship Clause as "... calculated completely to control the status of citizenship." (1967) 387 US, at p. 262 = 18 L Ed 2d at p. 763. And the dissenting Justices agreed with this proposition to the extent of holding that the Citizenship Clause was a "declaration of the classes of individuals to whom citizenship initially attaches." *Id.* at 292, 18 L Ed 2d at 780.

57. The majority opinion appears at times to rely on the argument that Bellei, while he concededly might have been a naturalized citizen, was not naturalized "in the United States." This interpretation obviously imposes a limitation on the scope of the Citizenship Clause which is inconsistent with the conclusion expressed above that the Fourteenth Amendment provides a comprehensive definition of American citizenship, for the majority's view would exclude from the protection of that Clause all those who acquired American citizenship while abroad. I cannot accept the narrow and extraordinarily technical reading of the Fourteenth Amendment employed by the Court today. If, for example, Congress should decide to vest the authority to naturalize aliens in American embassy officials abroad rather than having the ceremony performed in this country, I have no doubt that those so naturalized would be just as fully protected by the Fourteenth Amendment as are those who go through our present naturalization procedures. Rather than the technical reading adopted by the majority, it is my view that the word "in" as it appears in the phrase "in the United States" was surely meant to be understood in two somewhat different senses: one can become a citizen of this country by being born within it or by being naturalized into it. This

interpretation is supported by the legislative history of the Citizenship Clause. That clause was added in the Senate rather late in the debates on the Fourteenth Amendment, and as originally introduced its reference was to all those "born in the United States or naturalized by the laws thereof." Cong Globe, 39th Cong, 1st Sess, at 2768. (Emphasis added.) The final version of the Citizenship Clause was undoubtedly intended to have this same scope. See H. Flack, *The Adoption of the Fourteenth Amendment*, 88-89 (1908).

58. The majority takes the position that Bellei, although admittedly a citizen of this country, was not entitled to the protections of the Citizenship Clause. I would not depart from the holding in *Afroyim* that every American citizen has Fourteenth Amendment citizenship. Bellei, as a naturalized American, is entitled to all the rights and privileges of American citizenship, including the right to keep his citizenship until he voluntarily renounces or relinquishes it.

59. The Court today puts aside the Fourteenth Amendment as a standard by which to measure congressional action with respect to citizenship, and substitutes in its place the majority's own vague notions of "fairness." The majority takes a new step with the recurring theme that the test of constitutionality is the Court's own view of what is "fair, reasonable, and right." Despite the concession that Bellei was admittedly an American citizen, and despite the holding in *Afroyim* that the Fourteenth Amendment has put citizenship, once conferred, beyond the power of Congress to revoke, the majority today upholds the revocation of Bellei's citizenship on the ground that the congressional action was not "irrational or arbitrary or unfair." The majority applies the "shock-the-conscience" test to uphold, rather than strike, a federal statute. It is a dangerous concept of constitutional law that allows the majority to conclude that, because it cannot say the statute is "irrational or arbitrary or unfair," the statute must be constitutional.

60. Of course the Court's construction of the Constitution is not a "strict" one. On the contrary, it proceeds on the premise that a majority

of this Court can change the Constitution day by day, month by month, and year by year, according to its shifting notions of what is fair, reasonable, and right. There was little need for the founders to draft a written constitution if this Court can say it is only binding when a majority finds it fair, reasonable, and right to make it so. That is the loosest construction that could be employed. It is true that England has moved along very well in the world without a written constitution. But with complete familiarity with the English experience, our ancestors determined to draft a written constitution which the members of this Court are sworn to obey. While I remain on the Court I shall continue to oppose the power of judges, appointed by changing administrations, to change the Constitution from time to time according to their notions of what is "fair" and "reasonable." I would decide this case not by my views of what is "arbitrary," or what is "fair", but rather by what the Constitution commands.

61. I dissent.

Mr. Justice Brennan, with whom Mr. Justice Douglas, joins, dissenting.

62-63. Since the Court this Term has already downgraded citizens receiving public welfare, *Wyman v. James*, (1971) 400 US 309, 27 L Ed 2d 408, 91 S Ct 381 and citizens having the misfortune to be illegitimate, *Labine v. Vincent*, (1971) 28 L Ed 2d 288, I suppose today's decision downgrading citizens born outside the United States should have been expected. Once again, as in *James* and *Labine*, the Court's opinion makes evident that its holding is contrary to earlier decisions. Concededly petitioner was a citizen at birth not by constitutional right, but only through operation of a federal statute. In the light of the complete lack of rational basis for distinguishing among citizens whose naturalization was carried out within the physical bounds of the United States, and those, like Bellei, who may be naturalized overseas, the conclusion is compelled that the reference in the Fourteenth Amendment to persons "born or naturalized in the United States" includes those naturalized through operation of an Act of Congress, wherever they may be at the time. Congress was therefore powerless to strip Bellei of his citizenship;

he could lose it only if he voluntarily renounced or relinquished it. (1967), 387 US 253, 18 L Ed 2d 757, 87 S Ct 1660. I dissent.

AIR 1971 U. S. SUPREME COURT 87
(V 58 C 15)
(1971-28 L. Ed. 2d. 519)

James Melvin Kitchens, Petitioner v. S. Lamont Smith, Warden, Respondent.

No. 6131, Decided on 5-4-1971.

Constitution of India, Art 22 — (American Case) — Constitution of U. S. A. — Sixth Amendment — Right to be furnished counsel — Where the assistance of counsel is a constitutional requisite the right to be furnished counsel does not depend on a request by the accused for such assistance. This applies to guilty pleas as well as to trials. Of course to establish his right to appointed counsel at the time of his trial the accused has the burden of proving his inability at that time to hire an attorney — Where the accused in his petition for habeas corpus specifically averred that he was unable to obtain counsel because of his impoverished condition at the time of his trial and the State denied the allegation but made no effort whatever to contradict the testimony of the accused that he was indigent it must be held that the accused proved that he was without counsel due to indigency at the time of his conviction. (Paras 2, 3, 4)

SUMMARY

An accused who pleaded guilty to robbery in a Georgia State Court in 1944, when he was not represented by counsel, who escaped while serving his sentence, and who was returned to Georgia in 1969 to finish his sentence, brought a habeas corpus action in a Georgia County Court, alleging that his conviction was void under *Gideon v. Wainwright*, 372 US 335, 9 L Ed 2d 799, 83 S Ct 792, 93 ALR 2d 733, since he was not provided with counsel at the time of his conviction although he was too poor to hire a lawyer. At his habeas corpus hearing his uncontradicted testimony was that at the time of his conviction "I was a lot younger and I didn't have any money and I didn't have a lawyer." The county Court denied relief on the ground that the *Gideon* deci-

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sion is not retroactive. The Georgia Supreme Court affirmed on the ground that the accused did not testify at the habeas corpus hearing that at the time of his conviction he wanted a lawyer, asked for one, or was unable to hire a lawyer because of his poverty.

On certiorari, the United States Supreme Court reversed. In a per curiam opinion expressing the unanimous view of the Court, it was held that (1) the Gideon decision is fully retroactive; (2) the right to counsel, whether on a guilty plea or at a trial, does not depend on a request for counsel, and (3) the accused proved that he was without counsel due to indigency at the time of his conviction.

OPINION OF THE COURT Per Curiam.

1. Petitioner pleaded guilty to robbery in a Georgia State Court in 1944. He was not represented by counsel at any time. While serving his sentence, petitioner escaped and did not return to Georgia until 1969, when he was returned to finish the remainder of his sentence. He then brought this habeas corpus action in county Court, alleging that his conviction was void under *Gideon v. Wainwright*, (1963) 372 US 335 = 9 L Ed 2d 799 = 83 S Ct 792 = 93 ALR 2d 733. The county Court denied relief because Gideon was "recent law and under the law at the time of his sentence, the sentence met the requirements of the law at that time." This was error since as we have often noted, Gideon is fully retroactive. See, e.g., *Linkletter v. Walker*, (1965) 381 US 618, 639 = 14 L Ed 2d 601, 614 = 85 S Ct 1731; *Desist v. United States*, 394 US 244 = 22 L Ed 2d 248 = 89 S Ct 1030, n. 15; *McConnell v. Rhay*, (1968) 393 US 2, 3 = 21 L Ed 2d 2, 3 = 89 S Ct 32; *Stovall v. Denno*, (1967) 388 US 293, 297-298 = 18 L Ed 2d 1199, 1203, 1204 = 87 S Ct 1967.

On appeal, the Georgia Supreme Court affirmed the denial of habeas corpus on different grounds, saying that petitioner did not testify at the habeas corpus hearing that he "wanted a lawyer, asked for one, or made any effort to get one" or that "because of his poverty, or any other reason, he was unable to hire a lawyer."

2. As this Court has said, however, "[I]t is settled that where

the assistance of counsel is a constitutional requisite, the right to be furnished counsel does not depend on a request." *Carnley v. Cochran*, (1962) 369 US 506, 513, 8 L Ed 2d 70, 76, 82 S Ct 884. This applies to guilty pleas as well as to trials. *Uveges v. Pennsylvania*, (1948) 335 US 437, 441, 93 L Ed 127, 131, 69 S Ct 184.

3. Of course, to establish his right to appointed counsel in 1944, petitioner had the burden of proving his inability at that time to hire an attorney. His petition for habeas corpus specifically averred that he was unable to obtain counsel "because of his impoverished condition" at that time. The respondent denied this allegation and thus put the matter in issue. At the hearing, petitioner testified, "I was a lot younger and I didn't have any money and I didn't have a lawyer....." (Emphasis added). The State made no effort whatever to contradict petitioner's testimony that he was indigent; no part of its case went to the issue of indigency. In this light, the Georgia Supreme Court's finding that petitioner "did not testify that because of his poverty, or for any other reason, he was unable to hire a lawyer" is explicable only under the most rigid rules of testimonial construction. Though petitioner did not precisely testify that his failure to obtain a lawyer was a result of his indigency, this was the undeniable implication of his testimony, especially in view of the habeas corpus petition's allegation that petitioner was unable to hire an attorney "because of" his indigency. The hearing below as the transcript shows, was conducted informally. Petitioner had no lawyer, and introduced no evidence other than his own testimony. He testified discursively; no objections were made by the State, nor did it cross-examine petitioner on the issue of indigency.

4. It is our view that on this record petitioner proved he was without counsel due to indigency at the time of his conviction. The petition for certiorari is granted, the judgment of the Georgia Supreme Court is reversed and the case remanded for further proceedings not inconsistent with this opinion.

END

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[Vol. 58]

SUPREME COURT SECTION

WITH COMPARATIVE TABLES FOR

- (1) SUPREME COURT REPORTS
- (2) SUPREME COURT JOURNAL
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SUPREME COURT OF INDIA

1971

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PUISNE JUDGES :

The Hon'ble Mr. Justice J. M. Shelat.

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„ „ G. K. Mitter.

„ „ C. A. Vaidialingam.

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NOMINAL TABLE

Abbas, K. A. v. Union of India	(Mar) 481	Balkrishna Menon M. K. v. Assistant Cantroller of Estate Duty-Cum-In- come-tax Officer, Ernakulam	(Nov) 2392
Abdul Ghani v. State of Jammu and Kashmir	(July) 1217	Balraj Khanna v. Moti Ram	(July) 1389
Abdul Ghani Dar v. V. V. Giri : See (Jun)	1162	Balwant Singh v. Mool Chand	(Jan) 129
Abdul Rehman Bhadarwahi v. State of Jammu and Kashmir	(Feb) 266	Bankey Lal v. State of U. P.	(Nov) 2233
Abhey Dass v. S. Gurdial Singh	(May) 834	Bank of Bihar v. State of Bihar	(July) 1210
Achutyanand Singh v. State of Bihar	(Oct) 2001	Bansi, C. R. v. State of Maharashtra	(Apr) 786
Additional Collector of Customs, Cal- cutta v. M/s. Best & Co.	(Jan) 170	Bansidhar Sankarlal v. Md. Ibrahim	(July) 1292
Adi Pherozshah Gandhi v. H. M. Seervai, Advocate General of Maharashtra, Bombay	(Mar) 385	Bansi Lal v. State of Rajasthan	(Jun) 1116
Aditya Kumar Singh v. Principal, Raj- endra Medical College, Ranchi	(May) 1005	Bansilal Kohistani v. Rishi Kumar Kaushal	(July) 1262
Agarwala, R. D. v. Union of India	(Feb) 299	Barkat Ali v. State of Jammu and Kashmir	(Feb) 217
Ahmedabad Municipal Corporation, Ahmedabad, v. Haji Abdul Gafur Haji Hussenbhai	(July) 1201	Basappa Rudrappa Betgeri v. Hubli Dharwar Municipal Corporation	(Aug) 1427
Ahmed G. H. Ariff v. Commissioner of Wealth Tax, Calcutta	(Sep) 1691	Basudev Hazra v. Matiar Rahaman Mandal	(Apr) 722
Ahmed Suleman Bhorat v. State of Gujarat	(May) 991	Batahari Jena v. State of Orissa	(Aug) 1516
Allen Berry and Co. Private Ltd. v. Union of India	(Apr) 696	Becker Gray & Company (1930) Ltd. v. Union of India	(Jan) 116
All India Tea & Trading Co Ltd. v. Col- lector of Darrang	(July) 1253	Beharilal Ram Charan v. Aluminium Corporation of India Ltd. : See (Aug)	1482
Alote Estate, Alote v. R. B. Seth Hiralal Kalyanmal Kasliwal	(May) 920	Bhagaban Chandra Das v. State of Assam	(Oct) 2004
Amarchand Sobhachand v. Commis- sioner of Income-tax, Madras	(Apr) 720	Bhagwan Dass v. Chet Ram	(Feb) 569
Amitava Das Gupta v. Nath Bank Ltd.	(Feb) 218	Bhagwan Swarup v. State of U. P.	(Mar) 429
Andhra Pradesh Bankers and Pawn Brokers Association v. Union of India: See (June) 1170		Bhagwant Pundlik v. Kishan Ganpat Bharasakal	(Mar) 435
Andhra Pradesh Grain and Seed Mer- chants Association v. Union of India	(Nov) 2346	Bhagwat Singhji v. Union of India—See	(Mar) 30
Angnoo v. State of Uttar Pradesh	(Feb) 296	Bhaiya Ram Munda v. Anirudh Patar	(Dec) 2533
Antu v. State of Haryana	(July) 1213	Bhanu Kumar Shastri v. Mohanlal Sukhadia	(Oct) 2025
Anwar v. State of J. and K.	(Feb) 337	Bharat Barrel and Drum Mfg. Co. (P) Ltd. v. Collector of Customs, Bombay	(Apr) 704
Arun Ranjan Mukherjee v. Union of India	(Sep) 1814	Bharvad Bhikha Valu v. State of Gujarat	(June) 1064
Asaram Vithalsingh Pardeshi v. State of Maharashtra	(July) 1315	Bholanath Amritlal v. State of Gujarat	(Feb) 194
Asbestos Cement Ltd. v. P. D. Sawar- kar	(Jan) 100	Bhubneshwar Prasad Narain Singh v. Sidheshwar Mukherjee	(Nov) 2251
Ashoka Marketing Ltd. v. State of Bihar	(May) 946	Bihar State Board of Religious Trust, (Patna) v. Mahanth Sri Bisheshwar Das	(Oct) 2057
Assistant Registrar of Companies, West Bengal, Calcutta v. Standard Paint Works (Pvt.) Ltd.	(June) 1115	Bimal Chandra Banerjee v. State of Madhya Pradesh	(Mar) 517
Audim, R. K. v. Special Steel Ltd., Bombay	(Oct) 2049	Birla Jute Manufacturing Co. Ltd. v. Commissioner of Wealth Tax, West Bengal, Calcutta	(Dec) 2458
Awadhi Yadav v. State of Bihar	(Jan) 69	Bishambar Bhagat v. State of Bihar	(Nov) 2381
Ayyappa Reddiar, P. V. v. Ayyappan Pillai Janardhanan Pillai	(Oct) 2092	Biswanath Banerjee v. State of West Bengal	(June) 1038
Azmat Azim Khan v. Board of Revenue, Uttar Pradesh, Allahabad	(Aug) 1429	Bishwanath Rai v. Sachhidanand Singh	(Oct) 1949
Babulal Hargovindas v. State of Gujarat	(July) 1277	Boddepalli Rajagopala Rao v. N. G. Ranga	(Feb) 267
Bachan Singh v. Gauri Shankar Agarwal	(Aug) 1531	Bombay Panjrapole, Bhuleshwar v. Workmen	(Dec) 2422
Bachan Singh v. State of Punjab	(Nov) 2164	Bua Das Kaushal v. State of Punjab—See	(Sep) 1676
Badri Prasad v. Collector of Central Excise	(June) 1170	Budhoo v. State of Maharashtra—See	(Sep) 1898
Baidyanath Ayurved Bhawan (Pvt.) Ltd., Jhansi v. Excise Commissioner, U. P.	(Feb) 378	Burmah Shell Management Staff Associa- tion v. Burmah Shell Oil Storage and Distributing Co. of India Ltd. See	(May) 922
Bajaj Auto Ltd., Poona v. N. K. Firodia	(Feb) 321	Burmah Shell Oil Storage and Distribut- ing Co. of India, Ltd. v. Burmah Shell Management Staff Association	(May) 922
Bakshish Singh v. State of Punjab	(Oct) 2016	Calcutta Electric Supply Corporation v. Commissioner of Wealth Tax, West Bengal	(Dec) 2447
Balakrushna Swain v. State of Orissa	(Apr) 804	Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council	(June) 1021
Balaram T. S. v. Volkart Brothers, Bombay	(Nov) 2204		

Nominal Table, A. I. R. 1971 Supreme Court

Chajoo Ram v. Radhey Shyam	(July) 1367	Commissioner of Income-tax, West Bengal I, Calcutta v. Bengal River Steam Service Co. Ltd.	(Oct) 2114
Chaju Ram v. State of Jammu & Kashmir	(Feb) 263	Commissioner of Income-tax, West Bengal II, Calcutta v. Durga Prasad More	(Dec) 2439
Challappa Ramaswami v. State of Maharashtra	(Jan) 64	Commissioner of Income-tax, West Bengal II v. Kamal Behari Lal Singha	(Nov) 2375
Chanan Singh v. State of Haryana	(Aug) 1554	Commissioner of Income-tax, West Bengal III, Calcutta v. Balkrishna Malhotra	(Nov) 2219
Chanchal v. Syed Jalaluddin	(June) 1081	Commissioner of Taxes, Assam; Shillong v. Jalannagar South Estate Ltd.	(Oct) 2135
Chanchala, D. N. v. State of Mysore	(Sep) 1762	Commissioner of Wealth Tax, Bihar and Orissa, Patna v. Kripashankar Dayashankar Worah	(Dec) 2463
Chandrakant Madhavrao Dhaibar v. Patel Parshottamdas Shamalbhai	(Jan) 105	Commissioner of Wealth Tax, Gujarat v. Mrs. Arundhati Balkrishna	(May) 915
Chandraprakash Sibal v. State of Maharashtra—See	(Aug) 1630	Cricketer Association of Bengal v. State of West Bengal	(Oct) 1925
Chapsibhai Dhanjibhai Dand v. Purushottam	(Sep) 1878	D. A. V. College, Bhatinda v. State of Punjab	(Sep) 1731
Check Post Officer Coimbatore v. K. P. Abdulla and Bros	(Apr) 792	D. A. V. College, Jullundur v. State of Punjab	(Sep) 1737
Chhotelal v. Kewal Krishan Mehta	(May) 987	D. L. F. Housing and Construction Co. (P) Ltd. v. Sarup Singh	(Nov) 2324
Chhugamal Rajpal v. S. P. Chaliha	(Apr) 730	Daisy v. State of Kerala	(Nov) 2272
Chikkam Koteswara Rao v. Chikkam Subbarao	(Aug) 1542	Dalmia Dadri Cement Ltd. v. Murari Lal Bikaneria	(Jan) 22
Chinta Lingam v. Govt. of India	(Mar) 474	Dalmia Jain & Co. Ltd. v. Commissioner of Income-tax, Bihar and Orissa, Patna	(Oct) 2129
Chiranjilal Khaitan v. Motilal Saraogi	(Oct) 2116	Damyanti Naranga v. Union of India	(May) 966
Chowgule & Company (Hind) Pvt. Ltd. v. Union of India	(Oct) 2021	Daphtary, C. K. v. O. P. Gupta	(June) 1132
Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras	(May) 870	Darshan Singh Ram Kishan v. State of Maharashtra	(Nov) 2372
Collector of Darrang v. Assam Industries (P) Ltd.	(Jul) 1307	Dattatraya v. Rangnath Gopalrao	(Dec) 2543
Collector of Lakhimpur v. Bhuvan Chandra Dutta	(Oct) 2015	Davecos Garments Factory v. State of Rajasthan	(Jan) 141
Commissioner of Gift Tax, Madras v. N. S. Getty Chettiar	(Dec) 2410	Dayaram v. Dawalatshah	(Apr) 681
Commissioner of Income-tax, Andhra Pradesh, Hyderabad v. M/s. Jayalakshmi Rice and Oil Mills Contractor Co.	(June) 1015	Deb, K. R. v. Collector of Central Excise, Shillong	(Aug) 1447
Commissioner of Income-tax, Assam and Nagaland v. G. Hyatt	(Apr) 725	Delhi Administration v. Mohammad Iqbal	(Mar) 472
Commissioner of Income-tax, Bombay City I, Bombay v. Maharashtra Sugar Mills Ltd., Bombay	(Dec) 2434	Delhi Administration v. S. N. Khosla	(Aug) 1480
Commissioner of Income-tax, Bombay City II, Bombay v. West Coast Paper Mills Ltd.	(Dec) 2406	Delhi Cloth and General Mills Co. Ltd. v. Chief Commissioner, Delhi	(Feb) 344
Commissioner of Income-tax, Calcutta, v. Burlop Dealers, Ltd.	(Aug) 1635	Delhi Cloth and General Mills Co. Ltd. v. Commissioner of Sales-tax; Indore	(Nov) 2216
Commissioner of Income-tax, Delhi (Central), New Delhi v. M/s. Singh Engineering Works (P) Ltd., Kanpur	(Jan) 95	Delhi Transport Undertaking v. Balbir Saran Goel	(May) 836
Commissioner of Income-tax, Gujarat v. Bhanji Lavji Porbandar	(Apr) 717	Deokinandan Prasad v. State of Bihar	(July) 1409
Commissioner of Income-tax, Madhya Pradesh v. Hukumchand Mannalal and Co.	(Feb) 383	Deputy Chief Controller of Imports and Exports, New Delhi v. K. T. Kosalram	(July) 1283
Commissioner of Income-tax, Madhya Pradesh, Nagpur v. Hukumchand Mohanlal	(Dec) 2591	Devendra Singh v. State of U. P.	(Sep) 1759
Commissioner of Income-tax, Madras v. T. S. P. L. Chidambaram	(Oct) 2074	Devilal v. State of Rajasthan	(Aug) 1444
Commissioner of Income-tax, Mysore, Bangalore v. Mysore Electrical Industries, Ltd.	(July) 1361	Dey Raj Anand v. Bhagwandas	(Feb) 241
Commissioner of Income-tax, Mysore, Bangalore v. Segu Buchiah Setty	(May) 854	Dhedh Nathu Raja v. Langha Nathu Jamal	(Feb) 300
Commissioner of Income-tax, U. P. v. Bankey Lal Vaidya	(Nov) 2270	Director of Health Services, Orissa v. Their Workers:	See (July) 1259
Commissioner of Income-tax, U. P. v. Gurbux Rai Harbux Rai	(Apr) 726	Divisional Forest Officer; South Kamrup Division, Gauhati v. Moolchand Sarangi Jain	(Apr) 694
Commissioner of Income-tax, U. P., Lucknow v. M/s. Gurbux Rai Harbux Rai	(Dec) 2444	Doma Sao Mohanlal v. State of Bihar	(Aug) 1628
Commissioner of Income-tax, West Bengal, Calcutta v. Hemchandra Kar	(Nov) 2331	Dominic Varkey v. State of Kerala	(July) 1208
		Duvvur Dasaradharamareddy v. State of Andhra Pradesh	(Aug) 1461
		Dwarka Nath v. Municipal Corporation of Delhi	(Sep) 1844
		Erach v. Minoo	(Aug) 1653
		Exen Industries v. Chief Controller of Imports and Exports, New Delhi	(June) 1025
		Filmistan Private Ltd., Bombay v. Bhagwandas Santprakash	(Jan) 61

Nominal Table, A. I. R. 1971 Supreme Court

5

Food Inspector, Calicut Corporation v. Cherukattil Gopalan	(Sep) 1725	Inayat Ali Khan v. State of U. P.	(July) 1407
Fort Gloster Industries Ltd. v. Sethia Mercantile (P) Ltd.	(Nov) 2589	Income Tax Officer, Gudur v. Maram-reddy Sulochanamma	(Jan) 87
Francis Klein & Co, Private Ltd. v. Workmen	(Dec) 2414	India Electric Works Ltd. v. James Mantosh	(Nov) 2313
Gangappa Gurupadappa Gugwad v. Rachawwa	(Mar) 442	Indian Airlines Corporation v. Sukhdeo Rai	(Sep) 1828
Gannon Dunkerley and Co. Ltd., M/s. v. Workmen	(Dec) 2567	Indian Aluminium Co. Ltd. v. Commissioner of Income-tax, West Bengal I, Calcutta	(Nov) 2284
Gannon Dunkerley Employees Union v. Gannon Dunkerly and Co. Ltd.; See (Dec) 2567		Indian Mica and Micanite Industries, Ltd. v. State of Bihar	(Jun) 1182
Gauri Shanker Chittarmal Gupta v. Smt. Gangabai Tokersey	(Mar) 59	Indranarayan v. Roop Narayan	(Oct) 1962
Gaya Prasad Ramlal v. State of Maharashtra	(June) 112	Inspecting Assistant Commissioner of Agricultural Income Tax and Sales Tax (Special) Kozhikode v. V. K. Ramunni Panikkar	(Dec) 2513
Ghuran Yadav v. State of Bihar	(Aug) 1341	Iyanahalli Bakkappa & Sons v. State of Mysore	(Dec) 2598
Glan Mahtani v. State of Maharashtra	(Sep) 1498	Jadunath Singh v. State of U. P.	(Feb) 363
Girdhari Lal Gupta v. D. N. Mehta	(Jan) 28	Jagannath Prasad v. State of M. P.	(Mar) 517
Girdhari Lal Gupta v. D. N. Mehta	(Nov) 252	Jagat Kishore Prasad Narain Singh v. Rajendra Kumar Poddar	(Feb) 342
G. L. Killikar, Firm v. State of Kerala	(June) 136	Jagdish Prasad Shastri v. State of U. P.	(July) 1224
Gopal Prasad Sinha v. State of Bihar	(Mar) 458	Jage Ram v. State of Haryana	(June) 1033
Gopi Krishna Kanoria v. Draupadi Sahay	(Nov) 2560	Jai Narayan Mishra, Dr. v. State of Bihar	(July) 1318
Gopiram Bhagwandas v. State of Bihar	(Nov) 2223	Jaipur Hosiery Mills Pvt. Ltd. v. State of Rajasthan	(July) 1330
Government of India, Ministry of Home Affairs v. Tarak Nath Ghosh	(Apr) 323	Jamshed Jahan Begum v. Lakhan Lal	(Sep) 1678
Govind Mehta v. State of Bihar	(Sep) 1708	Janapada Sabha, Chhindwara v. Central Provinces Syndicate Ltd.	(Jan) 57
Guggila Ramaiah v. Union of India : See (Mar) 474		Jangloo Mian v. State of Bihar : See (Sep) 1826	
Gulabchand Bapalal Modi v. Municipal Corporation of the City of Ahmedabad	(Oct) 200	Jaswant Singh Saluja v. Chief Settlement Commissioner, New Delhi	(Apr) 748
Gulam Ghouse Mohiuddin v. Ahmad Mohiuddin Kamisul Qadri	(Nov) 284	Jatan Kanwar Golcha v. M/s. Golcha Properties Private Ltd.	(Feb) 374
Guntur Municipal Council v. Guntur Town Rate Payers' Association	(Feb) 553	Jayantilal Amratlal v. Union of India	(Jun) 1193
Gupta Industrial Corporation v. Metal Goods Mfg. Co. (P) Ltd. See (May) 898		Jayvant Rao v. Chandrakant Rao	(May) 910
Gurdev Singh v. State of Punjab	(Aug) 1530	Jijabai Vithalrao Gajre v. Pathankhan	(Feb) 315
Gurdio Singh v. State of Punjab	(Nov) 2340	Jiwan Nath Zutshi v. State of Madhya Pradesh	(Apr) 744
Gurumoorthy, M. v. Accountant General, Assam and Nagaland	(Sep) 1350	Joginder Ahir v. State of Bihar	(Sep) 1834
Gyan Chand v. State of Haryana	(Feb) 333	Joginder Singh v. State of Himachal Pradesh	(Mar) 500
Haji Hafiz Tanwar Ahmed v. Union of India	(Mar) 512	Jonnala Narasimharao & Co. v. State of Andhra Pradesh	(Aug) 1507
Hakam Singh v. Gammon (India) Ltd.	(Apr) 740	Jugraj Singh v. Jaswant Singh	(Apr) 761
Halim Mian v. State of Bihar	(Sep) 1326	Jupudi Kesava Rao v. Pulavarthi Venkata Subbarao	(June) 1070
Hanuman Pershad, L. v. Roop Narain	(July) 1212	Juwar Singh v. State of Madhya Pradesh	(Nov) 2249
Hanuman Prasad Gupta v. Hiralal	(Feb) 206	K. L. Selected Coal Concern v. S. K. Khanson & Co.	(Mar) 437
Harakchand Ratanchand Banthia v. Assistant Collector of Central Excise, Poona II, Division: See (June) 1170		Kahan Singh v. State of Haryana	(May) 983
Haridas Girdharidas v. Varadaraja Pillai	(Nov) 2366	Kakinada Annadana Samajam v. Commr of Hindu Religious & Charitable Endowments, Hyderabad	(May) 891
Hari Shankar Khanna v. Union of India	(June) 1085	Kali Prasad Poddar v. State of West Bengal : See (July) 1371	
Hari Singh Darbar v. Mahant Vaishnavdas Guru, Mahant Bajrangdas	(Oct) 1971	Kamakhyia Narain Singh v. Commissioner of Income tax, Bihar and Orissa	(Apr) 794
Hariyansh Lal Mehra v. State of Maharashtra	(June) 1130	Kanu Ambu Vish v. State of Maharashtra	(Nov) 2256
Harkishan Singh, Dr. v. State of Punjab	(Aug) 1502	Kapurchand Chandanmal Co. v. Union of India : See (July) 1170	
Har Prasad v. State of Madhya Pradesh	(Aug) 1450	Karamchand Ganga Pershad v. Union of India	(July) 1244
Har Sharan Verma v. Tribhuvan Narain Singh	(July) 1331	Karam Chand Thapar & Bros. (P) Ltd. v. Commissioner of Income-tax (Central) Calcutta	(Aug) 1590
Hatti v. Sunder Singh	(Nov) 2320	Karmi v. Amru	(Apr) 745
Hindusthan General Electrical Corporation Ltd. v. Bishwanath Prasad	(Dec) 2417	Karnail Singh v. State of Punjab	(Oct) 2119
Hira H. Advani v. State of Maharashtra	(Jan) 44	Kartar Singh v. Union of India	(Oct) 2020
Hira Lal v. State of Haryana	(Feb) 356	Kashinath v. Smt. Kudsia Begam	(Feb) 372
Hirday Narain, L. v. Income-Tax Officer Bareilly	(Jan) 33		
Hrishikesh Ganguli v. Commissioner of Income-tax, Calcutta	(Dec) 2516		
Husaina v. State of U. P.	(Feb) 260		
Hussain Bhai v. Commissioner of Income-Tax, Madras	(July) 1256		

Kashyap, S. K. v. State of Rajasthan	(June) 1120	Mannan Lal v. Mst. Chhotka Bibi	(July) 1874
Kedarnath Jute Mfg. Co. Ltd. v. Commissioner of Income Tax, (Central), Calcutta	(Oct) 2145	Manni Lal v. Parmai Lal	(Feb) 830
Keshav Ganga Ram Navge v. State of Maharashtra	(May) 953	Manohar Lal Bhogilal Shah v. State of Maharashtra	(Aug) 1511
Khagen Sarkar v. State of West Bengal	(Oct) 2051	Mansoor v. State of Madhya Pradesh	(Oct) 1977
Khajamian Wakf Estates v. State of Madras	(Jan) 161	Marulasiddaiah, G. Dr. v. Dr. T. G. Siddapparadhy	(Nov) 2264
Khedu Mohton v. State of Bihar	(Jan) 66	Master Lal Mohd. Sabir v. State of Jammu and Kashmir	(Sep) 1713
Kochan Kani Kunjuran Kani v. Mathevan Kani Sankaran Kani	(July) 1393	Mathuralal v. Keshar Bai	(Feb) 310
Krishna Beharilal v. Gulabchand	(June) 1041	Mathura Prasad Sarjoo Jaiswal v. Dossibai N. B. Jeejeebhoy	(Nov) 2355
Kulbhushan Kunwar Dr. v. Smt. Raj Kumari	(Feb) 234	Mathura Prasad Rajgharia v. State of West Bengal	(Mar) 465
Lachhmi Narain v. Financial Commissioner, Punjab, Chandigarh : See (Feb) 198		Matru v. State of U. P.	(Jun) 1050
Lachoo Mal v. Radhye Shyam	(Nov) 2213	Megna Mills Co., Ltd. v. Ashoka Marketing Ltd.	(Jan) 166
Lakhi Ram Ram Dass v. J. S. Boota Singh and Co.	(Oct) 1956	Meharbansing v. Naresh Singh	(Jan) 77
Lakshmanarao, A. v. Judicial Magistrate, First Class, Parvatipuram	(Jan) 186	Mehta, R. C. v. State of Punjab	(Jul) 1420
Lakshmiratan Cotton Mills, Co. Ltd. v. Aluminium Corporation of India Ltd.	(Aug) 1482	Mirza Maharao v. Union of India : See (Mar) 530	
Lalji Raja and Sons v. Firm Hansraj Nathu Ram	(May) 974	Mishra D. P. v. Kamalnayan Sharma	(May) 856
Latif Hussain v. State of Jammu & Kashmir	(Jan) 122	Mohan Lal v. Anandibai	(Nov) 2177
Lekh Raj Khurana v. Union of India	(Oct) 2111	Mohan Singh v. State of Punjab	(Dec) 2519
Lyngdoh H. v. Cromlyn Lyngdoh	(Jun) 1110	Mohindroo O. N v. Dist. Judge, Delhi	(Jan) 107
Madhav Rao Jivaji Rao v. Union of India	(Mar) 530	Morvi Industries Ltd. v. Commissioner of Income-tax (Central) Calcutta	(Nov) 2396
Madhaorao Rajeshwar v. Shankar Singh Madhao Singh	(Aug) 1659	Mukhtiar Singh v. State of Punjab	(Sep) 1864
Madhu Limaye v. Ved Murti	(Dec) 2481; (Dec) 2486; (Dec) 2608	Mukundas Raja Bhagwandas & Sons v. State Bank of Hyderabad	(Mar) 449
Madhu Limaye v. Sub Divisional Magistrate, Monghyr	(Dec) 2486	Mula v. Godhu	(Jan) 89
Madhusudan Gordhandas & Co. v. Madhu Woolen Industries Private Ltd.	(Dec) 2600	Municipal Board, Kannauj v. State of U. P.	(Oct) 2147
Madhya Pradesh Industries Ltd. v. Rai Bahadur Shriram Durga Prasad Ltd.	(Oct) 1983	Municipal Board, Nainital v. Brij Mohan Chandra	(Mar) 439
Magathane Samyukta Sahakari Sheti Sanstha v. Trustees of Seth Mulraj Khatau Trust Settlement	(July) 1334	Municipal Corporation, Indore v. Niya-matulla	(Jan) 97
Magraj Patodia v. R. K. Birla	(July) 1295	Municipal Corporation of Delhi v. Shiv Shanker	(Apr) 815
Mahabir Prasad v. Jage Ram	(Apr) 742	Muni Lal v. Delhi Administration	(Aug) 1525
Maharashtra State Road Transport Corporation v. Mangrulpir Joint Motor Service Co. (P) Ltd.	(Sep) 1804	Munir Khan v. State of U. P.	(Feb) 335
Mahendra Singh v. State of Rajasthan	(Dec) 2593	Munney Khan v. State of Madhya Pradesh	(Aug) 1491
Mahommed Mustafa v. Sri Abu Bakar	(Feb) 361	Nagar Panchayat, Una v. Una Taluka Sahakari Kharid Vechan Sangh Ltd.	(Jun) 1078
Mahomed Usman v. State of Andhra Pradesh	(Sep) 1801	Nagar Rice and Flour Mills v. N. Teekappa Gowda & Bros.	(Feb) 246
Major Som Nath v. Union of India	(Sep) 1910	Nandy, S. M. v. State of West Bengal	(May) 961
Makan Jivan v. State of Gujarat	(Sep) 1797	Nanhu Kahar v. State of Bihar	(Oct) 2143
Makeshwar Nath Srivastava v. State of Bihar	(Jun) 1106	Nanhu Prasad Singh v. State of Bihar	(Dec) 2479
Makhan Lal Waza v. State of Jammu and Kashmir	(Nov) 2206	Narain Dutt Chimwal v. Commissioner of Income Tax, U. P. Lucknow	(Dec) 2461
Management of Hospitals, Orissa v. Their Class IV Employees	(July) 1259	Narasimha Raju, G. P. L. v. State of Andhra Pradesh	(July) 1232
Management of National and Grindlays Bank Ltd. v. Their Workmen	(Dec) 2454	Narayana Murthy B. v. State of Andhra Pradesh	(Sep) 1716
Management of Panitola Tea Estate v. Workmen	(Nov) 2171	Narayana Pillay Daivasen v. State of Kerala	(Nov) 2287
Management of Shevaroy Bauxite Products Co. (Pvt) (Ltd.) v. workmen	(Oct) 2134	Narayan Nathu Naik v. State of Maharashtra	(Aug) 1656
Manali Ramakrishna Mudaliar v. State of Madras	(May) 989	Narayan Swamy v. State of Maharashtra	(Sep) 1789
Mangala Kunhamina Umma v. Puthiya-veettil Paru Amma	(Aug) 1575	Narendrajit Singh v. State of U. P.	(Feb) 306
Mangilal v. Krihnaji Rao Pawar	(Oct) 1943	Naresh Chandra Sanyal v. Calcutta Stock Exchange Association Ltd.	(Mar) 422
Mannam Venkatdri v. State of Andhra Pradesh	(Aug) 1487	Narender Chand Hem Rai v. Lt. Governor, Administrator, Union Territory H. P.	(Nov) 2399
		Nasiruddin v. State of Assam	(July) 1254
		Natarajan K. A. v. M. Naina Mohammed	(Mar) 43
		National Bell Co. v. Metal Goods Mfg. Co. (P) Ltd.	(May) 898
		National Tractors, Hubli v. Commissioner of Commercial Taxes, Bangalore	(Nov) 2277

Nominal Table, A. I. R. 1971 Supreme Court

7

Navin Chandra Chhotelal v. Central Board of Excise and Customs, New Delhi	(Nov) 2280	Radha Nath Seal v. Haripada Jana	(June) 1049
Navin Dutt v. State of U. P. ; See (Sep) 1759		Radhy Shyam v. Shyam Behari Singh	(Nov) 2337
Nedungadi P. K. v. Malayalee Bank Ltd.	(Apr) 329	Raghubanchmani Prasad Narain Singh v. Ambica Prasad Singh	(Apr) 778
New Central Jute Mills Co. Ltd., v. Asst. Collector of Central Excise, Allahabad	(Mar) 454	Raghubir Singh v. State of U. P.	(Oct) 2158
Noor Mohammad Mohd. Yusuf Momin v. State of Maharashtra	(May) 385	Raghunandan Prasad Mohan Lal v. State of U. P.	(Oct) 2089
Om Prakash v. State of Haryana	(July) 1388	Raghunatha Reddy, T. N. v. Mysore State Transport Authority	(Aug) 1662
Om Parkash v. Union of India	(Apr) 771	Raghu Nath, Dr. v. Competent Officer, Delhi	(Jan) 131
Pampakavi Rayappa Belagali v. B. D. Jatti	(July) 1348	Raghunath Laxman Wani v. State of Maharashtra	(Oct) 2137
Panchayati Akhara Maha Nirwani v. Consolidation Officer, Roorkee	(Nov) 2312	Raghunath Singh v. Krishna Chandra Sharma	(Sep) 1839
Panchmal Narayana v. Basthi Venkatesha	(May) 342	Rai Singh v. State of Haryana	(Dec) 2505
Panchashila Industrial Co-operative Society Ltd. v. Gurgaon Central Co-operative Bank Ltd. Gurgaon	(Dec) 2403	Rajagopalaswami Naidu S. v. Bark of Karaikudi, Ltd.	(May) 884
Pandurang Mahadeo Kavade v. Annaji Balwant Bokil	(Nov) 2228	Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Guru v. State of Andhra Pradesh	(Jan) 71
Paresh Chandra Nandi v. Controller of Stores, N. F. Railway, Pandu	(Feb) 359	Raja Shatrughit v. Mohammad Azmat Azim Khan	(Aug) 1474
Pa-shottam Jadavji ani v. State of Gujarat	(Jun) 1188	Rajendra Narayan Singh Deo v. Union of India : See (Mar) 530	
Patel Laljibhai Somabhai v. State of Gujarat	(Oct) 1935	Raj Kishore Singh v. State of Bihar	(June) 1058
Patel Uka Naran v. Kalyan Karsan	(Apr) 759	Raj Kumar Singh Hukam Chandji v. Commissioner of Income-tax, Madhya Pradesh	(Aug) 1454
Percy Rustomji Basta v. State of Maharashtra	(June) 1387	Raj Meghrajji v. Union of India : See (Mar) 530.	
Periakaruppan A. v. State of Tamil Nadu	(Nov) 2303	Raj Narain v. Superintendent, Central Jail, New Delhi	(Jan) 178
Periakaruppan Chettiar A. v. State of Tamil Nadu	(Oct) 2385	Ramabhupala Reddy v. State of Andhra Pradesh	(Mar) 460
Perspective Publications (P) Ltd. v. State of Maharashtra	(Feb) 221	Ramachandra Rao, B., Col. Dr. v. State of Orissa	(Nov) 2197
Perumal v. Ponnuswami	(Nov) 2352	Ramakrishna Hari Hegde v. Market Committee, Sirsi	(June) 1017
Phadnis K. H. v. State of Maharashtra	(May) 998	Rama Reddy v. V. V. Giri	(June) 1162
Pijush Kanti Hore v. State of Assam : See (Oct) 2004.		Ram Chandra Rai v. State of Madhya Pradesh	(Jan) 123
Pillai, T.C.M., Dr. v. Indian Institute of Technology, Guindy	(Sep) 1811	Ram Dahin Singh v. State of U. P.	(Oct) 2013
Pinto, A. J. v. Sahebbi Kom Muktum Saheb	(Oct) 2070	Ram Das v. Deputy Director of Consolidation, Ballia	(Apr) 673
Pioneer Paper Box Factory v. Thakurdevi Shrinivas	(Sep) 1781	Ramesh Chandra v. Chuni Lal Sabharwal	(July) 1238
Prabhat General Agencies v. Union of India	(Nov) 2298	Rameshwar Prasad Upadhyaya v. State of Bihar	(Dec) 2474
Prabhat Ranjan Sarkar v. Paras Nath Verma	(Oct) 2050	Ram Gobinda Daw v. Smt. H. Bhakta Bala Dass	(Mar) 664
Prabodh Chandra v. Mohinder Singh	(Feb) 257	Ram Janki Devi v. Juggilal Kamapat	(Dec) 2551
Prakash Chand Agarwal v. M/s. Hindustan Steel Ltd.	(Nov) 2319	Ramji Das v. Nihal Chand : See (Nov) 2361	
Prakash Chand Maheshwari v. Zila Parishad, Muzaffarnagar	(Sep) 1696	Ramji Das v. Trilok Chand	(Nov) 2361
Pratap Singh Malvendra Bahadur v. Union of India : See (Mar) 530.		Ram Narain v. State of U. P.	(Apr) 757
Priya Bala Ghosh v. Suresh Chandra Ghosh	(June) 1153	Rampal Singh v. Satyavir	(Apr) 678
Produce Exchange Corporation Ltd. v. Commissioner of Income-tax (Central), Calcutta	(Nov) 2328	Ranendra Narayan Sinha v. State of West Bengal	(July) 1245
Prokash Chandra v. Saradindu Kumar	(Dec) 2556	Rangalal Jajodia v. Commissioner of Income-tax, Madras	(Jan) 147
Provident Fund Inspector, Guntur v. T. S. Hariharan	(Aug) 1519	Rangaswamy Iyengar, A v. Pattammal	(Mar) 658
Provident Fund Inspector, Trivandrum v. Secretary, N.S.S. Co-operative Society, Changannacherry	(Jan) 82	Rani v. Santa Bala Debnath	(June) 1028
Punjab Produce and Trading Co. Ltd. v. Commissioner of Income-tax, West Bengal II, Calcutta	(Dec) 2471	Ranjit Singh v. State of U. P. : See (Feb) 306	
Puran Lal Sah v. State of U. P.	(Apr) 712	Rao, U. N. R. v. Smt. Indira Gandhi	(May) 1002
		Ratan Lal v. State of Madhya Pradesh	(Apr) 778
		Ratilal Bhanji Mithani v. State of Maharashtra	(Aug) 1630
		Ratilal Chhaganlal v. Dhari District Municipality	(Apr) 749
		Regina v. St. Aloysius Higher Elementary School	(Sep) 1920
		Reliable Water Supply Service of India (P) Ltd. v. Union of India	(Oct) 2083
		Roy, D. N. v. State of Bihar	(June) 1045
		Rukmanand Bairoliya v. State of Bihar	(Apr) 746

Sachindra Mohan Nandy v. State of West Bengal	(May) 963	Sri Vishwesha Thirtha Swamiar v. State of Mysore	(Nov) 2377
Sahadu Gangaram Bhagade v. Special Deputy Collector, Ahmednagar	(Sep) 1887	Standard Refinery and Distillery Ltd. v. Commissioner of Income-tax, Calcutta	(Nov) 2293
Saheb Ram v. Financial Commissioner, Chandigarh	(Feb) 198	State Bank of Bikaner and Jaipur v. Hari Har Nath Bhargava	(Nov) 2200
Sahodra Devi v. Government of India	(Aug) 1599	State Bank of Travancore v. Arvindan Kunju Panicker	(May) 996
Saifuddin Sood v. State of Jammu and Kashmir	(Aug) 1529	— v. Elias Elias	(Jan) 143
Sait Tarajee Khimchand v. Yelamarti Satyam	(Sep) 1865	State of Andhra Pradesh v. Lavu Narendra Nath	(Dec) 2560
Sales Tax Commissioner, U.P. v. M/s. Latha Singh Mal Singh	(Nov) 2221	— v. P. V. Narayana	(Apr) 811
Sambudamurthi Mudaliar v. State of Madras	(Nov) 2363	State of Assam v. Assam Tea Co. Ltd.	(July) 1358
Samrathmal Keshrimal Agarwal v. Regional Transport Authority, Indore	(Oct) 1986	— v. Daksha Prasad Deka	(Jan) 173
Sanjana. N. B. v. Elphinstone Spinning and Weaving Mills Co., Ltd.	(Oct) 2039	— v. Rameshwar Agarwala	(Apr) 674
Sankaranarayanan, C. v. State of Kerala	(Oct) 1997	— v. Talwar B. S. Major : See	(Aug) 1533
Saptawna v. State of Assam	(Apr) 813	State of Bihar v. K. K. Misra	(Sep) 1667
Sardar Balwant Singh v. Bishan Sahai Om Prakash	(Oct) 2079	— v. M.ammad Khursheed	(Nov) 2268
Sardari Lal v. Union of India	(Aug) 1547	— v. Shiva Bhikshuk Misra	(June) 1011
Sarin Chemical Laboratory v. Commissioner of Sales Tax, U. P.	(Jan) 65	— v. Tata Engineering and Locomotive Co., Ltd.	(Mar) 477
Satbir Singh v. Union of India : See	(Mar) 530	State of Bombay v. Lasalgaon Merchants' Co-operative Bank Ltd.	(Nov) 2255
Shaikh Alimuddin Ahmed v. State of West Bengal	(July) 1371	State of Gujarat v. Acharya Shri Devendraprasadji Pande	(May) 866
Shakhawati General Traders Ltd. v. Income-tax Officer, Company Circle I, Jaipur	(Nov) 2389	— v. M's Krishna Cinema	(Aug) 1650
Shambhu Prasad Singh v. Most. Phool Kumari	(July) 1337	— v. Dr. Raghunath Balkrishna Chandrachud	(May) 846
Shanbaggakkannu v. Muthu Bhattar	(Dec) 2468	— v. Ranjit Singhji Bhavansinghji	(Aug) 1645
Shankar Kerba Jadhav v. State of Maharashtra	(May) 840	State of Kerala v. R. E. D'Souza	(Apr) 832 (2)
Shankar Madhoji Nemade v. Ghisuji Janaji Bhadke	(Feb) 281	— v. South India Corporation (P) Ltd.	(Oct) 1930
Sheikh Mohd. Omer v. Collector of Customs, Calcutta	(Feb) 293	State of Madhya Pradesh v. Mir Basit Ali Khan	(Aug) 1620
Sheikhupura Transport Co., Ltd. v. Northern India Transporters Insurance Co., Ltd.	(Aug) 1624	— v. Shiv Kunwarbai	(Aug) 1477
Sheo Darshan v. State of U. P.	(Sep) 1794	State of Madras v. C. V. Parekh	(Mar) 447
Sheolal v. Sultan	(Jan) 93	— v. S. G. Jayaraj Nadar and Sons	(Dec) 2405
Sheo Nath Singh v. Appellate Assistant Commissioner of Income Tax (Central), Calcutta	(Dec) 2451	— v. S. Padmanabhan	(Oct) 2081
Shital Singh v. State of Bihar	(July) 1309	State of Maharashtra v. Champalal Kishanlal Mohota	(May) 908
Shivappa v. State of Mysore	(Feb) 196	— v. Dadamiya Babumiya Sheikh	(Sep) 1722
Shivaswamy, I. V. v. State of Mysore	(Aug) 1638	— v. Laxman Ambaji	(Sep) 1859
Shiv Lal v. Chetram	(Nov) 2342	— v. Laxman Baniya : See	(Sep) 1722
Shree Gopal Industries Ltd. v. State of Rajasthan	(Oct) 2054	— v. Nasimkhan Ahmed Khan Mali Khan	(Feb) 381
Shukla, M. D. v. State of Gujarat	(Jan) 117	— v. Syed Ahmed : See	(Sep) 1859
Shyamal Mondal v. State of West Bengal	(Nov) 2384	State of Mysore v. M/s. D. Cawasji & Co.	(Jan) 152
Shyam Deo Pandey v. State of Bihar	(Aug) 1606	— v. H. Papanna Gowda	(Jan) 191
Singh Ahluwalia, R. J. v. State of Delhi	(Aug) 1552	— v. M. Govindappa : See	(Jan) 152
Singh, M. P. v. Anand Transport Co. (P) Ltd.	(Oct) 2127	— v. P. T. Muniswamy Gowda	(July) 1363
Sirajuddin, P. v. State of Madras	(Mar) 520	— v. Pendakur Virupanna Setty and Sons	(July) 1325
Sobha Joseph v. State of Tamil Nadu : See	(Nov) 2303	— v. Swamy Satyanand Saraswati	(Aug) 1569
Sohan Lal v. State of U. P.	(Oct) 2064	State of Punjab v. Bua Das Kaushal	(Sep) 1678
Sohbat Dei v. Devi Phal	(Nov) 2192	— v. Hira Lal	(Sep) 1777
Spencer & Co. v. State of Mysore	(July) 1321	— v. Kishan Dass	(Apr) 766
Srikantiah, B. v. Regional Transport Authority, Anantapur	(Sep) 1705	— v. Ramji Lal	(July) 1228
Srinivas & Company v. Inden Biselers	(Nov) 2224	— v. Tarlok Singh	(July) 1221
Sriram Narayan Medhi v. State of Maharashtra	(Oct) 1992	State of Rajasthan v. Laxmidan	(July) 1387
		— v. Mohan Lal Vyas	(Oct) 2068
		— v. Rao Raja Kalyan Singh	(Oct) 2018
		State of Tamil Nadu v. M. Rayappa Gounder	(Feb) 231
		State of U. P. v. Jaggo alias Jagdish	(Aug) 1586
		— v. Manohar and Co. Bareilly	(Oct) 2131
		— v. Murari Lal and Brothers Ltd.	(Nov) 2210
		— v. Rahmatullah	(July) 1382
		— v. Rajju	(Apr) 708
		— v. Raj Kumar Rukmini Raman Brahma	(Sep) 1687

Nominal Table, A. I. R. 1971 Supreme Court

9

State of U. P. v. Ramkrishan Burman	(Jan) 87	Ugam Singh v. Kesrimal	(Dec) 2540
— v. Ram Niranjan Singh	(Aug) 1432	Union of India v. Allied International Products Ltd.	(Feb) 251
— v. Sham Lal Sharma	(Oct) 2151	— v. Apte, G. K., Lt. Col.	(Aug) 1533
State of West Bengal v. Bata Krishna Barman	(Jan) 156	— v. B. N. Ananthapadmanabhaiah	(Sep) 1836
— v. Shebait of Iswar Shri Saradiya Thakurani	(Oct) 2097	— v. M/s. Bhimsen Waleiti Ram	(Nov) 2295
Sub-Divisional Officer and Collector, Shivasagar v. Gopal Chandra Khound	(June) 1190	— v. Hindu Undivided Family Business	(Nov) 2333
Subedar v. The State of U. P.	(Jan) 125	— v. J. N. Sinha	(Jan) 40
Subramaniam Chettiar, Ps. Pl. Sp. v. Commissioner of Income-tax, Madras : See (Oct) 2074		— v. Jyoti Prakash Mitter	(June) 1093
Sukhnandan Singh v. Jamiat Singh	(June) 1158	— v. Kalinga Construction Co. (P) Ltd.	(Aug) 1646
Sukra Mahto v. Basudeo Kumar Mahto	(Aug) 1567	— v. Lonawala Borough Municipality of Lonawala	(Feb) 211
Sulkunte, M. C. Dr. v. State of Mysore	(Mar) 508	— v. Mohanlal Ishwar Dass Panchal	(Jan) 139
Sunil Kumar Roy v. Bhowra Kankanee Collieries Ltd.	(Apr) 751	— v. Mool Chand Dasumal Pardasani	(Nov) 2369
Surath Chandra Chakravarty v. State of West Bengal	(Apr) 752	— v. Ogale Glass Works Ltd.	(Dec) 2577
Surat Singh v. Manohar Lal	(Feb) 240	— v. Ram Kishan	(July) 1402
Suri, D. D. v. A. K. Barren	(Jan) 175	— v. Ram Kishan	(July) 1403
Surinder Singh Bahadur v. Union of India: See (Mar) 530		— v. S. R. Dhreshwar	(Sep) 1753
Surta v. State of Haryana	(Apr) 803	— v. Sohanlal Sampatlal	(Mar) 432
Sushila Devi v. Hari Singh	(Sep) 1756	— v. Sudhansu Mazumdar	(Aug) 1594
— v. Pandit Krishna Kumar Missir	(Nov) 2236	— v. Tarachand Gupta & Bros.	(Aug) 1558
Sushila Kashinath Dhone v. Harilal Govindji Bhogani	(Aug) 1495	— v. West Coast Paper Mills Ltd.	(Feb) 349
Sushil Kumar Gupta v. Joy Shankar Bhattacharjee	(Aug) 1543	University of Poona v. Shankar Narhar Agashe	(Sep) 1783
Talib Hussain v. State of Jammu and Kashmir	(Jan) 62	U. P. Electric Supply Co. Ltd. v. Workmen	(Dec) 2521
Tara Chand v. State of Haryana	(Sep) 1891	U. P. Sunni Central Wakf Board v. Mohammed Alim Cheshti	(July) 1396
Tarachand v. Superintendent of Central Excise, Bangalore	(Apr) 781	Vasundara, N. v. State of Mysore	(Aug) 1439
Tayabali Jaferbhai Tankiwala v. M/s. Ahsan and Co.	(Jan) 102	Veeramachineni Gangadhara Rao v. Andhra Bank Ltd.	(Aug) 1613
Thimma v. State of Mysore	(Sep) 1871	Vibhuti Narain Singh, Dr. v. Union of India: See (Mar) 530	
Thiru K. N. Rajgopal v. Thiru M. Karunanidhi	(Aug) 1551	Vidhya Singh v. State of Madhya Pradesh	(Sep) 1857
Tirunelveli Motor Bus Service Co. v. Commissioner of Income-tax, Madras	(Jan) 123	Vivian Rodrick v. State of West Bengal	(Aug) 1584
Tractoroexport, Moscow v. Tarapore and Co., Madras	(Jan) 1	Voltas Ltd. v. J. M. Demello	(Sep) 1902
Travancore Rayons Ltd. v. Union of India	(May) 862	Western States Trading Co. v. Commissioner of Income-tax (Central), Calcutta	(Nov) 2274
Trilochan Mishra v. State of Orissa	(Apr) 733	Wopansao v. N. L. Odyuo	(Oct) 2.23
Tulsiram Sangnaria v. Shrimati Annibai	(Mar) 671	Workers employed in Hirakud Dam v. State of Orissa	(Nov) 2242
Udaychand Mahatab Chand v. Subodh Gopal Bose	(Feb) 376	Workmen v. William Jacks and Co. Ltd., Madras	(Sep) 1821
		Yogendra Prasad Shrivastava v. Markandeshwar Singh	(Apr) 690
		Yusuf v. State of Bihar	(July) 1405
		Zora Singh v. J. M. Tandon	(Aug) 1537

SUBJECT INDEX

Act of State—See Civil P. C. (1908), S. 9 (Apr) 744

Administration of Evacuee Property Act (31 of 1950), S. 2 (f) (as it stood before Amending Act 11 of 1953) — Custodian of Evacuee Property holding 51 per cent or more shares of a company — Property of that company becomes evacuee property (Jan) 139

Administration of Evacuee Property (Central) Rules 1950, R. 14 — See Evacuee Interest (Separation) Act (1951), S. 10 (Jan) 131

Advocates Act (25 of 1961), Ss. 37, 44 — Bar Council — Powers of appeal and review stated (Jan) 107B

— S. 37 (1) — “Person aggrieved” — Ad-

Advocates Act (contd.)

vocate General appearing in pursuance of notice under S. 35 (2) is not

- (Mar) 385A
 —S. 38 — Powers of Supreme Court—
 Appeal lies both on facts and law —
 Supreme Court can review its previous
 order in appropriate cases (Jan) 107A
 —S. 44—See *ibid*, S. 37 (Jan) 107B

Air Corporation Act (27 of 1953), S. 8 (2)

- See *ibid*, S. 45 (Sep) 1828
 —S. 20—See *ibid*, S. 45 (Sep) 1828
 —S. 44—See *ibid*, S. 45 (Sep) 1828
 —S. 45—Dismissal of employee—Con-
 travention of Regulations under the Act
 — Dismissal cannot be declared as null
 and void (Sep) 1828

All India Services (Discipline and Appeal) Rules (1955)

See under Civil Services.

Allocated Government Servants (Absorption, Seniority Pay and Allowances) Rules (1957)

See under Civil Services.

Andhra Pradesh (Andhra Area) Estates Land (Reduction of Rent) Act 30 of 1947), S. 8 (i) — Exclusion of Civil Court jurisdiction Notification under S. 3 (2) based on decision of Special Officer under S. 2, which itself was based on no material— Notification can be challenged (Jan) 71B

Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), Pre., Ss. 2 (15) and 15 — Restrictions imposed on hereditary trustee are reasonable — Constitution of India, Art. 19 (5) (May) 891B

- S. 2 (15)
 See also (1) *ibid*, Pre. (May) 891B
 (2) Constitution of India, Article
 19 (1) (f) (May) 891A
 —S. 15—See *ibid*, Pre. (May) 891B

Andhra Pradesh General Sales Tax Amendment Act (9 of 1970)

See under Sales Tax.

Andhra Pradesh Registration Subordinate Service Special Rules

See under Civil Services.

Arbitration Act (10 of 1940), S. 2 (a)— Construction of arbitration agreement

- (Oct) 2088
 —S. 8 (1) (b) — Intention not to supply
 the vacancy—Requirements of provision
 (Nov) 2298
 —S. 20—Arbitration agreement—Arbi-
 trator to be appointed under S. 19,
 Defence of India Act, 1939—Award given

Arbitration Act (contd.)

by Arbitrator appointed under S. 20 (4)
 held not binding on facts (Mar) 512

—S. 30 — Mistake in award can be a
 ground of remission or setting it aside
 only when such mistake is apparent on
 the face of the award or forms a part of it
 (Apr) 696

—S. 30 — Error of law or fact
 (Aug) 1646B

—S. 33—See Evidence Act (1872), S. 91
 (Nov) 2289

—S. 35—See Foreign Awards (Recogni-
 tion and Enforcement) Act (1961), S. 3
 (Jan) 1D

—S. 39 — Powers of appellate Court
 (Aug) 1646

**Army Act (46 of 1950), S. 125—See Crimi-
 nal P. C. (1898), S. 549 (Mar) 500**

—S. 126 — See Criminal P. C. (1898),
 S. 549 (Mar) 500

—S. 126 — Prosecution of army officers
 along with civilians before Special Judge
 — Officer Commanding suggested institu-
 tion of Court Martial proceedings after
 expiry of period of limitation — Special
 Judge was not unjustified in asking
 Officer Commanding to make reference
 to Central Government for determination
 as to Court before which proceedings
 would be started (June) 1120A

**Assam Agricultural Income Tax Act (9 of
 1939), S. 8 (g) — Rules under the Act, R. 2**

(1) — Expenditure for charitable purposes
 — Exemption — Before claiming exemp-
 tion the assessee must establish that in
 the relevant year he had actually spent
 for one or the other of the charitable
 purposes mentioned in the rule—Exemp-
 tion cannot be claimed merely because
 the assessee has donated to a charitable
 trust (Oct) 2135B

—S. 26 (1) — Appellate powers of the
 Board of Revenue—Board of Revenue
 cannot reverse the decision that the asses-
 see is entitled to partial exemption in
 respect of donation given to charitable
 trust when it has become final — But
 Board is competent to decide legality of
 decision (Oct) 2135A

—S. 27 — See *ibid*, S. 26 (1)
 (Oct) 2135A

—S. 28 — See *ibid*, S. 26 (1)
 (Oct) 2135A

**Assam Forest Regulation (7 of 1891), S. 72,
 Rules framed under, R. 10 — Rule does
 not give rise to any liability to pay sum
 of money but merely imposes limitation
 on Forest Officers' power to grant leases
 in respect of certain forest produce**

(Apr) 694

Assam Fundamental Rules

See under Civil Services.

Assam General Clauses Act (2 of 1915), S. 26 — See Municipalities — **Assam Municipal Act (15 of 1957), S. 4**

(July) 1358

Assam Land Requisition and Acquisition Act (25 of 1948), S. 7 (1) — See Land Acquisition Act (1894), S. 23 (1) (Oct) 2015**Assam Land Revenue Regulations (1 of 1886)**

See under Tenancy Laws.

Assam Municipal Act (15 of 1957)

See under Municipalities.

Assam Public Service Commission (Limitation of Functions) Regulations (1951)

See under Civil Services.

Assam Services Discipline and Appeal Rules (1954)

See under Civil Services.

Bangalore City Municipal Corporation Act (69 of 1949)

See under Municipalities.

Banking Companies (Amendment) Act (1950) (Since repealed), S. 11 — See Limitation Act (1908), Art. 183 (Feb) 218**Banking Regulation Act (10 of 1949), S. 45 (5) (i)** — Guarantee under — Nature — Merger of Banks — Rank and status of employee of transferor Bank must be maintained (Jan) 143

— S. 45 (5) (i), Second Proviso—Reserve Bank of India determining status of employee of transferor Bank — Not a final order within meaning of Second Proviso (Jan) 143B

— S. 45B — See Limitation Act (1908), Art. 183 (Feb) 218

Baroda Land Revenue Code, S. 148 — Monies paid under orders of Executive Council of State passed by Maharaja in exercise of his prerogative and inherent powers cannot be recovered under S. 148 (May) 346B**Bengal Ferries Act (1 of 1885), S. 24** — Section 24 applies when lessee demands or receives from person using ferry or not, some payment on pretext that it is due as toll when it is legally not so due—His liability to prosecution for extortion under Penal Code does not exclude applicability of S. 24 (Apr) 722**Berar Regulation of Agricultural Lease Act (24 of 1951)**

See under Tenancy Laws.

Bihar and Orissa Co-operative Societies Act (6 of 1935)

See under Co-operative Societies.

Bihar and Orissa Co-operative Societies Rules (1959)

See under Co-operative Societies

Bihar and Orissa Excise Act (2 of 1915), S. 47—Conviction of a person under S. 47 is illegal when there is no legal evidence to show that it was his house which was searched from where non-duty paid ganza was recovered (Aug) 1641B

—S. 90—Rule 111 of Rules framed under —See Constitution of India, Art. 265

(June) 1182A

Bihar and Orissa Police Manual (1930)

See under Civil Services.

Bihar and Orissa Public Demands Recovery Act (4 of 1914), Ss. 3 (6), 4 — In proceeding for recovery of sales tax as arrears of land revenue against a partnership firm (a transferee of the business of a Hindu undivided family which was assessed to that tax) it must be enquired whether the said business was entirely transferred to the said firm (Aug) 1628A—S. 4—See *ibid*, S. 3 (6) (Aug) 1628A**Bihar Land Reforms Act (30 of 1950)**

See under Tenancy Laws.

Bihar Pension Rules

See under Civil Services.

Bihar Sales Tax Acts (6 of 1944) and (19 of 1959)

See under Sales Tax.

Bihar Service Code (1952)

See under Civil Services.

Bihar Tenancy Act (8 of 1885)

See under Tenancy Laws.

Bombay Agricultural Produce Markets Act (22 of 1939), S. 4-A — Notification of Mysore Government declaring certain area as Principal Market Yard in supersession of earlier notification is violative of fundamental right to carry on business of dealers who have to shift their business within a short period of ten days

(June) 1017

Bombay Cinemas (Regulation) Act (11 of 1953) — Bombay Cinema Rules, 1954, Rule 5 (2) — "No objection certificate" — Completion of building according to Rules before applying for—Issue of certificate not barred (Aug) 1650A

—S. 5—Bombay Cinema, Rules (1954), Rule 5 (2)—Government's absolute discretion under Rule 5 (2) in the issue of "no objection certificate" not arbitrary and does not override Licencing Authority's power to issue licence under Section 5 — Government's power to control the autho-

- Bombay Cinema (Regulation) Act (contd.)**
 rity to issue licence under S. 5 cannot be construed as power to supplant it
 (Aug) 1650C
 —S. 8-A—Licensing authority refusing "No objection certificate"—Dismissal of appeal by Government without making a speaking order (Aug) 1650B
Bombay Cinema Rules 1954, R. 5 (2)
 See (1) Bombay Cinemas (Regulation) Act (11 of 1953) (Aug) 1650A
 (2) Bombay Cinemas (Regulation) Act (11 of 1953), S. 5 (Aug) 1650C
- Bombay Civil Services Classification and Recruitment Rules (1957)**
 See under Civil Services.
- Bombay Civil Services; Conduct Discipline and Appeal Rules**
 See under Civil Services.
- Bombay Court-fees Act (36 of 1959)**
 See under Court-fees and Suits Valuations.
- Bombay District Municipal Act (3 of 1901)**
 See under Municipalities.
- Bombay Merged Territories and Areas Jajirs Abolition) Act (39 of 1954)**
 See under Tenancy Laws.
- Bombay Municipal Boroughs Act (18 of 1925)**
 See under Municipalities.
- Bombay Probation of Offenders Act (19 of 1938), S. 5 (1) (a)** — Release of accused on probation—Held, order was not based on proper considerations (Feb) 381
- Bombay Provincial Municipal Corporation Act (59 of 1949)**
 See under Municipalities.
- Bombay Public Trusts Act (29 of 1950), Ss. 35 (1), 66** — Mens rea — Requirement of is not a necessary ingredient — Section 35 (1) creates a quasi-criminal offence (May) 366B
- Bombay Rent Restriction Act (16 of 1939)**
 See under Houses and Rents.
- Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)**
 See under Houses and Rents.
- Bombay Reorganisation Act (11 of 1960), S. 81 (6), Proviso** — See States Reorganisation Act (1956), S. 115 (7) (Jan) 117A
 —S. 82—See States Reorganisation Act (1956), S. 115 (7) (Jan) 117A
- Bombay Sales Tax Act (51 of 1959)**
 See under Sales Tax.
- Bombay Tenancy and Agricultural Lands Act (67 of 1948)**
 See under Tenancy Laws.
- Bombay Tenancy and Agricultural Lands (Amendment) Act (31 of 1966)**
 See under Tenancy Laws.
- Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958)**
 See under Tenancy Laws.
- Calcutta Improvement Act (5 of 1911), Ss. 72, 77A** — Valuation by Tribunal — Interference by Appellate Court (Mar) 465C
 —S. 77A—See *ibid*, S. 72 (Mar) 465C
 —Sch., R. 9 — "Disposition of the land at the date of the publication of the declaration relating thereto under Section 6" —Meaning of (Mar) 465A
 —Sch., Rule 9—Market value—How to be determined stated (Mar) 465B
- Calcutta Stock Exchange Articles of Association, Art. 22** — See Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422B
 —Art. 24 — See Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422B
 —Art. 24 — Forfeiture of fully paid share of member — Separate resolutions expelling him and declaring him defaulter not required (Mar) 422A
 —Art. 26 — See Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422B
 —Art. 27 — See Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422B
 —Art. 29
 See also (1) Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422B
 (2) Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422C
 —Art. 33 — See Companies Act (1956), Sch. 1, Table A, Reg. 31 (Mar) 422C
- Cantonments Land Administration Rules (1937), R. 27** — Power given to Military Estates Officer to grant lease for regularisation of old grants is discretionary, but refusal should only be for sufficient reasons (Aug) 1599
- Central Civil Services (Classification, Control and Appeal) Rules (1957)**
 See under Civil Services.
- Central Excises and Salt Act (1 of 1944)**
 —S. 2 (f) and First Schedule Item 25-A (2) — Rolling of billets of copper alloys in circles—Excise duty under Item 25-A (2) is leviable, though circles are uncut and not trimmed (Nov) 2333

Central Excises and Salt Act (contd.)

—S. 12 — Notification applying provisions of Ss. 105 (1), 110 (3) of Customs Act, 1962 in matters relating to search of premises — Notification is valid

(Mar) 454A

—S. 12 — Section does not incorporate provisions of Sea Customs Act as integral part of that Act — On repeal of Sea Customs Act provisions of Customs Act, 1962 can be read in its place by virtue of S. 8 (1) of General Clauses Act (1897) — Fresh notification applying provisions of that Act is valid

(Mar) 454B

—S. 36 — Revisional jurisdiction of Central Government—Personal hearing — When should be given

(May) 862A

—S. 36 — Revision by Central Government — Exercise of judicial power by administrative or executive authority — Order should be speaking order

(May) 862B

—S. 37 — Central Excise Rules (1944), Rr. 10A, 9 (2) — Fact that notice of demand refers to wrong provision does not per se render it invalid if authorities have power to issue such notice under other provision

(Oct) 2039A

—S. 37 — Central Excise Rules (1944), R. 10—Word "paid" in rule can reasonably be interpreted to mean "ought to have been paid"

(Oct) 2039B

—S. 37 — Central Excise Rules (1944), R. 10 — Rule dealing with recovery of duties short levied applies also to cases of nil assessment

(Oct) 2039C

—S. 37 — Central Excise Rules (1944), R. 9 (2) — In order to attract R. 9 (2) goods liable to duty must have been removed clandestinely and without assessment

(Oct) 2039D

Central Excise Rules (1944)

—R. 9 (2)—See

(1) Central Excises and Salt Act (1944), S. 27 (Oct) 2039A

(2) Central Excises and Salt Act (1944), S. 37 (Oct) 2039D

—R. 10—See

(1) Central Excises and Salt Act (1944), S. 27 (Oct) 2039B

(2) Central Excises and Salt Act (1944), S. 37 (Oct) 2039C

—Rr. 10 and 10-A — Additional duty sought to be recovered on ground that original imposition was at a lower rate due to misapprehension — R. 10 and not R. 10-A applies

(Oct) 2049

—R. 10A—See also

(1) Central Excises and Salt Act (1944), S. 27 (Oct) 2039A

(2) Ibid, R. 10 (Oct) 2049

C. P. and Berar Money Lenders Act (13 of 1934)

See under Debt Laws.

C. P. Local Self Government Act (4 of 1920), S. 51 (2) — See M. P. Koyala Upkar (Manyatakarana) Adhiniyam (18 of 1964), S. 3

(Jan) 57A

Central Public Works Department Code (1929), Pr. 11—Word "dismissed" as used in Pr. 11 not only denote termination of services of employee by way of punishment but it covers also other cases of termination even before completion of work

(Nov) 2242A

Central Sales Tax Act (74 of 1956)

See under Sales Tax.

Chandernagore (Merger) Act (36 of 1954), S. 17 —W. B. Land (Requisition and Acquisition) Act (2 of 1948), applies to Chandernagore

(May) 963

Cinematograph Act (37 of 1952)

—S. 5B (2)—See also

(1) Constitution of India, Art. 14 (Mar) 481A

(2) Constitution of India, Art. 19 (1) (a), (2) (Mar) 481B

Citizenship Act (57 of 1955), S. 9 (2)—See Foreigners Act (1946), S. 14 (July) 1382A

Civilians in Defence Service (Temporary Service) Rules (1949), R. 5—Person holding civilian post connected with defence can challenge his termination on ground of non-compliance with R. 5

(Oct) 2111B

Civil Procedure Code (5 of 1908), Pre —Interpretation of statutes—Interpretation not to be inconsistent with established International Law

(Jan) 1A

—Pre — Interpretation of statutes — Domestic legislation to carry out International conventions

(Jan) 1B

—Pre — Interpretation of Statutes — Words

(Sep) 1691F

—Pre—Maxims — "Nemo tenetur seipsum accusare"—Not applicable in India

(Jan) 44F

—S. 2 (5) and (6) — Decree passed by Bankura Court in West Bengal in 1949 cannot be considered as a foreign decree vis-a-vis Court at Morena in former Madhya Bharat State

(May) 974A

—S. 2 (12) — See *ibid*, S. 38

(May) 974C

Civil P. C. (contd.)

- S. 9 — See Houses and Rents—M. P. Government Premises (Eviction) Act (16 of 1952), S. 3 (Aug) 1477
- S. 9—Exclusion of Civil Court jurisdiction in respect of decisions of Tribunals (Jan) 71A
- S. 9—Exclusion of Civil Court's jurisdiction — Notification under S. 3 (2) of Andhra Pradesh (Andhra Area) Estates Land (Reduction of Rent) Act whether can be challenged in Civil Court (Jan) 71C
- S. 9 — Illegal order of Governor on question of succession of certain zamindari and of revenue authorities in mutation proceedings (Apr) 681F
- S. 9 — Claim made on basis of grant by erstwhile ruler (Apr) 744
- S. 9—Resumption of ferries by Government — Suit for declaration that revenue in respect of such ferries abated (July) 1245B
- S. 9 — Exclusive jurisdiction of revenue Courts (Nov) 2320
- S. 9 Right to worship — Dispute as to, cognizable by Civil Court (Dec) 2540A
- S. 11 — Res judicata — Decision of criminal Court (Mar) 385B
- S. 11—Res judicata—Court basing its final decision on more than one point (Mar) 442A
- Ss. 11, 80—Res judicata—Suit against Government — Decision based on applicability of S. 80 as well as on merits (Mar) 442B
- S. 11 — Suit dismissed for default or for want of jurisdiction (Mar) 664
- S. 11 — Constructive res judicata — Decision in writ petition (Sep) 1676A
- S. 11—Res judicata—Waiver of plea — Necessary facts gone into by Court (Sep) 1676B
- S. 11 — Res judicata—Appeal preferred against only a part of the decree (Oct) 2070
- S. 11 — Res judicata — Court trying previous suit having no pecuniary jurisdiction to try subsequent suit (Nov) 2228B
- S. 11—Res judicata — Question relating to jurisdiction of Court — Erroneous decision of Court—Effect (Nov) 2355
- S. 11 — Income-tax assessment proceeding—Res judicata and estoppel—Applicability — Inclusion of certain income in assessee's income after rejecting his objection in previous year — Returns in subsequent years including such income — If can be considered (Dec) 2489D

Civil P. C. (contd.)

- S. 13—Decree pronounced in absentia by foreign Court — Validity (May) 974B
- S. 20 — Agreement conferring jurisdiction on Court not possessed by it—Agreement that one of Courts having jurisdiction alone shall try dispute—Effect (Apr) 740A
- S. 20, Expl. II—Word "Corporation" in Expl. II includes not only statutory Corporation but also company registered under Companies Act (Apr) 740B
- S. 20 (c) — See *ibid*, S. 38 (May) 974C
- S. 35
- See also (1) Constitution of India, Art. 136 (Feb) 281B
- (2) Evacuee Interest (Separation) Act (1951), S. 10 (Jan) 131
- S. 38 — Ex parte decree passed in 1949 by Bankura Court in West Bengal in personal action against resident of Morena in former Madhya Bharat State—Transfer to Morena Court for execution (May) 974C
- S. 39—See *ibid*, S. 38 (May) 974C
- S. 40—See *ibid*, S. 38 (May) 974C
- S. 47 — See Registration Act (1908), S. 2 (6) (Mar) 437B
- S. 48 — Period prescribed by S. 48 (1) whether period of limitation (May) 974E
- S. 60 (1) (3)—Pension—See Pensions Act (1872), S. 1. (May) 846C
- S. 75 — See *ibid*, S. 77 (Jan) 61B
- S. 75 — Power of Court to issue commissions is discretionary — Interference with such discretion (Jan) 61A
- Ss. 77, 75 — Power of Court to issue letter of request (Jan) 61B
- S. 80—See *ibid*, S. 11 (Mar) 442B
- S. 92 — See Hindu Law (Oct) 2057B, C, E
- S. 96
- See also (1) Companies Act (1956), S. 483 (Feb) 374
- (2) Hindu Law—Joint family property (June) 1028C
- S. 100—First appellate Court failing to consider material evidence in shape of documents and making good deal of assumptions of fact (June) 1049A
- S. 100 — View of Courts below that plaintiff did not get any right, title or interest because of termination of tenancy of predecessors of plaintiff, by notice — On proved and admitted facts it is open to High Court to find what the nature of tenancy was (June) 1049B

Civil P. C. (contd.)

- S. 107 — Appellate Court remanding case with direction that findings of lower Courts are set aside (Nov) 2177C
- S. 107—Appellate Court ordering remand with direction to lower Court to consider particular plea and giving liberty to plaintiff to amend plaint—New plea by plaintiff (Nov) 2177C
- S. 112 — See Constitution of India, Art. 133 (Apr) 776B
- S. 115—See *ibid*, S. 151 (Nov) 2324B
- S. 115—High Court's power to convert appeal into a revision (Oct) 2083B
- S. 115 — Order staying proceedings under Section 30. Land Acquisition Act—Revision (Nov) 2324A
- S. 141—See *ibid*, S. 151 (Nov) 2324B
- S. 149 — See High Court Rules and Orders — U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962), S. 3 (July) 1374
- Ss. 151, 141 and 115—Application to High Court under S. 151 read with S. 141 for clarification of revisional order — Ex parte order—Order invalid (Nov) 2324B
- O. 1, R. 3—Suit for declaration that transferee from mortgagors' son is not owner of suit land — Mortgagor's son is proper party (Apr) 761D
- O. 3, R. 4 — Admission by pleader — Concession made by Counsel whether can be acted on by Court to dispose of different case (Sep) 1753
- O. 6, R. 2—Plea of non-maintainability of suit (Oct) 2018A
- O. 6, R. 2—High Court in appeal considering competing claims of two parties claiming under two separate agreements of sale—Court holding that one of the contracts was contingent whether commits error (Oct) 2092
- O. 6, R. 4 — No pleading in respect of fraud or antedating of document—Plea raised for first time during arguments — Effect (Nov) 2177A
- O. 6, R. 17—See *ibid*, S. 107 (Nov) 2177D
- O. 6, R. 17—Application for amendment by defendant appellant in appeal — High Court rejecting application and taking highly technical view—Powers of Supreme Court in appeal (Feb) 361B
- O. 6, R. 17—Amendment taking away right accrued to a party by lapse of time (Nov) 2366B
- O. 12, R. 6—See *ibid*, O. 23, R. 3 (June) 1081C
- O. 13, R. 4—Marking of document as exhibit—Necessity of proof (Sep) 1865

Civil P. C. (contd.)

- O. 13, R. 18—Inspection by Court — Inspection made only for purpose of understanding evidence — Judgment not being based solely on result of personal inspection, not vitiated (Dec) 2540C
- O. 16, R. 14—Neither side summoning material witness—Discretion of Court to summon as Court witness (Oct) 1949C
- O. 20, R. 4—Finding without proper pleadings and necessary issues—Effect (Feb) 361A
- O. 21, R. 32—See Specific Relief Act (1877), S. 22 (July) 1238C
- O. 21, R. 90—See Letters Patent (All) Cl. 10 (Nov) 2337A
- O. 21, R. 90 (as amended by Allahabad High Court) — Setting aside of sale — Essentials (Nov) 2337B
- O. 21, R. 94 — Purchaser at auction sale—Doctrine 'caveat emptor' applies (July) 1201C
- O. 22, R. 2 — Suit against several defendants — Death of one against whom no relief is claimed — Failure to bring legal representatives on record—Whether appeal abates (June) 1028D
- O. 22, R. 4—See *ibid*, O. 41, R. 4 (Apr) 742A
- O. 22, R. 4—All legal representatives impleaded on record except one for want of particulars — Whether appeal abates (Apr) 673B
- O. 22, R. 4—Party respondent in appeal dying and one of his legal representatives already on record in another capacity—Effect (Apr) 742B
- O. 22, R. 11
- See also (1) *ibid*, O. 22, R. 4 (Apr) 742B
- (2) *ibid*, O. 41, R. 4 (Apr) 742A
- O. 23, R. 3 and O. 12, R. 6 — There can be more than one decree passed at different stages in same suit (June) 1081C
- O. 23, R. 3 — Partition decree based on compromise resulting in relinquishment by unlawful guardian of minor's share in property of deceased Mohammedan — Validity (Nov) 2184B
- O. 26, R. 5 — See *ibid*, S. 77 (Jan) 61B
- O. 26, R. 8 — Statement of witness taken under commission admitted on record — Thereafter, during course of the inquiry, witness unable to remain present in Court — His statement is admissible under R. 8 (Apr) 690A
- O. 32, R. 7 — See *ibid*, O. 23, R. 3 (Nov) 2184B

Civil P. C. (contd.)

—O. 34, R. 4—See Transfer of Property Act (1882), S. 58 (Feb) 310

—O. 41, R. 1—See High Court Rules and Orders—U.P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962), S. 3 (July) 1374

—O. 41, R. 2—First appeal—New plea of special period of limitation as defence (Jan) 97A

—O. 41, R. 4—Person jointly interested in decree made party respondent and on his death his heirs not brought on record—Powers of appellate Court (Apr) 742A

—O. 41, R. 20—Appeal to Supreme Court—Failure to implead necessary party (Feb) 240

—O. 41, R. 22—See Representation of the People Act (1951), S. 116-C (Oct) 2025D

—O. 47, R. 1—See Debt Laws—U.P. Zamindari Debt Reduction Act (15 of 1953), S. 4 (as amended by Act 20 of 1962) (Aug) 1474B

Civil Procedure Code (Amendment) Act (2 of 1951), S. 20 (1)—By extension of the Code to whole of India, including Madhya Bharat want of jurisdiction on part of Madhya Bharat Court to execute decree of British Indian Court was remedied (May) 974D

CIVIL SERVICES

—**All India Services (Discipline and Appeal) Rules (1955), R. 7 (1)**—Governments power to place officer under suspension even before definite charges are communicated to him (Apr) 823

—**Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules (1957)**—Absorption—Meaning of—Gujarat State Government's Order, D/- 19-8-1966—Held amounted to absorption of ministerial secretariat staff of former States of Saurashtra and Kutch into Gujarat State secretariat staff (Jan) 117B

—**Andhra Pradesh Registration Subordinate Service Special Rules, R. 5**—Rule 5 whether violates doctrine of equality on ground that Rule treats upper Division Clerks and Lower Division Clerks as equal (Sep) 1801A

—**R. 5—Recruitment on basis of seniority-cum-merit is in accordance with Rules** (Sep) 1801B

—**Assam Fundamental Rules, R. 56**—See Constitution of India, Art. 311 (June) 1110

Civil Services (contd.)

—**Assam Public Service Commission (Limitation of Functions) Regulations (1951), Reg. 6**—See Civil Services—Assam Services Discipline and Appeal Rules (1964), R. 10 (Oct) 2004B

—**Assam Services Discipline and Appeal Rules (1964), R. 10**—Rule 10 and Regn. 6 of Assam Public Service Commission (Limitation of Functions) Regulations (1951)—Consultation with Public Service Commission—Necessity (Oct) 2004B

—**Bihar and Orissa Police Manual (1930), R. 853**—Conferment of revisional power on appellate authority (June) 1106B

—**R. 861 (b)**—Appeal to Government against order of Inspector General of Police—Powers of Govt. (June) 1106A

—**Bihar Pension Rules, R. 5**—Right to pension (July) 1409B

—**Bihar Service Code (1952), Rule 76**—Automatic termination of service for continuous absence for 5 years—Order to that effect without giving opportunity to Government servant (July) 1409A

—**Bombay Civil Services Classification and Recruitment Rules (1957), R. 138**—See Civil Services—Allocated Government Servants (Absorption, Seniority Pay and Allowances) Rules (1957) (Jan) 117B

—**Bombay Civil Services, Conduct, Discipline and Appeal Rules, Rule 55**—High Courts' consistent view that procedure prescribed under Rule 55 is directory—Supreme Court declined to disturb (Apr) 749

—**Central Civil Services (Classification, Control and Appeal) Rules (1957), Rule 15**—Rule 15 whether contemplates successive inquiries (Aug) 1447

—**Rule 23, Expl**—Explanation is restricted to Rule 23 for giving dismissed servant right of appeal (Apr) 786A

—**Civil Services (Classification, Control and Appeal) Rules, R. 55**—Vague and indefinite charges and failure to supply statement of allegations—Effect (Apr) 752

—**Civil Services Regulations (1920), Article 229**—Remaining absent after end of leave—Officer ceases to have lien on any employment (June) 1085C

—**Art 465-A**—Order of compulsory retirement—Resort to Government files to discover any remark amounting to stigma (Oct) 2151

—**D. R. T. A. (Conditions of Appointment and Service Regulations (1962), Regulations, 9 (b), 15**—Termination of service

- CIVIL SERVICES—D. R. T. A. (Conditions of Appointment and Service) Regns. (contd.)**
 in terms of Regn. 9 (b) — Procedure in Regn. 15 not to be followed (May) 836
 —R. 15—See *ibid*, R. 9 (b) (May) 836
 —Fundamental Rules, R. 56 (1) (h) — See Constitution of India, Art. 14, (Nov) 2369
 —R. 56 (a) — Government order fixing certain date for founding classification of teachers who should retire at age of 55 years and those who having already retired before that date should get benefit of interim orders extending age of retirement to 58 or to 60 years not unreasonable (Sep) 1716A
 —R. 56 (a) (as amended in 1965) — Teachers employed by Municipalities, Zilla Parishads and Panchayat Samities — Claim to benefit of intention of retirement age by amendment of F R. 56 (a) (Sep) 1716B
 —R. 56 (j) — Rule is not invalid (Jan) 40A
 —R. 56 (j) — Compulsory retirement—Condition precedent for — Show cause notice against retirement (Jan) 40D
 —Government Servants' Conduct Rules (1926), Rules 20 and 23 — Disciplinary proceedings against sub-Inspector on charges involving breach of Rules 20 and 23—Charges not proved — Order by disciplinary authority asking him to resume duty from date of order with warning administered as disciplinary penalty held without any basis (Jan) 156A
 —R. 20 and 23 — Validity — Whether R. 20 (1) or R. 23 (1) violates fundamental right under Art. 19 (1) (a) and (b) of Constitution—(Quaere) (Jan) 157B
 —R. 23—See *ibid*, R. 20 (Jan) 156A;B
 —I. P. S. (Regulation of Seniority) Rules (1954), R. 3 (3) (b) — Officer of State Service promoted to I. P. S. under I. P. S. (Special Recruitment), Regulation after promulgation of Seniority Rules—Assignment of allotment year (Sep) 1814
 —Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956), Rule 25—Promotions—Promotions on communal basis (Nov) 2206A
 —Kerala Education Act (6 of 1959), S. 12 — See Constitution of India, Art. 309 (Oct) 1997B
 —Kerala Education Rules (1959), Ch. 14 C, R. 2 See *ibid*, Ch. 27A, R. 8 (Oct) 1997A
 —Ch. 27A, R. 8 — Age of superannuation of School teachers Aided school teacher opting to be governed by rules under Ch. 27-B and Ch. 14-C (Oct) 1997A
 1971 (S. C.) Indexes 2.
- CIVIL SERVICES — Kerala Education Rules (contd.)**
 —Ch. 27-B, R. 4 — See *ibid*, Ch. 27A, R. 8 (Oct) 1997A
 —Police Service Scheme, Para 4 (iii) (b) — See Constitution of India, Art. 311 (2) (Aug) 1580
 —Punjab Civil Medical Service Class I (Recruitment and Conditions of Service) Rules (1940), R. 9 (2) and (3) — Direct appointment to selection grade (Aug) 1602
 —Punjab Police Service Rules (1959), R. 16.1 — 'Reduction' — Punishment of forfeiture of approved service imposed on a constable reducing his salary to starting point in time-scale is not reduction in rank (Apr) 766B
 —R. 16.38 — Dismissal of a Foot Constable without informing District Magistrate in respect of complaint against that constable and without obtaining his decision to investigate that complaint (July) 1402B
 —R. 16.38 — Dismissal of Head Constable without informing District Magistrate about complaint against that constable and without obtaining his decision about investigation into that complaint (July) 1403
 —Railway Fundamental Rules, Rr. 2007 and 2010—See *ibid*, R. 2011 (Feb) 359
 —Rules 2011, 2007 and 2010—Transfer of permanent employee to permanent post and consequent transfer of his lien (Feb) 359
 —Rules Regulating Bihar and Orissa Agricultural Service, Class I, Promulgated on April 11, 1935, R. 16 — R. 12 of (1945) Rules providing for reference to Commission does not supersede R. 16 of (1935) Rules (July) 1318B
- Civil Services (Classification, Control and Appeal) Rules**
 See under Civil Services.
- Civil Services Regulations (1920)**
 See under Civil Services.
- Companies Act (7 of 1913), Ss. 156, 184 — Share-holder of fully paid shares—When can be placed on list of contributors (May) 920**
 —S. 171 — See *ibid*, S. 179 (1) (a) (July) 1292A
 —S. 171 — Execution of decree against company ordered to be wound up—Leave of Court under Section 171 not condition precedent (July) 1292B

Companies Act, 1913 (contd.)

—Ss. 179 (1) (a), 171—Company ordered to be wound up during pendency of second appeal filed by company—Liquidators prosecuting second appeal—Sanction of Court under Section 179 (1) (a) to prosecute second appeal

(July) 1292A

—S. 184—See *ibid*, S. 156 (May) 920

—S. 235 — Director enabling another Director to perpetrate fraud resulting in loss to Company (Apr) 829

Companies Act (1 of 1956), S. 36—See *ibid*, S. 207 (Feb) 206

—S. 73 (1)—More applications than one for quotation of shares — One of several applications only granted — Still facility for ensuring quick conversion is available (Feb) 251B

—S. 73 (1), (2) and (5)—Intimation that application will be given further consideration—Application cannot be refused until finally decided (Feb) 251A

—S. 111 (2)—Transfer of shares — Absolute discretion vested in directors under articles of company to refuse registration — Test for Court to consider how far reasons for refusal were justified, stated (Feb) 321

—S. 205—See *ibid*, S. 207 (Feb) 206

—Ss. 207, 205 and 36 — Provisions of S. 205 (5) incorporated in Articles of company — Obligation to pay dividend arises at place of company's registered Office (Feb) 203

—S. 433 (e) — Non payment of disputed debts—Bona fide dispute by company — Court can rightly refuse a petition for winding up (Dec) 2600A

—S. 433 (e) — Disappearance of substratum of company — Allegation has to be proved as a fact (Dec) 2600C

—S. 433 (e)—Petition for winding up — Petition presented to coerce company in satisfying some groundless claims — Improper motive — Inference (Dec) 2300D

—S. 433 (f) — Winding up of company under just and equitable clause—Opposition by creditors — Court can consider their wishes and decline to make order (Dec) 2600B

—S. 446—See *ibid*, S. 483 (Feb) 374

—S. 457—See *ibid*, S. 483 (Feb) 374

—Ss. 483, 446, 457—Order by Company Judge to sale by auction lease-hold rights of Company under liquidation — Notice of either sale or of proceedings culminating in order of sale not given to landlord either by Official Liquidator or

Companies Act, 1956 (contd.)

by Court—Right of landlord to file appeal under S. 483 is not deprived by R. 139 of the Companies (Court) Rules (1959) (Feb) 374

—S. 557—See *ibid*, S. 483 (f) (Dec) 2600B

—S. 624-B — Appeal against order of criminal Court passed in trial of offence under Companies Act is governed by Criminal P. C. (June) 1115B

—Sch. 1, Table A Reg. 31 — Calcutta Stock Exchange Articles of Association, Arts. 22, 24, 26, 27 & 29—Articles are *intra vires* and valid (Mar) 422B

—Sch. 1, Table A Reg. 31—Forfeiture of fully paid share — Calcutta Stock Exchange Articles of Association, Arts. 33, 29—Article 29 of Exchange is to be read subject to Art. 33 — Article giving power to company to appropriate balance in hand would be contrary to intentment of S. 74, Contract Act (Mar) 422C

Companies (Court) Rules (1959), R. 103—See Companies Act (1956), S. 483 (Feb) 374

—R. 139 — See Companies Act (1956), S. 483 (Feb) 374

Companies (Profits) Surtax Act (7 of 1964)—Sch. Second, R. 1—Allocations for reserves, being not possible on very first day of previous year, made subsequently during previous year—Effect (July) 1361

Conduct of Elections Rules (1961), R. 56 (2) (b) — Rejection of ballot papers on ground that marks made on them were made otherwise than with instrument supplied for the purpose—Burden lies on person, who challenges decision of returning officer in his election petition, to establish that officer had wrongly rejected ballot papers (Feb) 330C

—R. 75 (4) — See Education — Poona University Act (20 of 1948), S. 56 (Sep) 1783A

—R. 81 (3) — See Education — Poona University Act (20 of 1948), S. 56 (Sep) 1783A

Constitution of India, Pre — Unconstitutionality of legislation — Presumption as to Constitutionality (Nov) 2392B

—Art. 5 (a)—See Foreigners Act (1946), S. 2 (a) (July) 1382

—Art. 13 — Burden lies on party contending that a pre-Constitution law is void under article read with any of the guaranteed freedoms to prove the invalidity of the law (Dec) 2486B

Constitution of India (contd.)

—Art. 13 (3) (a) — Whether the law relating to contempt is a law within Article 13 (3) (a) (Quaere) (June) 1132C

—Art. 14

- See also (1) Civil Services — Andhra Pradesh Registration Subordinate Service Special Rules R. 5 (Sep) 1831A
 (2) Civil Services — Fundamental Rules R. 56 (a) (Sep) 1716A
 (3) Ibid, Art. 311 (Oct) 1997C
 (4) Education — Mysore Medical Colleges (Selection for Admission) Rules (1970), R. 9 (1) (Sep) 1732B
 (5) Municipalities — Bangalore City Municipal Corporation Act (39 of 1949), S. 99 (2) (b) (as amended) by Mysore Act (33 of 1964) (July) 1321A, 3, C
 (6) Prevention of Food Adulteration Act (1954), P.F.A. (Nov) 2346C
 (7) Punjab Development of Damaged Areas Act (11 of 1951), S. 8 (Nov) 2154B
 (8) Sales Tax — Andhra Pradesh General Sales Tax Amendment Act (9 of 1970), S. 9 (Aug) 1507A
 (9) Sea Customs Act (1878), S. 187-A (Aug) 511

—Art. 14—Criminal P. C. (1898), S. 344 (1-A) — Constitutionality — Section does not clothe Court with unfettered, arbitrary and unguided power (Jan) 186B

—Art. 14 — Criminal P. C. (1898), S. 344 — Constitutionality — Power of Court to remand accused — Although discretionary, is not unguided being judicial one (Jan) 186E

—Art. 14 — Cinematograph Act (1952), S. 5-B (2) — Treatment of motion picture on different footing from other forms of art and expression is valid classification (Mar) 481A

—Art. 14 — Discrimination — Public servant, head of department found actively responsible for directing commission of offences by his subordinates in particular manner — He cannot be allowed to take plea that subordinates must also be joined as co-accused with him (Mar) 520C

—Art. 14 — Notification under S. 4 (2), Rajasthan Sales Tax Act (1950), excluding "hosiery products" from exemption from

Constitution of India (contd.)

sales tax given to sale of garment the value of which did not exceed Rupees four in single piece is not discriminatory (July) 1830

—Art. 14 — Rule 3 of Mysore Rules for selection of candidates for admission to pre-professional/B.Sc. Part I course leading to M. B. B. S. in Government Medical Colleges imposing condition of residence for minimum period of ten years in State of Mysore in addition to condition of being domiciled in that State does not violate Art. 14 (Aug) 1439

—Art. 14 — Guru Nanak University Amritsar Act (21 of 1969), S. 4 (2), (3) — Validity (Sep) 1737G

—Art. 14—Unequal treatment by hostile intent to reject candidature will not be lightly presumed to be harboured by Selection Committee of University (Oct) 2085A

—Art. 14 — Where a selection Committee examining candidates for admission to Government-run Colleges of its own accord allots unequal values to items of merit-tests provided by the appointing State without allotting separate marks for the items, the selection has to be set aside as offending equal opportunity of education (Oct) 2085B

—Art. 14 — Mere absence of provision prescribing maximum rate in Act which delegates power to the Corporation to levy property tax does not per se render such delegation in any manner arbitrary or excessive (Oct) 2100A

—Arts. 14, 15 — Admission to Medical Colleges — Unitwise distribution of seats — Method violates Arts. 14 and 15 (Nov) 2303A

—Art. 14 — Admission to medical college — Interview—Objective tests (Nov) 2303C

—Art. 14 — Admission to Medical College — Rules requiring Selection Committee to assess candidates on basis of certain specified objective tests — In absence of specific provision in rules committee must distribute total marks equally on various items — Giving marks in lumpsum and not on itemised basis is illegal — Selection Committee cannot also consider matters falling outside scope of specified items (Nov) 2303D

—Art. 14 — Equality before law — Government memorandum introducing change in R. 56 (1) (b) of Fundamental Rules and thereby increasing date of

Constitution of India (contd.)

superannuation—Petitioner alone denied operation of memorandum — Art. 14 is violated (Nov) 2369

—Art. 14—Imposing an additional land revenue, by way of surcharge as a temporary measure before the uniform land revenue law is enacted after reorganisation of the State, is not a hostile discrimination so as to be violative of the Article (Nov) 2377B

—Art. 14 — Reasonable classification—The area of detention by Magistrate under Criminal P. C. is entirely different from detention under laws made for preventive detention under Art. 22 and there is therefore good classification (Dec) 2486D

—Art. 15

See (1) Ibid, Art. 14 (Nov) 2303A

(2) Education — Mysore Medical Colleges (Selection for Admission) Rules (1970)

(Sep) 1762C

—Art. 15 (4) — See Education—Mysore Medical Colleges (Selection for Admission) Rules (1970), R. 3 (Sep) 1762D

—Art. 15 (4) — Classification of backward classes on basis of castes — It is within purview of Art. 15 (4)

(Nov) 2303E

—Art. 16

See also Civil Services — Jammu and Kashmir Civil Services (Classification, Control and Appeal) 1956, R. 25 (Nov) 2206A

—Arts. 16, 226—State Government appointing person to selection post on basis of merit — Absence of mala fides — High Court not to interfere (July) 1318A

—Art. 16 (4) and (1) — Reservation of appointments or posts in favour of backward classes—Mere fact that it may give extensive benefits to persons who have the benefit of the reservation does not by itself make the reservation invalid

(Sep) 1777

—Art. 19 — See Criminal P. C. (1898), S. 144 (Dec) 2486F

—Arts. 19, 20, 21, 22—Non-citizen cannot claim fundamental right under Art. 19 but can claim rights under Arts. 20, 21 and 22 (Feb) 337A

—Art. 19 — Law uncertain and prima facie taking away guaranteed freedom — Law offends Constitution (Mar) 481C

—Art. 19—Privy purse is property (Mar) 530K

—Art. 19—Effect of Constitution (First Amendment) Act, 1951 on existing laws (Dec) 2486A

Constitution of India (contd.)

—Arts. 19 (1) (a) and (b) and (2) — See Civil Services — Government Servants Conduct rules (1926), R. 20 (Jan) 156B

—Arts. 19 (1) (f) and (g) and 19 (5) and (6)—See Gold Control Act (1968), S. 71

(June) 1170C

—Art. 19 (1) (f) and (5)—See Prevention of Food Adulteration Act (1954), s. 16 (1) (a) (Nov) 2346B

—Art. 19 (1) (g)—See Bombay Agricultural Produce Markets Act (22 of 1939), S. 4A (June) 1017

—Art. 19 (1) (g) — See Rice Milling Industry (Regulation) Act (1958), S. 8 (3) (c) (Feb) 246A

—Art. 19 (1) (i) and (g) — See Punjab Development of Damaged Areas Act (10 of 1951) (Nov) 2164A

—Art. 19 (1) (a), (2) — Cinematograph Act (1952), S. 5-B (2)—Validity—Censorship justified by Constitution — General principles in directions by Central Government cannot be said to be vague — There is however absence of direction for preserving art — Some procedural safeguards are also needed (Mar) 481B

—Art. 19 (1) (a) and (2) — Assuming that Art. 19 (2) applies to the law relating to contempt it imposes reasonable restrictions on the right to freedom of speech

(June) 1132B

—Art. 19 (1) (c) — Hindi Sahitya Sammelan Act (1962) violates Art. 19 (1) (c)

(May) 966A

—Art. 19 (1) (c) — Guru Nanak University Amritsar Act (21 of 1969), S. 5—Validity—There is no infringement of Art. 19 (1) (c) (Sep) 1737H

—Arts. 19 (1) (f) and 31—Office of hereditary trustee is not "property"

(May) 891A

—Art. 19 (1) (f) — Hindi Sahitya Sammelan Act (1962), contravenes Art. 19 (1) (f) and is void (May) 966C

—Art. 19 (1) (f) — Right to pension is 'property' (July) 1409C

—Art. 19 (1) (g)—Control Orders issued under S. 3 (2)(d) of Essential Commodities Act (1955) imposing restrictions on movement of rice and paddy—Power to grant or refuse permits conferred on fairly high rank officers — Reasonableness

(Mar) 474A

—Art. 19 (1) (g) and (6)—Pre-Constitution agreements by State granting monopoly rights to citizen to carry on business of plying buses become void and unenforceable after the Constitution and any amount due to State under such agreement, therefore, cannot be recovered (Oct) 2068

Constitution of India (contd.)

—Art. 19 (1), (3) (4) (5) — Reasonableness of restriction — Test Second part of sub-s. (6) of S. 144, Criminal P. C. violates Art. 19 (1) (b), (c) and (d)

(Sep) 1637A

—Art. 19 (2), (3) and (4) — Public order — Meaning of — Scope of expression "In the interests of public order"

(Dec) 2436C

—Art. 19 (5) — See Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), Preamble

(May) 831B

—Art. 20 — See *ibid*, Art. 19 (Feb) 337A

—Art. 20 (2) — Double jeopardy — Statement before Customs Officer in inquiry under S. 171-A, Sea Customs Act — Admissible in evidence — Art. 20 (2) no bar

(Jan) 44J

—Art. 21 — See *ibid*, Art. 19 (Feb) 337A

—Art. 21 — Prescription of entrance test by State Government in accordance with law for admission to Medical College

(Dec) 230B

—Art. 22

See (1) *Ibid*, Art. 14 (Dec) 2436D

(2) *Ibid*, Art. 19 (Feb) 337A

(3) Criminal P. C. (1898), Chapter VIII (Dec) 2486I

—Art. 22 (5) — See Public Safety—J. & K. Preventive Detention Act (13 of 1964), S. 8

(Feb) 263A, B

—Art. 26 — See *ibid*, Art. 31 (Jan) 161D

—Arts. 29, 30 — Right of Arya Samajist to invoke fundamental rights under Articles 29 and 30

(Sep) 1737D

—Arts. 29, 30 — Guru Nanak University Amritsar Act (21 of 1969), S. 4 (2) — Validity — The provision does not offend Article 29 (1) or Art. 30 (1)

(Sep) 1737E

—Arts. 29, 30 — Guru Nanak University Amritsar Act (21 of 1969), S. 4 (3) — Validity — The provision does not offend Article 29 or Art. 30

(Sep) 1737F

—Art. 29 (1) — Religious minority — The Arya Samajis are entitled to the guarantees under Arts. 29 and 30

(Sep) 1731B

—Art. 29 (1) — Right of minorities to establish and administer educational institutions of their choice, includes the right to have a choice of medium of instruction also

(Sep) 1731C

—Art. 30

See also (1) *Ibid*, Art. 29 (1)

(Sep) 1731B, C

(2) *Ibid*, Art. 29

(Sep) 1737D, E, F

—Art. 30 — Minority — How to be deter-

Constitution of India (contd.)

mined — Religious or linguistic minorities

(Sep) 1737A

—Art. 30 — Linguistic minority — Must at least have a separate spoken language — Distinct script not essential

(Sep) 1737B

—Art. 30 — Religious minority — The Arya Samaj can be considered to be a religious minority, at any rate as part of the Hindu religious minority in the State of Punjab

(Sep) 1737C

—Art. 30 (1) — Guru Nanak University Amritsar Act (21 of 1969), S. 19 (1) — Statutes under — Clauses 2 (1) (a), 17 and 18 — Validity

(Sep) 1737I

—Arts. 31, 32

See also (1) *Ibid*, Art. 19 (Mar) 530K

(2) *Ibid*, Art. 19 (1) (f) (May) 891A

—Arts. 31 and 26 — Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963) Pre — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act (30 of 1963) Pre — Validity — Acts are not invalid on ground that they provide for acquisition of properties belonging to religious denomination

(Jan) 161D

—Art. 31 (1) — See *ibid*, Art. 19 (1) (f) (July) 1409C

—Art. 31 (1) — Demand of tax from corporation not leviable under a valid law — Breach of fundamental right under Art. 31 (1) is involved — Corporation being a person within Art. 31 (1) can maintain a petition under Art. 32

(May) 870B

—Art. 31 (2) — See Punjab Development of Damaged Areas Act (10 of 1951), Pre

(Nov) 2164C

—Art. 31 (2) — Cession of territory by India as a result of treaty with Pakistan does not amount to compulsory acquisition of property

(Aug) 1594C

—Arts. 31 (2) and 31-A — Madras Inams Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963), Pre — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act (30 of 1963), Pre — Validity — Acts do not violate Art. 31 (2) — Moreover, the provision is protected by Art. 31A

(Jan) 161C

—Art. 31 (2A) — Acquisition or requisition — Transfer of ownership or right to possession of any property to State or to a corporation owned or controlled by State essential

(Aug) 1594B

Constitution of India (contd.)**—Art. 31A**

See also (1) Ibid, Art. 31 (2) (Jan) 161C
 (2) Tenancy Laws — Madras Lease-holds (Abolition and Conversion into Ryotwari) Act (27 of 1963), S. 4 (May) 989A

—Art. 31A — Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (26 of 1963), Pre — Madras Lease-Holds (Abolition and Conversion into Ryotwari) Act (27 of 1963) Pre — Madras Minor Inams (Abolition and Conversion into Ryotwari) Act, (30 of 1963), Pre — Constitutionality — Acts cannot be challenged on ground of violation of Arts. 14, 19 and 31 of Constitution (Jan) 161A

—Art. 31A Second Proviso — Acquisition in breach of second Provision to Art. 31A will be invalid to that extent (Jan) 161E

—Art. 31A — Saving of laws providing for acquisition of estates—Extent of protection under Art. 31A (Oct) 1992

—Art. 32

See also (1) Central Excises and Salt Act (1944), S. 36 (May) 862B

(2) Ibid, Art. 362 (Mar) 530B
 —Art. 32 — Habeas corpus—Court has to consider legality of detention on date of hearing (Jan) 62A

—Arts. 32 and 226 — Habeas Corpus—Detention pursuant to order of remand under S. 344 is not open to challenge (Jan) 186F

—Art. 32— Habeas corpus — Writ of— Nature — Foreigner entering India illegally — His detention for purpose of deportation is not illegal — Habeas corpus cannot be issued for his release (Feb) 337C

—Art. 32 — President does not exercise political power and exercise of powers by him is amenable to jurisdiction of Courts (Mar) 530I

—Art. 32—Under-trial prisoner—Question that he is entitled to be released as he was not produced before a Magistrate within 24 hours of his arrest does not arise (April) 813A

—Art. 32 — Where an accused is illegally detained, the detention becomes lawful when subsequently he is arrested and produced before a Magistrate within 24 hours (April) 813B

—Art. 32—Under-trial prisoner charged with two or more offences — Fact that he was arrested only in one case does not make any difference (April) 813C

Constitution of India (contd.)

—Art. 32 — Criminal P. C. does not apply to Tribal areas in Assam and Manipur—Accused arrested on a charge of two or more offences need not be produced in connection with each offence before a Magistrate for remand (April) 813D

—Art. 32 — Right to move Supreme Court for enforcing fundamental right— Conditions for (May) 870A

—Art. 32 — Right to move Supreme Court — Demand of tax not backed by valid law Is a threat to property—Petitioner will be limited only to establishing fundamental right — Existence of other remedies no bar (May) 870C

—Arts. 32, 370, 35 (c) — Application of Art. 35 (c) to Jammu and Kashmir is not in contravention of Art. 32 (4) (July) 1217A

—Art. 32—Procedure — Preventive detention order challenged as being mala fide—Court can see whether on facts stated, a charge of mala fide can be made out (Sep) 1713A

—Art. 32 — Procedure — Where on a petition being filed challenging the detention order, the Government files affidavits in reply which are sworn to by the Deputy Secretary such swearing can only be as to facts appearing from the record. He cannot swear to the affidavits based on his personal knowledge unless the fact is in his personal knowledge (Sep) 1713B

—Art. 32 — A petition can be filed when the fundamental rights are threatened. He need not wait till the actual threat has been carried out (Sep) 1731A

Art. 32 — Maintainability of petition — Depends upon whether the impugned law infringes any fundamental rights (Sep) 1737J

—Art. 32 — Illegal detention — In habeas corpus proceedings legality or otherwise of the detention at the time of the return and not with reference to the institution of the proceedings (Nov) 2197A

—Art. 32—Habeas corpus — Writ cannot be granted to a person undergoing sentence of imprisonment imposed on him by a competent Court (Nov) 2197B

—Art. 32 — Writ of habeas corpus cannot be granted to a person committed to jail custody by a competent Court by an order which prima facie does not appear to be without jurisdiction or wholly illegal (Nov) 2197C

Constitution of India (contd.)

- Art. 35 (c)—See *ibid*, Art. 32 (July) 1217A
- Art. 53—See *ibid*, Art. 366 (22) (Mar) 530A
- Art. 74 (1) — The Council of Ministers does not cease to hold office even after dissolution of the House of the People (May) 1002
- Art. 77 — See *ibid*, Art. 311 (2) (Aug) 1547
- Art. 124 (4)—Gross error in judgment does not amount to "misbehaviour" (June) 1132D
- Art. 129 — Ascribing dishonesty to Judge amounts to contempt (June) 1132A
- Art. 129 — Appeal is heard by two Judges—Criticism that a Judge "toed the line" of another Judge and surrendered his own judgment amounts to flagrant contempt (June) 1132H
- Art. 129—Evidence to justify allegations amounting to contempt of Court cannot be allowed (June) 1132I
- Art. 129—Formal charge when need not be drawn up (June) 1132J
- Art. 129—Who can apply—Advocates of Supreme Court including the President of the Court's Bar Association (June) 1132K
- Art. 132 (1) — Petition involving important questions — Single Judge refusing to refer petition for decision to a Bench and deciding case and granting certificate — Not proper (Feb) 299
- Art. 132 (1)—Single Judge of a High Court when can grant a certificate (June) 1093A
- Art. 132 (1) — Certificate by a Single Judge under Art. 132 (1) although technically correct should be given in very exceptional cases where a direct appeal is necessary (Aug) 1594A
- Art. 133 — New plea (Mar) 437A
- Art. 133 — Concurrent findings about genuineness or otherwise of a will — Interference (Apr) 681A
- Art. 133 — Concurrent findings of fact — Interference (Apr) 776B
- Art. 133 — New plea (Jun) 1095B
- Art. 133 — New plea (Aug) 1482B
- Art. 133 — Appellate jurisdiction of Supreme Court in Civil matters — Interference with findings of fact (Oct) 1971A
- Art. 133 — Appellate jurisdiction of Supreme Court in Civil matters — New plea (Oct) 1971B
- Art. 133 — Appellate jurisdiction of Supreme Court—New plea (Oct) 1971C
- Art. 133 — New plea (Oct) 2020

Constitution of India (contd.)

- Art. 133 — Judgment, decree or final order of High Court — Application to set aside *ex parte* decree rejected — High Court restoring it to file — No certificate can be granted (Nov) 2319
- Art. 133 (1) — Final order in a civil proceeding—Order dismissing writ petition to quash industrial award, is a final order (Jan) 100
- Art. 133 (1) — Judgment of reversal — Single Judge of High Court, is a Court immediately below Division Bench of that High Court hearing Letters Patent appeal (Mar) 658
- Art. 133 (1) (a) and (1) (c) — Certificate of fitness for appeal (Apr) 776C
- Art. 134 — Supreme Court — Power to review evidence in criminal appeals (Apr) 759A
- Art. 134 — Additional evidence when be allowed in criminal appeal before Supreme Court (Apr) 759B
- Art. 134 — Concurrent conclusions of Courts below when not tainted with any infirmity are binding on Supreme Court (Apr) 759C
- Art. 134—Sentence—Supreme Court when will interfere (Apr) 803
- Art. 134 — Findings of facts based on appreciation of evidence cannot be challenged before Supreme Court (July) 1277A
- Art. 134 — Supreme Court does not review evidence except in exceptional cases (Nov) 2233B
- Art. 134 (1) (c) — Application of settled principle to facts of a particular case does not make it fit for certificate (Apr) 832 (2)B
- Art. 134 (1) (c) — Issue of certificate — Duty of High Court — Certificate not disclosing question of law — Can be revoked (Aug) 1543B
- Art. 136
- See also (1) Central Excises and Salt Act (1944), S. 36 (May) 862B
- (2) Civil P. C. (1908), O. 6, R. 17 (Feb) 361B
- (3) *Ibid*, Art. 226 (Jan) 129; (Dec) 2451
- Art. 136 — Criminal appeal — Case depending on circumstantial evidence — Power to review evidence when exercised (Jan) 125
- Art. 136 — Murder case — Interference with sentence (Feb) 260
- Art. 136—Revocation of special leave — Special leave application should not contain any untrue or false statements

Constitution of India (contd.)

either in material particulars or on matters of importance or valuation

(Feb) 281A

—Art. 136 — Appeal by special leave—
Cost

(Feb) 281B

—Art. 136 — Appeal with special leave
— Finding by Railway Rates Tribunal that rates are unreasonable and discriminatory — Cannot be challenged

(Feb) 349B

—Art. 136 — New plea — Question involving an investigation into matters of fact — Cannot be allowed to be raised in appeal by special leave

(Feb) 369B

—Art. 136 — Concurrent findings of fact — Interference

(Feb) 376A

—Art. 136 — New plea raising question of fact cannot be entertained in appeal with special leave

(Feb) 376B

—Art. 136 — Petition for special leave to appeal against interlocutory order of Letters Patent Bench — Interference by Supreme Court

(Mar) 431

—Art. 136 — Interference with findings of fact

(Mar) 460B

—Art. 136 — New ground — Appeal by special leave — Additional ground requiring investigation into facts not allowed

(Mar) 508B

—Art. 136—Power of Supreme Court to remand a case

(Apr) 704C

—Art. 136 — Finding of fact supported by evidence is binding

(Apr) 720

—Art. 136 — Article 136 does not confer right of appeal on party — It only confers discretionary power on Supreme Court to interfere sparingly

(Apr) 722C

—Art. 136 — Concurrent finding as to genuineness of will cannot be questioned

(Apr) 745A

—Art. 136 — High Court enhancing a sentence at the instance of a private complainant—Interference by Supreme Court

(Apr) 757B

—Art. 136 — Concurrent findings of fact — Supreme Court would not ordinarily go into questions of fact unless it is shown that they are vitiated in any respect

(Apr) 786D

—Art. 136 — Appeals arising out of references under S. 66 (2), Income-tax Act (1922) — Supreme Court cannot exercise any wider power of interference than that permitted to the High Court under the Income-tax Act

(Apr) 794A

—Art. 136 — Supreme Court in appeal will not normally re-appraise evidence for acquittal of corrupt practice

(May) 856B

Constitution of India (contd.)

—Art. 136 — Supreme Court normally does not review and appraise evidence for itself

(May) 885A

—Art. 136 — Issue raised in suit broad enough to cover plea of estoppel — Plea argued and considered by lower Courts without objection — Plaintiffs cannot be permitted in appeal by special leave to contend that defendant had not taken any specific plea of estoppel

(June) 1041C

—Art. 136 — In Criminal appeals Supreme Court reappreciates evidence only in exceptional cases

(June) 1051

—Art. 136 — Appreciation of evidence — Concurrent findings of fact — Binding nature

(June) 1058A

—Art. 136 — Appeal against acquittal — Appreciation of evidence — No error committed by High Court — No interference

(July) 1221

—Art. 136 — Supreme Court Rules (1966), O. 16, R. 3 — Complaint filed by authority duly authorised by statute — Revocation of special leave granted at instance of private complainant

(July) 1283A

—Art. 136 — Appeal against acquittal — Supreme Court can convert acquittal into conviction

(July) 1283D

—Art. 136 — Appeal against order refusing to certify certain appeal under Art. 133 (1) (b) and (c) — View taken by High Court on merits of case found to be true — No interference

(July) 1292C

—Art. 136 — Concurrent findings of fact — Ordinarily no interference by Supreme Court

(July) 1309A

—Art. 136 — Appreciation of evidence — Previous history of dispute is a neutral factor and cannot displace oral evidence relied on by High Court

(July) 1309B

—Art. 136 — Quashing order of commitment

(July) 1371

—Art. 136 — Appreciation of evidence by High Court—Interference

(July) 1387

—Art. 136 — Supreme Court normally does not reappraise the evidence except in special cases

(Aug) 1461

—Art. 136 — Power of Supreme Court to interfere — It is of an exceptional and overriding nature and has to be exercised sparingly, the paramount consideration always being the perpetuation of justice

(Aug) 1533

—Art. 136—New point—Jurisdictional point can be raised for the first time

(Aug) 1552

—Art. 136 — Award of compensation to legal representatives of deceased per-

Constitution of India (contd.)

sons under Section 110-B, Motor Vehicles Act—Interference (Aug) 1624B

— Art. 136 — Supreme Court can interfere even with findings of fact if not supported by evidence (Aug) 1641A

— Art. 136 — New plea (Aug) 1659B

— Art. 136—New plea (Aug) 1662C

— Art. 136— Delay of ten years in filing appeal — No reason or justification for condoning delay given—Leave to appeal refused (Sep) 1676C

— Art. 136 — Power of Supreme Court to interfere with order of High Court (Sep) 1722A

— Art. 136—Interference with exercise of discretion (Sep) 1781

— Art. 136 — Appreciation of evidence by Supreme Court — The Supreme Court does not ordinarily upset the findings of the High Court which has on an evaluation of the evidence affirmed the trial court's conviction and sentence (Sep) 1910B

— Art. 136 — Jurisdiction of Court in special leave appeal—Supreme Court reappraises the evidence only in exceptional cases (Oct) 1977

— Art. 136—Where there is prima facie evidence to connect the accused with the offence complained against, the Supreme Court would not interfere with the dismissal in limine of revision against the order of taking cognizance of the offence (Oct) 2050

— Art. 136 — Power of Supreme Court to interfere with concurrent finding of fact (Oct) 2137A

— Art. 136 — Scope of jurisdiction of the Supreme Court in special leave appeal — It is only in exceptional cases that the Court takes upon itself to examine the evidence to satisfy itself that there is no failure of justice (Oct) 2156A

— Art. 136—Appeal by special leave to Supreme Court—Plea relating to delay in instituting proceedings though taken in written statement neither urged nor adjudicated by trial court nor taken in special leave petition—It cannot be urged at the time of hearing (Nov) 2200B

— Art. 136 — Concurrent findings fully supported by evidence — No interference (Nov) 2249

— Art. 136—On appeal against conviction for murder High Court altered conviction to one under S. 304, Part I, I. E. C. Supreme Court refused to interfere giving the benefit of doubt as to origin of the fight to the accused (Nov) 2268

Constitution of India (contd.)

— Art. 136 — Appeal by special leave—New point (Nov) 2312

— Art. 136 — Criminal case Grave injustice occurring Supreme Court will exercise its power (Dec) 2505A

— Art. 136 (1) — Ordinarily, Supreme Court does not interfere with the finding of a lower Court to exercise its overriding powers except when special circumstances exist for reappraisal of evidence (July) 1403

— Art. 137 — See Advocates Act (1961), S. 38 (Jan) 107A

— Art. 137 — When the attention of the Supreme Court was not drawn to the particular provision of the statute it can review its decision. It is not a case of mistaken judgment (Nov) 2162C

— Art. 141 — Binding nature of law declared by Supreme Court (Nov) 2206

— Art. 162—Prescription of written test by State Government for admission to Medical College—Validity for successful candidates at public examination (Dec) 2560A

— Art. 163—See *ibid*, Art. 164 (4) (July) 1331

— Art. 163 (1) — Even after dissolution of the Legislative Assembly of the State the Council of Ministers does not cease to hold office (Aug) 1551

— Art. 164 (1), (2)—See *ibid*, Art. 163 (1) (Aug) 1551

— Art. 164 (4) — Appointment of a person as Chief Minister cannot be challenged on the ground that he was not a member of either House of Legislature of the State at the time of his appointment (July) 1331

— Art. 166 — Direction given by State Government under Section 144 (6), Criminal P. C. is an executive act within Article 166 (Sep) 1667B

— Art. 173 — See Representation of the People Act (1951), S. 5 (c) (July) 1348

— Art. 175 — See *ibid*, Art. 164 (4) (July) 1331

— Art. 177—See *ibid*, Art. 164 (4) (July) 1331

— Art. 217 (3) — Where the President acting on the advice of Chief Justice of India expressly recorded that he accepted that advice and that the age of the concerned Judge should be determined according to a certain date of birth the decision is not open to challenge as not being his own decision (June) 1093B

— Art. 217 (3)—The mere fact that the President was assisted by machinery of Home Affairs Ministry in serving notices

Constitution of India (contd.)

and receiving communications addressed to him cannot lead to inference that he was guided by that Ministry in arriving at his decision particularly when no rules were framed regarding inquiries under Art. 217 (3) (June) 1093C

— Art. 217 (3) — The sending of case papers and entire evidence to the Chief Justice and obtaining his advice fully comply with requirements of Article — Personal discussion with the Chief Justice is not at all a condition precedent to a valid decision (June) 1093D

— Art. 217 (3) — The President while determining age of a High Court Judge discharges judicial and not executive function Though rules of natural justice have to be followed, personal hearing to concerned Judge is not obligatory (June) 1093E

— Art. 217 (3)—Order of President even though made final can be set aside by Court in appropriate cases though Court will not sit in appeal over order and will not substitute its own opinion for that of President by weighing the evidence before President (June) 1093F

— Art. 226

See also (1) Central Excises and Salt Act (1944), S. 36

(May) 862B

(2) Ibid. Art. 32 (Jan) 186F

(3) Ibid, Art. 309 (July) 1318A

(4) Ibid, Art. 311(2) (Aug) 1547

(5) Criminal P. C. (1893), S. 367 (July) 1244

(6) Income-tax Act (1931), S. 154 (Nov) 2234

(7) Rice Milling Industry (Regulation) Act (1958), S. 8 (3) (c) (Feb) 246A

— Art. 226 — Alternative remedy — Petitioner filing writ petition instead of availing of statutory remedy— High Court entertaining petition and giving hearing on merits (Jan) 33C

— Art. 226—Petition for writ of mandamus directing excise department not to recover licence fee for period for which no liquor was supplied — Dismissal in limine on ground that contractual remedies were open is improper — Rights and obligations arising under a licence issued under statute cannot be said to be purely contractual (Jan) 128

— Arts. 226 and 136 — Interim relief— Interference by Supreme Court (Jan) 129

— Art. 226 — Serious allegations of improper motive and mala fides by senior

Constitution of India (contd.)

member of Indian Administrative Service against other senior officers and State Government — Dismissal of petition in limine not justified (Jan) 175

— Arts. 226 and 227 — Procedure— Dismissal of application in limine (Feb) 333

— Arts. 226, 227 — Certiorari— Finding of Revenue authorities based on pure assumptions and conjectures (Apr) 746

— Art. 226 — Writ petition filed by student of Medical College against order of Principal striking off his name from college roll — Petition impleading only Principal and State Government allowed — Subsequent writ petition by same student against order of Registrar of University (May) 1005

— Art. 226 — Exercise of jurisdiction (June) 1021A

— Art. 226 — Petitioner not to be relegated to remedy of suit merely because questions of fact are raised (June) 1021C

— Art. 226 — Authorities whose acts are impugned acting properly or petition raising complicated questions of fact — Dismissal of petition in limine (June) 1025

— Art. 226 — New plea at argument stage in writ petition (June) 1038B

— Art. 226 — Remand of case to enable party to place sufficient materials before High Court (June) 1182B

— Art. 226 — Orders suffering from apparent error of law (June) 1190A

— Art. 226 — Disputed questions of fact — Rejection of petition on that ground— (July) 1224A

— Arts. 226, 311—High Court allowing Government letter to be brought on record by way of additional evidence — After admitting letter on record High Court cannot refuse to consider it (July) 1224C

— Art. 226 — Action taken by State Government — To establish mala fide, it is not necessary to name in petition particular officer or officers responsible for official act (July) 1228

— Art. 226 — Person aggrieved — Commission Agents in jaggery collecting tax from purchasers (Aug) 1507A

— Art. 226 — Error of law not apparent on the face of the record (Aug) 1531A

— Art. 226 — New plea (Aug) 1531B

— Art. 226 — Conclusions of Tribunal — Some of reasons relied on by Tribunal, extraneous — Interference by Superior Court (Aug) 1537

— Art. 226 — Executive action — Plea of mala fide — Mere probabilities cannot form its basis (Nov) 2003B

Constitution of India (contd.)

- Art. 226 — Procedure — Preliminary issue — Proper course for High Court — Decision on merits—Appeal under Art. 136 (Dec) 2451A
- Art. 226 — Directions to legislature or its delegate, (Government) to enact or refrain from enforcing sales tax law (Nov) 2399
- Art. 227
See also (1) Ibid, Art. 226 (Feb) 333
(2) Ibid, Art. 226 (Apr) 746
- Art. 227 — High Court while agreeing with Revenue Tribunal on all material findings, differing in two material aspects which affect jurisdiction of Revenue Tribunal to grant necessary relief — High Court commits no error of jurisdiction (Feb) 355A
- Art. 229 — Chief Justice of High Court or his nominee is the supreme authority in the matter of appointments of officers and servants of High Court (Sep) 1350
- Art. 245—See *ibid* Art. 265: (Nov) 2399
- Art. 245 — Essential Commodities Act (1955), S. 3 (2) (d) — Validity (Mar) 474B
- Art. 246
See also (1) Gold Control Act (1938), Pre. (June) 1170G
(2) Gujarat Industrial Development Act (23 of 1962), S. 1 (June) 1138A
- Art. 246—Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (26 of 1963), Pre. — Madras Lease-Holds (Abolition and Conversion into Ryotwari) Act (27 of 1963), Pre.—Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (30 of 1963), Pre. — Validity (Jan) 161B
- Art. 246, Sch. VII, List. II, Entry 54 —Taxing entry — Madras General Sales Tax Act (1 of 1959), S. 42 (3)—Power to seize and confiscate and levy penalty in respect of goods carried in vehicle whether sold or not (Apr) 792
- Art. 258—See *Foreigners Act* (1946), S. 3 (2) (c) (Feb) 337B
- Art. 265—See *Factories Act* (1948), S. 112 (Feb) 344A
- Art. 265—Tax by rule or regulation cannot be imposed unless specially authorised by statute (Mar) 517A
- Art. 265 — Customs duty or tax cannot be levied on basis of administrative instructions (June) 1130A
- Art. 265—Levy made under R. 111 of Rules under S. 90 of Bihar and Orissa Excise Act for a licence to possess cēna-

Constitution of India (contd.)

- tured spirit used by a manufacturer in his process—Validity (June) 1182A
- Art. 265—Directions by Court to legislature or Government delegate to enact or refrain from enforcing sales tax law (Nov) 2399
- Art. 276 (2), Proviso—See *Government of India Act* (1935), S. 142A (Sep) 1696A
- Art. 277—Sales tax on works contracts whether leviable by State of Kerala even after 26.1.1960 (Oct) 1930
- Art. 278—See *ibid*, Art. 227 (Oct) 1930
- Art. 286—See *Sales Tax — Mysore Sales Tax Act* (1957), S. 5 (3) read with its third schedule (Nov) 2277A
- Art. 286 (1) (b)—Read with *Central Sales Tax Act* (1956), S. 5(1)—Restrictions as to imposition of tax on sale or purchase of goods—Sale in the course of export — Essentials—Tests to determine (May) 80D
- Art. 286 (2) prior to amendment in 1956) — Sale in course of inter-State trade — Contract of sale requiring buyer to remove goods from State in which goods are purchased to another State (Mar) 477
- Art. 291—See *ibid*, Art. 363 (Mar) 530A
- Art. 291—Under the article there is an obligation on the part of the Union to pay and a corresponding right in the Rulers to require payment of privy purse (Mar) 530C
- Art. 299 (1)—See *Contract Act* (1872), S. 230 (3) (Nov) 2210
- Art. 299 (1) — Agreement between Government and private party—Government officer signing agreement with his official designation without however stating that agreement was executed "on behalf of Governor" (Jan) 141
- Art. 309—See *ibid*, Art. 310 (Jan) 40B
- Art. 309—Conditions of service of Government employee Power of Government under Art. 309 to make rules regulating conditions of service of Government employees or of teachers in aided schools under S. 12 of *Kerala Education Act* (Oct) 1997B
- Art. 310—See *Civil Services—Fundamental Rules*, R. 56 (j) (Jan) 40D
- Arts. 310, 309 and 311—"Doctrine of pleasure"—Limitations (Jan) 40B
- Art. 311
See also (1) *Civil Services—Assam Services Discipline and Appeal Rules* (1964), R. 10 (Oct) 2004B

Constitution of India (contd.)

- (2) Civil Services—Bihar Service Code (1952), R. 76 (July) 1409A
- (3) Civil Services — Civil Service (Classification, Control and Appeal) Rules, R. 55 (Apr) 752
- (4) Civil Services — Fundamental Rules, R. 56 (j) (Jan) 40D
- (5) Civil Services — Government Servants Conduct Rules (1926), R. 20 (Jan) 156A
- (6) Ibid, Art. 226 (July) 1224C
- (7) Ibid, Art. 310 (Jan) 40B
- (8) Education — Mysore University of Agricultural Science Act (22 of 1963), S. 7 (5) (Jan) 191
- Art. 311 — Reversion of Government servant from temporary officiating post to substantive post by way of punishment attracts Art. 311 (May) 998
- Art. 311 — Test for applicability of (June) 1011
- Art. 311 — Retrospective operation (June) 1085A
- Art. 311 — Person in Assam Judicial Service appointed temporarily as Judge of United Khasi Jaintia Hills District Council Court without sanction of Governor—Termination of his services without sanction of Governor (June) 1110
- Art. 311 — Reversion — Opportunity of being heard—Necessity (July) 1224B
- Art. 311 — Officer holding superior post in officiating capacity — Reversion to substantive post (July) 1224D
- Art. 311 — Person holding civilian post connected with defence and paid salary from defence estimates cannot claim protection of Art. 311 (Oct) 2111A
- Art. 311 — Word "dismissal" means termination of a person's service by way of punishment (Obiter) (Nov) 2242B
- Art. 311 (1) — Superintendent of Police (Traffic) in Delhi is competent to dismiss Foot Constable (July) 1402A
- Art. 311 (2) — See Institute of Technology Act (1961), S. 27 (Sep) 1811
- Art. 311 (2) — Date of compulsory retirement — Determination — Deprivation of guarantee under Art. 311 (2) — Plea of — When open (Jan) 173
- Art. 311 (2) — 'Reduction in rank' means reduction from a higher to a lower rank or post and not merely losing places in rank or cadre (Apr) 766A

Constitution of India (contd.)

- Art. 311 (2) Government raising age of superannuation from 55 to 58 while reserving to itself a right to ask any Government servant to retire at age of 55 without assigning any reason (Aug) 1516
- Art. 311 (2), Proviso (c) — Satisfaction that in the interest of security of State it is not expedient to hold inquiry of civil servant of Union must be that of President himself (Aug) 1547
- Art. 311 (2) — Reversion within 5 years on administrative grounds, of officiating Superintendent of Police to his substantive post if 'punishment' (Aug) 1580
- Art. 311 (2)—Compulsory retirement — Change in the rule relating to retirement — Validity (Oct) 1997C
- Art. 311 (2), Cl. (c) to Proviso — Absence of enquiry into charges against Government servant—Order under Cl. (c) of Proviso to Art. 311 (2) dispensing with all opportunity to show cause — Effect (Oct) 2004A
- Art. 342 — Order under — Constitution (Scheduled Tribes) Order 1950 — Express or implied admission by a person that he is not member of Scheduled Tribe is not conclusive (Dec) 2533A
- Art. 342 — Order under — Constitution (Scheduled Tribes) Order (1950), Part III — Scheduled Tribes of Bihar — Non-mention of 'Patars' as sub-tribe of Mundas in Schedule — Inference (Dec) 2533B
- Art. 343 — Intervenor arguing case in Hindi — Refusal by him to present arguments in Court language — Cancellation of his intervention (Dec) 2608
- Art. 362—See *ibid*, Art. 363 (Mar) 530E
- Art. 362—Agreements between Rulers and Union of India were not political agreements (Mar) 530B
- Art. 362—Article implies acceptance and recognition of personal rights, privileges and dignities but guarantee under the article relates to original covenants and agreements (Mar) 530D
- Art. 363—See *ibid*, Art. 362 (Mar) 530B
- Art. 363—Dispute in respect of right to privy purse under Art. 291 is not barred under Art. 363 (Mar) 530E
- Art. 363 — Huzur order of Maharaja of Baroda granting pension and premature retirement compensation to civil servant of State after accession but before merger (May) 846A

Constitution of India (contd.)

—Art. 366 (22) — In recognising or derecognising Ruler President exercises executive power (Mar) 530A

—Art. 366 (22) — See Ibid, Art. 363 (Mar) 530E

—Art. 366 (22) — Merely de recognising ruler without continuation of institution of Rulership is illegal (Mar) 530J

—Art. 366 (22) — Ruler means a former prince, Chief or other person who was recognised as Ruler on or after 26-1-1950 (Mar) 530L

—Art. 366 (22) — 'Other person' means some one analogous to a Prince (Mar) 530M

—Art. 366 (22) — (Per Hegde, J.) — Order dated 6-9-70 by President derecognising Rulers of former Indian States being for a collateral purpose must be held to be ultra vires Art. 366 (22) (Mar) 530N

—Art. 370 — See *ibid*, Art. 32 (July) 1217A

—Art. 372 — "All the law in force" — Order dated 22-1-1938 passed by former Ruler of Kota determining nature of 'Sarola Jagir' and giving it status of in-partible estate — Held Legislative and not executive (May) 510

—Sch. VII, List I, entry 33, List II entry 32 — Parliament whether competent to legislate in respect of newly constituted Hindi Sahitya Sammelan which at no stage had been declared as institution of national importance (May) 963B

—Sch. VII, List I, Entry 66 — See Education — Punjabi University Act (35 of 1961), S. 4 (2) (Sep) 1731E

—Sch. VII, List I, Item 66 — Prescription of medium of instruction — Whether State has legislative competence to prescribe particular medium of instruction in respect of higher education or research and scientific or technical instruction (Sep) 1731D

—Sch. VII, List II, Entry 11

See also (1) *Ibid*, Sch. VII, List I, Item 66 (Sep) 1731D

(2) Education — Punjabi University Act (35 of 1961), S. 4 (2) (Sep) 1731E

—Sch. VII, List II, Entry 32 — See *Ibid*, Sch. VII, List I, Entry 63 (May) 963B

—Sch. VII, List II, Entry 45 — Land Revenue — Surcharge on land revenue is within legislative competence (Nov) 2377A

—Sch. 7, List II, Entry 51 — See Mysore Excise Act (5 of 1901), S. 18 (Jan) 52

—Sch. VII, List II, Entry 54

See (1) *Ibid*, Art. 246 (Apr) 792

Constitution of India (contd.)

(2) Sales Tax — Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), S. 20A (May) 946A

(3) Sales Tax — Bombay Sales Tax Act (5 of 1959), S. 2 (13) (as amended by Act 15 of 1967) (May) 908

—Sch. 7, List II, Entry 62 — Education cess levied on excise revenue and not independently — Whether falls under Entry 62 (question left open) — See Mysore Excise Act (5 of 1901), S. 18 (Jan) 152

—Sch. 7, List II, Entry 65 — See *ibid*, Art. 265 (June) 1182A

—Sch. 7, List III, Entries 6, 7 & 13 — See Sales Tax — Bihar Sales Tax Act (1959), S. 20A (as amended by Act 1962) (May) 946A

Constitution (Scheduled Tribes) Order, 1950 — See Constitution of India, Art. 342 (Dec) 2583A, B

Contempt of Courts Act (32 of 1952), S. 1 — See Constitution of India, Art. 129 (June) 1132G

—S. 1 — Newspaper article containing scandalous allegations against High Court Judge (Feb) 221A

—S. 1 — Proceedings for contempt for scandalizing the Court — Remedy of instituting action for libel — Whether proper (Feb) 221B

—S. 1 — Summary jurisdiction by way of contempt how to be exercised (Feb) 221C

—S. 1 — Right to express fair criticism of act or conduct of Judge (Feb) 221D

—S. 1 — Distinction between defamation of Judge and contempt of Court — Test (Feb) 221E

—S. 1 — Truthfulness or factual correctness as defence (Feb) 221F

—S. 1 — Whether contempt proceeding is a criminal or civil proceeding or neither (June) 1132E

—S. 3

See also (1) Constitution of India, Art. 19(1)(a) (June) 1132B

(2) Constitution of India, Art. 129 (June) 1132H

—S. 3 — Scurrilous attack on a Judge in respect of a judgment or past conduct (June) 1132C

Contract Act (9 of 1872), S. 2 (h) — See Evidence Act (1872), S. 115 (June) 1021B

—S. 7 — See Delhi Liquor License Rules, R. 5.34, Cl. 21 (Nov) 2295

—S. 10 — See Evidence Act (1872), S. 91 (Nov) 2289

Contract Act (1872) (contd.)

- S. 11 — See Income-tax Act (1922), S. 26A (Feb) 383
- S. 23—See Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 1-A (Nov) 2213
- S. 28 — See Civil Procedure Code (1908), S. 20 (Apr) 740A
- S. 29—Agreement for sale in question held not void for uncertainty (Nov) 2192
- S. 43 — Liability of defendants joint and several Decree directing execution against one of the defendants in the first instance and to proceed against other defendant only afterwards for balance whether proper (Mar) 449B
- S. 50 — See Companies Act (1956), S. 207 (Feb) 206
- S. 56 — Law of frustration — Applicability to leases (Sep) 1756A
- S. 56—Impossibility whether confined to something not humanly possible (Sep) 1756B
- S. 70—Defendant benefited because of change in import trade policy of Government and not because of any act done by plaintiff (Nov) 2224
- S. 73 — Work done under contract pursuant to terms thereof—Claim by way of quantum meruit (Apr) 712
- S. 73—Suit for damages for premature cancellation of contract by defendant —Proof (June) 1196
- S. 73—Refusal to take delivery of goods for not fulfilling essential term of contract is justified (Oct) 1983
- S. 74 — See Companies Act (1956), Sch. I, Table A, Reg. 31 (Mar) 422C
- S. 176—Pawnee has special property and lien on the goods (July) 1210
- S. 180—See *ibid*, S. 176 (July) 1210
- S. 230 (3)—Contract entered into by Government Officer on behalf of Government which has become void by virtue of non-compliance with provisions of Art. 299 (1) of the Constitution cannot be enforced against the Government Officer (Nov) 2210

CO-OPERATIVE SOCIETIES

- Bihar and Orissa Co-operative Societies Act (6 of 1935), S. 6—Power conferred on Assistant Registrar by a notification published in Official Gazette cannot operate retrospectively (Oct) 2001A
- Bihar and Orissa Co-operative Societies Rules (1959), R. 39—Order passed by Assistant Registrar directing amalgamation

Co-operative Societies—B. & O. Co-operative Societies Rules (contd.)

- of a society under R. 39 (2), during pendency of appeal under sub-rule (4) is void (Oct) 2001B
- Multi Unit Co-operative Societies Act (6 of 1942), Pre.—See Co-operative Societies—Punjab Co-operative Societies Act (25 of 1961), S. 55 (Dec) 2403
- Punjab Co-operative Societies Act (25 of 1961), S. 55—A dispute between a co-operative society and its member, a multi-unit co-operative society, can be referred under S. 55 — Decision on reference — Appeal—Jurisdiction of Central Registrar to hear (Dec) 2403
- S. 68—See *ibid*, S. 55 (Dec) 2403

Court-fees Act (7 of 1870)

See under Court-fees and Suits Valuations.

COURT-FEES AND SUITS VALUATIONS

- Bombay Court-fees Act (36 of 1959), S. 7 read with Sch. I, Art. 3 — Court-fee payable on memorandum of cross-objection filed in an appeal against award made under S. 8 of Requisitioning and Acquisition of Immovable Property Act is ad valorem (Sep) 1887A
- Sch. I, Art. 3—Term “petition” includes cross-objection filed in an appeal (Sep) 1887B
- Sch. II, Art. 13—See *ibid*, S. 7 (Sep) 1887A
- Court-fees Act (7 of 1870), S. 4—See High Court Rules and Orders—U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1962), S. 3 (July) 1374
- S. 7 (iv-A) (U. P.) — “Decree for money and other property”—Meaning (Jan) 87
- S. 8—See Court-fees and Suits Valuations—Bombay Court-fees Act (36 of 1959), S. 7 read with Sch. I, Art. 3 (Sep) 1887A

Criminal Courts and Court Martial (Adjusment of Jurisdiction) Rules (1952), R. 3

- See Criminal P. C. (1898), S. 549 (Mar) 500
- R. 4 — See Criminal P. C. (1898), S. 549 (Mar) 500
- R. 5—Officer Commanding exercising discretion under R. 5 by communicating Criminal Court that accused army officers

Criminal Courts and Court Martial (Ad-justment & Jurisdiction) Rules (contc.)
should be tried by Court Martial—Subse-quent cancellation of communication

(June) 1120C

—R. 8 — See Army Act (1950), S. 26

(June) 1120A

—R. 9 — Prosecution of army officers along with civilians on charges of cons-piracy and corruption—Conflict of juris-diction of Criminal Court and Court Martial to try the case (June) 1120B

Criminal Law Amendment (Amending) Act (22 of 1966), S. 5— Word "pending"—Meaning of (June) 1120D

—S. 5 (1) (a) — In order that case be pending on 30-6-1966 within S. 5 (1) (a) charges against accused need not have been actually framed (June) 1120E

Criminal Procedure Code (5 of 1898), S. 4 (1) (h)— Delay in filing complaint—Duty of prosecution to explain delay satis-factorily—Failure (Jan) 66B

—S. 12—See Prevention of Corruption Act (1947), S. 5-A (Sep) 1866B

—Ss. 55 and 91—Sections do not apply to proceedings under Chap. 8

(Dec) 2466K
—S. 61 — See Constitution of India, Art. 32 (April) 813, A, B, C, D

—S. 91—See *ibid*, S. 55 (Dec) 2466K

—S. 91 — Power to take bond for ap-pearance—Provision applies to a person who is present in Court and is free be-cause it speaks of his being bound over, to appear on another day before the Court (Dec) 2431B

—S. 106 — See *ibid*, S. 107 (Dec) 2466G

—Chap. VIII (S. 106 to S. 132A)—Power of detention conferred by chapter is diffe-rent from detention by executive action under Art. 22 of the Constitution

(Dec) 2466I
—Chap. VIII (S. 106 to S. 132A) — Provisions are not contrary to Art 19 and are therefore constitutionally valid

(Dec) 2466J
—Chap. 8 (Ss. 106 to 132A) — Person proceeded against cannot be released on bail (Dec) 2466L

—Ss. 107 and 106 — Object of the sec-tions (Dec) 2466G

—S. 117 — Magistrate cannot adjourn case and in the interval send the person to jail if he fails to furnish a bond (Per Majority, Bhargava J. Contra)

(Dec) 2466H
—S. 117 (3)—See *Ibid*, S. 344

(Dec) 2431C

Criminal P. C. (contd.)

—S. 117 (3) — Interim security — A magistrate can ask for an interim bond for good conduct only after he has started inquiring into the truth of the informa-tion (Dec) 2481A

—S. 144—Scope of the section (Dec) 2486E

—S. 144 — Constitutional validity — Does not offend Art. 19, Constitution of India (Dec) 2486F

—S. 144 (6) second part—See Constitu-tion of India, Art. 19 (1) (Sep) 1667A

—S. 144 (6) —See Constitution of India, Art. 166 (Sep) 1667B

—S. 154 — First information report — Object of — Importance of F. I. R. made promptly (Sep) 1891D

—Ss. 156 and 337 — Prevention of Cor-ruption Act (1947), Ss. 5 and 5A — Pre-liminary enquiry — Granting of amnesty by enquiring Officer to persons to be examined as prosecution witnesses

(Mar) 520B

—Ss. 160 to 164 — See Prevention of Corruption Act (1947), S. 5 (Mar) 520A

—S. 161 — Unjustified and unexplained long delay by investigating officer in recording statement of material eye wit-ness (Apr) 804

—S. 190 — Duty of magistrate taking cognisance of case — Magistrate must examine facts of complaint and deter-mine whether his power is barred under S. 195 (1) (Sep) 1708A

—S. 190 — Court's jurisdiction to take cognisance of complaint filed by public prosecutor on sanction under S. 197 against a Magistrate for offences under Ss. 167, 465, 466 and 471, Penal Code

(Sep) 1708C
—S. 195—See *ibid*, S. 190 (Sep) 1708C

—S. 195 — Effect of non-compliance (Sep) 1708B

—S. 195 (1) (b) and (c)—Offences speci-fied must have been committed by party to the proceeding in the character as such party (Oct) 1935

—S. 196-A — Prosecution for criminal conspiracy — Consent as required by the Section when to be taken by Court (Nov) 2372

—S. 202 — Prima facie case made out — Magistrate must commit accused for trial (July) 1389

—S. 203 — See *ibid*, S. 202 (July) 1389A

—S. 207A — See Constitution of India, Art. 136 (July) 1371

—S. 233—Joint trial of several accused on several items of embezzlement — Ap-

Criminal P. C. (contd.)

peal — Failure of justice, not established
— Plea of misjoinder of charges at appellate stage (Aug) 1543A

— S. 236 — Prejudice to accused by framing alternative charge must be proved (May) 983

— S. 248 — High Court directing Magistrate to try accused for offence triable as summons case — Jurisdiction to permit withdrawal of complaint (Oct) 1925A

— S. 251A — See Criminal Law Amendment (Amending) Act (22 of 1966), S. 5 (1) (a) (June) 1120E

— S. 251A — Prosecution not bound to produce all witnesses (Oct) 2156C

— Ss. 252, 253 — See Criminal Law Amendment (Amending) Act (22 of 1966), S. 5 (1) (a) (June) 1120E

— S. 253 (2) — See *ibid*, S. 248 (Oct) 1925

— S. 253 (2) — Prima facie case made out against accused — Discharge under S. 253 (2) (May) 834

— S. 286

See also (1) *Ibid*, S. 251A (Oct) 2156C

(2) Evidence Act (1872), S. 154 (Aug) 1586B

— S. 286 — Witness whose evidence is essential to the unfolding of narrative must be called (Aug) 1586A

— S. 286 — Duty of prosecution — Murder case — Accused found to have injuries including those from a firearm — Accused putting forward certain version about the incident — Duty of prosecution to have taken carbine into custody and obtained opinion of expert (Sep) 1891C

— S. 288 — Evidence given in committal Court by a witness who resiled from it in trial Court, use of (June) 1116

— S. 288 — Statements made before committing Court by prosecution witnesses, who were not prepared to stand by their statements — Use of (Aug) 1450B

— S. 290 — It is of prime importance for accused to know as to what the exact prosecution case is — New prosecution case cannot be made to imperil defence (Aug) 1444B

— S. 337 — See *ibid*, S. 156 (Mar) 520B

— S. 342 — Statement of accused, under — Court cannot split statement into various parts and accept a portion and reject the rest (May) 866A

— S. 342 — Errors or omissions in complying with the section are curable irregularities (Sep) 1797

— S. 344

See also (1) Constitution of India, Art. 14 (Jan) 186E

Criminal P. C. (contd.)

(2) Constitution of India, Art. 32 (Jan) 186F

— S. 344 — Undertrial prisoner — Order of remand by Magistrate — Rule nisi by Supreme Court — Extension of remand by Magistrate — Presence of prisoner before Magistrate not necessary (Jan) 178

— S. 344 — Order of remand — Presence of accused in Court (Jan) 186A

— S. 344 — Applicability to a case at stage of investigation and collection of evidence (Jan) 186C

— S. 344 — The provision of S. 344 is not a substitute for S. 117 (3) of the Code (Dec) 2481C

— S. 344 (1-A) — See Constitution of India, Art. 14 (Jan) 186B

— S. 344 (1-A) Expl. — Merely serves to explain scope of "reasonable cause" (Jan) 186D

— S. 367

See also (1) Evidence — Appreciation of (Jan) 69

(2) Evidence — Credibility

(May) 991

— S. 367 — Defence of accused — Legitimate use (Apr) 722B

— S. 367 — Decisions of Civil Courts are binding on criminal courts — Converse not true (July) 1244

— S. 367 (5) (After amendment by Act 26 of 1955) — discretion of Court in deciding whether to impose sentence of death or of imprisonment for life has become wider after the Amendment (Oct) 2156E

— Ss. 417, 423 — Appeal against acquittal — High Court inclined to take different view of evidence (Jan) 66A

— S. 417 — Reversing order of acquittal on review of evidence — High Court should not act on conjectures or inferences not arising on evidence (Nov) 2256C

— S. 417 (3) and (4) — Appeal under S. 417 (3) against acquittal on a complaint by Assistant Registrar of Companies for non-compliance with provisions of Companies Act — Leave under S. 417 (4) (June) 1115A

— S. 421 — Appeal against conviction involving substantial point which is prima facie arguable — Dismissal by High Court of appeal summarily (Jan) 64

— S. 423 — See *ibid*, S. 417 (Jan) 66A

— S. 423 — Appeal against acquittal — Examination of evidence (Mar) 480A

— S. 423 — Appeal from acquittal — Duty of Court (July) 1315

Criminal P. C. (contd.)

- S. 423—Requirement as to “perusal of the record” is condition precedent for proper disposal of appeal (Aug) 1606
- S. 423—Appeal against conviction—Case against accused, given benefit of doubt by appellate Court, and that against accused whose conviction has been upheld, not identical—Convicted accused not entitled to acquittal merely on ground that conviction was based on testimony of witnesses not considered sufficiently trustworthy to sustain guilt of other accused (Oct) 2156B
- S. 423 (1) (a) — Order of acquittal preceded by order of sentence by Trial Court — Sentence within competence of trial Court alone can be passed by High Court (May) 840A
- S. 423 (1) (a) — Acquittal preceded by order of sentence of Court of first instance — Show cause notice imposing penalty, within competence of trial Court, not necessary (May) 840B
- S. 423 (1) (a) — Power to set aside acquittal in appeal without giving due weight to reasons given by trial Court in rejecting prosecution evidence (May) 953
- S. 429 — Reference to third Judge — New plea (Sep) 1835A
- S. 431 — Appeal against acquittal — Death of appellant — Appeal does not abate (Jan) 66C
- S. 439 — High Court’s power to take further evidence (Aug) 1630B
- S. 439 — High Court whether can *suo motu* interfere (Oct) 1925B
- S. 465 — Accused whether insane—Power of Court to hold enquiry into the matter (Aug) 1638
- S. 476 — See also *ibid*, S. 190 (Sep) 1708
- S. 476 — Sanctioning of prosecution for perjury — Satisfaction of Court (July) 1867
- S. 479-A — Person filing sworn affidavit is not a witness (July) 1867
- S. 479-A — Procedure in cases of perjury—Opportunity to witness to show cause against complaint—Necessity (Sep) 1789
- S. 492 — Government notification appointing Public Prosecutor for High Court in respect of ‘cases’ arising in the State—Powers of Public Prosecutor (Oct) 1977B
- S. 503 — See *ibid*, S. 561A (Aug) 1630A
- S. 508A — See *ibid*, S. 561A (Aug) 1630A
- S. 514 — Construction of Bonds (Sep) 1722B

Criminal P. C. (contd.)

- S. 537
- See (1) *Ibid*, S. 236 (May) 983
- (2) *Ibid*, S. 342 (Sep) 1797
- (3) Prevention of Corruption Act (1947), S. 5A (Mar) 508A
- S. 537 — Wide language of complaint and charge—Prejudice to accused (Apr) 781B
- S. 537 — Illegal investigation by police prior to taking cognizance of offence does not vitiate either the trial or conviction in absence of miscarriage of justice (Apr) 811B
- S. 537 — Police Officer committing irregularity in recording statement of witness (July) 1232C
- S. 540—See *ibid*, S. 439 (Aug) 1630B
- S. 549 — Rules under — Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules (1952), Rr. 3, 4 — Prosecution of military personnel before ordinary Criminal Court — Charge and investigation by Police known to competent Military Authority — Surrender of accused to civil authorities — No need for Magistrate to comply with Rule 4 (Mar) 500
- S. 561A — Directing prosecution to give facilities for employment of lawyer for examining witnesses abroad on commission—Court not to single out any accused for disallowing them (Aug) 1630A
- Custom** — Custom (Kerala) — Kanikkara tribe is not governed by any uniform customary law in matters of inheritance. (July) 1398B
- Family custom (Kerala)—Party must prove custom pleaded by him (July) 1398A
- Customs Act (52 of 1962)**, S. 108 (4) — Inquiry made by Customs Officer under S. 108 is deemed to be a judicial proceeding within meaning of Sections 193 and 228 of Penal Code (Jun) 1087B
- S. 111 (d) — Imports and Exports (Control) Act (1947), S. 3 — Imports Control Order 1955 Part IV Sch. 1 Item 1 — Expression “any prohibition” in S. 111 (d) — It means every prohibition (Feb) 293B
- S. 129 — Appellate Authority can dismiss appeal if sub-section (1) or order passed under the Proviso is not complied with by appellant. (Nov) 2280
- S. 131—Departmental authorities imposing fine on licensee without proper investigation — Duty of Central Government in revision (Apr) 704B

DEBT LAWS

—**C. P. and Berar Money Lenders Act (13 of 1934)**, S. 3 (b) — See Constitution of India, Art. 133. (Oct) 1971C

—S. 7 (c) — See Constitution of India, Art. 133 (Oct) 1971C

—**Displaced Persons (Debts Adjustment) Act (70 of 1951)**, S. 13 — Application containing joint claim both against displaced person and non-displaced person—Should be allowed to be continued by deleting name of displaced person (Oct) 2079

—S. 22 (d) and (g) — Principal debtor a displaced person—Surety not such a person — Application by former for adjustment of amount in decree passed against both of them—Order that liability of principal debtor will be recoverable from out of compensation received by such person — Interpretation (Oct) 1956A

—S. 22 (g) — Apportionment of joint debts — Liability of principal debtor not determined — Claim against surety will be premature (Oct) 1956B

—**Hyderabad Jagirdars Debt Settlement Act (12 of 1952)**, S. 25 (1) — Transfer of pending suits, appeals and execution proceedings to Board — Requisites (Mar) 449A

—**Usurious Loans Act (10 of 1918)**, S. 3 — Mortgage — Interest payable fixed at 10½ p. c. p. a.—Penalty clause providing that if mortgagor failed to pay interest regularly, he would be liable to pay interest at 12 p. c. p. a. — Default — Effect (May) 884B

—**U. P. Encumbered Estates Act (25 of 1934)**, S. 18—See *ibid*, S. 24 (Sep) 1678A

—S. 19 (2) (b) — Scope — Interest or rights of debtor need not be mentioned in the decree (Sep) 1678B

—S. 23A—See *ibid*, S. 23B (Aug) 1429

—S. 23-B—Liquidation of secured debt recoverable from compensation and rehabilitation grant — Powers of Board of Revenue (Aug) 1429

—S. 24 — See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act, 1950 (1 of 1951), S. 6 (a) (Sep) 1678C

—Ss. 24, 18 — 'Debtor's property other than proprietary rights in land'—Bhumidhari rights are not proprietary rights (Sep) 1678A

—**U. P. Zamindars' Debt Reduction Act (15 of 1953)**, S. 4 (as amended by Act 20 of 1962) — Requirements for claiming relief — Requirement that mortgaged property must be one "charged under the decree" for obtaining relief against a decree dispensed with (Aug) 1474A

Debt Laws—U. P. Zamindar's Debt Reduction Act (contd.)

—S. 4 (as amended by Act 20 of 1962)—Review—Order rejecting relief under the Act on ground that conditions of S. 4 are not satisfied (Aug) 1474B

Deed — Construction — Wazib-ul-arz for Zamindari in Chanda District did not make Zamindar mere life-tenant (Apr) 681C

—Construction — Normal and natural meaning of words employed to be given effect to (June) 1041A

Defence of India Act (35 of 1939), S. 19 — See Limitation Act (1908), Art. 144 (Dec) 2556

Defence of India Rules (1939), R. 75A—See Limitation Act (1908), Art. 144 (Dec) 2556

Defence of India Rules (1962), Part XII A (Gold Control Rules), (as inserted in 1963), Rule 126 I — See also Gold Control Act (1968), S. 116 (2) (June) 1193

—Rule 126J (4)—See *ibid*, R. 126Q (April) 781A

—Rules 126-Q, 126-X and 126-J (4) — Notification, D/- 10.1.1963 under R' 126-X read with Rule 126-J (4) as modified on 5.11.1963 by another notification — Construction of — Prosecution for offence punishable under Part XII-A — Who can institute. (Apr) 781A

—R. 126X—See *ibid*, R. 126Q (Apr) 781A

Delhi Factories Rules, 1950, R. 7 — See under Factories Act (1948), S. 112 (Feb) 344A

Delhi Liquor License Rules, Rule 5.34, Cl. 21 — Auction sale of liquor shop — Final bid subject to confirmation of Chief Commissioner — Resale ordered without bid having been confirmed by Chief Commissioner (Nov) 2295

D. R. T. A. (Conditions of Appointment and Service) Regulations (1952) — See under Civil Services.

Displaced Persons (Claims) Supplementary Act (12 of 1954), S. 5 — Suo motu powers of revision cannot be exercised (Apr) 748

Displaced Persons (Compensation and Rehabilitation) Act (44 of 1954), Ss. 19, 24, 22 — Cancellation of allotment based on oral verification—Relevant revenue records justifying such course — Powers of authorities (Apr) 771B

—S. 22—See *ibid*, S. 19 (Apr) 771B

—S. 24—See *ibid*, S. 19 (Apr) 771B

Displaced Persons (Debts Adjustment) Act (70 of 1951)

See under Debt laws.

Easements Act (5 of 1882), S. 12 — Prescriptive acquisition of right — Proof — Person must be exercising right on property treating it as some one else's property (Sep) 1878C— S. 15 — See *ibid*, S. 12 (Sep) 1878C— S. 52 — See **Tenancy Laws** — **W. B. Estates Acquisition Act (1 of 1954) S. 6 (2) Proviso** (Oct) 2037**Eastern Bengal and Assam Excise Rules— R. 300** — See **Constitution of India, Art. 226** (June) 1190A**Rule 300** — Bottles of adulterated liquor with their original seals untampered but loose discovered on rack in the shop of accused — **Presumption** (June) 1190B**East India Jute and Hessian Exchange Ltd. Bye-laws** — **Bye law 1 (b)** — See **Forward Contracts (Regulation) Act (1952), S. 15** (Jan) 166— **By-law 15** — See **Forward Contracts (Regulation) Act (1952), S. 15** (Jan) 166— **Bye-law 17** — See **Forward Contracts (Regulation) Act (1952), S. 15** (Jan) 166**East Punjab Urban Rent Restriction Act (3 of 1949)**

See under Houses and Rents.

EDUCATION**—Guru Nanak University Amritsar Act (21 of 1969), S. 4 (2)** — See **Constitution of India, Art. 29** (Sep) 137E— S. 4 (2) and (3) — See **Constitution of India, Art. 14** (Sep) 1737G— S. 4 (3) — See **Constitution of India, Art. 29** (Sep) 1737F— S. 5 — See **Constitution of India, Art. 19 (1) (c)** (Sep) 1737H— S. 19 (1) — See **Constitution of India, Art. 30 (1)** (Sep) 1737I**—Madras Elementary Education Act (8 of 1920), S. 56 (1) and (2) (h)** — Provisions for recognition or aid to private schools as contained in Chap. II and Chap. IV of Act having been repealed by **Madras Act 2 of 1939, Part II Rules** as reframed in 1939 in that regard are not one to carry out the purpose of Act (Sep) 1920**—Mysore Elementary Education Act (6 of 1941), S. 9** — See **Mysore Excise Act (5 of 1901), S. 18** (Jan) 152— **Sch. (as amended in 1955)** — See **Mysore Excise Act (5 of 1901), S. 18** (Jan) 152**Education (contd.)****—Mysore Medical Colleges (Selection for Admission) Rules (1970) — Validity** — Rules providing for requirements over and above minimum qualifications laid down by Universities (Sep) 1762A— **R. 3** — Residence as contemplated by the provision must *prima facie* have an element of continuity or regularity in residence (Sep) 1762E— **R. 4** — **Constitutionality** — Setting apart 60 seats at the disposal of Government — No objection can be taken on ground that it is excessive (Sep) 1762C— **R. 4 (h)** — **Constitutionality** — Provision making reservation for children of political sufferers not unconstitutional (Sep) 1762F— **R. 5** — Reservation of 48% of seats for scheduled castes, scheduled tribes and for socially and educationally backward classes, held not violative of **Art. 15 (4) of Constitution** (Sep) 1762D— **R. 9 (1)** — University-wise distribution of seats in Government Colleges not violative of **Art. 14 of Constitution** (Sep) 1762B**—Mysore Rules for Selection of Candidates for Admission to Pre-Professional/B.Sc. Part I course, R. 3** — See **Constitution of India, Art. 14** (Aug) 1439**—Mysore University of Agricultural Sciences Act (22 of 1963), S. 7 (5)** — **Validity** — Section is unconstitutional (Jan) 191**—Mysore University Staff (Appointment) Supplementary Rules (1967), R. 5** — Length of teaching experience — Not the only determining factor (Nov) 2264A— **R. 5** — Substantial compliance — Failure to record expressly reasons for disregarding greater length of service — Effect (Nov) 2264B**—Poona University Act (20 of 1948), S. 11** — Election to the Office of Vice-Chancellor by members of Court — Principals of Colleges in respect of which recommendation of University for affiliations is accepted by Government can vote in the election (Sep) 1783B— **S. 56** — Election to the office of Vice-Chancellor — Out of three candidates one excluded at first count on second count both continuing candidates having equal number of votes — Exclusion of one of them who had lower number of votes than the other continuing candidate in the first count is not illegal (Sep) 1783A**—Punjab University Act (35 of 1961), S. 4 (2)** — Medium of instruction — Section 4 (2) is not violative of **Sch. VII of List I, Entry 66 of Constitution** (Sep) 1731E

Education—Punjab University Act (contd).—S. 5 — See *ibid*, S. 4 (2) (Sep) 1731E

—**W. B. Board of Secondary Education Act (5 of 1963)**, S. 16 — Employee of Secondary Education Board under W. B. Secondary Education Act (37 of 1950) who was appointed as Secretary of Board by the Administrator appointed by State Government under W. B. Secondary Education (Temporary Provision) Act 22 of 1954 could be validly discharged from services (June) 1038A

—S. 46 (2) (c) — See Constitution of India, Art. 226 (June) 1038B

—**W. B. Board of Secondary Education (Appointment of Secretary) Rules (1963)**, R. 8 — See Education — W. B. Board of Secondary Education Act (5 of 1963), S. 16 (June) 1038A

Employees Provident Funds and Family Pension Funds Act (19 of 1952), S. 1 (3) (a) and (b) — Employment of a person for any purpose whatsoever and for however short a duration or for a period of one year is not the employment contemplated by S. 1 (3) (a) and (b) (Aug) 1519

—S. 1 (3) (a) — See *ibid*, S. 2A (Dec) 2577A

—Ss. 2-A, 1 (3) (a) — The Act applies to composite establishment (Dec) 2577A

—S. 14 — Prosecution under, for contravention of Employees' Provident Funds Scheme on basis that establishment was old one and not one set up in 1961 when Act became applicable to it — Burden of proof (Jan) 82B

—S. 16 (1) (b) — Act not to apply to certain infant establishments — Establishment first set up in year 1946 — Merely because Act becomes applicable to establishment from April 1961 it does not become a new establishment (Jan) 82A

—S. 16 (1) (b) — Existing establishment — When can be said to become new establishment for claiming exemption under S. 16 (1) (b) — Proof (Jan) 82C

—S. 19-A — "If any difficulty arises" — Meaning of (Dec) 2577C

—S. 19-A (ii) — Direction by Central Government — What constitutes (Dec) 2577B

Essential Commodities Act (10 of 1955), S. 1 — See Interpretation of Statutes

(Apr) 815

—S. 3 — See Interpretation of Statutes (Apr) 815

—S. 3 (2) (d) — See

(1) Constitution of India, Art. 19 (1) (g) (Mar) 474A

Essential Commodities Act (contd.)

(2) Constitution of India, Art. 245

(Mar) 474B

—S. 10 — Iron and Steel Control Order (1956), Cl. (5) — Sale of pig iron in contravention of clause by godown clerk of company in conspiracy with representative of another firm — Manager and director held could not be convicted by applying S. 10 as liability of persons in charge can arise under that section only when contravention is by company itself (Mar) 447

Estate Duty Act (34 of 1933), Ss. 5 and 7 —

Sthanam property — Death of sthanamdar

—Extent of property passing — Liability to estate duty (Nov) 2392A

—S. 7 — See *ibid*, S. 5 (Nov) 2392A

Evacuee Interest (Separation) Act (64 of 1951), S. 10 and R. 11B of the Rules made under the Act — Mortgagee becoming evacuee and his interest vesting in Custodian — Leases and allotments by Custodian — Payment of mortgage debt by mortgagor — Competent Officer can accept payment but can give only symbolical possession to mortgagor (Jan) 131

—R. 11B — See Evacuee Interest Separation Act (1951), S. 10 (Jan) 131

Evidence—Appreciation of — See Representation of Peoples Act (1951), S. 116A

(Feb) 257

—Appreciation of Investigating officer conducting search — No general rule that his evidence cannot be relied upon unless corroborated (Jan) 28A

—Appreciation of — Circumstantial evidence — Accused when can be convicted solely on circumstantial evidence (Jan) 69

—Appreciation of — Murder case — Witness brother of deceased — Fact of his relationship would add to value of his evidence (Feb) 296

—Appreciation of — Trap witness — Reliability of evidence (Feb) 356A

—Appreciation of — Interested witness

—Prosecution for offence of offering bribe

—Sub-Inspector of police himself participant in offence in having accepted offer though for working out case against accused — He is an interested witness (Feb) 356B

—Appreciation of — Police witness —

—Credibility of evidence (Feb) 356C

—Appreciation of — Interested witnesses (Mar) 460C

—Appreciation of — Failure of prosecution to produce informer as witness

—Effect (Apr) 708B

Evidence (contd.)

—Appreciation of — Murder trial —
Evidence of young boy — Corroboration
(June) 1034

—Appreciation of — Criminal trial —
Large number of accused persons involved — Witness also injured — His testimony cannot be rejected on ground of contradictions (Aug) 1450A

—Appreciation of — Murder trial —
Evidence of sole witness disbelieved on ground of his abnormal conduct after the occurrence (Aug) 1554

—Appreciation of — Murder case —
Occurrence in midnight at door of cottage of deceased — Sufficient light from lantern — Three out of five eye witnesses close relative of deceased — Remaining two resiling — Their evidence corroborating that of three eye witnesses except as to identity of assailant — Evidence of three eye-witnesses even though close relations of deceased held to be acceptable (Aug) 1656B

—Appreciation of — Circumstantial evidence — Absence of blood marks at scene of offence — Deceased stabbed on spot receiving wound in heart — Fact that deceased might have bled internally is sufficient explanation for this circumstance (Aug) 1656C

—Appreciation of — Murder trial —
Minor variances in evidence cannot dislodge prosecution story proved beyond reasonable doubt (Sep) 1794

—Appreciation of — Suspicion cannot take the place of proof (Sep) 1893A

—Appreciation of — Evidence of witness cannot be totally disregarded merely because he is interested (Oct) 1949D

—Appreciation of — Circumstantial evidence — Chain of evidence must be such as not to leave any reasonable ground for conclusion consistent with innocence of the accused (Oct) 2015C

—Appreciation of — Murder trial —
Accused proved to have committed murder by firing gun shots — Inconsistency between opinion of expert and prosecution story relating to distance from which gun shots were fired carries no weight (Oct) 2119

—Appreciation of — Criminal trial —
Act of absconding — Evidentiary value (Oct) 2156D

—Appreciation of — Simply because prosecution did not explain injuries on person of accused, Court cannot discard entire prosecution evidence (Nov) 2233A

—Appreciation of (Dec) 2433C

Evidence Act (contd.)

—Appreciation of — Duty of Court (Dec) 2505B

—Appreciation of — Industrial Tribunal whether bound to accept a figure in regard to certain expense found in audited balance sheet of a company (Dec) 2521B

—Credibility — Court unable to rely fully on evidence of prosecution witnesses with regard to some accused persons — It can still accept evidence of these witnesses with regard to other accused persons (May) 991

Evidence Act (1 of 1872), S. 1 — Criminal Case — Importation of principle of English Common Law relating to evidence (maxim 'Nemo tenetur seipsum accusare' in the Act) — Not permissible (Jan) 44E

—S. 3

See (1) Evidence — Appreciation of (Oct) 1949D

(2) Evidence — Credibility (May) 991

—S. 3 — Evidence — Slips containing entries seized in search of premises — Can be looked into as evidence if entries therein are carried out into account books seized along with them (Jan) 28B

—S. 3 — Document — Admissibility — Document procured by illegal means — No bar to its admissibility (July) 1295F

—S. 5 — Witness proving contents of letter written to him by one S — Correctness of contents of the letter can only be proved by examining S as witness (Oct) 1949B

—S. 8 — See also Penal Code (1860), S. 300 (June) 1051C

—S. 8 — Murder case — Court satisfied about accused being assailant of victim — Court need not consider question of motive (Aug) 1656A

—S. 8 — Accused absconding immediately after occurrence — Conduct is not conclusive of his guilt (Sep) 1871C

—S. 9 — Absence of test identification not fatal in all cases (Feb) 363

—S. 9 — Absence of request from accused — State whether bound to hold identification parade (Apr) 708A

—S. 9 — Identification tests do not constitute substantive evidence (June) 1051

—S. 9 — Identification parade — Delay in conducting — Effect (June) 1058B

—S. 13 — See Custom — Family custom (Kerala) (July) 1398A

—S. 17 — Admissions must be clear in their meaning (Aug) 1542

—S. 17 — Person executing document admitting title of his brother to certain

Evidence Act (contd.)

property and alienation by him to third person (Dec) 2548B

—S. 24 - Confession caused by inducement, threat etc. — Statement under Section 171-A, Sea Customs Act, did not stand at par with a confession (Jan) 44I

—S. 24 — Section 24 is not a bar to admissibility in evidence of statement made by a person to Customs Officer on summons issued under Section 108 of Customs Act (June) 1087A

—S. 24 — Every threat, inducement or promise even though emanating from person in authority is not hit by Section 24 (June) 1087C

—S. 24 — Extra Judicial confession made to person not in authority — Admissibility (Sep) 1871A

—S. 27—See also Penal Code (1860), S. 300 (Oct) 2016B

—S. 27—Fact already discovered from other sources cannot be discovered afresh even if relevant information is extracted from accused (Sep) 1871B

—S. 34 — Book of account when held to be proved (Dec) 2551B

—S. 35 — Order of Revenue Officer in mutation proceeding based on untrue piece of evidence has no evidentiary value in civil suit (Apr) 681E

—S. 45—See Evidence—Appreciation of (Oct) 2119

—S. 61

See also (1) Civil P. C. (1908), O. 13, R. 4 (Sep) 1865

(2) Mysore (Personal and Miscellaneous) Inam Abolition Act (1 of 1955), S. 22 (July) 1363

—S. 63—See *ibid*, S. 146 (June) 1162A

—S. 65 (e) See Income-tax Act (1922), S. 54 (1) (Mar) 671

—S. 67—Party seeking to prove execution of document — Proof of knowledge of contents (Dec) 2548A

—S. 74 — See Income Tax Act (1922), S. 54 (1) (Mar) 671

—Ss. 85, 114 — Registration Act (1908). S. 33 — Power of attorney for execution and presentation of document for registration — Endorsement of Notary Public that it had been subscribed and sworn before him—Presumption (Apr) 761A

S. 85—Registration Act (1908), Ss. 32, 33 — Execution and presentation of sale deed for registration—Vendor in U. S. A. —First power of attorney not duly authenticated — Second power of attorney duly authenticated and noticing first being defective and same being ratified — Second

Evidence Act (contd.)

power validates transaction and registration even though both are earlier to second power (Apr) 761B

—S. 90 — See Limitation Act (1963), S. 18 (Nov) 2342A

S. 91

See (1) Registration Act (1908), S. 17 (Aug) 1613

(2) Stamp Duty — Stamp Act (1899), S. 35 (June) 1070B

—S. 91 — Terms of contract required to be in writing cannot be proved otherwise than by offering document itself in evidence (Nov) 2289

—S. 92 — See Registration Act (1908), S. 17 (Aug) 1613

—S. 101

See also (1) Custom — Family custom (Kerala) (July) 1398A

(2) Hindu Law—Alienation by Karta (Nov) 2228A

(3) Representation of the People Act (1951), S. 123 (Oct) 2025E

—S. 101 — Witness of one party deposing that letter written by one S to him has been received by him Burden lies on other side to prove its allegation that letter was not written by S or that it was written in collusion between S and witness (Oct) 1949A

—Ss. 101-104

See (1) Constitution of India, Article 14 (Oct) 2085A

(2) Constitution of India, Article 16 (Sep) 1777

(3) Post Office Act (1898), S. 6 (Mar) 432B

—Ss. 101 to 104—Recitals in document —Correctness—Onus of proof—Surrounding circumstance can be looked into—Discharge of onus (Dec) 2439B

S. 112 Child born during subsistence of valid marriage — Husband and wife living apart in same village long before birth of that child — Presumption (Nov) 2352B

—S. 114

See (1) Civil P. C (1908), S. 11 (Dec) 2439D

(2) *Ibid*, S. 85 (Apr) 761A

(3) Prevention of Food Adulteration Act (1954) S. 10 (7) (July) 1277B

S. 114—Presumption whether accused were receivers of stolen property or were dacoits when to be drawn stated (Feb) 196B

—S. 114 — Hindu family will be presumed to be joint (May) 996A

Evidence Act (contd.)

—S. 114—Burden to prove that properties of the temple are held by reigning mahant on trust for public purposes of a religious or charitable character lying on Board of Religious Trust—No adverse inference for failure of mahant to produce certain document whereunder properties had been gifted to the founding mahant (Oct) 2057A

—S. 114—Presumption that a document is antedated cannot be raised against person producing it on ground of failure of the petition-writer to produce register required to be maintained by him—It can only affect value of petition-writer's evidence (Nov) 2167B

—S. 114 (e)—See Limitation Act (1963), S. 18 (Nov) 2342A

—S. 114, Illus. (f) — Marine Insurance — Insurance of export cargo — In usual course of business of insurance company, marine premium debit note always prepared at the time when policy was issued and a copy thereof attached to copy of policy kept in the office records — Court entitled to rely on presumption afforded by illus. (f) of S. 114 that the practice of insurance company of attaching such a note to the policy had been followed in a particular case (Jan) 44A

—S. 115

See also (1) Constitution of India, Article 309 (Oct) 1987B

(2) Ibid. S. 17 (Dec) 2548B

(3) Houses and Rents — U P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 1-A

(Nov) 2213

(4) Specific Relief Act (1877), S. 22 (July) 1258B

—S. 115 — Issue estoppel — Rule of — Rule applies when same issue of fact and law have been determined in previous litigation (Mar) 458

—S. 115 — Representation of existing fact and representation as to promise to do something in future — Distinction (June) 1021B

—S. 115—If a person having full knowledge of his rights as a possible reversioner enters into a compromise which settles his claim as well as the claim of the opponent at the relevant time, he cannot be permitted to go back on that arrangement when reversion actually opens (June) 1041B

—S. 115—Suit for pre-emption—Plaintiff when estopped from exercising his right of pre-emption (June) 1158A

Evidence Act (contd.)

—S. 132 — Interrogations by Customs Officer under S. 171-A, Sea Customs Act—S. 132 not attracted (Jan) 44C

—S. 133 — See Prevention of Food Adulteration Act (1954), S. 10 (7)

(July) 1277B

—S. 145 — Use of previous statements made by witness — Witness admitting having signed his previous statements — Use of statement (Sep) 1910C

—S. 145 — Statement in Panchanama can be used in evidence only for contradicting witness whose statement is contained in Panchanama (Nov) 2256A

—S. 145 — Witness confronted by his previous statement and given opportunity to explain that part of statement which is put to him does not constitute substantive evidence (Nov) 2256B

—Ss. 146, 63, 153, 155, 157 — Tape recorded statement—Admissibility

(June) 1162A

—Ss. 146, 153 — Section 146 not to be read with S. 153 in its entirety

(June) 1162D

—S. 153 — See also *ibid.*, S. 146

(June) 1162A, D

—Ss. 153, 155 — Sections 153 and 155 must be strictly construed (June) 1162C

—S. 154 — Mere presentation of application by prosecution that certain witness had been won over is not conclusive of the allegation (Aug) 1586B

—S. 155 — See (1) *ibid.*, S. 146

(June) 1162A

(2) *ibid.*, S. 153

(June) 1162C

—S. 155 (3) — “Which is liable to be contradicted” — Does not mean merely “which is relevant to the issue”

(June) 1162B

—S. 157 — See *ibid.*, S. 146

(June) 1162A

Excess Profits Tax Act (15 of 1940), S. 10A

—See also *ibid.*, S. 15 (Dec) 2444B

—S. 10-A—Pendency of valid proceeding under S. 15 for assessment or reassessment of escaped excess profits is a condition precedent for exercising power under S. 10-A to adjust liability to excess profits tax (Apr) 726

—S. 10A — Applicability — Tax officer bound to issue notice under S. 15 before applying S. 10A (Dec) 2444A

—S. 15—Profits escaping assessment—The decision of Appellate Assistant Commissioner in assessment proceedings that there had been only a partial partition in respect of the movable property of one of the two partners of the assessee, is a rele-

Excess Profits Tax Act (contd.)

vant information for initiating reassessment proceedings (Dec) 2444B

Factories Act (63 of 1948), S. 2 (1) — Worker—Test for determining is same as under Industrial Disputes Act

(Apr) 832 (2)A

—S. 9—Inspector appointed under Act —Duties of (Feb) 344B

—S. 112—Rules under—Delhi Factories Rules, 1950, Rule 7—Rule 7 read with R. 5 and its Schedule—Imposition of fee under, for renewal of licence—Levy is in nature of fee and not tax (Feb) 344A

Finance Act (12 of 1959) (as amended by Finance Act (1960)), S. 19 (4) — See Income-tax Act (1922), S. 18 (3D)

(Dec) 2406

Foreign Awards (Recognition and Enforcement) Act (46 of 1961), S. 3 — Per Shah and Grover JJ. (Ramaswami J. Contra)—Expression "submission" means actual submission or completed reference and does not mean an agreement to refer

(Jan) 1C

—S. 3 — Suit in India not liable to be stayed when there is absence of actual submission of dispute to arbitration in foreign country (Jan) 1D

Foreigners Act (31 of 1946), S. 2 (a) — Prior to its amendment by Foreigners Law (Amendment) Act (11 of 1957) which came into force on 19.1.1957 — In determining the status of a person entering into India on 1.4.1955 the definition of a foreigner in S. 2 (a) prior to its amendment read with Art. 5 (a) of the Constitution is of relevance (July) 1382

—S. 3 (2) (c)—Deportation of foreigners —Notification under Art. 258 by President entrusting Government of J. & K. functions of Central Government under S. 3 (2) (c) — Government of J. & K. can validly order deportation of foreigner (Feb) 337B

—S. 14 — See also Foreigners Order (1948), R. 7 (2) (Mar) 472

—S. 14—Prosecution of Indian national under S. 14 on charge of overstaying in India period of his Pakistani permit when not maintainable (July) 1382

Foreigners Order (1948), R. 7 (2)—Person leaving India for Pakistan in 1947 and returning India on Pakistani Passport and overstaying in India without obtaining residential permit — Conviction under S. 14 of Foreigners Act (1946) proper (Mar) 472

Foreign Exchange Regulation Act (7 of 1947), S. 12 (1) — Payment for exported

Foreign Exchange Regulation Act (contd.)

goods—Filing of declaration as to valuation — Under-valuation in declaration does not amount to contravention of restrictions imposed by S. 12 (1) (Jan) 116A

—Ss. 23 and 23A—See *ibid*, S. 27

(Jan) 116B

—S. 23C—While passing sentence Court can consider the facts that liability of accused was vicarious or that contravention took place without his knowledge or due to his negligence (Nov) 2162B

—S. 23.C (1)—Offence of attempting to export Indian Currency by firm of partners—Money belonging to firm and entries made in account books of firm — Acting partner whether liable for offence

(Jan) 28C

—S. 23C (1) and (2)—"Person incharge" means person who is in over all control of day to day business of the company or firm (Nov) 2162A

—Ss. 27, 23, 23A—Incorrect declaration by party in contravention of Rules framed under S. 27 or Forms prescribed under Rules—Effect (Jan) 116B

Forest Act (16 of 1927), S. 34A (Bom)— See Tenancy Laws — Bombay Merged Territories and Areas (Jagirs Abolition) Act, 1953 (39 of 1954), S. 11 (Aug) 1645

Forward Contracts (Regulation) Act (74 of 1952), S. 11—See *ibid*, S. 15 (Jan) 166

—Ss. 15 and 11 — East India Jute and Hessian Exchange Ltd., Bye-laws, Bye-laws 1 (b), 15 and 17 — Bye-law 1 (b) is mandatory (Jan) 166

Fruit Products Order (1955), Cl. 15 — See Interpretation of Statutes (Apr) 815

Fundamental Rules

See under Civil Services.

General Clauses Act (10 of 1897), S. 6

See also (1) Gold (Control) Act (1968), S. 116 (2) (June) 1193

(2) Interpretation of Statutes

(Apr) 815

—S. 8 (1)—See Central Excises and Salt Act (1944), S. 12 (Mar) 454B

—S. 26—See Interpretation of Statutes (Apr) 815

Gift Tax Act (18 of 1958), S. 2, Cl. (xxiv) sub-cl. (d) — Hindu undivided family — Coparcener agreeing to take lesser share —Effect (Dec) 2410A

—S. 2, Cl. (xxiv) Sub-cl. (d) — Transfer of property — Transaction—Meaning of —As partition of H. U. F. does not effect any transfer it does not come within the scope of the sub-clause (Dec) 2410B

Gold Control Act (45 of 1968), Preamble—
Gold Control Act (1960) is valid

(June) 1170G

—S. 2 (p), Explanation — “Gold article and ornament” — Distinction

(June) 1170D

—S. 6(1)—See Gold (Control) Act (1968), S. 16

(June) 1170F

—S. 16 — Section 16 is applicable to pawn broker

(June) 1170F

—S. 16 (1)—Provision requiring Pawn broker to make monthly declaration under Form GS III does not impose unreasonable restriction on his right under Art. 19(1) (f) or (g) of the Constitution

(June) 1170A

—S. 58—Validity—Provision is valid

(June) 1170E

—S. 68 — Notice prior to confiscation proceedings — Necessity

(June) 1170B

—S. 71—See also *ibid*, S. 68

(June) 1170B

—S. 71—Provision for confiscation of gold on failure of pawn broker to submit monthly return imposes unreasonable restriction on his right to acquire, hold and dispose of gold and gold ornaments, etc.

(June) 1170C

—S. 99—See *ibid*, S. 68

(June) 1170B

—S. 116 (2) — Notice under R. 126 (1) (10) of Gold Control Rules initiating proceedings for forfeiture of seized gold must be deemed to continue by virtue of S. 6 of General Clauses Act on repeal of Gold Control Ordinance, 1968

(June) 1193

Government Grants Act (15 of 1895), S. 3—
Absence of express provision in the grant of land that grantor transferred his right to sub-soil—Question whether that right is included in the grant how to be determined

(Aug) 1509A

Government of India Act (1935) (26 Geo. V, & 1, Edw. VIII, C. 2), S. 142-A — Power under S. 142-A to impose tax does not get exhausted by its exercise once. Profession Tax Limitation (Amendment and Validation) Act (1949) is saved under Art. 276(2), Proviso of the Constitution

(Sep) 1696A

—S. 240 — See Constitution of India, Art. 311

(Nov) 2242B

Government of India (Allocation of Business) Rules (1961)—See Constitution of India, Art. 311 (2)

(Aug) 1547

Government Servants Conduct Rules (1926)
See under Civil Services.

Gujarat Industrial Development Act (23 of 1962), S. 1—Act is valid

(June) 1138A

Gujarat Panchayat Act (6 of 1962)

See under Panchayats.

Guru Nanak University Amritsar Act (21 of 1969)

See under Education.

HIGH COURT RULES AND ORDERS

—**High Court Rules (All.), Ch. VIII, R. 5**

— See Letters Patent (All), Cl. 10

(Nov) 2337A

Hindi Sahitya Sammelan Act (13 of 1962), S. 4 — See Constitution of India, Art. 19 (1) (c)

(May) 966A

Hindu Adoptions and Maintenance Act (78 of 1956), S. 23 (2)—Claim for maintenance by wife and daughter — Quantum — Determination — Test — Date from which claimable

(Feb) 234A

—S. 23 (2) (d) — Amount regularly received by wife @ Rs. 250/- p. m. from her father during his lifetime — Sum so received not her income but only a bounty — Not a fact to be taken into consideration under S. 23 (2) (d)

(Feb) 234B

Hindu Law — Alienation—Alienation by Manager of joint Hindu family even without legal necessity is voidable and not void

(Apr) 776A

—Alienation by Karta — Proof of legal necessity by alienee when not necessary

(Nov) 2228A

—Conversion to Hinduism — Evidence of — Bona fide intention to be converted accompanied by conduct—Sufficient

(Nov) 2352A

—Family arrangement — Parties to the compromise need not all belong to one family

(June) 1041D

—Family arrangement — Has to be considered as a whole

(July) 1387A

—Hindu undivided family — See Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1950) (1 of 1951), S. 23 (1) (a)

(Sep) 1687

—Joint family property — Alienation for legal necessity by limited owner — Suit to set it aside — Recital in sale-deed that full consideration is paid — Onus on plaintiff

(June) 1028A

—Joint family property—Alienation — Legal necessity — Proof — Recital in sale-deed of legal necessity—Evidentiary value

(June) 1028B

—Joint family property — Alienation for legal necessity—Suit to set it aside — Plea of fraudulent representation and exercise of undue influence over vendor—Denial by vendee — No issue raised and no evidence led in trial — Effect

(June) 1028C

Hindu Law (contd.)

—Joint family—Separation—Presumption that members of Hindu family are joint is stronger in case of father and his sons (Oct) 1962A

—Minority & guardianship—See Hindu Minority and Guardianship Act (1956), S. 6 (Feb) 315B

—Religious Endowment—See Constitution of India, Art. 19(1)(f) (May) 891A

—Religious and Charitable Endowments—Feeding of Sadhu and giving hospitality to wayfarers not by itself indicative of temple being public temple (Oct) 2057B

—Religious and Charitable Endowments—Members of public freely admitted to temple for worship and/or for attending festivals celebrated by mahants—Inference (Oct) 2057C

—Religious and Charitable Endowments—Question whether property is given to head of mutt for his personal benefit only—Considerations (Oct) 2057D

—Religious and Charitable Endowments—Installation of idol permanently on pedestal—Temple constructed on grounds separate from residential quarters of mahant—Inference (Oct) 2057E

—Religious and Charitable Endowments—Properties appertaining to Asthal when to be considered as properties of public trust for religious or charitable purposes (Oct) 2057F

—Religious endowment—Offerings and worships—Right of Swetambari Sects of Jains to worship in a temple according to their tenets—Sect to which temple belongs not conclusive—Digambaris have right to object (Dec) 2540B

—Succession—Rule of primogeniture—Two or more equal claimants from common ancestor—Eldest member in senior most line will be preferred (Apr) 681B

Hindu Marriage Act (25 of 1955), S. 17—See Penal Code (1860), S. 494 (June) 1153

Hindu Minority and Guardianship Act (32 of 1956), S. 6—Natural guardians—Mother comes only after death of father—Father not taking any interest in minor—Mother treated as natural guardian (Feb) 315B

Hindu Succession Act (30 of 1956), S. 7 (3)—See Kerala Agricultural Income-tax Act (1950), S. 24 (Dec) 2513

—S. 7 (3)—Sthanam property—Death of sthanamdar—Estate duty, liability to—Extent of property passing—Effect of

Hindu Succession Act (contd.)

S. 7 (3)—See Estate Duty Act (1953), Ss. 5 and 7 (Nov) 2392A

—S. 14 (2)—A widow who succeeds to properties of her deceased husband on the strength of will executed by the husband in her favour cannot claim any rights in the properties other than those conferred by the will (Apr) 745B

HOUSES AND RENTS

—**Bombay Rent Restriction Act (16 of 1939)**, Ss. 4 (2) (b) and 11—Lease of lands to construct houses and to let out or to use it in any manner—Not for purpose of business or trade (June) 1081A

—S. 4 (2) (b)—Words “business” or “trade”—Interpretation—Word “business” as interpreted in income-tax law, or in terms of a covenant or the Companies Act cannot be used in interpreting the words in S. 4 (2) (b) (June) 1081D

—S. 11—See *ibid.*, S. 4 (2) (b) (June) 1081A

—**Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947)**, S. 12 (2)—Demand notice not giving break-up of the sum claimed as due per month not invalid (Mar) 659A

—S. 12 (2)—Demand notice by landlord for permitted increases as due under the Act is not effective only from date of notice (Mar) 659B

—S. 28 (1)—Exclusive jurisdiction of Small Cause Court—Relationship of landlord and tenant between parties in respect of every matter covered by S. 28 (1) not necessary (Aug) 1495A

—S. 28 (1)—Registered agreement embodying deed of charge for construction loan executed by defendants in favour of plaintiff—Deed complying with all requirements of S. 18 (3)—Defendants failing to let out premises after completion to the plaintiff in spite of provisions to that effect in deed of charge—Suit by plaintiff for enforcing charge for recovery of loan—Held, that suit related to “claims or questions arising out of this Act or any of its provisions” within S. 28 (1) (Aug) 1495B

—**East Punjab Urban Rent Restriction Act (3 of 1949)**, S. 2 (i)—Electric charges not fixed—Rent payable in advance—Electricity charges do not form part of Rent (May) 987A

—S. 2 (i)—Whether a fixed amount paid every month as electric charges forms part of the Rent (Quaere) (May) 987B

Houses and Rents (contd.)

—Madhya Pradesh Government Premises (Eviction) Act (16 of 1952), S. 3 — Order of eviction held not sustainable Government having failed to satisfy Court that premises in question was Government premises (Aug) 1477

—S. 4 — See *ibid*, S. 3 (Aug) 1477

—Mysore Rent Control Act (22 of 1931), S. 21 — Proceedings for eviction of tenant and recovery of possession of premises — Claim for compensation for improvements cannot arise for consideration (May) 942B

—S. 21 (1), Proviso (j) — Eviction of tenant — Ground of — Reasonable and bona fide requirement of landlord for immediate demolition and rebuilding — Proof (May) 942A

—U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 1-A — Benefit under S. 1-A in respect of buildings constructed after 1-1-1951 can be validly waived by landlord (Nov) 2213

—S. 3 (4) — See *ibid*, S. 16 (Nov) 2361

—Ss. 16, 3 (4) — Order of District Magistrate sanctioning institution of a suit in ejectment becoming final under S. 3 (4) — Order cannot be challenged in collateral proceedings (Nov) 2361

Hyderabad Abolition of Inams (Amendment) Act (10 of 1956)

See under Tenancy Laws.

Hyderabad Abolition of Inams and Cash Grants Act (8 of 1955)

See under Tenancy Laws.

Hyderabad Jagirdars Debt Settlement Act (12 of 1952)

See under Debt laws.

Import and Export Control Order, Entry 295 — See Imports and Exports (Control) Act (1947), S. 3 (Aug) 1558A

Imports and Exports (Control) Act (18 of 1947), S. 3 — See Customs Act (1962), S. 111 (d) (Feb) 293B

—S. 3 — Iron and Steel Controller's Public Notice No. 1/1-3/62, dated 6-12-1962, is not retrospective (Apr) 704A

—S. 3 — Import and Export Control Order, Entry 295 — Powers of Collector of Custom while examining goods imported under license and covered by Entry 295 (Aug) 1558A

—S. 5 (as amended by Act 4 of 1962) — Breach of conditions of licence — Effect (Jan) 170

—S. 5 — Imports (Control) Order (1955), Cl. 5 (4) — Import of two printing presses

Imports and Exports (Control) Act (contd.)

under actual user's licence — Condition of licence that goods will be utilized only for consumption as raw materials or accessories in licence holder's factory and no portion thereof be sold — Licensee negotiating for sale of one of them during the period when procedure in regard to its import was being carried out and actually selling it thereafter — Held, the condition of licence was applicable and breach thereof was fully intended and designed (July) 1283B

Imports (Control) Order (1955), Cl. 5 (4)

See Imports and Exports (Control) Act (1947), S. 5 (July) 1283B

—Part IV Sch. I Item 1 — See Customs Act (1962), S. 111 (d) (Feb) 293B

Income-tax Act (11 of 1922) — See Income Tax (Amendment) Act (1959), S. 4 (July) 1256B

—S. 2 (6A) and (6C) — See Income Tax Act (1922), S. 4 (Nov) 2375

—S. 2 (9) — See Income Tax Act (1961), S. 154 (Nov) 2204

—S. 3 — See *ibid*, S. 16 (3) (a) (ii) (Jan) 33A

—S. 3 — Hindu undivided family — For family to become taxable entity need not consist of two or more male members (Jan) 33B

—S. 3 — Business run by Hindu undivided family — Income derived by coparcener — Whether assessable as individual income or income of joint family — Test indicated (Aug) 1454

—Ss. 4, 10 — Profits over sale of shares acquired not for dealing in them — Would be on capital account (Apr) 794D

—Ss. 4, 10 — Sale of investment realising enhanced profits — Whether and when profits are assessable to tax — Test laid down (Apr) 794E

—S. 4 — Capital or income — Compensation received by assessee for termination of one of its managing agencies, which resulted in destruction of a source of income is capital receipt (Aug) 1590B

—S. 4 — Question whether a receipt is capital or income is a mixed question of law and fact (Aug) 1590C

—S. 4 — Question whether a receipt is revenue receipt or capital receipt has to be determined entirely by its character in the hands of the receiver (Nov) 2375

—S. 4 (1) (b) (i) — Accrual of income — Managing agent — Mercantile system of accounting — Income relinquished after it had become "due" but before it became payable (Nov) 2396

Income-tax Act (1922) (contd.)

—S. 4 (3)—Profits—Excess amount obtained by assessee on sale of portion of mortgage property which was formerly purchased by him in money-lending business, are profits and gains of that business (Dec) 2461

—S. 4 (3) (i)—See *Ibid*, S. 66 (2) (Dec) 2439A

—S. 10—See *ibid*, S. 4 (Apr) 794D,E

—S. 10 — Amount received by creditor assessee without direction from debtor about its appropriation, not entered by assessee in his account books, can be treated as income by way of interest (Oct) 2074C

—S. 10—Agreement for avoidance of double Taxation in India and Pakistan 1947 Item 5 (g) and 9—Income from business or other sources (Oct) 2114

—S. 10 (2)—Expenditure for business—Litigation expenses—When amounts to business expenditure (Oct) 2129

—S. 10 (2) (vii)—Business loss — Sale of business after carrying it for a part of the accounting year—Loss arising out of sale can be set-off (Nov) 2274B

—S. 10 (2) (xi) and (xv) — Income-tax paid under statutory obligation under S. 18 (7) cannot be allowed as business expenditure under S. 10 (2) (xv) (Nov) 2284

—S. 10 (2) (xv)—Business expenditure—The amount of sales tax paid or payable by the assessee is an 'expenditure' within meaning of S. 10 (2) (xv) (Oct) 2145

—S. 10 (2) (xv)—See (Nov) 2396.

—S. 10 (2) (xv)—Business expenditure — Business of cultivation of sugarcane and manufacture of sugar—Commission paid to managing agents—If permissible (Dec) 2434A

—S. 10 (2A) — Amount representing bonus payable shown in 1950-51 on debit side—Amount remained unpaid for some years—In accounting year 1957-58 part of amount paid to employees in full settlement and balance credited to profit and loss accounts—Credit treated as income accruing in the year 1957-58 and assessed to tax — No allowance or deduction in respect of bonus made in the assessment year 1950-51—Nothing to show that assessee had obtained any benefit relating thereto in assessment year 1957-58—Amount is not assessable under S. 10 (2A) (Jan) 123

—S. 12-B (1)—Dissolution of partnership assets of firm valued and partner paid certain amount in lieu of his share of

Income-tax Act (1922) (contd.)

assets—Amount received by partner cannot be taxed as capital gains (Nov) 2270

—S. 16 (1) (c) Third Proviso — Exemption — Deduction in computing total income settlement containing provision for retransfer of a part of its income to the settlor (Dec) 2516

—Ss. 16 (3) (a) (ii) and 3 — Assessment in capacity as Hindu undivided family—Section 16 (3) (a) (ii) not applicable—Income of minor children of assessee cannot be included in his income (Jan) 33A

—S. 17 (1)—See *Income-tax Act* (1961), S. 154 (Nov) 2204

—S. 18 (3D) and (3E) (as inserted by Act 12 of 1959) — Dividend on preference share — Deduction of tax at source — Failure to deduct—Effect (Dec) 2406

—S. 18A—See *Income-tax Act* (1961), S. 297 (2) (Jan) 95

—S. 23A—Super-tax—An order made under this section directing payment of additional super tax is not an order of assessment within the meaning of S. 34 (3) and to such an order the period of limitation prescribed thereby does not apply (Dec) 2471B

—S. 23A (9), Explanation (b) (iii) (as it stood prior to amendment of 1957)—Company in which the public are substantially interested—Essential conditions to be satisfied (Dec) 2471A

—S. 24 (2) — Dividends received on shares forming assessee's trading assets—Can be set off against loss carried forward from earlier years (Nov) 2274C

—S. 24 (2)—Whether separate transactions by a Company constitute "Same business"—Decisive test (Nov) 2293

—S. 24 (2) (before amendment of 1955) —Set-off of loss against profits of several businesses is available only where all constitute one "same business" — Tests for (Nov) 2328

—Ss. 24-B, 34—Reassessment of income of deceased in hands of his legal representatives—Notices under S. 34 relating to period subsequent to death are invalid (Jan) 37A

—Ss. 24-B and 34 — Reassessment of income of deceased person—Notice must be issued to all executors under the will or all legal heirs as the case may be (Jan) 37B

—S. 24B (3)—See *ibid*, S. 34 (3) Second proviso (Jan) 147

—S. 26A—Registration of firms—Joint Hindu family—Two or more coparceners

Income-tax Act (1922) (contd.)

entering into partnership—Firm can be granted registration—Partnership Act (1932) (Feb) 383

—S. 26-A—Application for registration under S. 58, Partnership Act made before end of such previous year but actually registered after end of such year—Firm cannot be treated as registered before the end of previous year under R. 2 (b) (June) 1015

—S. 27—Multiple defaults—Assessee must show cause for each default (May) 354

—S. 33—Subsequent Tribunal having advantage of examining assessee's transactions during longer period and having more comprehensive picture of all transactions—Can come to conclusion different from that arrived at earlier: (Apr) 794C

—S. 34—See *ibid*, S. 24B (Jan) 37A, B

—S. 34 (1)—Disclosure—Mere production of account books or other evidence from which material facts could have been discovered with due diligence not sufficient (Aug) 1635B

—S. 34 (1) (a)—Assessee disclosing all primary facts in his return necessary for assessment—Income Tax Officer is incompetent to start reassessment proceedings under S. 34 (1) (a) merely because he had dropped assessment proceeding on a wrong legal inference from facts disclosed (Apr) 717

—S. 34 (1) (a)—Assessee disclosing primary facts relevant to assessment—He is under no obligation to instruct Officer about inference to be drawn from them (Aug) 1635A

—S. 34 (1) (a)—Income Tax Officer regarding his inference from evidence and material produced to be erroneous—Other conclusion possible—Still proceeding under this section will not lie (Aug) 1635C

—S. 34 (1) (a)—Income-tax Officer can initiate proceedings under S. 34 when at the time of issuing notice under S. 34 (1) (a) he has formed a belief on the basis of material before him that there was under-assessment and that the same has resulted from non disclosure of material facts (Oct) 2074A

—S. 34 (1) (a)—Income-tax Officer is not required to issue fresh notice under S. 34 (1) (a) where the assessment order under S. 34 is set aside by Appellate Assistant Commissioner only on ground that assessee had not been given proper opportunity to put forward his case (Oct) 2074B

Income-tax Act (1922) (contd.)

—S. 34 (1) (a)—At time of first re-opening of assessment of Hindu undivided family and of individual members primary facts necessary for re-assessment of family were in possession of Income-tax officer—He proceeded to make re-assessment of individual members by including amounts in question in their individual accounts—He could not a few days later merely change his opinion and issue another notice under S. 34 to family seeking to include amount in question in income of the family (Nov) 2331

—S. 34 (1A)—Reasons for belief—In order to start proceedings for reassessment there must be some material or fact in the reasons therefor on which any belief can be founded of the nature contemplated under S. 34 (1A) (Dec) 2451B

—S. 34 (3)—See *ibid*, S. 23A (Dec) 2471B

—S. 34 (3)—Second Proviso and Section 24B (3)—Income-tax returns filed by one R—Assessment completed after his death, describing assessee as estate of R by heirs and legal representatives of R—Fresh assessments ordered in accordance with provisions of S. 24B—Held Ss. 34 (3) Second Proviso and 24B (3) applied to the facts (Jan) 147

—S. 34 (3)—Word "assessment"—Interpretation of—Means not merely computation of income of assessee but also determination of tax payable by him (Nov) 2219A

—S. 34 (4)—S. 34 (4) as inserted by Amendment Act of 1959 contemplates notice issued after coming into force of 1959 Act (July) 1256A

—S. 35—Mistake apparent on record brought to notice of Income-tax Officer—He cannot refuse to exercise power under S. 35 (Jan) 33D

—S. 35—Rectification of mistake—Application—Income-tax Officer cannot modify status of assessee without first giving him notice (Jan) 33E

—S. 41 (1)—See Wealth Tax Act (1957), S. 21 (1) (as it stood prior to 1964 amendment) (Dec) 2463A

—S. 54 (1)—Assessment order—Would be admissible in evidence if produced by assessee or his representative in interest (Mar) 671

—S. 66—Adventure in the nature of trade—Mixed question of law and fact (Apr) 794B

—S. 66—Neither High Court in reference nor Supreme Court in appeal can

Income-tax Act (1922) (contd.)
 re-appreciate material on record to find out whether facts found by Tribunal are correct or not (Aug) 1590A
 — S. 66 — High Court cannot disturb finding of fact recorded by Tribunal when same is not challenged before it by raising appropriate question (Nov) 2274A
 — S. 66 (2) — Question of law Finding as to unreality of trust (Dec) 2439A
 — S. 66A — See *ibid*, S. 66 (Aug) 1590A

Income-Tax Act (43 of 1961), S. 11 See Assam Agricultural Income-Tax Act (9 of 1939), S. 8 (g) (Oct) 2135B
 — S. 41 (1) — Assessee made liable under S. 41 (1) must be the same to whom allowance in respect of business expenditure has been granted earlier (Dec) 2591
 — S. 48 — See Income-tax Act, Ss. 55 (2) (i) and 48 (Nov) 2339
 — Ss. 55 (2) (i), 48 — Calculation of capital gain or loss — Market value of shares on 1-1-1954 (Nov) 2339
 — S. 56 — Interest on amount of assessee's own contribution to unrecognised provident fund is "income from other sources" within S. 56 (Apr) 725A
 — S. 147 — See (Nov) 2389
 — S. 151 (2) — Notice issued under S. 148 read with S. 151 (2) by I. T. O. on feeling that certain transactions by assessee with creditors were bogus and that there was case for investigating truth of alleged transactions is invalid (Apr) 730
 — S. 154 — Rectification of assessment — 'Mistake apparent from the record' — Whether Income Tax Officer has jurisdiction under S. 154 to rectify assessment of a firm originally made under S. 17 (3) of the Act of 1922 (Nov) 2204
 — Ss. 273, 297 (2) (g) — Assessment proceedings for the years 1960-61 and 1961-62 initiated under S. 18-A of Income-tax Act (1922) — Completion of assessment after 1-4-1962 — Income-tax Officer taking view that assessee had furnished inaccurate and untrue estimates of tax without satisfactory explanation — He is entitled to impose penalty under S. 273 (Jan) 95
 — S. 297 (2) (g) — See *Ibid*, S. 273 (Jan) 95

Income-tax (Amendment) Act (1 of 1959), S. 4 — Scope — Only ground on which validity of notice issued under S. 34 (1) (a) before the commencement of the Act cannot be attacked is that at the time of issue of the notice the period prescribed under S. 34 (1) (a) prior to its amendment by S. 18, Finance Act (1956) had expired (July) 1256B

Income Tax Rules (1922), R. 23 — Rule for splitting agricultural income from that chargeable to income-tax — Scope of (Dec) 2434B

I. P. S. (Regulation of Seniority) Rules (1954) — See under Civil Services.

Indore Municipal Act (4 of 1909)

See under Municipalities.

Industrial Disputes Act (14 of 1947), S. 2 (j) (k) and (s) — See *ibid*, S. 10 (1) (d) (July) 1259

— S. 2 (j) — Industry — Activities of Bombay Panjrapole Bhuleshwar held to be industry (Dec) 2422

— S. 2 (s) — See also Factories Act (1948), S. 2 (1) (Apr) 832 (2)A

— S. 2 (s) (as amended by Act 36 of 1956) — Workman, who is — Workman must be held to be doing that work which is his main work (May) 922A

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Transport Engineer in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Comes within exception (iv) (May) 922B

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — District Engineer in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Comes within exception (iv) (May) 922C

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Foreman (Chemicals) in Burmah Shell Oil Storage and Distributing Co. of India, Ltd. — Whether a workman (May) 922D

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Fuelling Superintendent in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Whether a workman (May) 922E

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Chemist in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — He is a workman (May) 922F

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Sales Engineering Representative in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — He is not a workman (May) 922G

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Blending Supervisors in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Some are workmen and some are not (May) 922H

— S. 2 (s) (as amended by Act 36 of 1956) — Workman — Foreman in Burma Shell Oil Storage and Distributing Co. of India Ltd. not workman (May) 922I

Industrial Disputes Act (contd.)

- S. 2 (s) (as amended by Act 36 of 1956)
- Workman — Depot Superintendent in Burma Shell Oil Storage and Distributing Co. of India, Ltd. (May) 922J
- S. 2 (s) (as amended by Act 36 of 1956)
- Workman — District Sales Representative in Burma Shell Oil Storage and Distributing Co. of India, Ltd.—Not a workman (May) 922K
- S. 10—See also *ibid*, S. 33 (Dec) 2417
- S. 10 — Reference of industrial dispute for adjudication—Subsequent closure of industry or taking over of undertaking by another (Dec) 2521A
- S. 10 (1) (d)—Hospital run by Government as a part of its function—Reference by Government under S. 10 (1) (d) incompetent (July) 1259
- S. 33 — Dismissal of an employee in violation of S. 33 — Reinstatement (Dec) 2117
- S. 33A—See *ibid*, S. 33 (Dec) 2117
- S. 33C (2) — Computation of benefits under award — Labour Court is competent to interpret award to settle disputes as to rights under such award (Sep) 1902
- S. 33.C (2) — Application by bank employee for grant of special supervisory allowance under Sastry Award — If employee discharging duties of a supervisory nature (Nov) 2200A
- Sch. 2 item 3 — See *ibid*, Sch. 3, item 11 (Dec) 2414
- Sch. II, Item 3 — General rule on setting aside wrongful dismissal of a workman is reinstatement (Nov) 2171
- Sch. 2, Item 6 — Domestic enquiry—Bias — Enquiry officer being junior advocate and at times appearing on behalf of management — No bias to be inferred (Jan) 22A
- Sch. 2, Item 6 — Domestic enquiry—Bias — Enquiry officer being lawyer and his report bearing stamp of a lawyer's work — Circumstances do not justify conclusion that he acted unduly hastily (Jan) 22B
- Sch. 2, Item 6 — Domestic enquiry—Bias — Mere fact that Works Manager referred to opinion of others did not exclude his having formed his own opinion (Jan) 22C
- Sch. 2, Item 6 — Domestic enquiry—Act of indiscipline — Worker blowing whistle at instance of another worker leading to stoppage of work in factory — Cannot be tolerated (Jan) 22D
- Sch. 3, Item 2 — Compensatory and other allowances — House rent allowance

Industrial Disputes Act (contd.)

- Labour court allowing meagre amount as house rent allowance to workers paid very low—Cannot be said to be unreasonable when company's financial position is sound (Oct) 2134
- Sch. 3, Item 2 — Medical allowance
- Bipartite Settlement—Standardisation (Dec) 2454
- Sch. 3, Item 5 — Bonus — Full Bench formula — Applying of (Dec) 2521C
- Sch. 3, Item 5 — Available surplus—Prior charge — Return on paid up share capital (Dec) 2521D
- Sch. 3, Item 5 — Available surplus—Prior charge — Statutory contingency reserve and statutory development reserve (Dec) 2521E
- Sch. 3, Item 5—Available surplus for distribution as bonus — Advances not made in course of business transactions of a nature as would form part of working capital (Dec) 2567A
- Sch. 3, Item 5—Computation of gross profit for calculation of surplus available for bonus — Income accruing from trade investments (Dec) 2567B
- Sch. 3, Item 5—Computation of gross profit for calculation of surplus available for bonus — Interest earned by Company on loans advanced on personal security (Dec) 2567C
- Sch. 3, Item 5—Computation of gross profit for calculation of surplus available for bonus — Entries in registers produced by Company showing original cost of buildings (Dec) 2567D
- Sch. 3, Item 5—Computation of gross profit for calculation for surplus available for bonus—Claim for rehabilitation grant for machinery (Dec) 2567E
- Sch. 3, Item 5—Claim for rehabilitation grant for machinery in calculation of surplus available for bonus—Machinery working only in one shift on iron and steel (Dec) 2567F
- Sch. 3, Item 5—Claim for rehabilitation grant for machinery in calculation of surplus available for bonus — Divisors should be worked out only after estimating correctly life of machinery (Dec) 2567G
- Sch. 3, Item 5—Claim for rehabilitation grant in calculation of surplus available for bonus — Depreciation (Dec) 2567H
- Sch. 3, Item 5—Computation of gross profit for calculation of surplus available for bonus—Allocation of surplus between Company and workmen — Rate of bonus paid to officers (Dec) 2567I

Industrial Disputes Act (contd.)

—Sch. 3, item 11 — Reinstatement of workman—Termination of services of an employee discharging an office of trust on ground of loss of confidence — Power of Industrial Tribunal (Dec) 2414

Institute of Technology Act (59 of 1961), S. 27, Statute 13, Cls. (9) and (5)—Services of probationer are terminated not by way of penalty—Statute 13, Cl. (9) does not apply (Sep) 1811

—Statute 13 Cl (9) & (5)—See Institute of Technology Act (1961), S. 27

(Sep) 1811

International Law (Private) — See Civil P. C. (1908), S. 13

(May) 974B

Interpretation of Statutes

See (1) Evidence Act (1872), S. 153

(June) 1162C

(2) Land Acquisition Act (1894), S. 17 (2) (June) 1033E

(3) Natural Justice (Jan) 40C

—Conferment of specific power without prejudice to generality of general power already specified — Specific power does not restrict general power (Apr) 771A

—Interpretation of constitutional provision — Considerations stated

(Mar) 530G

—Language used in statute not carrying out its object — Court cannot supply deficiencies (Jan) 57B

—No need to call into aid rules of construction when meaning of statute is plain and unambiguous (Apr) 725B

—Prevention of Food Adulteration Act cannot be held to be impliedly repealed by Essential Commodities Act or Fruit Products Order made thereunder

(Apr) 815

—Provisions ensuring security of fundamental human rights to be liberally construed (Mar) 530F

—Taxing provision — Rule of interpretation (Feb) 378B

—Taxing statute — Interpretation of a provision in a taxing statute rendered years back should not be easily departed from (Nov) 2219B

—Taxing Statute — Strict construction — Benefits of ambiguity (Dec) 2463B

—Word of Statute or instrument — Construction of—Dictionary meanings—Use of (July) 1283C

Iron and Steel Control Order (1956), Cl. 5 — See Essential Commodities Act (1955), S. 10 (Mar) 447

Jaipur District Boards Act (1947)

See under Panchayats.

Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules (1956)

See under Civil Services.

Jammu and Kashmir Preventive Detention Act (13 of 1964)

See under Public Safety.

J. & K. Representation of the People Act (4 of 1957), (as amended by Act 11 of 1967), S. 123—Supreme Court should permit respondent to support judgment in his favour even on grounds which were negatived in that judgment (July) 1262B

—S. 132 (4)—Corrupt practice — Statement relating to political character does not amount to corrupt practice

(July) 1262A

Kerala Agricultural Income Tax Act (22 of 1950), S. 24 — Death of Sthanamdar after Hindu Succession Act (1956) — Liability for agricultural income-tax (Dec) 2513

Kerala Education Act (6 of 1959)

See under Civil Services.

Kerala Education Rules (1959)

See under Civil Services.

Kerala General Sales Tax Act (11 of 1925 ME)

See under Sales Tax.

Kerala Sthanam Properties (Assumption of Temporary Management and Control) and Hindu Succession (Amendment) Act (28 of 1958), S. 1 — See Kerala Agricultural Income-tax Act (17 of 1950), S. 24

(Dec) 2513

Land Acquisition Act (1 of 1894), S. 3 (f)—Industrialisation of an area is in public interest (June) 1033A

—S. 4—Establishment of an industrial area by a corporation is public purpose

(June) 1188B

—S. 4 (1)—Notification not specifying locality where lands were needed does not comply with essential requirement — Defect not cured by giving particulars in later notification under S. 6 (1) (Feb) 306

—S. 6 (3)—Absence of proof of colourable exercise of power — Court cannot go behind declaration of Government

(June) 1033B

—S. 11 — Award of compensation by Collector — Agreement between parties can be treated as good evidence of market value (Mar) 465D

—S. 17 — Urgency — Determination — Government or party being lethargic at an earlier stage not very relevant — Conclusion of Government that there was urgency entitled to great weight

(June) 1033D

Land Acquisition Act (contd.)

—S. 17 (2) (as amended in Punjab)—Clause (c) cannot be interpreted, by application of the rule of ejusdem generis

(June) 103EE

—S. 18—Owner in his application for reference not raising issue about area compulsorily acquired—Cannot agitate matter before Court

(Nov) 2287B

—S. 23—Compensation—Evidence relating to gradual rise in prices in area under acquisition should be considered

(July) 1253

—S. 23—Compensation—High Court not fixing compensation at capitalised value of lease money—Appeal to Supreme Court—Fact that capitalised value of 12 years' rental would be little more than amount actually awarded would not justify interference

(July) 1307

—S. 23—Compensation—Market price fixed in respect of a contiguous plot recently acquired can be taken into consideration—Relative situation and importance of the plots to be compared

(Nov) 2272

—S. 23 (1)—Compensation—Value fetched for small plot of land cannot be applied to lands covering a very large extent

(Oct) 2015

—S. 30—See Civil P. C. (1908), S. 115

(Nov) 232A

—S. 38—Where Government had contributed money towards cost of land sought to be acquired it is not necessary to proceed with the acquisition under Part VII of the Act

(June) 1035C

—S. 54—Compensation—Supreme Court will not interfere with decision of High Court in appeal where it finds no infirmity either in reasoning of High Court or in appreciation of evidence by it

(Nov) 228A

—S. 55—Enquiry under S. 5A held in accordance with rules framed under S. 55—Objector is not entitled to cross-examine officers of the corporation—Opportunity of being heard personally given—It is sufficient

(June) 1185C

Letters Patent, Cl. 10 (All.)—Order of Single Judge of High Court in appeal arising out of proceedings under O. 21, R. 90, C. P. C.—Appeal against under Cl. 10 is maintainable

(Nov) 233A

—Cl. 15 (Bom.)—There being important questions of public importance or important rulings which should be taken into consideration Letters Patent appeal should be admitted—Prolongation of litigation no ground for refusing admission

(Nov) 2255

Letters Patent (contd.)

—Cls. 11 and 12 (Cal.)—See Limitation Act (1908), Art. 183

(Feb) 218

—Cl. 15, (Mad)—New point of mixed question of law and fact

(Dec) 2468

Limitation Act (9 of 1908), S. 14—Suit for recovery of damages for illegal occupation of premises—Future damages till recovery of possession, awarded by trial Court set aside in appeal on ground that future damages could not be awarded in pure money suit—Subsequent suit for damages for period subsequent to that in earlier suit—Limitation—Period of pendency of first suit could be excluded

(Nov) 2313A

—S. 14 (2)—See Civil P. C. (1908), S. 48

(May) 974E

—S. 18—Plaintiff must establish that there has been fraud and that by such fraud he has been kept away from knowledge of his right to or of title where it is founded

(Nov) 2184F

—S. 19—Acknowledgment—Must relate to present subsisting liability and indicate existence of jural relationship between parties and intention to admit such relationship

(Aug) 1482A

—S. 28—See Transfer of Property Act (1882), S. 58

(Feb) 310

—Art. 10—Suit for pre-emption—Even part of land sold being in possession of tenant—Article 10 will apply and not S. 30 of Punjab Pre-emption Act

(June) 1158B

—Art. 14—Order in summary proceeding dismissing petition on ground that it raised complicated questions of law and petitioner relegated to civil suit—Order does not fall under Art. 14

(Jan) 93B

—Art. 60—Whether transaction is deposit of money or loan—Factors decisive of

(Dec) 2551A

—Art. 60—Limitation does not start to run on demand for return of part of the amount deposited

(Dec) 2551C

—Art. 62—Suit to recover tax, etc., illegally collected—Recovery of revenue in excess of amount lawfully due—Suit for refund and for declaration that revenue stood abated—Limitation

(July) 1245A

—Arts. 142 and 144—Suit for arrears of rent against tenant and tenant's licensee—Licensee denying title of landlord and claiming title by adverse possession—Suit decreed against tenant and dismissed against licensee—Tenant paying rent but discontinuing after sometime—Consequent decree for eviction—While ex-

Limitation Act (1908) (contd.)

cutting decree licensee could be evicted—His possession, held, was not adverse to landlord merely because of landlord's failure to bring suit for eviction against licensee (July) 1312

—Art. 144 — No adverse possession against co-sharer in absence of evidence of open assertion of a hostile title coupled with exclusive possession and enjoyment by one of them to the knowledge of the other (July) 1337B

—Art. 144—Heirs of deceased Moham-medan holding estate of deceased as tenants in common without dividing it — One of them subsequently bringing suit for recovery of his share—Limitation for such suit runs from date of express ouster or denial of title—Art. 144 is relevant (Nov) 2184D

—Art. 144 — Possession by one co-owner is not by itself adverse to other co-owners (Nov) 2184E

—Art. 144 — Possession of immovable property by Government pursuant to requisition under R. 75A, Defence of India Rules — Effect (Dec) 2556

—Art. 183 — Banking Regulation Act (1949), S. 45-B — Banking Companies (Amendment) Act (1950); S. 11 — Suit transferred to Calcutta High Court under provisions of S. 11—Article 183 is applicable for execution of decree passed by High Court (Feb) 218

Limitation Act (36 of 1963), S. 18 — Suit for redemption — Plaintiff relying on certified copy of a statement made in mutation proceedings for purpose of acknowledgement of mortgage — Held, that copy could not serve as acknowledgement (Nov) 2342A

—Art. 65 — See Limitation Act (1908), Art. 144 (Dec) 2556

—Art. 65 — Possession of the lands by co-owner however long it might be cannot confer on him any right unless it is adverse to other co-owner (Feb) 376C

—Art. 65—Permissive possession when can be converted into adverse possession (May) 996B

—Art. 114 — See Criminal P. C. (1898), S. 417 (3) and (4) (June) 1115A

Madhya Bha. Abolition Act (13 of 1951)

See under Tenancy Laws.

Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals Alienated Lands) Act (1 of 1951)

See under Tenancy Laws.

Madhya Pradesh Excise Act (2 of 1961), Ss. 25 and 62—Duty on excisable articles under S. 25 — Liquor which contractors failed to lift is not an excisable article (Mar) 517B

Madhya Pradesh General Sales Tax Act (2 of 1959)

See under Sales Tax.

Madhya Pradesh Government Premises (Eviction) Act (16 of 1952)

See under Houses and Rents.

Madhya Pradesh Koyala Upkar (Manyata-karan) Adhiniyam (18 of 1964), S. 3 — Act does not validate levy of cess exceeding 3 pies per ton (Jan) 57A

Madhya Pradesh Motor Vehicles (Taxation of Passengers) Act (17 of 1959), S. 10 — Recovery of tax — Returns submitted by operator accepted as correct tax officer is not bound to make any assessment order before issuing the notice of demand (Oct) 2127

Madras City Tenants Protection Act (3 of 1922)

See under Tenancy Laws.

Madras Commercial Crops Markets Act (20 of 1933), S. 11 (1)—Market Committee of Bellary could only levy a fee under Section 11 (1) as it originally stood — It could not levy cess by way of sales tax under that section as amended by Mysore Act 20 of 1953 (July) 1325

Madras Commercial Crops Markets (Mysore Amendment and Validation of Levy of Cess) Act (20 of 1958), S. 2— See Madras Commercial Crops Markets Act (20 of 1933), S. 11 (1) (July) 1325

Madras District Municipalities Act (5 of 1920)

See under Municipalities.

Madras Elementary Education Act (8 of 1920)

See under Education.

Madras Entertainments Tax Act (10 of 1939), S. 4 — See Madras Entertainments Tax (Amendment) Act (20 of 1966), S. 7 (Feb) 231

Madras Entertainments Tax (Amendment) Act (20 of 1966), S. 7—Section is invalid (Feb) 231

Madras Hindu Religious and Charitable Endowments Act (19 of 1951), S. 6 (9) — "Hereditary trustee" — Trustee "succession to whose office... is regulated by usage..." is included — Expression "regulated by usage", meaning of — Person elected to office of trustee by community

Madras Hindu Religious and Charitable Endowments Act (contd.)

for a fixed period of a year is not "hereditary trustee" (Nov) 2333

Madras Inam Estates (Abolition and Conversion into Ryotwari) Act (26 of 1963)
See under Tenancy Laws.**Madras Lease-Holds (Abolition and Conversion into Ryotwari) Act (27 of 1963)**
See under Tenancy Laws.**Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (30 of 1963)**
See under Tenancy Laws.**Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961)**
See under Tenancy Laws.

Mahomedan Law—Inheritance estate of deceased devolves on his heirs who succeed to the estate as tenants in common in specific shares (Nov) 2184C

—Minor's brother is not a lawful guardian of minor's property (Nov) 2184A

—Wakf—Declaration of particular property as wakf — Effect — Right of wakf is extinguished and ownership is transferred to Almighty — Status and rights of mutawalli (Sep) 1681A

Maxims

See

(1) Civil P. C. (1908), Pre. (Jan) 44F

(2) Houses and Rents — U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947), S. 1A (Nov) 2213

Medicinal and Toilet (Preparations (Excise Duties) Act (16 of 1955), Ss. 3 (1) & 4—See
ibid, Sch. 1, Item 1 (Feb) 378A

—Sch. I, Item 1, S. 3 (1), (4) — Excise Duty on medicinal preparations—Preparation by adding tincture of which alcohol is component — Preparation is liable to excise duty (Feb) 378A

Mineral Concession Rules (1960), Rr. 54, 55
— See Mines and Minerals (Regulation and Development) Act (1957), S. 30

(Oct) 2021

Mines and Minerals (Regulation and Development) Act (67 of 1957), S. 30 — Central Government in exercise of its suo motu power cancelling mining lease granted to appellant by State Government — Failure of Central Government to give show cause notice vitiated the order (June) 1045
—S. 30 — Revision by Central Government—It is bound to indicate grounds on which revision application is disposed of unless the State Government had already in its order of rejection given the

Mines and Minerals (Regulation and Development) Act (contd.)

grounds and Central Government referred to them in its capacity as revising authority (Oct) 2021

Motor Vehicles Act (4 of 1939), S. 43 (1) (i) — Notification under, issued by Government — Conditions of permit stand statutorily amended by virtue of S. 59 (3) (c) (Sep) 1705

—S. 47 — R. T. A. has power to ask for further information from applicants for stage carriage permit for full consideration of applications in the interest of public — R. T. A. can publish the same information in order to enable persons affected to send their representation (Sep) 1804

—S. 57—See *ibid*, S. 47 (Sep) 1804

—S. 59 (3) (c)—See *ibid*, S. 43 (1) (i) (Sep) 1705

—Ss. 63, 68-D (3) and 68-F (1) — Inter-State agreement regarding counter signature of inter-state permit—Kolar Scheme for Nationalisation of Road Transport — Total exclusion of private operators from nationalised routes except existing permit holders—Crucial date of determining existing permit holders within Cl. (d) of Scheme (Aug) 1662A

—Ss. 63 and 68-B — Inter-state agreement for counter-signature of inter state permits envisaged in proviso to S. 63 is not law—It cannot override provisions of Chap. IV-A in view of specific provisions in S. 68-B (Aug) 1662B

—S. 68-B—See *ibid*, S. 63 (Aug) 1662B

—S. 68-C — See Constitution of India, Art. 136—New plea (Aug) 1662C

—S. 68-D (3)—See *ibid*, S. 63 (Aug) 1662A

—S. 68-F — Application by private operators for renewals — Renewal for the entire route cannot be refused to the private operator whose route partially overlapped the routes proposed to be exclusively taken over by the Corporation and who had been excluded from the scheme as modified by Secretary under S. 68-D (2) because they had not been served with notices (Oct) 1986A

—S. 68-F — Cancellation of permit of private operators — Once scheme under S. 68-C is approved by State Government under S. 68-D (2), R. T. A. is bound to grant a permit in respect of the route exclusively earmarked for such undertaking. In such a case the permit of private operators in respect of that route can be lawfully cancelled. (Obiter). (Oct) 1986

Motor Vehicles Act (contd.)

—S. 68-F (i)—See *ibid.* S. 63

(Aug) 1662A
—S. 95 (2) (b) — Statutory liability of insurer to indemnify insured in case of a vehicle allowed to carry more than six passengers—Extent of (Aug) 1624G

—S. 110-B — See also Constitution of India, Art. 136. (Aug) 1624E

—S. 110-B — Fixation of compensation — Pecuniary loss to claimant caused by reason of death—How ascertained

(Aug) 1624A

Multi Unit Co-operative Societies Act (6 of 1942)

See under Co-operative Societies.

MUNICIPALITIES

—Assam Municipal Act (15 of 1957), S. 4

—Notification applying Ss. 4 (1) (b) and (c) and 5 (1) and (2) (b) of Assam Municipal Act, 1923 to notified area Committees — No notification under S. 328 of 1923 Act for extending boundaries issued — Repeal of Act — Effect — S. 26, Assam General Clauses Act — State Government is competent under S. 4 of 1957 Act to extend boundaries of notified area committee (July) 1358

—Bangalore City Municipal Corporation Act (69 of 1949), S. 99 (2) (b) (as amended by Mysore Act 33 of 1964)—Section 99 (2) (b) is not violative of Art. 14 of Constitution (July) 1321A

—S. 99 (2) (b) (as amended by Mysore Act (33 of 1964)—Levy of uniform tax on basis of market value of the land and not on the basis of income of the land is not discriminatory (July) 1321B

—S. 99 (2) (b) (as amended by Mysore Act 33 of 1964)—Classification of vacant lands not unreasonable or discriminatory (July) 1321C

—Bombay District Municipal Act (3 of 1901), S. 59 (1) Proviso — See Municipalities — Bombay Municipal Boroughs Act (1925), S. 73(1), Proviso 2 (c) (Feb) 211

—Bombay Municipal Boroughs Act (18 of 1925), S. 73 — Municipality can validly impose house tax on its own buildings and realise it from lessees-occupiers of those buildings (Aug) 1427

—S. 73 (1), Proviso 2, Cl. (c)—Bombay District Municipal Act (30 of 1901), S. 59 — 'Consolidated tax' — Nature of—It cannot be distinguished from a tax on buildings and lands (Feb) 211

—S. 85—See *ibid.* S. 73 (Aug) 1427

Municipalities Act (contd.)

—Bombay Provincial Municipal Corporation Act (59 of 1949), Ss. 67, 68—See Prevention of Food Adulteration Act (1954), S. 20 (1) (July) 2277E

—S. 129 (Prior to amendment in 1968) See Constitution of India, Art. 14

(Oct) 2100A

—S. 141—Municipality cannot by virtue of S. 141 enforce its charge against property, in hands of a transferee for consideration without notice (July) 1201A

—Sch. A, Chap. 8, R. 10 — Rule gives discretion to Commissioner to maintain either one assessment book for whole city or ward assessment-books separately for each ward (Oct) 2100B

—Sch. A, Chap. 8, R. 19 — Entry made under R. 9 (e) in respect of amount of tax is conclusive evidence, (Oct) 2100C

—Indore Municipal Act (4 of 1909), S. 135 (2)—Special period of limitation for suit in respect of any act done under the Act — Suit for declaration that dismissal is illegal — Governed by Art. 120 of Limitation Act (1908) and not by S. 135 (2)

(Jan) 97B

—Madras District Municipalities Act (8 of 1920), S. 82 (2)—Method of assessment of annual value of lands and buildings — Measure of fair rent determinable under Rent Control Act must be taken into account (Feb) 353

—U. P. Municipalities Act (2 of 1916), S. 34 (1-B)—Power of State Government to prohibit execution of Board's order — Order of dismissal of certain sweepers — No power under S. 34 (1-B) (Oct) 2147

—S. 128 (1) (vii)—Imposition of tax on passengers carried by vehicles—Validity (Mar) 439A

—S. 164—Prosecution for non payment of tax — Power of High Court to quash proceedings (Mar) 439B

Mysore Elementary Education Act (6 of 1941)

See under Education.

Mysore Excise Act (5 of 1901), S. 18 — Mysore Elementary Education Act (6 of 1941), S. 9 and Schedule (as amended in 1955) — Levy of education cess on excise revenue — "Shop rent" paid by excise contractor is not excise revenue (Jan) 152

Mysore Land Revenue (Surcharge) Act (13 of 1961), S. 5 — See Constitution of India, Sch. VII, List II, Entry 45 (Nov) 2377A

Mysore Medical Colleges (Selection for Admission) Rules (1970)

See under Education.

Mysore (Personal and Miscellaneous)**Inams Abolition Act (1 of 1955)**

See under Tenancy Laws.

Mysore Rent Control Act (22 of 1961)

See under Houses and Rents.

Mysore Rules for Selection of Candidates for Admission to Pre-Professional/B.Sc. Part 1 Course Rule

See under Education.

Mysore Sales Tax Act (25 of 1957)

See under Sales Tax.

Mysore University of Agricultural Sciences Act (22 of 1963)

See under Education.

Mysore University Staff (Appointment) Supplementary Rules (1957)

See under Education.

Natural Justice

See also (1) Companies Act (1956), S. 483 (Feb) 374

(2) Displaced Persons (Claims) Supplementary Act (1954), S. 5 (Apr) 748

—Rules of—Nature—Conflict between rules of natural justice and statutory provision—Latter prevails (Jan) 40C

—Order by Governor exercising powers under Wazib-ul-arz incorporating conditions of Chanda Patent proprietary rights contemplates quasi-judicial inquiry must be consistent with rules of natural justice and in accord with custom of family (Apr) 681D

Oaths Act (10 of 1873), S. 4—Authority to administer oaths—No application to interrogatories by Customs Officer under S. 171-A, Sea Customs Act (Jan) 44D**Orissa Kendu Leaves (Control of Trade) Act (28 of 1961), Ss. 3 (2) (a), 8 (1) (as amended in 1969) and Rule 5-B (6), (7), (8), (9) and (16), Rule 6 (3) and Rule 7 (1)**—Not violative of Arts. 14, 15, 19 (1) of the Constitution (Apr) 733—S. 8 (1) See *ibid*, S. 3 (2) (a) (Apr) 733**PANCHAYATS**—**Gujarat Panchayat Act 1961 (6 of 1962), S. 307 (c) and (k)**—Saurashtra Terminal Tax and Octroi Ordinance (1949), S. 4—Power of Municipality to collect Octroi under Rules—Replacement of Municipality by Nagar Panchayat—Nagar Panchayat held was entitled to collect octroi (June) 1078—**Jaipur District Boards Act (1947), S. 31 (2)**—See *ibid*, S. 32 (b) (Oct) 2018B

—S. 32 (b)—District Board has no

Panchayats — Jaipur District Boards Act (contd.)

right to demand from Thikanedar, cess collected from sub-grantees and tenants in Non-khalsa area (Oct) 2018B

—S. 33—See *ibid*, S. 32 (b) (Oct) 2018B—S. 34 (1)—See *ibid*, S. 32 (b) (Oct) 2018B—**U. P. District Boards Act (10 of 1922), S. 120 (3)**—See *ibid*, S. 172 (Sep) 1693D

—S. 172—Rules under — Rules framed under the Act did not become inconsistent and unworkable after commencement of the U. P. Antarim Zilla Parishads Act (22 of 1968) (Sep) 1696B

—S. 172—Rules under, R. 4—Time schedule mentioned under Rr. 4 and 5 is directory and not mandatory (Sep) 1696C

—S. 172—Rules under—Irrregularity in framing of rules—If curable by notification under S. 120 (3) (Sep) 1696D

—Rules under R. 4—See Panchayats—**U. P. District Boards Act (10 of 1922), S. 172** (Sep) 1696C—Rules under R. 5—See Panchayats—**U. P. District Boards Act (10 of 1922), S. 172** (Sep) 1696C—**U. P. Kshettra Samittis and Zilla Parishads Adhiniyam (33 of 1961), S. 43**—Appointment of Kar Adhikari—Validity—State Public Service Commissions approval or disapproval, not received—Assessment made by him after two years is invalid (Sep) 1696**Parliamentary Proceedings (Protection of Publication) Act (24 of 1956), S. 3**—See Contempt of Courts Act (1952), S. 1 (June) 1132E

—S. 3—Whether a notice of impeachment under Art. 124 (4) if not admitted by the Speaker under S. 3 (1) of the Judges (Inquiry) Act (1968) is a proceeding of Parliament (Quaere) (June) 1132F

—S. 3—Protection to newspapers and broadcasting agencies—Extent of (June) 1132L

Partnership Act (9 of 1932), S. 4—See Income Tax Act (1922), S. 26A (Feb) 383

—S. 40—Partnership consisting of two partners—Agreement that one of the partners will retire—Amounts to dissolution (Aug) 1653A

—S. 40—Construction of partnership agreement—Clause to refer to arbitration all disputes and questions whatsoever which may arise during the partnership

Partnership Act (contd.)

or afterwards — Disputes whether parties agreed that partnership be dissolved is covered by the clause (Aug) 1653B

—S. 58 — See Income Tax Act (1922), S. 26A (June) 1015

—S. 59 — See Income Tax Act (1922), S. 26A (June) 1015

Payment of Bonus Act (21 of 1965), S. 5.

See Industrial Disputes Act (1947), Sch. 3, Item 5 (Dec) 2521C, D, E;

(Dec) 2567A

—S. 6—See also Industrial Disputes Act (1947), Sch. 3, Item 5 (Dec) 2567B, C, D, E, F, G, H and I

—S. 6 (as amended by Act 9 of 1969)—Income-tax deductible in working out gross profit—Bonus payable should not be taken into account (Sep) 1821C

—S. 23—See *ibid*, Sch. Third, Item 1 (Sep) 1821A

—Schedule Second, Item 2 (e)—“Other reserves”.—Provision made for existing and known liabilities is not a reserve (Sep) 1821B

—Schedule Third, Item 1—Calculation of the gross profit for purposes of bonus—Interest paid by one office of the Company to its another office on advances received has to be disallowed—Presumption under S. 23 if available (Sep) 1821A

Penal Code (45 of 1860), S. 21 — See Prevention of Corruption Act (1947), S. 6

(Dec) 2479

—S. 34—See also *ibid*, S. 302 (Aug) 1467; (Dec) 2519

—Ss. 34, 109, and 120B—Distinction—Under S. 34 participation in the commission of offence necessary — Under S. 109 accused need not be present — Under S. 120B mere agreement is sufficient — Conspiracy—Proof (May) 885B

—S. 34—Common intention to murder — Inference — Accused not holding any weapon (June) 1112

—S. 34—Number of persons assaulting another with a stick mercilessly—Knowledge of likelihood of causing death would be relevant under S. 149 and not under S. 34 (Aug) 1444A

—S. 34—A charge of constructive liability for an offence presupposes sharing of particular intention by more than one person to do a criminal act (Sep) 1826

—S. 34 — Individual liability for acts done in furtherance of common intention is incurred vicariously only when a

Penal Code (contd.)

criminal act is done by several persons in furtherance of common intention of all (Sep) 1834

—S. 40—See Bombay Public Trusts Act (29 of 1950), S. 35 (1) (May) 866B

—S. 53—See Foreign Exchange Regulation Act (1947), S. 23C (Nov) 2162B

—S. 84 — Plea of unsoundness of mind — Burden of proof is on accused (Apr) 778A

—S. 84 — Plea of unsoundness of mind —Homicidal tendency is not necessary or only sign of insanity (Apr) 778B

—S. 84 — Plea of unsoundness of mind —Tendency to set fire to ones own clothes and house—Prima facie proof of insanity (Apr) 778C

—S. 84—Plea of unsoundness of mind—Proof of insanity — Appreciation of evidence (Apr) 778D

—Ss. 96 to 100 — Right of private defence — Scope and limitations of — Duty of Court (Aug) 1491B

—S. 97—See also *ibid*, S. 96 (Aug) 1491B

—S. 97 — Non-possession by accused of disputed land does not per se make them aggressors so as to render them liable for death caused during scuffle (July) 1213

—S. 97 — Right of private defence — Incident relating to deaths of A and B not divisible into parts — Same right of private defence is available in both the cases (Aug) 1432

—S. 97 — Right of private defence of property — Extent of — Tractor of complainant party trespassed on field in possession of accused—Right of private defence of property of accused is subject to restrictions imposed by S. 99 — Accused exceeding his right (Sep) 1891A

—S. 98 — See *ibid*, S. 96 (Aug) 1491B

—S. 99 — See also (1) *Ibid*, S. 96 (Aug) 1491B

(2) *Ibid*, S. 97 (Sep) 1891A

—S. 99 — Question of exceeding right of self-defence is entirely a question of fact (July) 1208

—S. 99 — Extent of right of private defence—Accused exceeding right of private defence — Conviction under S. 304, Part I and not under S. 302 (Sep) 1857

—S. 99 — Serious injuries inflicted on deceased not necessary for protecting property — Indiscriminate attack continued even after deceased fell down — Minor injuries received by accused — Right of private defence exceeded (Oct) 2143

Penal Code (contd.)

- S. 100—See *ibid*, S. 96 (Aug) 1491B
- S. 101—See *ibid*, S. 304 (Aug) 1491A
- S. 109 — See *ibid*, S. 34 (May) 885B
- S. 120B — See also
 - (1) Criminal P. C. (1898), S. 196-A (Nov) 2372
 - (2) *Ibid*, S. 34 (May) 885B
- Ss. 141, 142 — Being member of unlawful assembly—Presumption and proof (Nov) 2331
- S. 142—See *ibid*, S. 141 (Nov) 2331
- S. 149 — See also
 - (1) *Ibid*, S. 34 (Aug) 1444A
 - (2) *Ibid*, S. 302 (Aug) 1437
- S. 149 — Common object—In mutual fight there is no common object (Feb) 335A
- S. 195 — See Criminal P. C. (1893), S. 476 (July) 1367B
- S. 201 — Concealing evidence of murder — Circumstantial evidence — Accused and his son last seen with deceased — Recovery of dead body from the field of accused on being pointed out by son of accused — Held, conviction was proper (Oct) 2013
- S. 300 — See also
 - (1) Evidence Act (1872), S. 8 (Aug) 1656A
 - (2) *Ibid*, S. 34 (Aug) 1444A
- S. 300 — Motive — Absconding by itself does not necessarily lead to a definite conclusion of guilty mind (June) 1051C
- S. 300—Motive for murder—Inference from deceased's claim to share in family property from accused father and brothers (Oct) 2013A
- S. 300—Evidence —Recovery of dead body by police on information given by accused is not a conclusive circumstance —Raises strong suspicion against him (Oct) 2013B
- S. 300, Exception 2 — See also
 - (1) *Ibid*, S. 304 (Aug) 1491A
 - (2) *Ibid*, S. 304I (Sep) 1891B
- S. 300, Exception 2—Several accused firing at unarmed persons, after committing trespass—Both parties at close quarters — No reasonable apprehension of danger to accused — Right of defence of person or property cannot be availed (July) 1232D
- S. 302—See also
 - (1) Constitution of India, Art. 136 (Nov) 2268
 - (2) Criminal P. C. (1898), S. 367 (5) (after amendment by Act 26 of 1955) (Oct) 2156E

Penal Code (contd.)

- (3) Evidence—Appreciation of (Jan) 69 (Oct) 2119
- (4) *Ibid*, S. 34 (June) 1112
- (5) *Ibid*, S. 99 (Sep) 1857
- (6) *Ibid*, S. 304 (Aug) 1491A
- S. 302 — Confirmation of death sentence after believing evidence—Failure of accused to show grounds for interference in appeal arising out of special leave —Supreme Court refused to interfere (Mar) 429
- S. 302 — Conviction for murder — Lesser penalty— Interference by Appellate Court (Apr) 757A
- S. 302 — Sentence—Several accused inculpated for deaths caused — Discrimination in punishment not desirable (July) 1232A
- S. 302 — Sentence — Drunkenness at time of offence—Not a mitigating circumstance for punishment (July) 1232B
- S. 302—Sentence — Death Sentence on a boy of 19 years, was held excessive when his instigators were given benefit of doubt (July) 1388
- S. 302 — Charge under S. 302/34 or S. 302/149—Acquittal—High Court convicting under S. 302/149 without considering distinction between Ss. 34 and 149 —Legality (Aug) 1467
- S. 302 — Sentence —Extreme delay in disposal of case — Imposition of lesser penalty justified (Aug) 1584
- S. 302 — Sentence — All true facts of incident not brought to light by prosecution—Lesser penalty (Sep) 1759
- S. 302 — Murder by firing—Evidence of forensic expert — Credibility (Sep) 1864
- S. 302—While setting aside conviction under S. 302 simpliciter Supreme Court cannot consider whether that person was guilty under S. 302 read with S. 34 when the State has not appealed against acquittal of the co-accused under S. 302 read with S. 34 (Oct) 2064
- S. 302—Death sentence should not be awarded when there is some probability of the deceased offering some kind of provocation to the accused (Nov) 2240
- S. 302—Proof of murder — Benefit of doubt (Dec) 2505C
- Ss. 302, 34 —Murder charge—Vicarious liability (Dec) 2519
- S. 304 — See also Constitution of India, Art. 136 (Nov) 2268
- Ss. 304, 302, 300, Exception 2, 101—Conviction — Exceeding right of private

Penal Code (contd.)

defence—Conviction must be under first part of S. 304 and not under S. 302

(Aug) 1491A

—S. 304, Part I—See also *ibid*, S. 99

(Sep) 1857

—S. 304, Part I — Where two accused had been convicted under S. 302/34, Penal Code by the High Court, the Supreme Court altered their conviction to one under S. 304 Part 1/34 as the offence was found to be culpable homicide not amounting to murder falling within exception 2 to S. 300

(Sep) 1891B

—S. 304, Part II—See *ibid*, S. 34

(Sep) 1834

—S. 324 — Mutual fight between two parties — Death of one person of complainant's party — Case of stabbing—No evidence of nature of injury caused by accused — Held, accused could be convicted only under S. 324. His convictions under Ss. 307/149 and 323/149 were unsustainable

(Feb) 335B

—S. 395 — Sentence — Offence though serious no injury caused—Held sentence of three years' rigorous imprisonment would meet ends of justice

(Feb) 196A

—S. 408 — See Criminal P. C. (1898), S. 233

(Aug) 1543A

—S. 420 — Cheating Conviction — In the absence of misrepresentation or suppression of any material facts with a view to defraud or cheat the public the promoters of a money circulation scheme are not guilty of cheating even if the scheme is speculative and unworkable

(Aug) 1620

—S. 457 — Conviction for — House breaking by night for purpose of committing offence of abducting woman

(July) 1254

—S. 471 — Using as genuine a forged document—"Fraudulently or dishonestly" — Proof

(Dec) 2593

—S. 477A — See Criminal P. C. (1891), S. 233

(Aug) 1543A

—S. 494 — Bigamy—Proof of solemnization of second marriage in accordance with essential religious rites essential — Mere admission not enough

(June) 1153

—S. 499 — See *ibid*, S. 500

(July) 1389B

—S. 499, Exceptions—Applicability of — Can arise only at stage of enquiry whether *prima facie* case is made out on basis of complaint

(July) 1389C

—S. 499 — Exception 9 — Imputation made in — What accused has to prove good faith

(Aug) 1567A

—S. 499, Exception 9—Question of title

Penal Code (contd.)

involved in proceeding under S. 144, Criminal P. C. — A party cannot make defamatory statement against other party and then claim that it was for protection of interest

(Aug) 1567B

—S. 500 — Defamation— Form of complaint — Actual words used by accused need not be set out

(July) 1389

Pensions Act (23 of 1871), S. 1 — Word 'pension', meaning of

(May) 846C

—S. 4—Bar of suits relating to pension — No bar to writ of mandamus

(July) 1409D

Police Act (5 of 1861), S. 3—Civil Services — Bihar and Orissa Police Manual (1930) R. 861 (b)

(June) 1106A

Police Service Scheme

See under Civil Services.

Poona University Act (20 of 1948)

See under Education.

Post Office Act (6 of 1898), Ss. 6, 33, 74— Post Office Rules (1933), Rr. 81, 83—Post parcel containing gold coin, or bullion or currency notes — Market value — Declaration of—Innocent or insignificant misstatement by insured — Does not dis-entitle him to receive compensation

(Mar) 432A

—S. 6 — Plea that policy is not subsisting or there is breach of conditions of policy — Burden lies on insurer—Provisions of Act and Rules do not displace this general principle

(Mar) 432B

—S. 33 — See *ibid*, S. 6

(Mar) 432A

—S. 72 — Complaint Meaning—Mere information to police not sufficient as complaint

(Feb) 194

—S. 74 — See *ibid*, S. 6

(Mar) 432A

Post Office Rules (1933), R. 81—See *ibid*, S. 6

(Mar) 432A

—S. 83 — See *ibid*, S. 6

(Mar) 432A

Precedents — It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment

(Mar) 530H

—Requirement of public interest should be considered in disturbing a question of law which has held the field for long time

(Nov) 2313B

Press and Registration of Books Act (25 of 1867), S. 7 — Force of presumption under S. 7 in a charge under S. 123 (4) of the Representation of the People Act would differ with circumstances

(May) 856C

Press and Registration of Books Act (contd.)

—S. 19-D (b)—Annual report published by Press Registrar containing name of a person as editor of a newspaper—Cannot displace effect of return published under Section 19-D (b) containing a different name (May) 853D

Prevention of Corruption Act (2 of 1947),

—S. 4 (1) — Presumption under Section 4 (1) is not applicable to prosecution of accused under S. 5 (1) (d) read with S. 5 (2) and burden of proving his innocence cannot be cast on accused (July) 1420

—Ss. 5 and 5A—Criminal P. C. (1898), Ss. 160 to 164 — Public servant charged for serious misdemeanour — Preliminary enquiry necessary before lodging FIR — Duty of enquiring officer (Mar) 520A

—Ss. 5, 5A — See Criminal Procedure Code (1898), S. 156 (Mar) 520B

—S. 5—Charge for offence of criminal misconduct—Prosecution failing to prove particular instances of bribery alleged — Accused proved to have resources and property beyond his known means—Presumption under S. 5 (3) can be raised — Conviction (Apr) 736F

—S. 5 (1) (a) — Charge under, of habitually accepting bribe — Individual instances mentioned in charge are not at all essential — Charge is not illegal for their non-mention (Apr) 736C

—S. 5 (1) (b) — “Any person having any connection with the official functions of himself” — Includes any subordinate of person who accepts valuable things (Mar) 520D

—S. 5 (1), Cls. (b) and (d)—Absence of agreement with trader that Officer is not expected to pay for goods obtained on credit—Even if officer does not intend to pay, he does not obtain pecuniary advantage (Aug) 480

—S. 5(1)(d)—Charge of utilising official position for sending articles from Goa to Bombay without paying any customs duty after a date on which no such duty was leviable—Conviction unjustified (June) 1130C

—S. 5 (3)—Criminal misconduct in discharge of official duties — Presumption under sub-section (3) — Rebuttal (Dec) 2474

—S. 5A—See also Criminal P. C. (1898), S. 537 (Apr) 811B

—S. 5A — Permission to investigate granted to Inspector of Police Anti-corruption—Trap laid down by Inspector and after further investigation accused

Prevention of Corruption Act (contd.)—
charge-sheeted — Special Judge directing reinvestigation by Deputy Superintendent of Police Anti-corruption—Sanction held not invalid—Conviction—Legality (Mar) 508A

—S. 5. A — Grant of permission to investigate under not a mechanical act — Grant of permission to Inspector of Police on his application and mere ipse dixit that Senior Officers were otherwise busy — Is illegal (Apr) 811A

—S. 5. A—Irregularity in investigation does not vitiate trial unless there is miscarriage of justice (Aug) 1525A

—S. 5. A — Investigation by Officer authorised by Act — Taking assistance of deputies—Effect (Aug) 1525B

—S. 5. A (before amendment in 1964)—Magistrate of the First Class at Delhi cannot authorise the investigation of cases in the State of Assam (Sep) 1836B

—S. 6 — Sanction for prosecution — Income-tax Officer — Dismissal from service for criminal misconduct — Ceases to be a public servant—Sanction not necessary—Appeal against dismissal order pending—Cannot make him a public servant (Apr) 786B

—S. 6 — Essentials of sanction—Facts constituting the offence—Must be placed before the sanctioning authorities (Sep) 1910A

—S. 6 — Sanction for prosecution — Public servant — Who is—Extra departmental agent performing duties of a village post master — Dismissal from service—Sanction not necessary (Dec) 2479

—S. 6 (1) (c) — Sanction for prosecution — Prosecution of Government servant working as Assistant in Co-ordination Section (C D III), D. G. T. D., Udyog Bhawan New Delhi — No sanction by Home Ministry of India — Prosecution not maintainable (Aug) 1552B

Prevention of Food Adulteration Act (37 of 1954), Pre.—Act and Rules thereunder do not infringe Art. 14 (Nov) 2346C

—S. 1 — See Interpretation of Statutes (Apr) 815

—S. 2 (xiii) — Sale — Definition—Sale of a sample of a food article to Food Inspector amounts to a “sale” (Sep) 1725A

—S. 7 — Conviction under S. 16 (1) (a) (1) paid with S. 7 — Proof of dealership not necessary — Sale of adulterated food enough (Sep) 1725B

—S. 10 (7) — Provisions of S. 10 (7) being salutary should be complied with

Prevention of Food Adulteration Act (contd.)

by Food Inspector — Evidence of Food Inspector regarding their compliance — Corroboration — If necessary

(July) 1277B

—S. 13 (1) — See Prevention of Food Adulteration Rules (1954), R. 7 (2)

(July) 1277D

—S. 13 (2)—Delay in launching prosecution — Accused not applying under S. 13 (2) — It can complain about deprivation of his right to send sample in his custody to Director, Central Food Laboratory

(July) 1277C

—S. 13 (5) — Validity — Does not infringe Art. 20 (3) of the Constitution — Conclusiveness attributed to certificate of Director does not amount to compelling accused to be a witness against himself

(Nov) 2346E

—S. 16 (1)—See *ibid*, Pre. (Nov) 2346C

—S. 16 (1) (a) (i) — See *ibid*, S. 7

(Sep) 1725B

—S. 16 (1) (a) — Validity — Restrictions imposed upon conduct of business by traders in Foodstuffs — Not unreasonable

(Nov) 2346B

—S. 19 — See *ibid*, Pre. (Nov) 2346C

—S. 19 (2) — Protection under—Retail sale of branded article of food by opening its container — Protection if lost

(Nov) 2346A

—S. 20 (1) — Complaint filed by Food Inspector of a Municipal Corporation with written consent of Medical Officer of Health—Validity

(July) 1277E

—S. 23 (1) (c) (f) (g) and (d) — Power of Central Government to frame rules — Rule 32 (e) is *ultra vires* but R. 32 (b) is valid under S. 23 (d)

(Sep) 1844

—S. 23 (1) (e)—See Prevention of Food Adulteration Rules (1954), R. 7 (2)

(July) 1277D

—Sch. — Validity — Schedule is not invalid on grounds that an ordinary retail vendor may not be familiar with the technical expressions used therein and that he may not be in position to verify contents of articles dealt by him

(Nov) 2346D

Prevention of Food Adulteration Rules (1954), R. 7 (2) — No inconsistency between R. 7 and S. 13 (1) — Nor is the rule *ultra vires* under S. 23 (1) (e) — Rule 7 (2) authorising Public Analyst to get sample analysed by his subordinate is valid

(July) 1277D

—R. 32 (b) (e)—See Prevention of Food Adulteration Act (1954), S. 23 (1) (c) (f) (g) and (d)

(Sep) 1844

Profession Tax Limitation (Amendment and Validation) Act (61 of 1949), S. 3—See Government of India Act (1935), S. 142A

(Sep) 1696A

PUBLIC SAFETY

—Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 3—Order of detention under—Detenu knowing English —Order of detention not explained in vernacular—Order not illegal (Feb) 266

—S. 3—Order of detention — Grounds —Existence of material on which detention is based need not be mentioned

(July) 1217C

—S. 3—Expression “acting in any manner”—Meaning of

(July) 1217D

—S. 3—Detention for security of the State—Grounds for detention need not be communicated

(Aug) 1529

—S. 3—Mention of Act in the detention order—It means the Act as existing on that date, including the amendments

(Sep) 1713D

—S. 3 (1) (b) — Detention under for purposes of deportation — Reference to Central Government for making necessary arrangements — Delay in making such arrangements if affects validity of detention or makes it *mala fide*

(Feb) 217

—S. 3 (3)—Order of confirmation by Government made before arrest but within 20 days of order of detention—Detention is not illegal

(Jan) 122

—S. 8—See also

(1) Constitution of India, Art. 32

(July) 1217A

(2) *Ibid*, S. 3

(Aug) 1529

—S. 8—Illiterate detenu — Grounds of detention in English — Necessity to explain grounds in the language detenu understands

(Feb) 263A

—S. 8—Grounds of detention held vague and hence not complying with law

(Feb) 263B

—S. 8, Proviso — District Magistrate passing order that detenu be informed that it was not in public interest to disclose to him grounds of detention — No need of serving copy of that order on detenu

(July) 1217B

—S. 8 (2)—Non-disclosure of grounds of detention—Order stating that it was against the public interest and the security of the State to disclose the grounds—Order is not defective in form

(Sep) 1713C

Public Safety — Jammu and Kashmir Preventive Detention Act (contd.)

—S. 13A—See also

(1) Constitution of India, Art. 32

(July) 1217A

(2) Ibid, S. 3

(Aug) 1529

—**West Bengal (Prevention of Violent Activities) Act (19 of 1970), S. 3**—Preventive detention—Sufficiency or otherwise of material—Not justiciable—grounds for setting aside order (Oct) 2051

—S. 3 (2)—“Acting in manner prejudicial to security of State or maintenance of public order” (Nov) 2384

Public Works Department Financial and Accounts Rules, R. 375—Officer required to carry out a work for which no appropriation exists—He should take immediate steps to obtain orders from appropriate competent authority (Oct) 2025C

Punjab Civil Medical Service Class I (Recruitment and Conditions of Service) Rules (1940)

See under Civil Services.

Punjab Co-operative Societies Act (25 of 1961)

See under Co-operative Societies.

Punjab Development of Damaged Areas Act (10 of 1951), Pre.—Act does not violate Art. 19 (1) (f) and (g) of Constitution (Nov) 2164A

—Pre.—Act does not violate Art. 31 (2) of Constitution (Nov) 2164C

—S. 3—Act does not offend Art. 14 of Constitution (Nov) 2164B

Punjab Land Revenue Act (17 of 1887), S. 44—See Limitation Act (1963), S. 18

(Nov) 2342A

Punjab Police Service Rules (1959)

See under Civil Services.

Punjab Pre-emption Act (1 of 1913), S. 15 (1) (a) Fourthly (as amended by Act 10 of 1960)—Right of pre-emption of tenant—Right of tenancy must be subsisting at time of institution of suit for pre-emption as also at time of passing of decree (Feb) 369A

—S. 30—See Limitation Act (1908), Art. 10 (June) 1158B

—S. 31 (as amended by Act 10 of 1960)—Section is retrospective—Appellate Court must give effect to amendment—Appellants deprived of their right by amendment pending appeal—Appellate Court cannot pass decree in favour of appellant (Jan) 89

Punjab Redemption of the Mortgages Act (2 of 1913), S. 12—Scope—Section does not enlarge period of limitation prescribed for a redemption suit (Nov) 2342B

Punjab Security of Lands Tenures Act (10 of 1953)

See under Tenancy Laws.

Punjab University Act (35 of 1961)

See under Education.

Railway Fundamental Rules

See under Civil Services.

Railways Act (9 of 1890), S. 28—See *ibid*, S. 41 (Feb) 349A

—S. 29 (3)—See *ibid*, S. 41

(Feb) 349A

—S. 41—See also Constitution of India Artical 136 (Feb) 349B

—Ss. 41, 28, 42, 29 (3)—Railway Rates Tribunal—Jurisdiction—Declaration that rates between two stations are unreasonable—Within Tribunal's Jurisdiction (Feb) 349A

—S. 42—See *ibid*, S. 41 (Feb) 349A

Rajasthan Sales Tax Act (29 of 1954)

See under Sales Tax.

Rajasthan Urban Improvement Act (35 of 1959), S. 2 (1) (i), (vi)—See *ibid*, S. 72

(Oct) 2025B

—Ss. 72, 2 (1) (i) and 2 (1) (vi)—A road cannot be an improvement so as to attract S. 72 (Obiter) (Oct) 2025B

Redemption of Mortgages (Punjab) Act (2 of 1913), S. 9—Petition for redemption dismissed because it raised complicated questions of law and mortgagor relegated to Civil Suit—Order not falls under S. 9—Article 14, Limitation Act does not apply (Jan) 93A

Registration Act (16 of 1908), Ss. 2 (6) and 17 (2) (vi)—Executability of compromise decree creating charge on machinery challenged on ground of non-registration—Finding by High Court that machinery was movable property—Judgment debtor failing to show that machinery was permanently embedded to earth—Held that as machinery was not immovable property compromise decree comprising it was executable (Mar) 437B

—S. 17—Parties creating security by deposit of title deeds reducing their bargain to the form of document—Document must be registered (Aug) 1613

—S. 17 (2) (vi)—See *ibid*, S. 2 (6)

(Mar) 437B

—S. 32—See Evidence Act (1872), S. 85 (Apr) 761B

—S. 33—See Evidence Act (1872), S. 85 (Apr) 761A, B

Religious Endowments Act (20 of 1863).
S. 10—Filling in vacancies in Committee of waqf — District Judge has no jurisdiction or power to fill in vacancies on the Committee constituted under Religious Endowments Act for waqf of a Dargah

(July) 1396

Representation of the People Act (43 of 1950), S. 16 — See Representation of the People Act (1951), S. 100 (d) (iv)

(July) 1348B

—S. 19 (b) — See Representation of the People Act (1951), S. 100 (d) (iv)

(July) 1348B

—S. 20 (3) — Registration of service personnel of 12th Battalion Assam Rifles — Powers of electoral Registration officer

(Oct) 2123B

—S. 24 — See Representation of the People Act (1951), S. 100 (d) (iv)

(July) 1348B

—S. 30 — Finality of electoral roll — Cannot be challenged in an election petition

(Oct) 2123A

Representation of the People Act (43 of 1951), S. 2 (1) (e)—See *ibid*, S. 5 (c)

(July) 1348

—S. 5 (c), 2 (1) (e) and Chap. III of Part II—Representation of the People Act (1950), S. 16 and 19 (b) — Competency for standing for election to Assembly — Condition of being ordinarily resident of constituency under S. 19 (b) — Not relevant

(July) 1348

—S. 8 (2)—See also *ibid*, S. 100 (1) (a)

(Feb) 330B

—S. 8 (2)—“Disqualified from the date of such conviction”—Disqualification is wiped out and does not exist at all when an appellate order of High Court sets aside conviction

(Feb) 330A

—S. 9A (as amended by Act 47 of 1966)—“Contract entered into by a person in the course of his trade or business with the Government”—Whether contract of supply of electricity by Electric Supply Company with Government is such a contract

(Oct) 1943A

—S. 77 — Expenses incurred by political party—S. 77 not applicable

(July) 1295D

—S. 77 — Expenditure suppressed — Court should try to estimate expenditure

(July) 1295E

—S. 80 — See Representation of the People Act (1950), S. 30

(Oct) 2123A

—Ss. 81 (3), 86 (1)—Discrepancies between copy of petition supplied to opposite party and actual petition presented to Court misleading opposite party and

Representation of the People Act (contd.) prejudicing its defence — Petition liable to be dismissed under S. 86 (1) (Feb) 342

—S. 82 (1) (b) — Parties to petition — Candidate who has withdrawn has also to be joined as respondent if there is allegation of corrupt practice against him

(Feb) 372B

—S. 83 — Amendment of election petition — Rectification of defective petition by way of amendment after expiry of period of limitation for filing it is not permissible

(Feb) 372A

—S. 86 (1)—See *ibid*, S. 81(3) (Feb) 342

—S. 99 (1) — Corrupt practice petition — Non-party must be given opportunity to show cause why he should not be named

(May) 856A

—Ss. 100 (1) (a) and 8 (2) — Question whether returned candidate was disqualified on date of election—Opinion as to, is to be formed at the time of pronouncement of judgment in election petition

(Feb) 330B

—S. 100 (d) (iv)—Representation of the People Act (1950), Ss. 16, 19 (b) and 24 — Election petition — Scope of enquiry—Question whether returned candidate was ordinarily resident under S. 19 (b) cannot be enquired except in accordance with provisions of 1950 Act

(July) 1348B

—S. 116-A—See also

(1) J. & K. Representation of the People Act (1957), S. 123

(July) 1262B

(2) *Ibid*, S. 123

(Feb) 267A

(3) *Ibid*, S. 123 (4)

(Sep) 1399A

—S. 116. A—Finding of trial Court that witnesses are not reliable is finding of fact — Supreme Court will not interfere unless it is perverse

(Feb) 257

—Ss. 116A, 123 — Corrupt practice — Finding of fact—Supreme Court will not interfere

(July) 1295A

—S. 116A — No proof but merely preponderance of probability of corrupt practice having been committed by respondent — Held case fit for not awarding costs to respondent returned candidate — Appeal dismissed but parties directed to bear their own costs in appeal

(July) 1295G

—Ss. 116-A and 123 — Charge of corrupt practice — Finding of fact reached by trial Judge—Interference with by Supreme Court — Rule of prudence

(July) 1348C

—S. 116A—Petitioner-appellant failing to establish that returned candidate did not believe impugned statements to be

Representation of the People Act (contd.)
true as required by S. 123 (4)—Statements
proved to be factually untrue — Appeal
held not maintainable but no order as to
cost passed (Sep) 1859B

—S. 116A — Trial Court believing
evidence of witnesses and reaching find-
ing as to commission of corrupt practice
under S. 123 (3) — Supreme Court would
not interfere with it (Oct) 1949F

—S. 116.C — Case neither based on
pleadings nor raised before High Court
cannot be allowed to be raised at appel-
late stage before Supreme Court
(Oct) 2025A

—S. 116.C — In appeal under S. 116A
Supreme Court may in appropriate case
permit respondent to support judgment
under appeal on any ground even though
decided against him (Oct) 2025D

—S. 123 — See also

(1) Ibid, S. 116A (July) 1295A

(2) (July) 1348C

(3) (Oct) 1949F

—S. 123 — Corrupt practice — Bribery
— What amounts to (Feb) 241

—Ss. 123, 116.A — Charge of corrupt
practice at election — Court of first
instance refusing to place reliance upon
testimony of appellant's witnesses —
Appellate Court will not ordinarily re-
appreciate evidence (Feb) 257A

—S. 123 — Corrupt practice — Proof
— Evidence must be cogent and con-
clusive (July) 1295B

—S. 123 — Allegation of corrupt practice
— Onus of its proof lies on election peti-
tioner (Oct) 2025E

—S. 123 — Allegations of corrupt
practice against Ministers—Their normal
bona fide acts should be kept apart from
abuse of opportunities of power and
resources which are not available to their
opponents (Oct) 2025F

—S. 123 (3) — Appeal to voters on
ground of caste — Appeal contained in
letter written by supporter of appellant
to supporter of respondent to support
candidature of appellant on ground of
caste and to ignore personal differences
with appellant in interests of unity and
success of members of the caste — No
corrupt practice within S. 123 (3)
(Oct) 1949E

—S. 123 (4) — See J. and K. Represen-
tation of the People Act (1957), S. 132 (4)
(July) 1262A

—S. 123 (4) — Corrupt practice —
Publication of statement — Consent of

Representation of the People Act (contd.)
candidate or his agent must be establish-
ed (Feb) 267B

—S. 123 (4) — Publication of pamphlet
at instance of returned candidate held,
was "corrupt practice" within S. 123 (4)
(Apr) 690B

—S. 123 (4) — Statements complained
of by election petitioner proved to be fac-
tually untrue—Petitioner however failing
to establish that returned candidate did
not believe statements to be true—Petition
cannot succeed (Sep) 1839A

—S. 123 (4) — No proof that impugned
statement was false and was either believ-
ed to be false or not believed to be true
by returned candidate and his agent—
Statement does not come within S. 123 (4)
(Oct) 1943B

—S. 123 (6) — Corrupt practice—Proof
— General allegation not sufficient proof
— Expenditure by party of successful
candidate cannot be taken into account
(Feb) 267C

—S. 123 (6) — Conclusion regarding
corrupt practice drawn on unreliable,
fabricated and manipulated evidence not
sustainable (Apr) 676

—S. 123 (6) — Incurring of expenditure
beyond prescribed limit — Proof—Autho-
rity or consent of candidate or his election
agent to be proved (July) 1295C

—S. 129 — Elections must be freely
and fairly conducted — Duty of police
and Government officers pointed out
(July) 1348

—Chap. III of Part II — See *ibid*, S. 5
(c) (July) 1348

**Requisitioning and Acquisition of Immov-
able Property Act (30 of 1952), S. 8 — See**
Court-fees and Suits Valuations—Bombay
Court-fees Act (36 of 1959), S. 7 read with
Sch. I, Art. 3 (Sep) 1387A

—S. 11—See **Court-fees and Suits Valua-
tions—Bombay Court-fees Act (36 of**
1959), S. 7 read with Sch. I, Art. 3
(Sep) 1387A

Rice Milling Industry (Regulation) Act (21
of 1958), Ss. 5 (4), 8 (3) (c) — Change of
location of existing rice mill — S. 5 (4)
has no application in granting permission
under S. 8 (3) (c) (Feb) 246B

—S. 8 (3) (c)—See also *ibid*, S. 5 (4)
(Feb) 246B

—S. 8 (3) (c) — Change of location of
rice mill — Sanction for change obtained
after shifting — Competitor in business
has no locus standi to challenge grant of
permission (Feb) 246A

Rules Regulating Bihar and Orissa Agricultural Service; Class I Promulgated on April 17, 1935 . . .
See under Civil Services.

Sale of Goods Act (3 of 1930), S. 2 (7) —
See Sales Tax — Bombay Sales Tax Act (51 of 1959), S. 2 (13) (as amended by Act 15 of 1967) (May) 908

SALES TAX

—**Andhra Pradesh General Sales Tax Amendment Act (9 of 1970), S. 9—**Exemption granted by the provision to dealers who have not collected tax is not violative of Art. 14 of the Constitution (Aug) 1507B

—**S. 11 —** See Constitution of India, Art. 226 (Aug) 1507A

—**Bihar Sales Tax Act (6 of 1944), S. 10 —** Decision regarding assessment to tax in respect of one assessment period cannot operate as res judicata in respect of another period (Aug) 1628B

—**S. 17 —** See Bihar and Orissa Public Demands Recovery Act (4 of 1914), S. 3 (6) (Aug) 1628A

—**Bihar Sales Tax Act (19 of 1959), Ss. 3 and 7 —** Liability of tax under Act is not on purchaser (May) 946B

—**S. 7—** See *ibid*, S. 3 (May) 946B

—**S. 20-A (3), (4), (5) and (8) (as amended by Act 20 of 1962) —** Sub-ss. (3), (4) (5) (6) and (8) are invalid (May) 946A

—**S. 33 (3)—**Reference—Question whether assessee effecting sales to dealers who had supplied declarations to him and claiming benefit of deductions in respect of those sales would, in the event of those purchasing dealers being found to be bogus and fictitious lose benefit in the absence of any collusion or mala fide dealings on his part is one of law (Nov) 2223

—**Bombay Sales Tax Act (51 of 1959), S. 2 (13) (as amended by Act 15 of 1967)**

—**Contract of sale —** Standing timber agreed to be severed under — Sale of timber can be regarded as sale of goods (May) 908

—**Central Sales Tax Act (74 of 1956), S. 5 —** See Sales Tax — Mysore Sales Tax Act (1957), S. 5 (3) read with its third schedule (Nov) 2277A

—**S. 5 (1) —** See also Constitution of India, Art. 286 (1) (b) (May) 870D

—**S. 5 (1) —** 'Occasions' — Meaning of — Must be given wider meaning viz., to bring about especially in an incidental or subsidiary manner (May) 870E

Sales Tax (contd.)

—**Kerala General Sales Tax Act (11 of 1125 M E) —** See Constitution of India, Art. 277 (Oct) 1930

—**Madhya Pradesh General Sales Tax Act, 1958 (2 of 1959), S. 2 (o) —** Sales tax recovered from purchasers is part of the sale price (Nov) 2216

—**Mysore Sales Tax Act (25 of 1957), S. 2 (i) explanation 3 (a) —** Sale of Goods within the state—When takes place (Dec) 2598

—**S. 2 (k)—**Casual transactions—Whether dealer is liable to tax on incidental non-business turnover (Nov) 2277B

—**S. 5—** See *ibid*, S. 2 (k) (Nov) 2277B

—**S. 5 (3) read with its third schedule—** Tax on iron ore bought by dealer assessee for export to foreign countries is payable "at the point of the last purchase within the State" (Nov) 2277A

—**Rajasthan Sales Tax Act (29 of 1954), S. 2 (cc) (ii)—** See *ibid*, S. 15 (Oct) 2054

—**S. 4 (2) —** See Constitution of India, Art. 14 (July) 1330

—**S. 15—** Application to High Court to call upon Board of Revenue to state a case and refer same to it for deciding question of law—Scope of jurisdiction of High Court (Oct) 2054

—**Tamil Nadu General Sales Tax Act (1 of 1959), S. 12 (2) and (3) —** Penalty — Imposition of—Filing of an incorrect return —Not a ground to impose penalty (Dec) 2405A

—**S. 12 (2) —** Best judgment assessment —It must have a reasonable nexus, to the available material and the circumstances of each case (Dec) 2405B

—**S. 17 —** Notification bearing earlier date but promulgated on the very date of commencement of the Act is valid (Oct) 2081

—**S. 42 (3) —** See Constitution of India, Art. 246 (Apr) 792

—**S. 53 (4)—** See *ibid*, S. 17 (Oct) 2081

—**U. P. Sales Tax Act (15 of 1948), S. 3 —** Notification No. ST.909/X dated 31-3-1956 declared invalid by High Court is in force as it is subsequently revived by S. 3 (1) of U. P. Sales Tax (Validation) Act (15 of 1958) (Oct) 2089A

—**S. 3 (A) —** Notification No. 905/X, D/- 31-3-1956, entry 6 — Tooth powder is a toilet article — Its turnover liable to be taxed at single point (Jan) 65

—**S. 3A —** Notification No. ST.6069/X-1097-56, dated 30-9-1956, issued under S. 3A is not in force (Oct) 2089B

Sales Tax—U. P. Sales Tax Act (contd.)

—S. 3A—State Government Notification dated 8.6.1948 under — Cloth manufactured by means of power-loom does not fall under the term "cloth manufactured by the mills" (Nov) 2221

—S. 18 (4)—Assessment of firm—Dealer cannot elect assessment year basis from previous year basis under R. 39, in a case in which S. 18 (4) applies warranting assessment on previous year basis — Subsequent assessment or reassessment on previous year basis not barred (Oct) 2131

—U. P. Sales Tax Rules (1948), R. 3E — See Sales Tax—U. P. Sales Tax Act (15 of 1948), S. 18 (4) (Oct) 2131

—U. P. Sales Tax (Validation) Act (15 of 1958), S. 3 (1) — See Sales Tax—U. P. Sales Tax Act (15 of 1948), S. 3 (Oct) 2089A

Saurashtra Terminal Tax and Octroi Ordinance (1949), S. 4 — See Panchayats—Gujarat Panchayat Act, 1961 (6 of 1962), S. 307 (c) and (k) (June) 1078

Sea Customs Act (8 of 1878), S. 75 — Passengers (Non-Tourist) by Baggage Rules 1960, clarified by Notification of Government of India, Ministry of Commerce and Industries Import Trade Control Public Notice No.-1 ITC (PN)/61, D/- 2.1.1961—Exemption of pet animals from import trade control—"Pet animal"—Mare not even seen by importer before its arrival in India held not "pet" animal (Feb) 293A

—S. 167 (8)—See

(1) Foreign Exchange Regulation Act (1947), S. 27 (Jan) 116B

(2) Imports and Exports (Control) Act (1947), S. 5 (Jan) 170

—S. 171-A — Statements made to Customs Officers in inquiry under S. 171-A—Admissible in evidence against maker in criminal proceedings launched against him (Jan) 44B

—S. 171-A — S. 171-A does not limit right of interrogation to questions the answers where to may not incriminate person interrogated (Jan) 44C

—S. 171-A (4) — Statement under Section 171-A (4) containing inculpatory and exculpatory portions — Inculpatory part can be accepted excluding exculpatory (Jan) 44H

—S. 187-A — Power given to customs authorities to file complaint for offence under S. 187 (81)—Does not offend Art. 14 of the Constitution (Aug) 1511

Sea Customs Act (contd.)

—S. 188 — 'Decision or Order'—Means a real and not purported determination—Jurisdiction of Civil Courts not excluded (Aug) 1558B

Specific Relief Act (1 of 1877), S. 21 (b) — See Education—Madras Elementary Education Act (8 of 1920), S. 56 (1) and (2) (h) (Sep) 1920

—S. 22 — Discretion to grant relief of specific performance—R having imperfect title agreeing to sell his lease-hold right in plot to A — Condition of lease requiring R to obtain sanction of authority for transfer — R forfeiting earnest money and cancelling contract without applying for sanction—Suit by A for specific performance — A's readiness and willingness to perform his part of contract — Held on facts A was entitled to a decree for specific performance (July) 1238A

—S. 22—Trial Court refusing to decree specific performance and directing refund of part consideration — Appeal by plaintiff — Conduct of plaintiff unequivocally showing that he was not willing to accept trial Court's decree — Fact that plaintiff had in meantime sought execution of trial Court's decree cannot disentitle him to obtain decree for specific performance in appeal (July) 1238B

—S. 22 — Specific performance of agreement to sell plot — Plot transferred to third person by defendant — Proper form of decree to be passed stated: (July) 1238C

—S. 42—Suit for declaration that defendants are neither owners of land nor they have right to get the same as per certain order of S. D. O. acting as Collector — Plaintiff neither asking for cancellation of order nor for any injunction—Suit hit by S. 42 (Apr) 761C

Specific Relief Act (47 of 1963), S. 14—See Air Corporation Act (1953), S. 45 (Sep) 1828

Stamp Act (2 of 1899)

See under Stamp Duty.

STAMP DUTY

—Stamp Act (2 of 1899), S. 2 (14) — "Instrument"—Does not cover copy of document (June) 1070A

—S. 35, 36 — Secondary evidence by way of oral evidence or copy of document insufficiently stamped is not admissible in a suit (June) 1070B

—S. 36—See *ibid*, S. 35 (June) 1070B

States Reorganisation Act (37 of 1956), Ss. 52, 57 — Saurashtra High Court abolished and jurisdiction conferred on Bombay High Court — Appeal again transferred to Gujarat High Court under Bombay Reorganisation Act (1960) — Held appeal from single Judge to Division Bench was governed by Letters Patent Cl. 15 (Bom) and not by S. 22A of Saurashtra Ordinance 2 of 1948 (Feb) 300

— S. 57 — See *ibid*, S. 52 (Feb) 300

— Ss. 115 (7), Proviso and 116 — Bombay Reorganisation Act (1960), Ss. 81 (6) Proviso and 82 — Effect of — Public servant allotted to another State — Applicability of — Conditions of service applicable immediately before 1-11-1956 (Jan) 117A

— S. 116 — See *ibid*, S. 115 (7) (Jan) 117A

Succession Act (39 of 1925), S. 74 — Non-bequest of property to children of testator does not make the will invalid if the execution of will is satisfactorily proved (Nov) 2236

— S. 173 — See **Wealth Tax Act (1957)**, S. 2 (e) (iv) (May) 915A

Supreme Court Rules (1966), O. 16, R. 3 — See **Constitution of India**, Art. 136 (July) 1283A

— O. 47 — See **Constitution of India**, Art. 134 (Apr) 759B

Tamil Nadu General Sales Tax Act (1 of 1959)

See under **Sales Tax**.

Tariff Act (32 of 1934), S. 5 — Notification issued in 1950 declaring Goa to be foreign territory for purposes of exports from that country to India — Legal effect — Liability to pay customs duty on transmission of goods from Goa to Bombay after integration of Goa (June) 1130B

TENANCY LAWS

— **Assam Land Revenue Regulations (1 of 1886)** — Rules framed under, R. 40 — State Government can fix rate of premium in respect of individual tea garden without first fixing general rate for a region larger than tea garden (Apr) 674

— **Barar Regulation of Agricultural Lease Act (24 of 1951)**, S. 9 — See **Tenancy Laws** — **Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (1958)**, S. 52 (Feb) 281C

— **Bihar Land Reforms Act (30 of 1950)**, S. 4 (b) — See **Constitution of India**, Art. 226 (Apr) 746

Tenancy Laws — Bihar Land Reforms Act (contd.)

— S. 6 — Partition suit launched before passing of Act by a non-possessing co-sharer of bakasht land can be allowed to proceed (Nov) 2251

— **Bihar Tenancy Act (8 of 1885)**, S. 10, Proviso — See *ibid* S. 155 (Nov) 2360

— Ss. 155, 178 (1) (c) and 10, Proviso — Suit for ejectment of tenant on ground of breach of condition — Prior notice under S. 155 is necessary (Nov) 2360

— S. 178 (1) (c) — See *ibid*, S. 155 (Nov) 2360

— **Bombay Merged Territories and Areas (Jagirs Abolition) Act 1953 (39 of 1954)**, S. 11 — Right of Jagirdar for compensation for teak trees standing on Jagir land after abolition of Jagirs (Aug) 1645

— **Bombay Tenancy and Agricultural Lands Act (67 of 1946)** — See **Constitution of India**, Art. 31A (Oct) 1992

— S. 32 F (1) (a) — Exemption of lands from being deemed to be purchased by tenant under S. 32 (1) — Claim by minor member of joint family, under S. 32-F (1) (a) on ground of partition of joint family estate — Maintainability (Jan) 105

— S. 32-G (3) — Notice calling upon tenants who are deemed to have purchased lands on the "tillers' day," to appear before Tribunal — Failure of tenant to make a statement that he is not willing to purchase — Declaration that the purchase is ineffective should be by a written order (July) 1334

— **Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958)**, S. 20 — See *ibid*, S. 36 (Mar) 435A

— Ss. 36 and 20 — Landlord taking possession of land from tenant for personal cultivation without complying with provisions of Ss. 20 and 36 (2) — Tenant entitled to be restored to possession (Mar) 435A

— S. 36 (1) — Whether mere verification by the Tahsildar without an order of Tahsildar authorising the landlord to obtain possession disentitles the tenant to claim possession under S. 36 (1)? (Quaere) (Mar) 435B

— S. 38 — See *ibid*, S. 39 (Feb) 315C

— Ss. 39 and 38 — Lease prior to 1-4-1957 — Section 39 does not apply — High Court held was right in treating application as one under S. 36 read with S. 38 and granting relief of possession of half area of lands leased, under S. 38 (4) (a), proviso (i) with requisite direction to Revenue Court (Feb) 815C

Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha and Kutch Areas) Act (contd.)

—S. 43 (Prior to Amendment by Act 2 of 1962)—See *ibid*, S. 46 (1) (Aug) 1659A

—Ss. 46 (1), 48 (Prior to Amendment by Act 2 of 1962)—Protected lessee not taking steps to purchase land from owner prior to insertion of sub-s. 14 A in S. 43 which is not retrospective — He became statutory owner under S. 46(1) with effect from 1.4.1961 (Aug) 1659A

—Ss. 52 and 132 (2) (i)—Interpretation of — 'Protected lessee' in Berar — Landlord terminating tenancy on ground of requirement of personal cultivation and obtaining possession under S. 9, Berar Act (24 of 1951) — S. 52 of Bombay Act when applies (Feb) 281C

—S. 132 (2) (i)—See *ibid*, S. 52 (Feb) 281C

—Bombay Tenancy and Agricultural Lands (Amendment) Act (31 of 1966) — See Constitution of India, Art. 31-A (Oct) 1992

—Hyderabad Abolition of Inams and Cash Grants Act, 1954 (8 of 1955), S. 3 (2) b)—See *ibid*, S. 33 (Sep) 1359A

—S. 6 - Crucial date for grant of occupancy rights is 1-7-1960 when the entire Act came into effect and not the date of vesting of the land in the State on 20-7-1955 (Sep) 1359B

—S. 33—Relationship of landlord and tenant continued to subsist between 20-7-1955 when inams were abolished and lands vested in the State and 1-7-1960 when a notification under S. 1 (3) (b) of the Act by Maharashtra Government made the entire Act applicable (Sep) 1359A

—Hyderabad Abolition of Inams (Amendment) Act (10 of 1956), S. 4—See Tenancy Laws — Hyderabad Abolition of Inams and Cash Grants Act 1954 (8 of 1955), S. 33 (Sep) 1359A

—Madhya Bharat Zamindari Abolition Act (13 of 1951), S. 4 (1) (f)—Suit for redemption and possession of mortgaged land by proprietors—Enforcement of Act during pendency of suit—Effect of S. 4 (1) (f) on the rights of plaintiffs (Jan) 77

—Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), S. 14—Civil Court and not the Compensation Officer has jurisdiction to determine competing claims of persons to proprietary rights to property vesting in Government under S. 3 (Apr) 681G

Tenancy Laws (contd.)

—Madras City Tenants' Protection Act (3 of 1922), S. 12, Proviso (as amended by Act 19 of 1955)—Effect of contracts made by tenants — Protection against eviction is not available to a tenant who stipulates in writing registered as to the erection of building in so far as those stipulations related to buildings erected after the date of contract (Nov) 2366A

—Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Preamble—See

(1) Constitution of India, Art. 31

(Jan) 161D

(2) Constitution of India, Art. 31 (2)

(Jan) 161C

(3) Constitution of India, Art. 31-A

(Jan) 161A

(4) Constitution of India, Art. 246

(Jan) 161B

—Madras Lease Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963), Preamble—See also

(1) Constitution of India, Art. 31

(Jan) 161D

(2) Constitution of India, Art. 31 (2)

(Jan) 161C

(3) Constitution of India, Art. 31A

(Jan) 161A

(4) Constitution of India, Art. 246

(Jan) 161B

—S. 4 — The Act cannot be challenged as unconstitutional on the ground of violation of fundamental rights under Arts. 19 and 31 as it is completely protected by Art. 31-A (May) 989A

—S. 9 — There is no bar to applying the provisions of the Act to a particular village merely because proceedings under the Land Acquisition Act, 1894 have been taken in respect of certain lands especially when no award of compensation has been made and the lands have also not vested in the State (May) 989B

—Madras Minor Inams (Abolition and Conversion into Ryotwari) Act (30 of 1963), Pre—Validity—See also

(1) Constitution of India, Art. 31

(Jan) 161D

(2) Constitution of India, Art. 31 (2)

(Jan) 161C

(3) Constitution of India, Art. 31A

(Jan) 161A

(4) Constitution of India, Art. 246

(Jan) 161B

—Maharashtra Agricultural Lands (Ceiling on Holdings) Act (27 of 1961), S. 12 — Determination of ceiling area — Is to be

Tenancy Laws—Maharashtra Agricultural Lands (Ceiling on Holdings) Act (contd.) determined with reference to state of affairs of a person on the appointed day i.e. 26-1-1962. The area so fixed would not be liable to fluctuations with subsequent increase or decrease in the number of his family members (Oct) 2137B

—**Mysore (Personal and Miscellaneous) Inams Abolition Act (1 of 1955), S. 22—**Proceedings under Act by the Special Deputy Commissioner or Special Tahsildar are not judicial—Production of documents in evidence in such proceedings are not strictly governed by provisions of Evidence Act (July) 1363

—**Punjab Security of Land Tenures Act (10 of 1953), S. 18 (1) (i)—**Claim of right of purchase under—Six years should have been completed on date of application for purchase (Feb) 198

—**U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961), S. 6 Cl. (xvii)—**Exemption of certain land from imposition of ceiling — Land used for growing fodder for purposes other than dairy are not exempted (July) 1407

—**U. P. Zamindari Abolition and Land Reforms Act 1950 (1 of 1951), Ss. 6 (a), 18—**Trees constituting grove do not vest in State—They can be proceeded against under S. 24 of U. P. Encumbered Estates Act (25 of 1934) (Sep) 1678C

—**S. 18—**See also
(1) Debt Laws — U. P. Encumbered Estates Act (25 of 1934), S. 24

(Sep) 1678A
(2) *ibid*, S. 6 (a) (Sep) 1678C

—**S. 20 (b)—**A person cannot claim adhivasi rights under S. 20 (b) when his name is entered in the record as occupant in the year 1356 Fasli surreptitiously, fraudulently or fictitiously (Apr) 673A

—**S. 23 (1) (a)—**Impartible estate of undivided Hindu family—Transfer by its holder in favour of junior member of family in recognition of right of maintenance, held, not gift (Sep) 1687

—**S. 70—**see Debt Laws — Uttar Pradesh Encumbered Estates Act (25 of 1934), S. 23B (Aug) 1429

—**U. P. Zamindari Abolition and Land Reforms Rules (1952), Rule 77 (i)—**See Debt Laws—Uttar Pradesh Encumbered Estates Act (25 of 1934), S. 23B

(Aug) 1429

Tenancy Laws (contd.)

—**W. B. Estates Acquisition Act (1 of 1954), S. 6 (2) Proviso.—**A person to become a direct tenant under the Government by virtue of the Proviso has to hold a valid lease of the land from the intermediary immediately before the date of vesting of estate in State (Oct) 2097

—**Trade and Merchandise Marks Act (43 of 1958), Ss. 2 (j), 9 (3)—**Trade mark consisting of numeral—It can be distinctive — Registration of numerals not limited to textile goods—Registrable for other goods also on proof of extensive use (May) 898D

—**S. 9 (3)—**See also
(1) S. 2 (j) (May) 898D
(2) *ibid*, S. 32 (c) (May) 898B

—**Ss. 11 (e), 32 (b)—**Registration of non-registrable trade mark, it not being distinctive — Rule under S. 32 as to its conclusiveness — Applicability — Clause (e) of S. 11 — Construction of (May) 898E

—**S. 32 (b)—**See *ibid*, S. 11 (e) (May) 898E

—**Ss. 32 (c), 9 (3)—**Word “distinctive” is used in S. 32 (c) in same sense as is used in S. 9 (3) — Expression “for the purpose of this Act” in S. 9 (3) indicates that word “distinctive” has uniform meaning all throughout the Act (May) 898B

—**S. 32 (c), 56 —**Presumption under S. 32 as to registered trade mark — Rebuttal on ground that mark is not distinctive — Fact that mark is not distinctive must exist as on date of filing rectification application under S. 56 and not on date of registration (May) 898C

—**S. 32 (c)—**Distinctiveness of trade mark — Loss of — Cancellation of registered trade mark — When possible (May) 898F

—**S. 32 (c)—**Expression “commencement of proceedings” — Interpretation of (May) 898G

—**S. 32 (c)—**Infringement of registered trade mark — Negligence to proceed against—When amounts to abandonment of trade mark (May) 898H

—**S. 56 —**See *ibid*, S. 32 (c) (May) 898C

—**S. 56 —**Power to rectify is discretionary—No interference in appeal when discretion is properly exercised (May) 898I

Trade and Merchandise Marks Act (contd.)

—S. 56 (2) — "Aggrieved person" — Expression includes person who has, before registration, used trade mark in question as also person against whom infringement action is taken or threatened (May) 893A

Transfer of Property Act (4 of 1882), S. 3 — Question of constructive notice has to be determined on facts and circumstances of each case and has to be approached from equitable considerations (July) 1201B

—S. 6 (g) — See Pensions Act (1872), S. 1 (May) 845C

—Ss. 58, 60 — Mortgage with possession — Lease back — Preliminary decree — No application for final decree — Mortgagee only loses his right to recover money by sale of property — Otherwise his security remains intact — Mortgagee can sue on rent note — Mortgagor continues to have his right to redeem (Feb) 310

—S. 58 — Mortgage or lease — Tests stated (Aug) 1575

—S. 60 — See *ibid*, S. 58 (Feb) 310

—S. 67-A — Same mortgagor—Husband and wife owning separate properties and mortgaging their properties separately and jointly — Suit to enforce joint mortgage does not bar a suit to enforce mortgage executed by one spouse alone — Section 67-A not attracted (May) 884A

S. 100 — See Municipalities — Bombay Provincial Municipal Corporation Act (1949), S. 141 (July) 1201A

—S. 105 — See also

(1) Tenancy Laws — W. B. Estates Acquisition Act (1 of 1954), S. 6 (2), Proviso (Oct) 2097

(2) *ibid*, S. 53 (Aug) 1575

(3) *ibid*, S. 116 (June) 1081B

—S. 105 — Lease whether permanent or for lifetime — Determination of — Agreement of lease for fixed period in first instance for constructing building (Sep) 1873A

—S. 107 — Agreement varying essential term like rent of an existing registered lease must be registered (Apr) 751

—S. 108 (d) — Accession to leasehold property — Claim by lessee by making contradictory pleas of adverse possession and of easementary rights by prescription — Maintainability of claim (Sep) 1873B

—S. 113, Illustration (b) — Notice to quit on ground of arrears of rent — Second notice demanding rent for period between 1st and 2nd notice — Waiver of first notice (Jan) 102

T. P. Act (contd.)

—Ss. 116 and 105 — Consent decree for eviction — Judgment-debtors allowed to continue in possession for period of five years — Mesne profits at higher rate required to be paid by judgment debtors — Clause in decree that in case of default of mesne profits they could be immediately called upon to deliver possession — Consent decree neither constituted a new tenancy nor a licence (June) 1081B

Trusts Act (2 of 1882), S. 82 — Advancement — Hindu transferring his money in a bank to the joint names of himself and his son — Amount made payable to either or survivor — Plea of advancement by son — Proof (Oct) 1962B

Usurious Loans Act (10 of 1913)

See under Debt Laws.

U. P. District Boards Act (10 of 1922)

See under Panchayats.

U. P. Encumbered Estates Act (25 of 1934)

See under Debt Laws.

U. P. High Court (Abolition of Letters Patent Appeals) Act (14 of 1963), S. 3 — Bar against filing Letters Patent Appeals — Insufficiently stamped memorandum of appeal filed before Act, but accepted on payment of deficit fees after Act came into force — Can be treated as pending appeal — Bar under S. 3 not attracted (July) 1374

U. P. Imposition of Ceiling on Land Holdings Act (1 of 1961)

See under Tenancy Laws.

U. P. Industrial Disputes Act (28 of 1947), S. 4K — See Industrial Disputes Act (1947), S. 10 (Dec) 2521A

U. P. Kshettra Samittis and Zilla Parishads Adhiniyam (33 of 1961)

See under Panchayats.

U. P. Municipalities Act (2 of 1915)

See under Municipalities.

U. P. Muslim Waqfs Act (15 of 1960), S. 19 — See Religious Endowments Act (1863), S. 10 (July) 1396

U. P. Sales Tax Act (15 of 1948)

See under Sales Tax.

U. P. Sales Tax Rules (1948)

See under Sales Tax.

U. P. Sales Tax (Validation) Act (15 of 1958)

See under Sales Tax.

- U. P. (Temporary) Control of Rent and Eviction Act (3 of 1947)**
See under Houses and Rents.
- U. P. Zamindari Abolition and Land Reforms Act (1 of 1951)**
See under Tenancy Laws.
- U. P. Zamindari Abolition and Land Reforms Rules (1952)**
See under Tenancy Laws.
- U. P. Zamindars Debt Reduction Act (15 of 1953)**
See under Debt Laws.
- West Bengal Board of Secondary Education Act (5 of 1963)**
See under Education.
- W. B. Board of Secondary Education (Appointment of Secretary) Rules (1963)**
See under Education.
- West Bengal Estates Acquisition Act (1 of 1954)**
See under Tenancy Laws.
- West Bengal (Prevention of Violent Activities) Act (19 of 1970)**
See under Public Safety.
- Wealth Tax Act (27 of 1957), S. 2 (e) — Assets** — Includes property of every description—Creation of wakf-alal-aulad by Hanafi Mussalman—Right of beneficiaries (Sep) 1691C
—S. 2 (e) (iv)—‘Annuity’—Meaning of — Trust deeds—Trustees to pay annually to assessee a share of income from trusts funds after deducting expenses—Assessee having only life interest in such payments — Payments are not annuities (May) 915A
—S. 2 (e) (iv) — Word “Annuity” — Meaning (Sep) 1691E
—S. 5 (1) — Jewellery intended for personal use of assessee only comes within S. 5(1)(viii)—Its value cannot be included in computation of net wealth of assessee —S. 5 (1) (xv) deals with jewellery in general (May) 915B
—S. 7 (1)—Valuation of asset—Right to share in income—Market value — Determination of (Sep) 1691D
—S. 7 (2) — Determination of value of assets — Assessee Electric Supply Company — Service connections shown as assets—Mode of valuation (Dec) 2447
- Wealth Tax Act (contd.)**
—S. 7 (2) — Determination of value of assets — Book value in the balance sheet should be taken as the primary basis of valuation—Wealth Tax Officer can make such adjustment in cash valuation (Dec) 2458
—S. 21 (1) (As it stood prior to 1964 Amendment)—Assets held by a trustee — A trustee holding assets for the benefits of the beneficiaries under a trust-deed is assessable to wealth-tax under the Section (Dec) 2463A
—S. 21 (4) — Shares of beneficiaries under a trust whether indeterminate — Where the settlor creating trust and his wife are alive, they have a right to be maintained out of the income of the trust properties and a right of residence in the house situate in that property; the settlor's minor sons have a right to be maintained and educated, the shares of the beneficiaries are indeterminate (Dec) 2463C
- W. B. Land (Requisition and Acquisition) Act (2 of 1948)**—Act is not ultra vires the Constitution under Art. 19 (1) (f) read with Art. 19 (5) (May) 961
—S. 17 — See Chandernagore (Merger) Act (1954), S. 17 (May) 963
- West Bengal Transferred Territories (Assimilation of Laws) Act (19 of 1958), S. 3 (2), Proviso, Cl. (a)** — Repeal of laws existing in transferred territories, effect of (Oct) 2116
- Words and Phrases** — ‘Annuity’, meaning of—See Wealth Tax Act (1957), S. 2(e)(iv) (May) 915A
—“Business” or ‘trade’ — See Houses and Rents—Bombay Rent Restriction Act (16 of 1931), S. 4 (2) (b) (June) 1081D
—Mineral—Granite is a mineral (Aug) 1569B
—“Occasions”—See Sales Tax—Central Sales Tax Act (1950), S. 5 (1) (May) 870E
—“Pending” — See Criminal Law Amendment (Amending) Act (22 of 1966), S. 5 (June) 1120D
—“Person in-charge” — See Foreign Exchange Regulation Act (1947), S. 23C (1) & (2) (Nov) 2162A
—“Pet animal” — See Sea Customs Act (1878), S. 75 (Feb) 293A
—Word “property”—Meaning of (Sep) 1691B

LIST OF CASES OVERRULED, REVERSED AND DISSENTED FROM ETC., IN AIR 1971 SUPREME COURT

Diss.=Dissented from in; Not F.=Not followed in; Over.=Overruled in; Revers.=Reversed in.

Privy Council

(1911-12) 16 Cal W N 74 (PC), *Mir Sarwarjan v. Fakruddin Mahomed*—Held no longer good law in view of AIR 1948 PC 95 as interpreted AIR 1971 Cal 341 (Aug).

Supreme Court

AIR 1954 SC 238 = 1954 SCR 317, *Chaturbhuj Vithaldas Jasani v. Moreshwar Parashram*—Not F. in view of later decision in AIR 1968 SC 1218 as interpreted AIR 1971 Cal 219A (May).
AIR 1966 SC 671=(1966) 1 SCR 466, *Madhya Pradesh Industries Ltd. v. Union of India*—Held overruled by AIR 1967 SC 1606 as interpreted AIR 1971 SC 862B (May).
AIR 1966 SC 671=(1966) 1 SCR 466, *Madhya Pradesh Industries Ltd. v. Union of India*—Held overruled in AIR 1967 SC 1606 as interpreted AIR 1971 All 54B (FB) (Feb).

Allahabad

AIR 1913 All 115=ILR (1943) 453 (FB), *Nawal Kishore v. Municipal Board Agra*—Over. AIR 1971 SC 1201 B (July).
(1957) W P No. 508 of 1956, D/- 1-5-1957 (All), *Hukam Singh v. Board of Revenue U. P.*—Held no longer good law in view of AIR 1968 SC 466 as interpreted AIR 1971 SC 673A (Apr).
(1963) C W No. 1885 of 1962, D/- 9-9-1963 (All)—Revers. AIR 1971 SC 966A (May).
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Calcutta (contd.)

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Madhya Pradesh

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Madras

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Madras (contd.)

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Mysore

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Mysore (contd.)

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Nagpur

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Rao v. Firm Radhakisan Ramsahai—Over.
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Patna

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Punjab

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Punjab (contd.)

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2342A (Nov).

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(Nov).

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Rajasthan

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Rajasthan (contd.)

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Tripura

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COMPARATIVE TABLES

Supplement to Comparative Tables of Previous Years.

Owing to late receipt of other Journals the following Supplement to Comparative Tables of A. I. R. = Other Journals is issued.

A. I. R. Supreme Court = Other Journals

AIR 1965 SC		AIR 1969 SC		AIR 1970 SC		AIR 1970 SC	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1314	1966 ACJ 200	734	(1971) 2 SCA 142	381	con(1970) 2 S R 801	745	con(1971) MPWR 374
		897	1969 UJ (SC) 98		1971 Mah LJ 403		1981 MPLJ 663
		930	1969 UJ (SC) 169	417	(1970) 2 SCR 751	778	(1970) 3 SCR 263
		1028	1969 UJ (SC) 106	453	73 Bom LR 104	786	1971 BLJR 49
		1062	1969 UJ (SC) 199		1971 Mah LJ 305		(1971) 1 SCA 281
		1073	1969 UJ (SC) 262		(1970) 2 SCR 787		(1970) 3 SCR 946
		1089	1969 UJ (SC) 171	458	(1970) 2 SCR 809	789	(1970) 3 SCR 953
		1103	1969 UJ (SC) 138	470	(1971) 1 SCJ 182	794	1971 Ren CJ 372
		1111	(1971) 1 SCA 370	486	1969 UJ (SC) 747	814	(1970) 3 SCR 380
		1167	(1971) 1 SCA 699	488	(1971) 1 SCJ 49	819	(1970) 3 SCR 334
		1245	1969 UJ (SC) 140		(1971) 1 SCA 389	828	72 Bom LR 92
		1302	39 FJR 21	535	(1971) 2 SC	843	(1971) 2
					Cri R 121		SC Cri R 124
					(1970) 2 SCR 796		(1970) 2 SCR 823
					(1971) 2 SCJ 369	846	(1970) 2 SCR 869
					1971 MLJ (Cri) 578	860	1970 Ind CR 572
				540	(1970) 2 SCR 732	867	1970 Ind CR 495
				546	(1971) 2 SCJ 51	878	1970 Ind CR 533
				549	(1971) 1 SCJ 199	919	1970 Ind CR 577
					(1971) 1 MLJ	940	(1971) 2 SCJ 123
					(SC) 33		1971 MLJ (Cri) 436
					(1971) 1 An WR	951	(1971) 3 SCR 233
					(SC) 33		1971 BLJR 689
					1971 MLJ (Cri) 155	967	(1970) 2 SCR 903
					1971 MLW (Cri) 32	977	(1971) 1 SCJ 254
					(1970) 2 SCR 760		1971 MLJ (Cri) 146
				564	(1970) 3 SCR 530		(1971) 1 SCA 539
				652	(1970) 3 SCR 121		(1970) 3 SCR 909
				655	(1971) 2		73 Bom LR 521
					SC Cri R 143	979	(1971) 2
					40 FJR '6		SC Cri R 132
				675	(1971) 1 SCJ 85	988	1971 Ren CJ 370
					1971 MLJ (Cri) 46	987	(1971) 1 SCJ 728
					(1970) 3 SCR 225		(1971) 1 SCR 211
				691	1971 MPLJ 263		(1971) 2 SCA 218
					1171 Mah LJ 207		73 Bom LR 906
					1971 MPWR 8	989	(1971) 2
					(1970) 3 SCR 323		SC Cri R 201
					1971 Jab LJ 735	992	(1971) 1 SCJ 468
				694	(1970) 2 SCR 835		(1971) 1
				732	1971 MPLJ 154		MLJ (SC) 63
				744	(1970) 3 SCR 311		(1971) 1 SCA 547
				745	(1970) 3 SCR 328		(1971) 1

AIR 1970 SC		AIR 1970 SC		AIR 1970 SC		AIR 1970 SC	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
992con	An WR (SC) 68	1212	(1971) 1 SOA 129	1385	(1971) 2 SC Ori R 177	1542con	(1971) 1 MLJ (SC) 76
997	(1971) 1 SCR 227	1217	1971 BLJR 262	1372	1971 Mad LW (Ori) 21		(1971) 1 An WB (SC) 76
	(1970) 2 An LT 297		(1970) 3 SCR 788		1971 MLJ (Cri) 82	1569	82 ITR 613
	1971 All WR (HC) 232	1223	(1970) 3 SCR 409		(1971) 1 SCJ 112	1560	(1971) 1 ITJ 237
	(1971) 1 SOA 598		(1971) 1 SCJ 157	1376	(1970) 3 SCR 913		(1971) 1 SCJ 283
999	(1971) 1 SCR 207	1228	(1970) 3 SCR 440	379	79 (TR) 9		(1971) 1 SCR 517
	(1971) 1 SCJ 1		(1971) 1 SCJ 124	1381	(1971) 1 SOA 637	1563	(1971) 1 IT 446
	(1971) 1 SOA 286		73 Bom LR 489	1401	(1970) 3 SCR 343		(1971) 1 SCJ 586
	(1971) 1 ITJ 249	1228	(1971) 3 SCR 288		40 FJR 292		(1971) 1 SCR 539
	(1971) 1 SCR 195		(1971) 1 SCJ 603	1407	(1970) 2 SCJ 755	1566	(1971) 2 SC Cri R 54
1011	(1971) 1 ITJ 230	1231	(1971) 1 SOA 99		(1971) 1 S R 177		(1971) 1 SCJ 751
	(1971) 1 SCJ 277		(1970) 3 SCR 662	1417	(1971) 1 SCJ 730		1971 MLJ (Cri) 351
1012	(1971) 1 SCR 266	1265	(1971) 1 SCR 87		(1971) 2 SOA 150		(1971) 1 SCR 599
	(1971) 8 R 298	1266	(1971) 1 S A 320		(1971) 1 CR 243	1573	(1971) 1 S R 492
1033	1971 MPWR 722		(1971) 1 SCR 31		(1971) 2 SCJ 19		(1971) 1 S R 458
	73 Bom LR 514		1971 MLW (Ori) 245	1421	(1970) 2 S R 935		(1971) 1 SOA 613
	(1970) 3 SCR 525	1269	1971 BLJR 110		(1971) 2 SCJ 19	1578	(1971) 1 SOA 114
1039	(1970) 3 SCR 266		(1970) 3 S R 963		(1971) 2 An WR (SC) 19		1571 Rev LR 44
	(1971) 1 SCJ 41		(1971) 1 SOA 270		39 FJR 437	1578	(1971) 2 ITJ 1
1059	(1970) 3 SCR 319	1275	(1971) 1 SOA 587		(1970) 3 SCR 208		(1971) 2 SCJ 155
1061	(1970) 3 SCR 354		(1970) 3 SCR 498	430	(1970) 3 SCR 47		(1971) 1 SCR 426
1072	(1970) 3 SCR 193	1281	1971 BJR 289	436	1971 BLJR 798	1582	(1971) 2 SOA 246
1076	(1970) 3 SCR 314		(1970) 3 SCR 832	1475	12 Guj LR 55		1971 MPLJ 244
1079	(1970) 3 SCR 423	1286	(1971) 1 SCJ 52		(1971) SOA 612		(1971) 1 SCJ 665
	(1971) 1 SOA 1		(1971) 1 SCR 101		(1971) 1 SCR 66		(1971) 1 ITJ 502
1093	(1970) 2 SCR 698	1292	(1971) 1 SCJ 446		(1971) 1 SOA 20		(1971) 1 SCR 422
	(1971) 2 SCJ 48		(1971) 1 SOA 450	477	1971 MPWR 424	1584	1971 MPWR 771
	1971 MLJ (Ori) 406		12 Guj LR 382		(1971) 1 SCR 8		(1971) 1 SCJ 748
1095	(1971) 1 SOA 291		(1971) 1 SCR 288	1494	(1970) 3 SCR 448		(1971) 2 SOA 54
	(1971) 1 SCJ 439	1298	(1971) 1 SCJ 732		(1971) SOA 35		(1971) 1 SCR 335
	(1970) 3 SCR 271		(1971) 1 SCR 275		1971 MPWR 71	1588	73 Bom LR 900
1102	(1970) 3 SCR 595	1302	(1971) 1 SCJ 256		1971 Mah LJ 188		(1971) 1 SCJ 668
	(1970) 2 SOA 672		(1971) 1 SOA 477		1971 MPLJ 217		(1971) 1 ITJ 499
1108	(1970) 3 SCR 467		(1971) SCR 201	1514	(1971) 1 SCJ 233		(1971) 1 SCR 418
1114	(1970) 2 SCR 917	1305	(1971) 1 SCJ 185		1971 MLJ (Cri) 141	1597	41 Com Cas 884
1118	1971 J & K LR 83		1971 MLJ (Cri) 118		(1971) 1 S R 138	1616	(1970) 2 S R 928
1126	(1970) 2 SOA 680		(1971) 1 SCR 56	1518	(1971) 1 ITJ 47	1624	(1971) 1 ITJ 45
	(1970) 3 SCR 881	1314	(1971) 1 SCR 508		(1971) 1 SCJ 92		(1971) 1 SCJ 90
1133	(1970) 3 SCR 363		(1971) 2 S R 628		(1971) 1 SCR 809		(1971) 1 MLJ (SC) 24
1147	1971 MPLJ 1	1319	(1971) 1 SCR 512	1520	(1971) 1 SCJ 63		(1971) 1 An WR (SC) 44
	(1971) 1 SOA 16		(1971) 2 SC Cri R 27		(1971) 1 ITJ 5		(1971) 1 SCR 465
	1971 Mah LJ 1		(1971) 1 SCJ 453		(1971) 1 MLJ (SC) 14	1626	(1971) 1 SOA 625
	(1971) 1 SCJ 443		(1971) 1 SOA 484		(1971) 1 SCJ 14		(1971) 2 SCJ 145
	73 Bom LR 305	1371	(1971) 2 SC Ori R 76		(1971) 1 SOA 405		(1971) 2 An WR (SC) 9
	(1970) 3 SCR 689		(1971) 1 SCJ 223	1525	(1971) 2 SCJ 55	1641	(1971) 2 MLJ (SC) 9
1150	(1970) 3 SCR 863		1971 MLJ (Cri) 131		(1971) 2		(1971) 1 SOA 488
	1971 MPWR 214		(1971) 1 SOA 555		An WR (SC) 1		(1971) 1 SCJ 543
	(1970) 2 An LT 335		(1971) 1 SCR 564		(1971) 2 MLJ (SC) 1		(1971) 1 SCR 442
	(1971) 1 S A 87	1380	(1971) 2		(1971) 1 SCR 361	1649	(1971) 1 SCJ 34
	1971 MPLJ 825		SC (Cri) R 9	1530	(1971) 1 SCJ 461	1651	(1971) 1 ITJ 451
1153	(1971) 1 SCJ 180		1971 SOA 115		(1971) 1 MLJ (SC) 57		(1971) 1 SCJ 589
	1971 MLJ (Cri) 108		(1971) 1 SCJ 546		(1971) 1 An WR (SC) 57		(1971) 1 SCR 581
	(1971) 1 SOA 275		1971 MLJ (Cri) 274		(1971) 1 SCR 348	1661	(1971) 2 SC Ori R 1
	(1971) 1 SCR 1		(1971) 1 SCR 617		(1971) 1 ITJ 521		(1971) 1 SCJ 445
	1971 Mad L W (Cri) 211 (2)		73 Bom LR 806	1531	(1971) 1 ITJ 488		1971 MLJ (Cri) 348
	(1971) 2 An LT 260	1354	1970 Ind OR 548		(1971) 1 SCJ 612		1971 BLJR 771
1157	73 Bom LR 75	1343	(1971) 1 ITJ 472		(1971) 1 SCR 357		(1971) 1 SCR 317
1171	1971 BLJR 444		(1971) 1 SCJ 599	1535	(1971) 1 ITJ 469	1667	(1971) 1 SCJ 493
1188	(1970) 2 SOA 903		(1971) 1 S A 577		(1971) 1 SCJ 597		(1971) 1 Mad LJ (SC) 59
	73 Bom LR 81	1354	(1971) 1 SCR 237		(1971) 1 SCR 371		(1971) 1 An WR (SC) 59
1197	(1971) 1 S A 84		(1971) 1 SCJ 78	1539	1971 BLJR 4		(1971) 1 ITJ 526
	(1979) 3 SOA 704		MLJ (SC) 17		(1970) 3 SCR 903		(1971) 1 SCR 434
1199	(1970) 3 SCR 198		(1971) 1 An WR (SC) 17	1542	(1971) 1 SOA 493		
1201	(1979) 3 S R 415		(1971) 1 SOA 310		(1971) 1 SCJ 525		
	(1971) 1 SOA 73	1350	(1971) 1 SCR 153				
	(1971) 1 SCJ 119		(1971) 1 ITJ 439				
	73 Bom LR 801		(1971) 1 SCJ 560				
	1971 MPLJ 695		1971 An LJ 697				
	1971 Mah LJ 619		(1971) 1 SCR 530				
1205	(1970) 3 SCR 370						
	(1971) 1 SOA 378						

AIR 1970 SC		AIR 1970 SC		AIR 1970 SC		AIR 1970 SC	
AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1672	27 STC 114	1732	(1971) 1 ITJ 466	1841	con 1971 MPLJ 417	2007	con (1971) 1 SCJ 508
1673	(1971) 1 An		(1971) 2 SCJ 495	1848	(1970) 3 SCR 202		(1971) 1 SCA 526
	WR (SC) 1		(1971) 1 SCR 2	1851	(1970) 2 SCR 883		(1971) 1 SCR 667
	(1971) 1 MLJ (SC) 1	1784	(1971) 1 SCJ 598	893	1971 Mah LJ 233	2015	(1971) 3 SC
1588	(1971) 1 SCA 462		(1971) 1 ITJ 536		73 Bom LR 72		Cri R 210
	(1971) 1 SOJ 545		(1971) 1 SCA 52	1898	(1971) 1 SCA 639		(1971) 1 SCJ 631
	(1971) 1 MLJ	1742	(1971) 2 SCJ 34	1906	73 Bom LR 131		1971 Mad LJ
	(SC) 94	1759	(1971) 1 ITJ 481		59 FJR 44		(Cri) 315
	(1971) 1 An		(1971) 1 S J 406		1971 MPLJ 476		1971 Cri App
	WR (SC) 94		(1971) 1 SCR 323		1971 Mah LJ 395		R 149 (SC)
	1971 Ren CJ 725	1756	1970 Jab LJ 556	1923	59 FJR 156		1971 MLW (Cri) 145
	(1971) 1 SCR 548		1971 MPLJ 578	1926	(1971) 1 SCJ 269		(1971) 1 SCR 697
1707	(1971) 1 SCJ 456	1765	(1971) 1 SCJ 59		73 Bom LR 85	2025	1971 MPLJ 267
	(1971) 1 An		(1971) 2 SC		1971 Mah LJ 503		1971 Mah LJ 201
	WR (SC) 151		Cri R 302	1934	(1971) 1 SCJ 433		73 Bom LR 3
	(1971) 1 MLJ		1971 MLJ (Cr.) 359		1971 MP LJ 324	2037	(1970) 3 SCR 1
	(SC) 51		(1971) 1 SCR 714		1971 Mah LJ 274	2055	(1971) 1 ITR 443
	(1971) 1 ITJ 515	1767	(1971) 2 SC		73 Bom LR 28		(1971) 1 SCA 482
	81 ITR 310		Cri F 240		1971 MLJ (Cri) 212		(1971) 1 SCJ 583
	(1971) 1 SCR 340	1771	(1971) 1 SCA 409	1950	(1970) 2 SCR 830	2062	(1971) 1 SCR 635
1712	(1971) 1 SCJ 5		(1971) 1 SCJ 586	1960	(1970) 3 SCR 8		73 Bom LR 119
	(1971) 1 MLJ		(1971) 1 SCR 719		1971 BLJR 370		1971 Mah LJ 354
	(SC) 11	1782	(1971) 1 SCJ 544	1972	1971 MPLJ 255	2067	1971 MPLJ 431
	(1971) 1 An		(1971) 1 ITJ 531		1971 Mah LJ 199		(1971) 2 SCJ 34
	WR (SC) 11		(1971) 1 SCR 446		(1971) 1 SCJ 39		(1971) 1 ITJ 675
	(1971) 1 ITJ 378	1785	(1971) 1 ITJ 1		73 Bom LR 51		(1971) 1 SCR 773
	(1971) 1 SCR 377		(1971) 1 SCJ 59		(1970) 3 SCR 285	2072	Assam LR (1970)
1717	1971 BLJR 86		(1971) 1 SCR 468	1980	49 ITR 8		SC 81
	1971 MPWR 1	1795	(1970) 3 SCR 83	1982	(1971) 2 SCJ 29	2079	(1971) 1 SCJ 641
1722	(1971) 1 ITJ 432		(1971) 2 SCJ 167		(1971) 1 ITJ 588		(1971) 2 SCA 194
	(1971) 1 SCA 427		(1971) 2 MLJ		(1971) 1 SCR 761		(1971) 1 SCR 734
	(1971) 1 SCJ 576		(SC) 27	1985	(1970) 3 SCR 127	2088	(1971) 1 SCJ 238
	(1971) 1 An WR		(SC) 27	1988	(1971) 2 SC	2097	(1970) 3 SCR 694
	(SC) 105	1821	(1971) 1 SCA 352		Cri R 254		(1978) 2 SCJ 768
	(1971) 1 MLJ	1832	(1971) 2 SCJ 60	2000	(1971) 1 SCJ 495		(1971) 1 SCA 143
	(SC) 105		(1971) 1 SCR 586		(1971) 1 SCA 638	2178	(1970) 3 SCR 481
	(1971) 1 SCR 522	1841	73 Bom LR 124		(1971) 1 SCR 671		(1971) 1 SCA 45
1780	(1971) 1 SCA 93		1971 Mah LJ 322	2007	1971 MPLJ 85	2182	(1971) 1 SC 244
	(1970) 3 SCR 894						(1971) 1 SCA 652

A. I. R. 1971 Supreme Court = Other Journals

AIR		AIR		AIR		AIR	
Other Journals		Other Journals		Other Journals		Other Journals	
1	(1970) 2 SCA 316	40	con 1971 Lab I C 8	66	con 1971 M L W (Cri)	82	1969 Ker L T 703
	(1970) 3 SCR 53		(1971) 1 SCJ 655		153		(1969) 2 Lab LJ
	(1971) 2 SCJ 184		(1971) 1 SCR 791		1971 Cri LJ 20		693
	(1971) 2 MLJ (SC)	44	(1970) 2 SCA 10		1970 SCD 1077		1970 SC Cri R 319
	44		(1970) 1 SCR 821		1970 Pat LJ R 715		21 Fac LJ R 5
	(1971) 2 An WR		(1970) 2 SCJ 192		(1971) 2 SC Cri R		1970 Mad LJ W
	(SC) 44		1970 Mad LJ (Cri)		89		(Cri) 171
22	21 Fac LJ R 201		490		1971 MLJ (Cri) 248		(1970) 2 SCR 481
	1970 Cur LJ 846		1971 Cri LJ 6		(1971) 1 SCJ 573		(1970-71) 6 CO-op
	(1970) 2 Lab LJ		73 Bom LR 112		(1971) 1 An LT		LJ 137
	416		1971 Mah LJ 359		288		1971 Lab I C 18
	1970 UJ (SC) 795	57	(1970) 2 SCJ 454		(1971) 1 SCR 839		40 FJR 310
	1971 Lab I C 1		1971 MPWR 309	69	1970 Cur LJ 820	87	(1970) 2 SCR 588
	33 FJR 443		1971 MPLJ 467		1970 UJ (SC) 776		1971 All LJ 1
28	1971 Cri LJ 1		(1970) 3 SCR 745		1971 Cri LJ 23	89	(1970) 2 SCR 129
	(1971) 2 SC Cri R		1971 Jab LJ 683		1970 Pat LJ R 713		(1970) 2 SCJ 258
	67	61	1970 UJ (SC) 786		(1971) 2 SC Cri R		1970 Fun LJ 632
	(1971) 2 SCJ 12	62	1970 UJ (SC) 709		141		1971 Rev LJ R 775
	1971 MLJ (Cri)	64	1970 UJ (SC) 723	71	(1970) 2 SCR 714	93	(1970) 2 SCJ 246
	387		1970 SCD 26		(1971) 1 SCJ 192		(1970) 2 S J R 405
38	78 ITR 26		1971 Cri LJ 19		(1971) 1 MLJ		1970 Pun LJ 698
	(1971) 1 ITJ 548		(1971) 2 SC Cri R		(SC) 28	95	78 ITR 90
	(1971) 1 SCJ 705		238		(SC) 28		(1971) 1 SCJ 781
	(1971) 1 SCR 683	65	26 STC 839	77	(1970) 2 SCJ 267		(1971) 1 ITJ 572
37	1970 UJ (SC) 747		(1971) 1 SCJ 516		1970 MPWR 753		(1971) 1 SCR 769
	79 ITR 1		(1971) 1 SCA 601		1970 Jab LJ 791	97	1969 Jab LJ 1035
40	1970 Ser LJ R 748		(1971) 1 SCE 781		1971 MPLJ 85		1970 MPLJ 455
	(1970) 2 Lab LJ 284	66	1970 Cur LJ 817		(1970) 3 SCR 18		(1970) 2 SCR 47
	1970 Cur LJ 800						

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
97con	(1970) 2 S C J 255	168	(1971) 2 S C J 418	206con	1971 Cri L J 262	321con	(1971) 2 S C R 40
	1970 M P W R 616	170	(1971) 2 S C J 415		(1971) 1 S C J 104		(1971) 2 S C A 548
	1971 Serv L R 708		(1971) 2 S C A 491		(1971) 1 S C A 263	330	(1971) 2 S C J 280
100	21 Fac L R 89	178	1971 Lab I C 27		(1970) 3 S C R 788		(1971) 2 S C A 213
	(1970) 2 Lab L J		1971 Serv L R 14	211	1971 Mah L J 93		(1971) 1 S C R 798
	129		Assam L R 1971		(1970) 3 S C R 920	333	1970 U J (SC) 787
	(1970) 2 S C J 458		(SC) 7		(1971) 2 S C J 600	335	1970 U J (SC) 725
	38 F J R 207		(1971) 1 Lab L J	217	1971 U J (SC) 63		1971 Cri L J 238
	1971 Lab I C 11		554		1971 Cri L J 287		(1971) 2 S C R 92
	1971 Mah L J 220		(1971) 2 S C J 275		1970 S C D 1120		1971 All WR (HC)
	1971 M P L J 315		(1971) 1 S C A 544	218	1971 U J (SC) 65		156
	73 Bom L R 311	175	1970 Serv L R 942		41 Com Cas 159		1971 All Cr R 151
	(1970) 3 S C R 752		37 Cut L T 91	221	(1969) 2 S C R 779	337	1970 U J (SC) 702
102	1970 Ren C R 150		1971 S C D 13		(1970) 2 S C J 85		(1971) S C J 502
	(1970) 2 S C J 310		1971 U J (SC) 87		1970 Mad L J (Cri)		(1971) 1 S C A 519
	(1970) 2 S C R 554	178	1970 S C D 1018		425		(1971) 1 S C R 637
	73 Bom L R 109		1971 Cri L J 244		1971 Cri L J 269	342	1970 Pat L J R 565
	1971 Ren C J 331		(1971) 2 S C J 238		73 Bom L R 57		(1971) 1 S C J 667
105	1970 U J (SC) 819		1971 M L J (Cri)	231	1970 U J (SC) 923		(1971) 2 S C A 263
	(1971) 2 S C R 11		505		1971 S C D 91		(1971) 1 S C R 821
107	(1971) 2 S C R 11		(1971) 2 S C A 458	234	1970 S C D 1136	344	20 Fac L R 33
116	1970 U J (SC) 313		(1971) 2 S C R 147		(1971) 2 S C J 270		38 F J R 57
	(1970) 2 S C J 571	186	1971 Cri L J 253		1971 All L J 1047		(1970) 2 S C R 348
	1970 Mer L R 282		1971 Cri Ap R 45	240	1970 U J (SC) 793		(1970) 2 S C A 537
	1971 MLW (Cri) 19		(SC)	241			(1971) 2 S C J 40
	(1970) 3 S C R 445		(1971) 2 S C J 391	246	1970 S C D 364	349	1970 S C D 1125
	41 Com Cas 887		1971 M L J (Cri)		(1970) 2 S C J 473		(1971) 2 S C J 522
117	1970 Serv L R 312		608		(1970) 3 S C R 846	353	1970 Ren C R 967
	11 Guj L R 1018		(1971) 2 An W R	251	41 Com Cas 127		1970 S C D 1111
	(1971) 1 S C J 217		(SC) 92		(1971) 2 S C J 560		1970 Ren C J 989
	(1970) 3 S C R 515		(1971) 2 M L J		(1971) 2 S C A 507		(1971) 2 S C J 142
122	1970 U J (SC) 701		(SC) 92	257	...		(1971) 2 MLJ (SC) 7
	1971 Cri L J 28		1971 Cur L J 1040	260	1970 U J (SC) 831		(1971) 2 An W R
123	78 I T R 55	191	1971 Serv L R 48		1971 Cri L J 278		(SC) 7
	1970 U J (SC) 750		(1970) 2 Lab L J	263	1971 Cri L J 281		(1971) 2 S C A 158
125	1971 Cri L J 25		683		(1971) 1 S C J 129		(1971) 2 ALJ 257
	(1971) 2 S C R 135		(1971) 2 S C J 367		1971 MLJ (Cri) 100	356	1971 Cri L J 290
	1971 M L J (Cri)	194	1970 All Cri R 462		(1970) 3 S C R 872		1971 U J (SC) 106
	298		1970 U J (SC) 734	266	1971 U J (SC) 56	359	1971 Serv L R 68
	(1971) 1 S C J 741		1970 S C D 950		1971 Cri L J 284		1971 Lab I C 219
	(1971) 1 S C R 826		(1971) 2 S C J 44	267	...		22 Fac L R 70
128	1970 S C D 972		1971 Cri L J 258	281	(1971) 2 S C J 377	361	1971 U J (SC) 109
	73 Pun L R 12		(1971) 1 S C J 616		(1971) 2 S C R 73	363	1971 Cri L J 305
129	1970 U J (SC) 809		1971 M L J (Cri)	293	(1971) 1 S C J 682		1971 Cri Ap R 10
131	(1971) 2 S C J 1		265		(1971) 2 S C R 35		(SC)
	(1971) 1 S C R 851		1971 M L W (Cri)	296	(1971) 2 S C R 35		(1971) 2 S C J 285
139	1970 U J (SC) 816		143		1971 Cri L J 285		1971 All W R (HC)
141	...		(1971) 1 S C R 817	299	(1970) 2 S C J 787		632
143	(1970) 2 Lab L J	196	1970 S C D 384		1971 S C D 79		1971 All Cri R 508
	424		1970 SC Cri R 415		73 Pun L R 190		1971 MLJ (Cri) 692
	1971 Lab I C 14		(1970) 2 S C J 681		1971 All WR (HC)	369	1970 Pun L J 760
	21 Fac L R 342		885		174		(1971) 2 S C J 388
	41 Com Cas 14		1970 M L J (Cri)		(1971) 1 S C A 335	372	1971 U J (SC) 123
	(1971) 2 S C J 44		849	300	(1970) 3 S C R 778	374	41 Com Cas 230
	(1971) 2 S C R 28		1970 M L W (Cri)		(1970) 2 S C R 434	376	1971 U J (SC) 123
147	79 I T R 505		302		11 Guj L R 985	378	1971 U J (SC) 48
	(1971) 1 MLJ (SC)		1971 Cri L J 260		(1970) 2 S C A 689		1971 Mar L R 1
	80		1971 All Cri R 38	306	1970 All L J 70		(1971) 2 S C J 267
	(1971) 1 An W R		(1970) 3 S C R 720		1970 U J (SC) 196	391	1970 Mah L J 887
	(SC) 80		1970 Pun L J 282		(1970) 2 S C A 699		1971 Cri L J 311
	(1971) 2 I T J 234	198	1970 Cur L J 500		(1971) 1 S C J 127		1971 M L J (Cri)
	(1971) 2 S C J 329		(1970) 2 S C J 466		(1970) 3 S C R 278		295
152	(1971) 2 S C J 363		(1971) 1 S C A 118	310	1970 Ren C R 318		(1971) 1 S C J 738
156	1971 Lab I C 23		(1970) 3 S C R 798		1970 S C D 807		1971 M L W (Cri)
	(1971) 2 Lab L J		206		(1971) 1 S C J 171		140
	698		1970 Mer L R 121		1971 Mah L J 242		(1971) 2 S C R 306
	1971 U J (SC) 78		1970 SC Cri R 484		1971 M P L J 305		
	1971 Serv L R 600		40 Com Cas 1058		(1970) 3 S C R 724	383	78 I T R 18
161	1971 S C D 156		(1970) 2 Com L J		1971 M P W R 465		(1971) 1 S C A 485
	(1971) 2 M L J		195	315	(1971) 2 S C J 17		(1971) 1 I T J 455
	(SC) 75		1970 M L W (Cri)		(1971) 2 S C R 1		(1971) 1 S C J 592
	(1971) 2 An W R		252	321	41 Com Cas 1		(1971) 1 S C R 648
	(SC) 75				(1971) 2 S C J 205		1971 MPWR 819
	(1971) 2 S C J 324						

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
385	(1971) 2 S C J 71 (1971) 2 S C A 74 (1971) 1 SCR 863	517	1970 Jab LJ 942 1971 MPLJ 158 (1971) 1 SCJ 178 81 ITR 105 (1971) 1 SCR 344	708	con 1971 Cri Ap R 93 (SC)	759	1971 Cri LJ 651 1971 Cri Ap R 122 (SC)
422	41 Com Cas 51 (1971) 2 SCJ 609			712	(1971) 1 Civ Ap J 88 (SC)		1971 UJ (SC) 528 (1971) 2 SC Cri R 452
429	(1971) 2 SC Cr R 64	520	1970 SC Cri R 457 1971 Cri LJ 533 1971 MLW (Cri) 46 (1970) 3 SCR 331 (1971) 2 SCJ 591 (1971) 2 An WR (SC) 97 (1971) 2 MLJ (SC) 97	717	79 ITR 582 1971 Tax LR 77 1971 UPTC 239	761	(1971) 1 SCA 156 (1971) 1 SCJ 141 73 Pun LR 314 1971 UJ (SC) 379 (1971) 1 SCR 38 (1971) 1 Civ Ap J 363 (SC)
431	1971 Cri LJ 413 (1970) 2 S C J 677 (1970) 2 Mad LJ (SC) 126 (1970) 2 Andh WR (SC) 126 (1970) 3 S C R 495			720	1971 UJSC 267 1971 UPTC 320 82 ITR 591		
432	1971 S C D 34 41 Com Cas 136	530	(1971) 1 SCJ 295 1971 Mer LR 78 (1971) 2 SCA 357	722	1971 Cri LJ 646 1971 UJ (SC) 270 1971 Cri Ap R 165 (SC)	766	1971 Serv LR 174 1971 Lab IC 461 (1971) 1 Lab LJ 271 (1971) 2 SCJ 291 (1971) 1 Civ Ap J 69 (SC)
435	(1971) 2 SCJ 441	658	1971 UJ (SC) 175 (1971) 1 Civ Ap J 213 (SC)	725	1971 UJ (SC) 212 1971 Tax LR 193 80 ITR 177 1971 UPTC 244	771	1971 UJ (SC) 93
437	1971 UJ (SC) 61	659	1971 Ren C J 207 1971 Ren C E 153 1971 UJ (SC) 170 1971 SCD 276 1971 Mah LJ 591 (1971) 1 Civ Ap J 218 (SC)	726	1971 Tax LR 194 1971 UPTC 154 81 ITR 476 79 ITR 603	776	1971 SCD 167 1971 UJ (SC) 132
439	1971 SCD 28 1971 Cri LJ 415 (1971) 2 SC Cri R 149 (1971) 2 SCJ 475 1971 MLJ (Cri) 826	664	1971 SCD 255 (1971) 1 Civ Ap J 277 (SC)	780	1971 Tax LR 198 37 Out LT 233 1971 SCD 196 (1971) 1 Civ Ap J 386 (SC)	778	1971 Cri LJ 654 1971 Cri Ap R 80 (SC)
442	1971 SCD 40 (1971) 2 SCJ 555	671	(1971) 1 An WR (SC) 110 (1971) 2 SCR 183 (1971) 1 SCJ 685 (1971) 2 SCR 92	740	1971 SCD 183 1971 UJ (SC) 167 (1971) 1 Civ Ap J 50 (SC)	781	1971 MPLJ 677 1971 Mah LJ 625 1971 Jab LJ 688 1971 All LJ 1261 1971 BLJR 1034 1971 MPWR 799 1971 Cri LJ 657 1971 Cri Ap R 24 (SC)
447	1971 Cri LJ 418	672	1971 UJ (SC) 242 1971 All WE (HC) 415 (1971) 1 Civ Ap J 15 (SC)	742	1971 UJ (SC) 151 1971 SCD 266 (1971) 1 Civ Ap J 42 (SC)	786	(1971) 2 SCJ 315 1971 MLJ (Cri) 534 1971 SCD 144 1971 Cri LJ 662 1971 Cri Ap R 105 (SC)
449	(1971) 1 SCJ 669 (1971) 1 MLJ (SC) 110 (1971) 1 An WR (SC) 110	674	1971 UJ (SC) 234 Assam L R (1971) 20 12 (1971) 1 Civ Ap J 26 (SC)	744	(1971) 2 SCJ 584 1971 UJ (SC) 136 1971 MPLJ 596 1971 Mah LJ 527 (1971) 1 Civ Ap J 18 (SC)	792	27 STC 1 1971 Ker LT 75 1971 Tax LR 4 (1971) 2 SCJ 242 (1971) 2 MLJ (SC) 89 (1971) 2 An WR (SC) 89
454	(1971) 2 SCR 183 (1971) 1 SCJ 685 (1971) 2 SCR 92	676	1971 UJ (SC) 154 (1971) 1 Civ Ap J 80 (SC)	745	1971 UJ (SC) 140 1971 SCD 274 (1971) 1 Civ Ap J 24 (SC)	794	77 ITR 253 (1970) 3 SGR 163 (1970) 2 ITJ 349 (1970) 2 SCJ 540 1970 Pat LJ 652 (1971) 1 SCA 52 1971 Tax LR 201
458	1970 SCD 1116 1971 Cri LJ 420 (1971) 2 SC Cr R 410	681	(1971) 2 SCJ 431 (1971) 2 Civ Ap J 440 (SC)	746	1971 UJ (SC) 143 1971 SCD 285 (1971) 1 Civ Ap J 22 (SC)	803	1971 Cri LJ 668 1971 UJ (SC) 305
460	1970 SCD 1057 1971 UJ (SC) 6 1971 Cri LJ 423 (1970) 2 An LT 300 (1971) 2 SC Cri R 289	689	1971 UJ (SC) 146 (2) (1971) 1 Civ Ap J 33 (SC)	748	1971 UJ (SC) 137 (1971) 1 Civ Ap J 17 (SC)	804	1971 Cri LJ 670
465	...	691	1971 UJ (SC) 233 Assam LR (1971) (SC) 16 (1971) 1 Civ Ap J 23 (SC)	749	1971 Serv LR 145 1971 UJ (SC) 139 1971 Lab IC 480 (1971) 1 Civ Ap J 13 (SC)	811	1971 SCD 247 1971 Cri LJ 676 1971 UJ (SC) 339 (1971) 1 An LT 247 1971 Cri Ap R 213 (SC)
472	1971 UJ (SC) 91 1971 Cri LJ 509 (1971) 2 SC Cri R 187 1971 Cri Ap R 4 (SC)	696	1971 SCD 125 (1971) 1 Civ Ap J 1 (SC)	751	(1971) 2 SCJ 21 1971 BLJR 1098	813	1971 Cri LJ 679 1971 UJ (SC) 341
474	1971 UJ (SC) 87 (1971) 2 SC Cri R 278 (1971) 2 SCJ 497	704	(1971) 2 SCJ 430 1971 SCD 125 (1971) 1 Civ Ap J 1 (SC)	752	1971 Serv LR 103 1971 Lab IC 458 (1971) 1 Lab LJ 293	815	1971 Cri LJ 680 1971 Cri Ap R 192 (SC)
477	1971 Ker LR 1 27 STC 127 1971 Pat LJ 180 (1971) 2 SCJ 423	703	1971 UJ (SC) 237 1971 Cri LJ 642 (1971) 2 SC Cri R 228	757	1971 UJ (SC) 117 1971 Cri LJ 649 1971 Cri Ap R 1 (SC) (1971) 2 SC Cri R 273 1971 All Cri R 319 1971 All WR (HC) 371	823	1971 Lab IC 487 1971 Serv LR 264 (1971) 1 Lab LJ 299 (1971) 2 Civ Ap J 312 (SC)
481	(1971) 2 SCJ 242					829	
500	1971 Cri LJ 511 1971 Cri Ap R 32 (SC) (1971) 2 SCJ 277 1971 MLJ (Cri) 684 (1971) 2 SCA 517						
508	1971 UJ (SC) 83 1971 Cri LJ 519 (1971) 2 SC Cri R 182 R 118 (SC)						
512	(1971) 2 MLJ (SC) 92 (1971) 2 An WE (SC) 92						

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
832(2)	1971 Ker LT 262 (1971) 2 SC Cri R 257 22 Fac LR 178 1971 Cri LJ 639 (1971) 1 Lab LJ 307 1971 Lab I C 719 39 F.R 65 1971 UJ (SC) 363 834 Cri LJ 691 1971 UJ (SC) 361 836 1970 Ser LR 371 20 Fac LR 333 (1970) 2 Lab LJ 20 (1971) 1 SCJ 286 1971 Lab I C 642 (1970) 3 SCR 757 840 1970 SC Cri R 290 1970 Mad LW (Cri) 92 (1970) 2 SCJ 54 1970 Mad LJ (Cri) 434 (1970) 2 SCR 227 73 Bom LR 66 1971 Maha LJ 261 1971 MPLJ 286 1971 Cri LJ 693 (1969) 2 SCR 755 (1970) 2 SCJ 178 854 77 ITR 539 (1971) 1 ITJ 9 (1971) 1 SCJ 65 1971 Tax LR 389 (1971) 1 SCR 352 (1971) 2 SCJ 465 856 1970 SCD 1 862 (1970) 2 SCA 559 (1970) 3 SCR 40 (1971) 2 SCJ 372 866 1971 Cri LJ 760 (1971) 2 SC Cri R 281 1971 Maha LJ 629 (1971) 2 SCJ 311 1971 MLJ (Cri) 531 870 25 STC 528 (1970) 2 SCA 457 (1971) 1 SCJ 14 (1970) 3 SCR 147 1971 Tax LR 391 884 1970 SCD 1054 1971 Mer LR 51 885 1970 SC Cri R 441 (1971) 1 SCJ 43 1971 SCD 81 1971 Mad LJ (Cri) 33 1971 Cri LJ 793 73 Bom LR 516 (1971) 1 SCJ 119 1971 Mah LJ 792 (1971) 2 SCJ 527 (1971) 2 SCA 496 898 1970 Mer LR 267 (1970) 2 SCJ 667 (1971) 1 SCA 264 (1971) 1 SCR 70 909 (1970) 2 SCJ 567 27 STC 118 1971 Tax LR 495 (1971) 1 SCR 46 910 (1971) 1 SCA 303 (1970) 3 SCR 837 (1971) 2 SCJ 586	916 77 ITR 605 1970 SCD 863 (1970) 2 ITJ 335 (1970) 2 SCJ 526 11 Guj LR 974 1971 Tax LR 407 (1970) 3 SCR 819 920 (1970) 2 Com LJ 179 (1970) 2 SCJ 515 40 Com Cas 1116 1970 Mer LR 279 1970 MPWR 1023 (1971) 1 SCA 60 1971 Tax LR 412 1971 MPLJ 463 1971 Mah LJ 520 (1970) 3 SCR 740 922 (1970) 2 Lab LJ 590 22 Fac LR 11 1971 Lab I C 699 942 1970 Ben LR 307 (1970) 2 SCJ 601 (1971) 1 SCA 593 (1970) 3 SCR 734 946 (1970) Pat LJ 255 26 STC 254 1970-2 SCJ 577 1971 BLR 78 (1971) 1 SCA 64 (1970) 3 SCR 455 1971 Tax LR 414 953 1971 UJ (SC) 289 1971 Cri LJ 798 1971 Cri Ap R 282 (SC) 961 1971 UJ (SC) 279 963 ... 966 1971 UJ (SC) 409 974 (1971) 1 Civ Ap J 350 (SC) 983 1971 Cri LJ 806 1971 UJ (SC) 422 1971 Cri Ap R 369 (SC) 987 1971 Ren CJ 439 1971 Ren CR 318 1971 Rev LR 188 1971 Cur LJ 477 73 Pun LR 425 1971 SCD 452 1971 UJ (SC) 434 (1971) 1 Civ Ap J 225 (SC) 989 1971 UJ (SC) 441 1971 SCD 585 (1971) 1 Civ Ap J 369 (SC) 991 1971 Cri LJ 810 1971 UJ (SC) 444 (1971) 2 SC Cri R 337 996 1971 SCD 542 (1971) 1 Civ Ap J 154 (SC) 998 1971 Serv LR 345 1971 Lab IC 721 (1971) 1 Civ Ap J 166 (SC) 1002 (1971) 1 Civ Ap J 178 (SC) 1005 ... 1011 (1970) 2 Lab LJ 440 1970 Ser LR 863 1970 Pat LJ R 717	1011con 1971 Lab I C 724 (1971) 2 SCJ 63 (1971) 2 SCR 191 1016 79 ITR 549 1971 UJ (SC) 185 1971 Rev LR 140 1971 Tax LR 421 1971 U P T C 323 (1971) 2 I T J 263 (1971) 2 SCJ 335 (1971) 2 M L J (SC) 86 (1971) 2 An W R (SC) 86 1017 (1971) 1 Civ Ap J 63 (SC) 1021 1970 SCD 321 (1970) 2 SCJ 689 1971 M P L J 13 1971 Maha LJ 81 (1971) 1 SCA 613 (1970) 3 SCR 854 73 Bom LR 510 1025 1971 UJ (SC) 219 73 Pun LR 569 (1971) 1 Civ Ap J 315 (SC) 1028 1971 UJ (SC) 51 (1971) 2 SCJ 550 1033 (1971) 1 Civ Ap J 416 (SC) 1038 (1971) 1 Civ Ap J 373 (SC) 1041 1971 Cur LJ 652 1971 UJ (SC) 492 (1971) 1 Civ Ap J 206 (SC) 1045 1970 SCD 1070 (1971) 2 SCJ 320 1049 1971 UJ (SC) 874 1050 1971 Cur LJ 545 1971 Cri LJ 913 (1971) 2 SC Cri R 532 1058 1971 SCD 62 1971 Cri LJ 921 (1971) 2 SC Cri R 356 1064 1971 Cri LJ 927 (1971) 2 SC Cri R 380 1070 (1971) 1 Civ Ap J 448 (SC) 1078 1970 SCD 1101 (1971) 2 SCJ 214 1081 1970 Ren CJ 915 1970 Ren CJ 984 (1971) 2 SCJ 401 (1971) 2 SCR 171 1085 1971 Ser LR 532 1971 UJ (SC) 454 (1971) 1 Civ Ap J 163 (SC) 1087 1971 SCD 424 1971 Cri LJ 923 1971 Cri Ap R 305 (SC) 1093 1971 Ser LR 203 (1971) 1 Lab LJ 256 (1971) 1 Civ Ap J 400 (SC) (1971) 2 SCJ 501 1106 1971 Serv LR 317 1971 Lab I C 727	1106con (1971) 1 Civ Ap J 129 (SC) 1110 1971 Serv LR 330 1971 UJ (SC) 449 (1971) 1 Civ Ap J 377 (SC) 1112 1971 Cri LJ 824 1971 Cri Ap R 145 (SC) (1971) 2 SC Cri R 345 1971 UJ (SC) 436 1115 41 Com Cas 474 1971 Cri LJ 827 1971 UJ (SC) 439 (1971) 2 SC Cri R 342 1971 Cri Ap R 293 (SC) 1116 1971 Cri LJ 828 1971 UJ (SC) 352 (1971) 2 SC Cri R 543 1120 1971 Cri LJ 832 (1971) 2 SC Cri R 520 1130 1971 Cri LJ 842 1971 UJ (SC) 512 (1971) 2 SC Cri R 449 1132 1971 Cri LJ 844 (1971) 2 SC Cri R 482 1153 1971 Cur LJ 496 1971 SCD 439 1971 Cri LJ 929 1971 Cri Ap R 329 (SC) (1971) 2 SC Cri R 513 1158 1971 Pun LJ 278 1971 UJ (SC) 390 (1971) 2 Civ Ap J 71 (SC) 1162 1970 Ker LT 390 1970 SCD 546 1970 UJ (SC) 604 1971 Mad LW (Cri) 75 (1971) 1 SCA 294 (1971) 1 SCJ 483 (1971) 1 SCR 389 1170 ... 1182 37 Cut LT 539 1971 SCD 489 1971 Pat LJ R 452 (1971) 2 Civ Ap J 76 (SC) (1971) 2 SCA 222 1188 (1971) 1 Civ Ap J 34 (SC) 1190 1971 SCD 523 1971 UJ (SC) 550 (1971) 1 Civ Ap J 201 (SC) 1193 1971 UJ (SC) 384 (1971) 2 Civ Ap J 316 (SC) 1196 (1971) 2 Civ Ap J 1 (SC) 1971 UJ (SC) 704 1201 (1971) 1 Civ Ap J 63 (SC) 1208 1971 Ker LT 420 1971 Cri LJ 1057			

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1208	con 1971 Civ Ap R 2:9 (SC)	1288	con (1971) 2 S C Cri R 364	1389	1971 Cri L J 1110 1971 S C D 822 1971 U J (SC) 805 73 Pun LR (D) 271	1477	con 1971 Jab L J 935 1480 1971 Cri L J 1151 (1971) 2 S C Cri R 313
1210	1971 S C D 868 1971 S C D 482 41 Com Cas 591 1971 Mer L R 128 (1971) 1 Civ Ap J 598 (SC) 1971 U J (SC) 658 (1971) 2 S C A 241 (1971) 2 SCJ 661 1971 S C D 171 (1971) 2 S C Cri R 233 1971 Cri Ap R 85 (SC) 1971 Cri L J 1059	1292	41 Com Cas 21 1971 Tax L R 740 1295 1970 U J (SC) 905 (1971) 2 SCR 118 1307 1971 U J (SC) 1 Assam L R (1971) SC 10 1309 1970 U J (SC) 369 1971 S C D 58 1971 Cri L J 1090 1312 1970 S C D 1058 1971 Ren C R 16 1315 1970 U J (SC) 240 1970 S C D 1058 (1971) 2 SC Cri R 23 1971 Cri L J 1093 1318 1970 Serv L R 923 1970 S C D 1030 1971 Pat L J R 190 1971 Lab I C 833 1321 1971 S C D 73 (1971) 2 Civ Ap J 167 (SC) 1325 ... 1330 26 S T C 341 (1971) 1 S C J 181 (1971) 1 S C A 490 (1971) 1 S C R 386 1331 1971 U J (SC) 482 (1971) 1 Civ Ap J 150 (SC) 1334 1971 U J (SC) 485 (1971) 1 Civ Ap J 158 (SC) 1337 1971 S C D 455 (1971) 2 Civ Ap J 90 (SC) (1971) 2 SCJ 650 1348 ... 1358 1971 U J (SC) 190 Assam L R (1970) SC 84 (1971) 2 S C J 22 (1971) 1 SCR 931 1381 41 Com Cas 817 80 I T R 566 1971 Tax L R 747 1971 U P T C 54 1383 1971 U J (SC) 564 (1971) 1 Civ Ap J 344 (SC) 1387 1971 Cri L J 1096 (1971) 2 S C Cri R 22 1971 S C D 1054 (1971) 2 Andh L T 277 1371 1971 Cri L J 1100 (1971) 2 S C Cri R 27 1374 1970 S C D 1052 (1971) 1 S C J 174 (1971) 1 S C A 138 1971 All L J 549 (1971) 1 S C R 253 1382 1971 Cri L J 1102 1377 1971 Cri L J 108 1971 U J (SC) 518 1388 1971 Cri L J 1109 1971 All W R (HC) 288 1971 All Cri R 368 1971 U J (SC) 598 (1)	1396	1971 All W R (HC) 486 (1971) 2 Civ Ap J 190 (SC) 1398 1971 Ker L T 458 1971 S C D 793 (1971) 2 Civ Ap J 46 (SC) 1402 1971 Lab I C 892 1971 Cri Ap R 269 (SC) (1971) 2 Civ Ap J 63 (SC) 1403 1971 Lab I C 894 1971 Cri Ap R 279 (SC) (1971) 2 Civ Ap J 60 (SC) 1971 S C D 995 1405 1971 Cri L J 1117 1971 Cri Ap R 168 (SC) 1971 S C D 1060 1407 1971 All W R (HC) 489 (1971) 2 Civ Ap J 49 (SC) 1409 1971 Lab I C 881 (1971) 2 S C A 43 (1971) 1 Lab L J 557 1971 S C D 769 1971 Pat L J R 458 (1971) 2 Civ Ap J 201 (SC) 1420 1971 Cri L J 1119 1971 U J (SC) 659 1427 1971 Mer L R 516 1971 Tax L R 929 (1971) 2 Civ Ap J 164 (SC) 1429 (1971) 2 Civ Ap J 21 (SC) 1971 U J (SC) 651 1432 1971 Cri L J 1125 1971 U J (SC) 690 1439 (1971) 2 Civ Ap J 32 (SC) 1444 1971 U J (SC) 857 1971 Cri L J 1132 1971 S C D 699 1971 Cri Ap R 314 (SC) 1447 (1971) 1 Lab L J 427 1971 Lab I C 945 (1971) 1 Civ Ap J 197 (SC) 1450 1971 Cri L J 1135 1454 78 I T R 33 1970 U J (SC) 855 (1971) 1 I T J 552 (1971) 1 S C J 710 1971 Tax L R 932 (1971) 1 SCR 748 1461 1971 Cri L J 1139 1971 U J (SC) 584 1467 1971 Cri L J 1145 1474 ... 1477 1971 Ren C R 477 (1971) 2 Civ Ap J 17 (SC)	1477	con 1971 Jab L J 935 1480 1971 Cri L J 1151 (1971) 2 S C Cri R 313 1971 Cri Ap R 373 (SC) 1482 1970 S C D 1146 1971 All L J 1378 1971 M P W R 828 1491 1971 B L J R 1080 1970 All Cri R 521 1970 Mah L J 888 1970 Jab L J 926 1970 M P L J 893 (1971) 2 S C Cri R 112 1971 S C D 228 1971 M P W R 805 1971 All L J 1299 (1971) 1 SCR 943 1495 1969 Ren C R 996 (1970) 2 S C A 655 (1970) 2 S C R 950 1970 Ren C R 138 (1971) 1 S C J 145 78 Bom L R 320 1971 Mah L J 670 1507 1971 Tax L R 939 28 S T C 282 1971 UPJC 796 1511 1971 Cri L J 1157 1518 (1971) 1 Lab L J 422 1971 Lab I C 948 1971 S C D 656 37 Cut L T 747 1519 28 Fac L R 260 (1971) 1 Lab L J 416 39 F J R 233 (1971) 1 Lab I C 951 (1971) 2 S C A 186 (1971) 2 Civ Ap J 304 (SC) 1525 1971 S C D 548 1971 Cri L J 1153 1529 1971 Cri L J 1162 1971 U J (SC) 526 1531 1971 All L J 745 1971 U J (SC) 571 (1971) 1 Civ Ap J 265 (SC) 1533 1971 Cri L J 1164 (1971) 25 S C Cri R 377 1971 U J (SC) 569 1971 S C D 832 1537 1970 U J (SC) 829 1542 1970 S C D 380 (1970) 2 S C J 679 (1970) 2 Mad L J (SC) 147 (1970) 2 Andh W R (SC) 127 1543 1970 S C Cri R 328 (1970) 2 S C J 481 1970 Mad L J (Cri) 728 (1970) 3 S C R 770 1547 1971 Serv L R 188 (1971) 1 Lab L J 815 (1971) 2 S C A 129 (1971) 1 Civ Ap J 82 (SC)

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1551	1971 U J (SC) 499	1638con	1971 Cri L J 1198	1718con	1971 2 Civ Ap J	1828con	1971 Lab I C 1129
1552	1970 U J (SC) 885	1641	37 Cut L T 338		131 (SC)		(1971) 2 S C A 176
	(1971) S O Cri R 310		1971 U J (SC) 245		1971 Serv L R 888		23 Fac L R 172
1554	1971 Cri Ap R 318		1971 S O C 289	1722	1971 Cri L J 1274	1834	1971 Cri Ap R
	(SC)		(1971) 2 S C Cri		1971 S O D 816		262 (SC)
1558	1971 Tax L R 706		R 228		1971 Cri Ap R		1971 Cri L J 1285
	(1971) 1 Civ Ap J		1971 Cri Ap R 99		60 (SC)		1971 U J (SC) 614
	459 (SC)		(SC)		1971 U J (SC) 694	1836	1971 Cri L J 1287
1567	1971 Cri L J 1168		1971 Cri L J 1197	1725	1971 Ker L T 462		1971 S O D 693
	1971 S O D 590	1645	1971 U J (SC) 15		1971 Cri Ap R		1971 U J (SC) 601
	(1971) 2 S C Cri	1648	1970 S O D 995		536 (SC)		1971 Cri Ap R
	R 315		36 Cut L T 1221		1971 Cri L J 1277		515 (SC)
1569	1971 S O D 848		(1971) 2 S C J 345		1971 S O D 750	1839	1971 U J (SC) 616
	(1971) 2 Civ Ap J		(1971) 2 S O R 184		(1971) 2 S O J 607	1844	73 Pun L R 581
	83 (SC)	1650	(1971) 2 S O J 25	1731	...		1971 S O D 643
1575	1971 Ker L T 163		73 Bom L R 896	1737	...		1971 Cri L J 1290
	1971 S O D 322		(1971) 2 S O R 110	1753	1971 Cur L J 798		1971 Cri Ap R
	(1971) 1 Civ Ap J	1653	1970 Mer L R 521		(1971) 2 Lab		437 (SC)
	380 (SC)		(1971) 2 S C J 114		L J 117	1850	22 Fac L R 327
1580	1971 Serv L R 164		(1971) 2 S O R 99		1971 U J (SC) 688		1971 Serv L R 434
	1971 U J (SC) 226	1656	1970 S O D 697	1756	1971 J & K L R 241		Assam L R (1971)
	1971 Lab I C 956		1970 S O Cri R 516		(1971) 2 Civ Ap J		S O 42
	(1971) 1 Civ Ap J		(1971) 1 S O J 72		42 (SC)		(1971) 2 Lab
	191 (SC)		1971 Mad L J		1971 S O D 911		L J 109
1584	1971 U J (SC) 224		(Cri) 43	1759	1971 Cri L J 1283	1857	1971 Cri L J 1298
	1971 S O D 211		1971 All W R		1971 Cri Ap R		1971 Cri Ap R
	1971 Cri Ap R 185		(HC) 160		357 (SC)		296 (SC)
	(SC)		1971 All Cri R 156		1971 U J (SC) 685		1971 U J (SC)
	1971 Cri L J 1171		1971 Mad L W	1762	...		598 (2)
1586	1971 S O D 557		(Cri) 71(2)	1777	1971 Serv L R 96	1859	1971 Ren O R 466
	1971 U J (SC) 1173		(1971) 1 S O R 133		(1971) 2 S O J 471		1971 S O D 683
	(1971) 2 S O Cri	1659	1971 Mah L J 4	1781	1970 Ren O R 765		(1971) 2 Civ Ap J
	R 397		(1971) 1 S O J 177		1970 U J (SC) 626		144 (SC)
	1971 Cri Ap R 323		(1970) 3 S O R 309		(1971) 1 S O R 626	1864	1971 Cri L J 1298
	(SC)	1662	(1971) 1 S O J 290		(1971) 2 S O J 607		1971 U J (SC) 582
1590	80 I T R 167		(1970) 3 S O R 780	1783	1971 U J (SC) 662	1865	(1971) 2 Civ Ap J
	1971 Tax L R 944	1667	1869 Pat L J R	1789	1971 Cri L J 1301		7 (SC)
	1971 U P T C 550		(SC) 93A		1971 S O D 759		1971 U J (SC) 644
1594	1971 U J (SC) 520		(1970) 2 S O A 574		1971 Cri Ap R		1971 S O D 1113
1599	1971 U J (SC) 568		(1970) 3 S O R 181		343 (SC)	1871	1970 S O Cri R 565
	(1971) 1 Civ Ap J		1971 Mad L W	1784	1971 Cri L J 1306		(1971) 1 S O J 721
	273 (SC)		(Cri) 24		1971 Cri Ap R		1971 Mad L J
1602	1971 Serv L R 373		(1971) 1 S O J 621		299 (SC)		(Cri) 336
	1971 Lab I C 860		1971 Mad L J		1971 U J (SC) 630		1971 Cri L J 1314
	1971 U J (SC) 576		(Cri) 305	1797	1971 Cri L J 1310		(1971) 1 S O R 215
1606	1971 Cri L J 1177	1676	(1971) 1 Lab L J 81		1971 S O D 721	1878	1971 Ren C J 441
	1971 S O D 620	1678	1970 All L J 1104		1971 U J (SC) 634		1971 Ren C R 428
	(1971) 2 S C Cri		(1970) 2 S O R 566		1971 Cri Ap R		1971 S O D 601
	R 413		(1971) 1 S O A 339		395 (SC)		(1971) 2 S C A 81
1613	1971 S O D 1097	1687	(1970) 2 S O R 355	1801	(1971) 1 Lab	1887	(1971) 1 S O J 717
1620	1971 S O D 891		1970 All L J 1256		L J 534		1970 S O D 799
	1971 Cri Ap R 458 (SC)		(1971) 1 S O J 100		1971 Serv L R 584		(1971) 1 S O R 146
	1971 Cri L J 1184	1691	78 I T R 471		1971 Lab I C 1114		73 Bom L R 903
	(1971) 2 S O Cri R 421		(1970) 2 I T J 11		(1971) 2 Civ Ap J	1891	1971 Cri L J 1411
	1971 Jab L J 939		(1970) 2 S C R 19		24 (SC)		1971 Cri Ap R
1624	1971 A C J 206		(1970) 2 S O J 331	1804	1971 S O D 706		376 (SC)
	1971 S O D 535		(1970) 2 S O A 248	1811	(1971) 1 Lab		1971 S O D 1065
	1971 U J (SC) 489		1971 Tax L R 952		L J 539		1971 Cri L J 1417
	73 Pun L R 722	1696	1971 Tax L R 957		1971 S O D 763	1898	1971 Cri Ap R
	(1971) 1 Civ Ap J		(1971) 2 Civ Ap J		1971 Serv L R 679		388 (SC)
	168 (SC)		331 (SC)		(1971) 2 Civ Ap J		(1971) 2 S O Cri
1628	27 S T C 473		1971 U P T C 530		28 (SC)		R 484
	1971 Tax L R 947	1705	1971 S O D 837	1814	1971 Lab I C 1117		1971 S O D 1012
	1971 U J (SC) 533		(1971) 2 Civ Ap J		97 U J (SC) 654		1971 U J (SC) 890
1630	1971 U J (SC) 302		104 (SC)	1821	23 Fac L R 302	1902	1971 Lab I C 1171
	1971 S O D 337	1708	1971 Cri L J 1266		(1971) 1 Lab L J 503		23 Fac L R 109
	1971 Cri Ap R 205		1971 U J (SC) 720		(1971) 2 S O A 206		39 F J R 486
	(SC)		1971 Cri Ap R 519		1971 Lab I C 1124		(1971) 2 Lab
	1971 Cri L J 1188		(SC)		19 F J R 399		L J 307
1635	79 I T R 609	1713	1971 Cri L J 1271		1971 U J (SC) 622		(1971) 2 Civ Ap J
	1971 U J (SC) 209		1971 S O D 848	1826	1971 Cri L J 1299		230 (SC)
	1971 Tax L R 949		(1971) 2 Civ Ap J		1971 U J (SC) 627	1910	1971 Cri L J 1428
	1971 U P T C 399		127 (SC)		1971 Cri Ap R		(1971) 2 S O Cri
1638	1971 U J (SC) 194		1971 U J (SC) 710	1828	(1971) 1 Lab		R 471
	1971 Cri Ap R 74		1971 Lab I C 1108		L J 496		1971 S O D 1128
	(SC)						

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
1920	---	2013con	1971 Cri L J 1431	2089con	1971 U P T C 203 1971 Tax L R 1358	2151con	1971 S O D 925 1971 Lab I C 1369 (1971) 2 Lab L J: 325 (1971) 2 Civ Ap J 254 (SC) 23 Fac L R 185
1925	1971 S O D 575 (1971) 2 S C Cri R 383 1971 U J (SC) 535 1971 Cri L J 1432	2015	1971 U J (SC) 274 Assam L R (1971) SC 15 (1971) 1 Civ Ap J 340 (SC)	2092	(1971) 2 Cri Ap J 487 (SC)	2156	1971 Cri L J 1468 1971 U J (SC) 762
1930	27 S T C 494 1971 S C D 565 1971 Tax L R 1130 1971 U J (SC) 554	2016	1971 U J (SC) 231 1971 Cri App R 169 (SC) 1971 Cri L J 1432	2097	1971 U J (SC) 458 (1971) 1 Civ Ap J 181 (SC)	2162	1971 Cri A P R 235 (SC) 1971 U J (SC) 378
1935	1971 S C D 863 1971 Cri L J 1437	2018	(1971) 1 Civ Ap J 233 (SC)	2100	1971 Tax L R 1360 (1971) 1 Civ Ap J 114 (SC)	2164	---
1943	(1971) 2 Civ Ap J 108 (SC) 1971 Jab L J 927	2020	1971 U J (SC) 273	2111	1971 Ser L R 323 1971 U J (SC) 451 1971 Lab I C 1240 (1971) 1 Civ Ap J 171 (SC)	2171	22 Fac L R 217 (1971) 1 Lab L J 233 Assam L R (1971) S C 34 1971 Lab I C 1235 (1971) 2 Cri Ap J 462 (SC) 40 F J R 362
1949	1971 U J (SC) 726 (1971) 2 Civ Ap J 245 (SC)	2021	(1971) 1 Civ Ap J 334 (SC)	2114	1971 Tax L R 1371 82 I T R 41 (1971) 2 S C J 644	2177	(1971) 1 Civ Ap J 135 (SC)
1956	1971 U J (SC) 713 (1971) 2 Civ Ap J 194 (SC)	2025	(1971) 1 Civ Ap J 95 (SC)	2116	1971 Ren C J 840 (1971) 2 Civ Ap J 226 (SC)	2184	(1971) 2 Civ Ap J 462 (SC)
1962	1971 Jab L J 715 1971 S C D 799 (1971) 2 Civ Ap J 116 (SC)	2039	(1971) 1 Civ Ap J 299 (SC)	2119	1971 Cri L J 1463 1971 Cri Ap R 383 (SC)	2192	1971 U J (SC) 395 (1971) 1 Civ Ap J 483 (SC)
1971	(1971) 2 Civ Ap J 182 (SC) 1971 U J (SC) 697	2049	1971 U J (SC) 269 (1971) 2 Civ Ap J 311 (SC)	2123	(1971) 2 Cri Ap J 482 (SC)	2197	37 Cut L T 1084 1971 S C D 918 1971 U J (SC) 767 1971 Civ Ap R 464 (S C)
1977	1971 Cri App R 272 (SC) 1971 Cri L J 1445 1971 Jab L J 727 1971 M P L J 1017 1971 Mah L J 944	2050	1971 U J (SC) 252 1971 Cri L J 1454	2127	1971 M P L J 971 1971 Jab L J 843 1971 U P T C 728	2200	1971 Lab I C 1374 (1971) 2 Lab L J 331 (1971) 2 Civ Ap J 260 (SC) 40 F J R 217
1983	1971 U J (SC) 682 1971 M P L J 1003 1971 Mah L J 952	2051	1971 Cri L J 1456	2129	1971 Tax L R 1373 81 I T R 764 1971 U P T C 784	2204	1971 Tax L R 1508 82 I T R 50 (1971) 2 S C J 641
1986	(1971) 2 Civ Ap J 160 (SC) 1971 S C D 901 1971 U J (SC) 676	2054	1971 Tax L R 1341 28 S T C 327 1971 S C D 1073 1971 U P T C 21 1971 U J (SC) 397	2131	1971 Tax L R 1376 28 S T C 606	2206	1971 Ser L R 294 1971 U J (SC) 417 1971 J & K L R 401 (1971) 1 Civ Ap J 287 (SC) 1971 Lab I C 1377
1992	(1971) 2 Civ Ap J 156 (SC)	2057	(1971) 2 Civ Ap J 173 (SC)	2134	1971 Lab I C 1243 23 Fac L R 127 40 F J R 42 (1971) 2 Civ Ap J 219 (SC)	2210	(1971) 2 Civ Ap J 320 (SC)
1997	1971 Ker L T 422 (1971) 2 Civ Ap J 139 (SC) 1971 Lab I C 1178 1971 S C D 861	2064	1971 U J (SC) 384 1971 Cri App R 138 (SC) (1971) 2 S C Cri R 260 1971 Cri L J 1458	2135	1971 Tax L R 1378 1971 U P T C 718	2218	1971 Ren C J 340 1971 Ren C R 320 1971 U J (SC) 342 1971 S C D 407 1971 All W R (HC) 325 (1971) 1 Civ App J 444 (SC)
2001	1971 S C D 637 (1971) 2 Civ Ap J 38 (SC) 1971 U J (SC) 734	2066	1971 U J (SC) 222 1971 S C D 215	2143	1971 S C D 456 1971 Cri Ap R 253 (SC) (1971) 2 S C Cri R 328 1971 U J (SC) 467 1971 Cri L J 1487	2216	1971 Tax L R 1510 26 S T C 831
2004	(1971) 1 Lab L J 576 1971 Car L J 782 1971 Lab I C 1182 (1971) 2 S C A 161 1971 Serv L R 758	2070	(1970) 2 Civ Ap J 240 (SC)	2145	1971 Tax L R 1380 82 I T R 368 23 S T C 672		
2013	(1971) 2 S C Cri R 78	2074	80 I T R 467 1971 U P T C 313 1971 Tax L R 1356	2147	(1971) 2 Civ Ap J 264 (SC) 1971 U J (SC) 784		
		2079	1971 U J (SC) 257 (1971) 1 Civ Ap J 245 (SC)	2151	1971 Serv L R 718		
		2081	27 S T C 466 1971 Tax L R 1356				
		2082	1971 U J (SC) 315 1971 S C D 318 1971 Mer L R 168 (1971) 1 Civ Ap J 247 (SC)				
		2085	---				
		2089	27 S T C 489				

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
2216con	1971 Jab L 833 1971 U P T C 737	2274con	80 I T R 21 (1971) 2 I T J 267 (1971) 2 S C J 338 1971 Tax L R 1525	2331con	(1971) 1 S C J 618 (1971) 1 S C R 283 1971 Tax L R 1541	2369	1971 Lab I C 1390 1971 S C D 1052 (1971) 2 Lab L J 548
2219	1971 Tax L R 1514 81 I T R 759 1971 U P T C 731	2277	27 S T C 271 1971 Tax L R 1525	2333	(1971) 2 S C J 110 1971 Tax L R 1543 (1971) 1 S C R 936	2372	1971 S C D 969 1971 Cri L J 1697 1971 Cri Ap J 489 (SC)
2221	1971 Tax L R 1516 28 S T C 325 (1971) U J (SC) 900	2280	(1971) Civ Ap J 57 (SC) 1971 Tax L R 1525 (1971) 2 S C J 578	2337	(1970) S C D 942 1970 Cur L J 779 (1971) 1 S C J 650 (1971) 1 S C A 135 (1971) 1 S C R 785	2375	1971 Tax L R 1549 82 I T R 460 1971 U J (SC) 812
2223	1971 Tax L R 1517 28 S T C 322 1971 S C D 1093 1971 U J (SC) 902	2284	79 I T R 514 1971 U J (SC) 177 1971 U P T C 124 (1971) 2 I T J 421 1971 Tax L R 1538 (1971) 2 S C J 547	2342	1970 Mer L R 288 1970 Cur L J 898 1970 Pun L J 770 (1971) 2 S C J 8 (1971) 2 S C R 104	2377	1971 S C D 947 1971 U J (SC) 778
2224	1971 U J (SC) 317 (1971) 1 Civ Ap J 501 (SC)	2287	1971 U J (SC) 141 (1971) 1 Civ Ap J 20 (SC)	2346	1970 S C D 553 (1970) 1 Andh L T 281 1971 Cri L J 1556 (1971) 1 S C A 418 (1971) 1 S C J 518 (1971) 1 Mad L J (SC) 69 1971 Mad L J (Cri) 267 (1971) 1 Andh W R (SC) 69 (1971) 1 S C R 166	2381	1971 Cri L J 1700 1971 S C D 1012
2228	1971 S C D 235 1971 U J (SC) 311 (1971) 1 Civ Ap J 318 (SC)	2289	(1971) 2 Civ Ap J 52 (SC)	2352	(1970) 2 S C J 653 (1970) 2 Mad L J (SC) 121 (1970) 2 Andh W R (SC) 121 (1971) 1 S C R 49	2384	1971 Cri L J 1703
2233	1971 U J (SC) 330 1971 S C D 400 1971 Civ Ap R 239 (SC) 1971 Cri L J 1540	2293	79 I T R 589 1971 U J (SC) 187 1971 Rev L R 123 1971 U P T C 226 (1971) 2 I T J 272 (1971) 2 S C J 352 1971 Tax L R 1538	2355	1970 Ren C R 398 (1970) 2 S C J 685 1970 Cur L J 675 1971 M P L J 10 1971 Maha L J 37 1970 Ren C J 1091 (1971) 1 S C A 297 (1970) 3 S C R 880 73 Bom L R 492	2389	1971 Tax L R 1551 82 I T R 788 1971 U P T C 746
2236	1971 S C D 296 (1971) 2 Civ Ap J 68 (SC) 1971 U J (SC) 298	2295	(1970) 2 S C R 594 (1970) 1 S C J 75	2403	1971 Punj L J 638	2392	1971 Tax L R 1554 1971 Mer L R 186
2240	1971 U J (SC) 284 1971 Cri L J 1544	2298	1971 U J (SC) 20 1971 S C D 4 (1971) 2 S C J 558	2405	1971 Tax L R 1738 28 S T C 700	2396	1971 Tax L R 1558 82 I T R 835
2242	1971 Ser L R 219 22 Fac L R 188 (1971) 1 Lab L J 224 1971 Lab I C 1381	2303	(1971) 2 S C J 223 (1971) 2 Andh W R (SC) 65 (1971) 2 Mad L J (SC) 65	2406	82 I T R 607 1971 Tax L R 1740	2399	1971 Tax L R 1734
2249	1971 U J (SC) 285 1971 Cri L J 1545	2312	1970 U J (SC) 849 1970 S C D 1082	2410	82 I T R 599 1971 Tax L R 1743	2408	1971 Punj L J 638
2251	(1971) 1 Civ Ap J 477 (SC)	2313	1970 S C D 985 (1971) 2 S C J 117	2414	1971 Lab I C 1393 (1971) 2 Civ Ap J 372 (SC) 40 F J R 183 23 Fac L R 241 (1971) 2 Lab L J 815	2409	82 I T R 607 1971 Tax L R 1740
2255	1971 U J (SC) 276 1971 Mah L J 692 1971 M P L J 820	2319	1970 S C D 964 35 Cut L T 1145 (1971) 2 S C J 122	2417	1971 Lab I C 1396 (1971) 2 Lab L J 340 (1971) 2 Civ Ap J 347 (SC) 40 F J R 160	2410	82 I T R 599 1971 Tax L R 1743
2256	1971 Civ Ap R 181 (SC) 1971 Cri L J 1547	2320	1971 S C D 18 (1971) 2 S C J 452 (1971) 2 S C R 163	2422	1971 Lab I C 1401 (1971) 2 Lab L J 393 (1971) 2 Civ Ap J 281 (SC) 40 F J R 126	2411	1971 Lab I C 1396 (1971) 2 Lab L J 340 (1971) 2 Civ Ap J 347 (SC) 40 F J R 160
2264	(1971) 2 Lab L J 349	2324	(1970) 2 S C R 588 (1970) 2 S C A 616 (1971) 1 S C J 108 (1971) 73 Pun L R (D) 92	2424	1971 Tax L R 1405 82 I T R 452 1971 U J (SC) 806	2417	1971 Lab I C 1396 (1971) 2 Lab L J 340 (1971) 2 Civ Ap J 347 (SC) 40 F J R 160
2268	1971 U J (SC) 250 1971 Cri Ap R 172 (SC) 1971 Cri L J 1555	2328	77 I T R 739 (1971) 1 I T J 50 (1971) 1 S C J 94 (1971) 1 S C R 332 1971 Tax L R 1538	2426	1971 Tax L R 1622 82 I T R 540 1971 U J (SC) 872	2417	1971 Lab I C 1396 (1971) 2 Lab L J 340 (1971) 2 Civ Ap J 347 (SC) 40 F J R 160
2270	79 I T R 594 1971 U P T C 207 1971 Tax L R 1547	2331	77 I T R 1 (1971) 1 I T J 402	2427	1971 Tax L R 1627 82 I T R 154 1971 Tax L R 1680 1971 U J (SC) 784	2422	1971 Lab I C 1401 (1971) 2 Lab L J 393 (1971) 2 Civ Ap J 281 (SC) 40 F J R 126
2272	1971 U J (SC) 531 (1971) 1 Civ Ap J 312 (SC)			2444	1971 Tax L R 1627 82 I T R 154 1971 Tax L R 1680 1971 U J (SC) 784	2424	1971 Tax L R 1405 82 I T R 452 1971 U J (SC) 806
2274	1971 U J (SC) 190			2447	1971 Tax L R 1627 82 I T R 154 1971 Tax L R 1680 1971 U J (SC) 784	2426	1971 Tax L R 1622 82 I T R 540 1971 U J (SC) 872

AIR	Other Journals	AIR	Other Journals	AIR	Other Journals	AIR	Other Journals
2451	82 I T R 147 1971 Tax L R 1747 1971 U J (SC) 802	2474con1971 Cri LJ 1708		2519con1971 Cri App R 7 (SC)		2556con1971 U J (S C) 821	
		2479	1971 S C D 978 1971 Cri L J 1715		1971 Cri L J 1746	2560	...
2454	89 F J R 479 23 Fac L R 140 (1971) 2 Civ Ap J 221 (SC) 1971 Lab I C 1491	2481	1971 Cri Ap R 128 (SC) 1971 Cri L J 1715 (1971) 2 S C J 515 1971 M L J (Cri) 651	2521	1971 Lab I C 1495 (1971) 2 Lab L J 528 40 FJR 378	2567	22 Fac L R 158 (1971) 1 Civ Ap J 489 (SC) 1971 Lab I C 1507 40 FJR 325
2458	82 I T R 142 1971 Tax L R 1751 1971 U J (SC) 756	2486	1971 Cri L J 1721 (1971) 2 S C J 473 1971 M L J (Cri) 625	2533	1970 Pat L J R 721 (1971) 1 S C J 670 (1971) 2 S C A 229 (1971) 1 S C R 804	2577	1971 Lab I C 1516 (1971) 2 Lab L J 513 40 F J R 258 (1972) 3 Cri Ap J 45 (SC)
2481	1971 Tax L R 1754			2540	(1971) 2 S C J 539		
2483	81 I T R 763 1971 Tax L R 1756	2505	1971 S C D 980 1971 Cri L J 1733	2549	1971 S C D 368 (1971) 1 Civ Ap J 328 (SC)	2591	82 I T R 824 1971 Tax L R 1767
2488	(1971) 2 Civ Ap J 215 (SC)	2513	1971 Tax L R 1744 1971 Ker L T 852	2551	1971 S C D 219 (1971) 1 Andh L T 282 (1971) 1 Civ Ap J 292 (SC)	2593	1972 Cri L J 34
2471	82 I T R 619 1971 Tax L R 1761 1971 UP TC 724	2516	1971 Tax L R 1519 82 I T R 180			2598	1971 Tax L R 1769
		2519	1971 U J (SC) 98 (1971) 2 S C Cri R 183	2553	1971 S C D 414 (1971) 1 Civ Ap J 472 (SC)	2600	1971 Tax L R 1771
2474	1971 Civ Ap R 432 (SC)					2608	1970 S C D 975 (1971) 2 S C J 344 (1971) 2 S C R 145

(1969) 2 S C R			(1970) 3 S C R			(1971) 1 S C R			(1971) 2 S C R			(1971) 1 S C J		
SCR	AIR		SCR	AIR		SCR	AIR		SCR	AIR		SCR	AIR	
755	1971	SC 846	689	1970	SC 1147	298	1970	SC 1019	1	1971	SC 315	90	1970	SC 1524
			694	"	" 2086	304	"	" 1520	11	"	" 107	92	"	" 1518
			704	"	" 1197	308	"	" 1518	28	"	" 143	94	1971	" 2328
			708	"	" 1217	312	"	" 1732	35	"	" 283	100	"	" 1687
			720	1971	" 196	317	"	" 1661	40	"	" 321	104	"	" 206
			724	"	" 310	323	"	" 1750	73	"	" 281	108	"	" 2324
			734	"	" 942	335	"	" 1534	92	"	" 454	112	1970	" 1372
			740	"	" 920	340	"	" 1707	99	"	" 1833	119	"	" 1201
			745	"	" 57	348	"	" 1530	101	"	" 2342	124	"	" 1226
			752	"	" 100	352	1971	" 854	110	"	" 1650	127	1971	" 2360
			757	"	" 836	357	1970	" 1531	118	"	" 1295	129	"	" 263
			770	"	" 1543	364	"	" 1525	136	"	" 449	137	"	" 306
			778	"	" 299	373	"	" 1535	145	"	" 2608	141	"	" 761
			780	"	" 1662	377	"	" 1712	147	"	" 178	145	"	" 1495
			788	"	" 206	382	1971	" 2328	163	"	" 2320	157	1970	" 1223
			796	"	" 198	388	1972	" 83	171	"	" 1081	160	"	" 1153
			809	"	" 1659	396	1971	" 1330	184	"	" 1646	165	"	" 1305
			815	"	" 2361	399	"	" 1162	191	"	" 1011	171	1971	" 310
			819	"	" 915	413	1970	" 1576				177	"	" 1659
			826	"	" 2360	418	"	" 1588				182	1970	" 470
			830	"	" 2355	422	"	" 1582				192	1971	" 71
			837	"	" 910	426	"	" 1578				199	1970	" 549
			846	"	" 246	434	"	" 1667				217	1971	" 117
			854	"	" 1021	442	"	" 1641				223	1970	" 1321
			862	1970	" 1281	446	"	" 1733				233	"	" 1514
			872	1971	" 283	452	"	" 1734				238	"	" 2086
			878	1970	" 1376	465	"	" 1624				244	"	" 2182
			881	"	" 1123	463	"	" 1785				252	"	" 997
			894	"	" 1730	474	"	" 1542				254	"	" 977
			903	"	" 1539	503	"	" 1314				256	"	" 1302
			909	"	" 977	512	"	" 1318				263	"	" 214
			913	"	" 1372	517	"	" 1530				269	"	" 1928
			920	1971	" 211	522	"	" 1722				277	"	" 1011
			931	"	" 520	530	"	" 1380				283	"	" 1660
			946	1970	" 786	535	"	" 2065				286	1971	" 836
			953	"	" 789	539	"	" 1663				290	"	" 1662
			963	"	" 1269	546	"	" 1833				295	"	" 530
						564	"	" 1321				433	1970	" 1934
						581	"	" 1651				439	"	" 1095
						586	"	" 1832				443	"	" 1147
						599	"	" 1568				446	"	" 1292
						612	"	" 1573				453	"	" 1318
						617	"	" 1330				456	"	" 1707
						626	1971	" 1781				461	"	" 1330
						637	"	" 237				463	"	" 1667
						646	"	" 383				468	"	" 982
						657	1970	" 2007				474	1971	" 1374
						671	"	" 2000				481	"	" 1330
						688	1971	" 33				483	"	" 1182
						697	1970	" 2015				492	1970	" 1572
						714	"	" 1765				495	"	" 2000
						719	"	" 1771				502	1971	" 337
						731	1971	" 65				508	1970	" 2007
						734	1970	" 2079				516	1971	" 65
						748	1971	" 1454				518	"	" 2346
						761	1974	" 1982				525	1970	" 1542
						769	1971	" 95				543	"	" 1641
						773	1970	" 2067				545	"	" 1688
						783	1971	" 2337				556	"	" 1330
						791	"	" 40				566	"	" 1771
						793	"	" 330				573	1971	" 66
						804	"	" 2533				578	1970	" 1722
						817	"	" 191				580	"	" 1360
						821	"	" 342				583	"	" 2055
						826	"	" 125				586	"	" 1563
						833	"	" 381				589	"	" 1651
						839	"	" 66				592	1971	" 383
						844	"	" 517				595	1970	" 1732
						851	"	" 131				597	"	" 1635
						863	"	" 385				599	"	" 1343
						931	"	" 1358				606	"	" 1750
						936	"	" 2333				612	"	" 1531
						943	"	" 1491				616	1971	" 194
												618	"	" 2331

85

[illegible]

[illegible]

1971 Mah L J		1971 Tax L R		1970 M P L J		(1971) 1 Mad LJ		1971 Mad L J (Cri)	
Mah LJ	AIR	Tax L R	AIR	MPLJ	AIR	MLJ	AIR	MLJ	AIR
361 1971 SC 841		1536 1971 SC 2293		893 1971 SC 1491		1 1970 SC 1673		343 1970 SC 1661	
374 1970 " 1934		1538 " " 2328				11 " " 1912		351 " " 1686	
385 " " 453		1541 " " 2331				14 " " 1520		359 " " 1765	
322 " " 1841		1543 " " 2333				17 " " 1554		387 1971 " 28	
354 " " 2062		1547 " " 2370				24 " " 1624		406 1970 " 1093	
359 1971 " 44		1549 " " 2375				26 1971 " 71		436 " " 940	
395 1970 " 1908		1551 " " 2389				33 1970 " 548		505 1971 " 178	
403 " " 381		1554 " " 2392				51 " " 1707		531 " " 888	
403 " " 1928		1558 " " 2396				57 " " 1530		534 " " 781	
520 1971 " 920		1617 " " 2434				59 " " 1667		578 1970 " 535	
527 " " 744		1622 " " 2439				63 " " 922		608 1971 " 186	
528 1972 " 45		1627 " " 2444				69 1971 " 2346		626 " " 439	
591 1971 " 559		1630 " " 2447				76 1970 " 1542		629 " " 2486	
619 1970 " 1201		1734 " " 2399				94 " " 1683		651 " " 2481	
625 1971 " 778		1738 " " 2405				105 " " 1722			
629 " " 826		1740 " " 2406				110 1971 " 448			
670 " " 1495		1743 " " 2410							
692 " " 2255		1747 " " 2451							
722 " " 885		1751 " " 2458							
877 " " 2137		1754 " " 2461							
944 " " 1977		1756 " " 2463							
952 " " 1983		1761 " " 2471							
		1764 " " 2513							
		1767 " " 2591							
		1769 " " 2593							
		1771 " " 2600							
1971 Tax L R		1971 Ker L R		1970 Ker L T		1970 Mad L J		1971 Mad L W	
April to Dec. 71		KerLR		KerLT		(S C)		(Cri)	
TaxLR	AIR	1971 Ker L T		1971 M P W R		1971 Mad L J		1971 Mad L W	
4 1971 SC 792		KerLT		MPWR		(Cri)		1971 Mad L W	
75 " " 671		1971 Ker L T		1971 M P W R		1971 Mad L J		1971 Mad L W	
77 " " 717		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
133 " " 725		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
194 " " 726		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
198 " " 730		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
201 " " 791		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
269 " " 854		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
391 " " 870		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
405 " " 908		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
407 " " 915		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
412 " " 920		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
414 " " 916		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
421 " " 1015		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
740 " " 1192		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
743 " " 1256		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
747 " " 1361		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
929 " " 1427		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
932 " " 1454		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
939 " " 1507		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
944 " " 1590		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
947 " " 1628		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
949 " " 1635		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
952 " " 1691		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
957 " " 1896		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1130 " " 1930		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1247 " " 2064		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1350 " " 2074		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1356 " " 2081		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1358 " " 2089		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1369 " " 2100		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1371 " " 2114		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1373 " " 2129		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1376 " " 2131		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1378 " " 2135		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1380 " " 2145		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1405 " " 2434		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1503 " " 2204		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1510 " " 1216		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1514 " " 2219		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1518 " " 2221		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1517 " " 2223		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1519 " " 2516		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1522 " " 2274		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1523 " " 2277		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1523 " " 2280		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	
1523 " " 2284		KerLT		1971 M P W R		1971 Mad L J		1971 Mad L W	

(1971) 39 FJR

FJR	AIR
233 1971	SC 1519
396 "	" 1259
399 "	" 1821
437 1970	" 1421
436 1971	" 1902

(1971) 40 FJR

FJR	AIR
42 1971	SC 2184
76 1970	" 655
126 1971	" 2422
160 "	" 2417
171 1972	" 293
183 1971	" 2414
202 1972	" 308
217 1971	" 2200
223 1972	" 277
258 1971	" 2577
292 1970	" 1401
310 1971	" 82
507 1972	" 136

(1970) 76 ITR

ITR	AIR
471 1971	SC 1691

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ITR	AIR
1 1971	SC 2331
733 "	" 2328

(1970) 78 ITR

ITR	AIR
33 1971	SC 1454
256 1972	" 83

(1971) 79 ITR

ITR	AIR
1 1971	SC 87
6 1970	" 1980
9 "	" 1379
136 "	" 192
502 1971	" 671
505 "	" 147
514 "	" 2224
519 "	" 1015
522 "	" 717
539 "	" 2293
594 "	" 2270
603 "	" 730
669 "	" 1636

(1971) 80 ITR

ITR	AIR
21 1971	SC 2274
167 "	" 1590
177 "	" 726
467 "	" 2074
477 "	" 1256
566 "	" 1361

(1971) 81 ITR

ITR	AIR
105 1971	SC 517
310 1970	" 1707
476 1971	" 726
754 "	" 2129
759 "	" 2219

(1971) 82 ITR

ITR	AIR
41 1971	SC 2114
44 1972	" 168
50 1971	" 2204
51 1972	" 268
142 1971	" 2458
147 "	" 2451
154 "	" 2447
160 "	" 2516
166 1972	" 19
363 1971	" 2145
367 1972	" 29
372 "	" 156
376 "	" 159
452 1971	" 2434
460 "	" 2375
464 1972	" 80
527 "	" 260
540 1971	" 2459
555 1972	" 397
561 "	" 34
570 "	" 126
586 "	" 445
591 1971	" 720
599 "	" 2410
607 "	" 2406
613 1970	" 1559
619 1971	" 2471
624 "	" 2591
704 1972	" 273
788 1971	" 2389
794 1972	" 391
804 "	" 386
835 1971	" 2396
880 1972	" 176

(1970) 2 Lab LJ

Lab LJ	AIR
440 1971	SC 1011
582 "	" 1224

(1971) 1 Lab LJ

Lab LJ	AIR
31 1971	SC 1676
224 "	" 2212
233 "	" 2171
258 "	" 1093
271 "	" 766
293 "	" 762
299 "	" 823
307 "	" 832(2)
315 "	" 1547
416 "	" 1519
422 "	" 1513
427 "	" 1447
493 "	" 1828
503 "	" 1821
530 "	" 1811
551 "	" 1801
554 "	" 173
557 "	" 1403
578 "	" 2004

(1971) 2 Lab LJ

Lab LJ	AIR
109 1971	SC 1650
117 "	" 1753
307 "	" 1503
317 1972	" 308
325 1971	" 2151
331 "	" 2100
335 1972	" 171
340 1971	" 2417
349 "	" 2204
393 "	" 2422
407 1972	" 333
479 "	" 313
505 "	" 277
513 1971	" 2577
528 "	" 2521
739 1972	" 293
548 1971	" 2369
581 1972	" 345
599 "	" 133
615 1971	" 2414

(1970) 25 S T C

STC	AIR
341 1971	SC 1330

(1971) 27 STC

STC	AIR
1 1971	SC 792
116 "	" 908
118 1970	" 1672
127 1971	" 477
271 "	" 2277

(1971) 27 STC

STC	AIR
466 1971	SC 2081
469 "	" 2089
473 "	" 1628
494 "	" 1930

(1971) 28 STC

STC	AIR
262 1971	SC 1507
322 "	" 2223
325 "	" 2221
327 "	" 2054
331 "	" 2216
599 1972	" 51
603 "	" 154
606 1971	" 2131
672 "	" 2145
700 "	" 2405
702 "	" 38

(1970) 36 Cut

Cut LT	AIR
1145 1971	SC 2319
1221 "	" 1648

(1971) 37 Cut

Cut LT	AIR
91 1971	SC 175
233 "	" 733
338 "	" 1641
539 "	" 1182
647 "	" 1259
747 "	" 1516
1064 "	" 2197

1971 BLJR

BLJR	AIR
1 1971	SC 2360
4 1970	" 1539
49 "	" 786
78 1971	" 946
86 1970	" 1717
110 "	" 1269
262 "	" 1217
289 "	" 1231

1971 BLJR

BLJR	AIR
370 1970	SC 1960
444 "	" 1171
689 "	" 951
771 "	" 1661
798 "	" 1436
1034 1971	" 778
1090 "	" 1491
1096 "	" 761

1970 Pat LJR

Pat LJR	AIR
276 1971	SC 2360
717 "	" 1011
721 "	" 2532

1971 Pat LJR

Pat LJR	AIR
180 1971	SC 477
186 1972	" 57
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452 "	" 1182
458 "	" 1409

1970 Cur LJ

Cur LJ	AIR
675 1971	SC 2355
779 "	" 2337
898 "	" 2342

1971 Cur LJ

Cur LJ	AIR
477 1971	SC 987
496 "	" 1153
545 "	" 1060
652 "	" 1041
782 "	" 2004
788 "	" 1753
836 "	" 1254
1040 "	" 188

(1971) 73 Pun L R

Pun LR	AIR
12 1971	SC 128
190 "	" 299
314 "	" 761
425 "	" 987
569 "	" 1025
681 "	" 1844
722 "	" 1624

THE
All India Reporter
1971
Supreme Court

AIR 1971 SUPREME COURT 1
(V 58 C 1)

(From: Madras)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER JJ.

M/s. V/O. Tractoroexport, Moscow,
Appellant v. M/s. Tarapore and Co.,
Madras and another, Respondents

Civil Appeals Nos. 1208, 1209, 1833
and 1834 of 1969, D/- 28-10-1969.

(A) Civil P. C. (1908), Preamble —
— Interpretation of Statutes — Inter-
pretation should not be inconsistent
with established International Law.

There is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law. (Para 16)

(B) Civil P. C. (1908), Preamble —
Interpretation of Statutes — Domestic

* O. S. Appeals Nos. 25 and 23 of 1968 and Applns. Nos. 105 and 106 of 1968 in C. S. No. 118 of 1967 D/- 14-12-1968 and 12-4-1968 (Mad).

legislation to carry out International conventions.

In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well-established sense which they had in municipal law. (1933) AC 402, Ref. (Para 17)

(C) Foreign Awards (Recognition and Enforcement) Act (1961), Section 3 — Expression "submission" in section means actual submission or completed reference and does not mean an agreement to refer or an arbitral clause — "Agreement"

does not mean a commercial contract but an agreement to refer or an arbitral clause—Genesis and the background of the Act considered. Per Shah and Grover, JJ. (Ramaswami, J. Contra) (Para 23)

(D) Foreign Awards (Recognition and Enforcement) Act (1961), S. 3 — Suit in India not liable to be stayed when there is absence of actual submission of dispute to arbitration in foreign country — Foreign firm, a party to suit will be restrained from proceeding with arbitration in foreign country — Principles of Section 35 Arbitration Act 1940 will be applied.

(Per Shah and Grover JJ.) — With regard to foreign proceedings, the Court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign Court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England Courts have been very cautious and have largely refrained from granting stay of proceedings in foreign Courts. The injunction is, however issued against a party and not a foreign Court.

(Para 26)

Although it is a moot point whether Section 35 of the Arbitration Act, 1940, will be applicable to such a case, the principle embodied in that section cannot be completely ignored while considering the question of injunction. (Para 27)

Where the suit is not being stayed under Section 3 of the Foreign Awards (Recognition and Enforcement) Act it would be contrary to the principle underlying Section 35 not to grant an injunction restraining the foreign Firm from proceeding with the arbitration at foreign country. The principle essentially is that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a civil Court.

(Para 28)

Ordinarily, a party which has entered into a contract of which an arbitral clause forms an integral part should not receive the assistance of the Court when it seeks to resile from it. But where a suit is being tried in the Courts of this country, which cannot be stayed under Section 3 of the Foreign Awards (Recognition and Enforcement) Act in the absence of an

actual submission of the disputes to the arbitral tribunal in foreign country prior to the institution of the suit, the only proper course to follow is to restrain the foreign Firm which has gone to the foreign Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of.

(Para 29)

Moreover, the arbitration proceedings in foreign countries if allowed to be continued, it will be ex parte where due to restrictions on availability of foreign exchange, put by Government of India of which Courts will take judicial notice, it would be impossible for Indian firms to take its witnesses to the foreign country before the arbitral tribunal and to properly conduct the proceedings there.

(Para 30)

Cases Referred: Chronological Paras

- | | |
|---|----------------|
| (1968) 1968-2 All ER 89, Pa v. Bow Road Domestic Proceedings Court | 46 |
| (1967) 1967 RPC 401, Unipat A. G. v. Dowty Hydraulic Units | 13 |
| (1966) 1966-3 All ER 871, Salomon v. Commrs. of Customs and Excise | 42 |
| (1965) AIR 1965 Bom 114 (V 52) = 66 Bom LR 758, K. E. Corporation v. S. De Traction | 46 |
| (1965) 1965-2 WLR 250 = 1965-1 All ER 230, Owners of Cargo on Board the Merak v. The Merak (Owners) | 13, 14, 15, 43 |
| (1959) AIR 1959 SC 1357 (V 46) = (1960) 1 SCR 569, Shiva Jute Baling Ltd. v. Hindley and Co. Ltd. | 27 |
| (1959) AIR 1959 Cal 8 (V 46) = 1959 Cal LJ 169, W. Wood & Son Ltd. v. Bengal Corporation | 19, 46 |
| (1957) AIR 1957 Cal 240 (V 44), Bajrang Electric Steel Co. Private Ltd. v. Commrs. for the Port of Calcutta | 46 |
| (1936) 1936-2 All ER 721, Radio Publicity Ltd. v. Compagnie Luxembourgeoise de Radiodiffusion | 43 |
| (1933) 1933 AC 402 = 102 LJ PC 33, Barras v. Aberdeen Steam Trawling and Fishing Co., Ltd. | 17, 45 |
| (1930) 1930-1 All ER 503, Ellerman Lines Ltd. v. Murray | 42 |

(1907) 1907 AC 81 = 76 LJ PC 25, Webb v Outtrim 45
 (1904) 1 CLR 91, Aus. D'Emden v. Pedder 45
 (1898) 1898 AC 571 = 67 LJ Ch 628, Eastman Photographic Materials Co. v. Comptroller-General of Patents 47
 (1882) 22 Ch D 397 = 52 LJ Ch 325, McHenry v. Lewis 51
 (1870) 1870-5 Ch 703 = 23 LT 289, Ex. p. Campbell 46
 (1855) 6 De M & G 1 = 43 ER 1129, Hawkins v. Gathercole 47
 (1849) 13 QB 769 = 116 ER 1458, R. v. Blane 46
 (1584) 1 Plowd 201 = 75 ER 308, Stradling v. Morgan 47

M/s. S. Mohan Kumaramangalam and M. K. Ramamurthi, Senior Advocates (Mr. S. M. Ali Mohd., Mrs. Shyamla Pappu, M/s. J. Ramamurthy, Vineet Kumar and C. R. Somasekharan, Advocates with them), for Appellant; M/s. V. P. Raman, S. N. Srivatsa, B. Datta and D. N. Mishra, Advocates and Mr. J. B. Dadachanji Advocate of M/s. J. B. Dadachanji and Co., (for No. 1) and M/s. Rameshwar Nath and Mahinder Narain Advocates of M/s. Rajinder Narain and Co., (for No. 2), for Respondents.

The following Judgments of the Court were delivered by

GROVER, J. (For himself and Shah J.)—These connected appeals which involve points of importance and interest in international commercial arbitration arise out of a suit instituted on the original side of the High Court of Judicature at Madras by M/s. Tarapore & Co. against M/s. V. O. Tractoroexport, Moscow.

2. Initially the claim was for a permanent injunction restraining the Russian firm from realizing the proceeds of a Letter of Credit opened on June 9, 1965, with the Bank of India, Ltd., Madras, which had also been impleaded as a defendant. Subsequently by an amendment of the plaint the plaintiff has confined relief to recovery of damages.

3. The facts chronologically are as follows: A contract was entered into on February 2, 1965, between the Indian and the Russian firms for the supply of earth-moving machinery for a value of Rupees 66,09,372.00. The machinery was required by the Indian firm for executing the work of excavation of a feeder canal as part of the

Farraka Barrage Project. On June 9, 1965, the Indian firm opened a Letter of Credit with the Bank of India Ltd., for the entire value of the machinery in favour of the Russian firm. The consignments started arriving at Calcutta in October, 1965. On February 22, 1966, the Indian firm wrote to the Russian firm saying that there was something wrong with the design and working of motorised scrapers which had been supplied and which formed one of the items of machinery covered by the contract. On June 6, 1966 came the devaluation of the Indian rupee by 57.48 per cent. as a result of which the amount that became payable by the Indian firm to the Russian firm under the contract increased by Rs. 25 lakhs or so. On June 20, 1966, the Russian firm demanded an increase in the Letter of Credit owing to the devaluation. On August 1, 1966, the Indian firm served a notice on the Russian firm containing the main allegations relating to breach of contract on the part of the Russian firm. The latter was called upon to remedy the breaches and pay compensation. It was made clear that until this was done the Russian firm would not be entitled to encash the Letter of Credit for the balance amount. On August 4, 1966, the Indian firm filed a suit on the original side of the Madras High Court and obtained an ex parte order of injunction in respect of the operation of the Letter of Credit. On August 14, 1966, the parties arrived at a settlement at Delhi after mutual discussion.

4. Pursuant to the agreement the suit was withdrawn by the Indian firm but no amicable settlement, as contemplated, took place. The Indian firm instituted a suit (No. C. S. 118 of 1967) on the original side of the Madras High Court on August 14, 1967. It also filed an application for an interim injunction in the matter of the operation of the Letter of Credit. On October 26, 1967, another application was filed for an interim injunction against the encashment of the devaluation drafts. On November 4, 1967, the Russian firm instituted proceedings in terms of the arbitral clause in the contract before the Foreign Trade Arbitration Commission of the U. S. S. R. Chamber of Commerce, Moscow. On November 14, 1967, the Russian firm entered appearance

under protest before the Madras High Court in the suit filed by the Indian firm. On the same date the Russian firm filed an application under S. 3 of the Foreign Awards (Recognition and Enforcement) Act (XLV of 1961), hereinafter called the Act. A prayer was made for stay of the suit. On January 15, 1968, the Indian firm filed an application for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow. We are not concerned with the branch of the litigation which came up to this Court at a prior stage in respect of the interim injunctions granted by the single Judge with regard to the operation of the Letter of Credit and the subsequent arrangement made for payment as a result of devaluation. It is sufficient to mention that the appeals brought to this court were allowed on November 26, 1968, and the temporary injunction granted by the learned single Judge relating to the operation of the Letter of Credit was vacated.

5. The application which had been filed by the Russian firm for stay of the suit under Sec. 3 of the Act was dismissed by Ramamurthi, J., on April 12, 1968. The application of the Indian firm for an interim injunction restraining the Russian firm from taking any further part in the arbitration proceedings at Moscow was, however, granted. The Russian firm preferred appeals against the orders of the learned single Judge before a Division Bench. The bench maintained the orders of Ramamurthi, J. The present appeals have been brought by the Russian firm by special leave both against the order of the Division Bench and against the judgment of the learned single Judge. This was presumably done because there was some controversy about the finality of the orders which had been made by the single Judge of the High Court.

6. The questions which have to be determined in these appeals are quite narrow. The first question is whether the words "a submission made in pursuance of an agreement" mean an actual or completed reference made pursuant to an arbitration agreement or they mean an arbitration agreement that has come into existence as a result of a commercial contract. Ac-

cording to the appellant firm whenever there is an arbitration agreement or an arbitral clause in a commercial contract of the nature mentioned in the Convention the Court is bound to stay the suit provided the other conditions laid down in Section 3 are satisfied. On this approach the word "submission" is to be understood as an arbitration agreement or arbitral Clause relating to existing or future differences and the word "agreement" means an agreement of a commercial or business character to which the Convention applies. The respondent firm maintains that the critical words "submission" and "agreement" must be given their natural and grammatical meaning and the word "submission" made in pursuance of an agreement can only mean an actual submission of the disputes to the arbitral tribunal. The word "agreement" can have reference to and can be construed only in the sense of an arbitration agreement or an arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. In other words, if submission has to be taken in the sense of an arbitration agreement it would render the words "submission made in pursuance of an agreement" meaningless and unintelligible. The second question relates to the jurisdiction of the Courts in this country to grant an injunction restraining a party which is in Moscow from proceeding with the conduct of arbitration before a tribunal there. Even if the Courts have jurisdiction to grant an injunction, it is said, it would not be a proper exercise of that jurisdiction in the circumstances of the present case to give an injunctory relief. The learned single Judge has decided certain other controversial issues but the Division Bench did not go into them nor do we propose to deal with them unless the decision on the true and correct interpretation of Section 3 of the Act goes in favour of the appellant firm.

7. The Act has been enacted to enable effect to be given to the Convention on the recognition and enforcement of foreign arbitral awards done at New York on June 10, 1958, to which India is a party. In the Statement of Objects and Reasons it has

been pointed out that the procedure for settlement through arbitration of disputes arising from international trade was first regulated by the Geneva Protocol on Arbitration Clauses 1923 and the Geneva Convention on the Executive of Foreign Arbitral Awards to which India was a party and which was given effect to in India by the Arbitration (Protocol and Convention) Act, 1937.

8. The provisions of the Act may be noticed. Sections 2 and 3 are in these terms:

Section 2. "In this Act unless the context otherwise requires "foreign award" means an award on differences between persons arising out of legal relationships, whether contractual or not, considered as commercial under the law in force in India made on or after the 11th day of October, 1960—

(a) In pursuance of an agreement in writing for arbitration to which the Convention set forth in the Schedule applies; and

(b) In one of such territories as the Central Government being satisfied that reciprocal provisions have been made may, by notification in the Official Gazette, declare to be territories to which the said Convention applies."

Section 3. "Notwithstanding anything contained in the Arbitration Act, 1940, or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not

in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings."

The Schedule contains the Convention on the recognition and enforcement of foreign arbitral awards. Article II may be reproduced with advantage.

Article II

1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not concerning a subject-matter capable of settlement by arbitration.

2. The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of Letters or telegram.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

9. In order to resolve the controversy on the first question the history of the International Protocols and Conventions as a result of which legislation had to be enacted in England and India as also the relevant provisions of the Arbitration law may be set out. The Geneva Protocol on Arbitration Clauses 1923 recognised the validity of an agreement between each of the Contracting States whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agreed to submit to arbitration all or any differences that might arise in connection with such contract relating to commercial matters or to any other matter capable of submission by arbitration whether or not the arbitration was to take place in a country to whose jurisdiction none

of the parties was subject. Article 4 of the Protocol was as follows:

"The tribunals of the Contracting Parties, on being seized of a dispute regarding a contract made between persons to whom Article applies and including an arbitration agreement whether referring to present or future differences which is valid in virtue of the said Article and capable of being carried into effect, shall refer the parties on the application of either of them to the decision of the arbitrators....."

In order to give effect to this Protocol the Arbitration Clauses (Protocol) Act, 1924 was enacted in England. Section 1 (1) of that Act contained provisions similar to Section 3 of the Act with certain differences. When the aforesaid Act of 1924 was enacted the meaning of "submission" as contained in Section 27 of the English Arbitration Act, 1889, was "a written agreement to submit present or future differences to arbitration whether an arbitrator was named therein or not."

10. The Arbitration (Foreign Awards) Act, 1930, was enacted to give effect "to a certain convention on the execution of arbitral awards and to amend sub-section (1) of Section 1 of the Arbitration Clauses (Protocol) Act, 1924, which provision was described in Section 8 as one "for staying of legal proceedings in a Court in respect of matters to be referred to arbitration under agreements to which the Protocol applies". The Arbitration Act, 1889, was amended by the Arbitration Act of 1934 which also provided for other matters relating to arbitration law in England. In sub-section (2) of Section 21 the expression "arbitration agreement" was defined to mean "a written agreement to submit present or future differences to arbitration whether an arbitrator was named therein or not".

11. Although the definition of the expression "arbitration agreement" was introduced by the amendment made by the Arbitration Act of 1934 the definition of the word "submission" contained in Section 27 of the Arbitration Act of 1889 remained unaffected and unchanged. To complete the history of legislation in England mention may be made of the Arbitration Act, 1950, which repealed the earlier enactments. Section 4 (2) of this Act provided for stay when legal proceedings

were commenced in Court by any party "to a submission to arbitration made in pursuance of an agreement to which the protocol set out in the First Schedule to this Act applies". The Schedule to this Act contained the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the execution of foreign arbitral awards of 1927. In this Act the definition of "submission" contained in the Act of 1889 was omitted. By Section 32 "arbitration agreement" was defined to mean "a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not".

12. In India the Arbitration (Protocol and Convention) Act, 1937, was enacted for the first time to give effect to the Protocol and the Convention of 1923 and 1927 respectively. This was done as the Government wanted to meet widely expressed desire of the commercial world that arbitration agreements should be ensured effective recognition and protection. Section 3 of the 1937 Act employed the same language as is contained in Section 3 of the Act except with some minor differences. Both the Geneva Protocol of 1923 and the Convention of 1927 were appended as Schedules to this Act. So far as the ordinary arbitration law was concerned, prior to the enactment of the Indian Arbitration Act, 1940, there were two sets of laws applicable to what were called Presidency towns and areas which did not fall within those towns. The Indian Arbitration Act, 1889, applied to cases where the subject matter submitted to arbitration was of a nature that if a suit were to be instituted it could be instituted in a Presidency town. Section 4 (b) contained the definition of the word "submission" which was similar to the definition in the English Act of 1889. In the Civil Procedure Code of 1882, Part V dealt with arbitration. These provisions were applicable to such areas which were outside the Presidency towns. When the Civil Procedure Code, 1908, was enacted it contained in the IIInd Schedule similar provisions for arbitration. There was, however, no definition of "submission" or "arbitration agreement". The Arbitration Act, 1940, was meant to consolidate and amend the law relating to arbitration in India. The word "submission" was not defined but the word

"arbitration agreement" in Section 2 (a) was stated to mean a written agreement to submit present or future differences to arbitration whether the arbitrator was named therein or not.

13. The phraseology which has been employed in the English statute and the Indian enactment for giving effect to the Protocol and the Conventions relating to arbitration is practically the same. In the English Act of 1924 the words used were identical with the words to be found in Section 3 of the Act, namely, "a submission made in pursuance of an agreement". The only change which has been effected in the English Arbitration Act of 1950 in Section 4 (2) is that the words "to arbitration" have been inserted within the words "submission" and "made". Among the authoritative text book writers there has been a good deal of divergence of opinion on the meaning of the above phraseology. In the 8th Edn. of the Conflict of Laws by Dicey and Morris, Rule 182 has been formulated which is based on Section 4 (2) of the English Arbitration Act, 1950. Referring to Section 4 (2) and the meaning of the words "a submission to arbitration made in pursuance of an agreement to which the protocol applies" the authors are of the view that this condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The Court is, according to them, under a duty to stay proceedings although no arbitrators have been appointed. The word "submission" must be regarded as synonymous with the term "arbitration agreement" in the Protocol and the term "agreement to which the Protocol applies" is used "to identify the commercial or business contract between the parties." This statement is based on the judgment of Scarman, J., in *Owners of Cargo on Board the Merak v. The Merak (Owners)*, (1965) 2 WLR 250. Even before the pronouncement of this judgment preference for the view which later on came to be expressed by Scarman, J., had been indicated in the 7th Edn. of the same book. (See pages 1075 to 1076). According to the well-known work of Russell on Arbitration, 17th Edn., the English translation of the Protocol is most obscure. This is what has been stated at p. "9:

"The words of the section, however, would seem to limit its operation to

cases where some sort of "agreement to submit" is followed by an actual "submission" made "pursuant to" it. (Presumably, the word "submission" here bears its natural meaning, of "a submission (written or not) of an actual dispute to the authority of an arbitral tribunal," rather than the statutory meaning which it bore under the 1889 Act and is now borne by the phrase "arbitration agreement"). Thus the common case, of an agreement to refer which is never followed by a submission because the claimant prefers to sue instead, is apparently outside the section, although the Protocol clearly meant it to be covered; see the French text of Article 4".

The English translation of the French text in the 1950 Act has been stated to be a mistranslation. It has been suggested that the Parliament may have enacted not the true text of the Protocol but a very limited interpretation of the false translation. In *Halsbury's Laws of England*, Third Edn., Cumulative Supplement 1968, Vol. II, Arbitration, page 2, reference has been made to the decision of Scarman, J., in *The Merak* which was affirmed on appeal and which has been followed in *Unipat A. G. v. Dowty Hydraulic Units*, 1967 R. P. C. 401 the statement in the text being that this provision of law applies although no actual submission to arbitration has been made.

14. In the *Merak*, (1965) 2 WLR 250, Scarman, J., read Section 4 (2) of the Act of 1950 with the translation of the Protocol in the First Schedule to the Act. According to him the Protocol was concerned with two agreements — one, a contract commercial in character or giving rise to a difference relating to matters that were either commercial or otherwise capable of settlement by arbitration between parties subject to the jurisdiction of different contracting States; the other an arbitration agreement whereby the parties to such a contract agreed to submit their differences to arbitration. (The arbitration agreement might be itself included in and simultaneous with the commercial or business contract). Section 4 (2) of the Act was intended to make the same distinction between the parties' business contract and their arbitration agreement. He proceeded to say:

"It uses the term "submission to arbitration" to identify the protocol's agreement to submit their differences to arbitration and the term "agreement to which the protocol applies" to identify the commercial or business contract between the parties. Section 4 (2), in my opinion, applies to agreements to submit to arbitration made in pursuance of a contract to which, because of its character and the character of its parties, the protocol applies. The words "in pursuance of" merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class to which the protocol applies. They have in this context no temporal significance."

15. One of the main reasons which prevailed in *The Merak*, 1965-2 W.L.R. 250 was that by construing "submission to arbitration" as an actual submission of an existing dispute to a particular arbitrator, it would make "nonsense of the Protocol".

16. Now, as stated in Halsbury's *Laws of England* Vol. 36, p. 414, there is a presumption that Parliament does not assert or assume jurisdiction which goes beyond the limits established by the common consent of nations and statutes are to be interpreted provided that their language permits, so as not to be inconsistent with the comity of nations or with the established principles of International Law. But this principle applies only where there is an ambiguity and must give way before a clearly expressed intention. If statutory enactments are clear in meaning, they must be construed according to their meaning even though they are contrary to the comity of nations or International Law.

17. We may look at another well-recognised principle. In this country, as is the case in England, the treaty or International Protocol or convention does not become effective or operative of its own force as in some of the continental countries unless domestic legislation has been introduced to attain a specified result. Once, the Parliament has legislated, the Court must first look at the legislation and construe the language employed in it. If the terms of the legislative enactment do not suffer from any ambiguity

or lack of clarity they must be given effect to even if they do not carry out the treaty obligations. But the treaty or the Protocol or the convention becomes important if the meaning of the expressions used by the Parliament is not clear and can be construed in more than one way. The reason is that if one of the meanings which can be properly ascribed is in consonance with the treaty obligations and the other meaning is not so consonant, the meaning which is consonant is to be preferred. Even where an Act had been passed to give effect to the convention which was scheduled to it, the words employed in the Act had to be interpreted in the well established sense which they had in municipal law (*See Barras v. Aberdeen Steam Trawling and Fishing Co. Ltd.*, 1933 AC 402.)

18. The approach in "*The Merak*" appears to have been dominated by the Protocol of 1923 and the question to be examined is whether the language of Section 4 (2) of the English Act of 1950 and Section 3 of the Act contains any such ambiguity or suffers from any such lack of clarity as would justify the use of the Protocol to the extent made in the English case. The term 'submission' as defined in the English Act of 1889 and the Indian Act of 1899, was meant to cover both an arbitration clause by which the parties agreed that if disputes arose they would be referred to arbitration and also an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. For the sake of convenience, a distinction could be made by calling the first "an agreement to refer" and the second "a submission". The term — "arbitration agreement" as defined by the English Act of 1950 and the Indian Act of 1940 also covers both "an agreement to refer" and "an actual submission". Turning to the words used in Section 3 of the Act "submission made in pursuance of an agreement to which the convention set forth in the schedule applies", the first critical expression "submission" can have both the meanings in view of the historical background of the legislation which was enacted to give effect to the Protocol and the Conventions. If this term is to be given the larger meaning of including of "an agreement to refer" as also "an actual sub-

mission" of a particular dispute, it has to be determined which meaning would be appropriate in the context in which the term "submission" has been used in Section 3 of the Act. If "submission" means "agreement to refer" or an "arbitral clause" in a commercial contract, it makes the entire set of words unintelligible and completely ambiguous. It is difficult to comprehend in that case why the Legislature should have used the words which follow the term "submission", namely, "made in pursuance of an agreement." This brings us to the true import of the expression "agreement." If by "agreement" is meant a commercial contract of the nature mentioned in the "Merak", the words "made in pursuance of" convey no sense. Another anomaly which militates against the established rule of interpretation would arise if by the word "agreement" is meant a commercial contract. It cannot, even by stretching the language, bear that meaning in the second part of Sec. 3 which reads:

".....The court unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings."

Here "agreement" can have reference to and mean not the commercial contract to which the convention set forth in the Schedule applies but only the agreement to refer or the arbitral clause. Unless the context so compels or requires, the same meaning must ordinarily be attributed or given to the same words used in the section. The above difficulties completely disappear if "submission" is given the second meaning of an actual submission of a particular dispute or disputes to the authority of a particular arbitrator. The words which we are construing then have a clear, consistent and intelligible meaning, namely, an actual submission made in pursuance of an arbitration agreement or arbitral clause to which the convention set forth in the Schedule applies. The words "in pursuance of" are also thus saved and not rendered otiose. The courts have to be guided by the words of the statute in which the legislature of the country has ex-

pressed its intention. If Section 3 cannot be so read as to permit the meaning of the word "submission" to be taken as an arbitral clause or an agreement to refer, the courts would not be justified in so straining the language of the section as to ascribe the meaning which cannot be warranted by the words employed by the legislature. We are aware of no rule of interpretation by which rank ambiguity can be first introduced by giving certain expressions a particular meaning and then an attempt can be made to emerge out of semantic confusion and obscurity by having resort to the presumed intention of the legislature to give effect to international obligations.

19. It is true that by taking the above view the purpose and object behind the Protocol and the conventions may not be fully carried out. The intention underlying Article 4 of the Protocol of 1923 and Art. 2 of the Convention of 1958 undoubtedly appears to be that whenever the parties have agreed that their differences arising out of a commercial contract be referred to an arbitration the Court of a contracting State when seized of an action in the matter, shall refer the parties to an arbitration unless it finds that the agreement is null and void or is inoperative or incapable of being performed. We apprehend it would hardly be conducive to international commercial arbitration not to have legislation giving full and complete effect to what is provided by the Protocol and the Conventions. We also share in full measure the anxiety and the effort of those who desire to respect the terms of international Protocols and Conventions in letter and spirit. But we are bound by the mandate of the legislature. Once it has expressed its intention in words which have a clear signification and meaning, the Courts are precluded from speculating about the reasons for not effectuating the purpose underlying the Protocol and the conventions. The consistent view of the Indian Courts on the interpretation of the critical words in Section 3 of the Act of 1937 has not been in favour of what prevailed in the "Merak". In the leading case in *W. Wood & Son Ltd. v. Bengal Corporation*, AIR 1959 Cal 8, Chakravarti C. J. while delivering the judgment of the court, examined the various aspects of the ques-

tion including the terms of the Protocol of 1923 and the Convention of 1927 and said:

"If the agreement to which the Protocol applies is an agreement for arbitration, there cannot possibly be an agreement in pursuance of that agreement. Section 3 must, therefore, be construed as contemplating a case where not only is there an arbitration agreement in force between the parties but there has also been an actual reference to arbitration."

20. The learned Single Judge has given some reasons why in England as also in India the Statutes insist upon an actual submission before a stay of the suit can be granted. It has been pointed out that in different countries the law relating to arbitration is naturally different. Actual submission has been made a condition precedent for granting stay but the court has been left with no discretion in England and in India. In some of the other countries the order for stay of a suit contrary to the arbitral clause is discretionary, there being no difference between the municipal arbitration and arbitration under the Protocol. It was presumably for this reason that the Parliament insisted upon a real dispute between the parties and an actual reference or submission to an arbitration to resolve the particular point or points in dispute as a condition for stay. We do not consider that it would be right to speculate about the reasons which prevailed with the Parliament in enacting Sec. 3 of the Act in the language in which it has been done. It is abundantly clear that the Parliament did not employ language which would indicate an unequivocal intention that in the presence of an agreement to refer to an arbitral clause in a commercial contract, the provisions for granting stay under the section would immediately become applicable irrespective of an actual submission or a completed reference. As it was open to the legislature to deviate from the terms of the Protocol and the Convention it appears to have given only a limited effect to the provisions of the 1958 Convention. A clear deviation from the rigid and strict rule that the courts must stay a suit whenever an international commercial arbitration as contemplated by the Protocol and the Conventions, was to take place, is to be found in Sec. 3. It is of a nature

which is common to all provisions relating to stay in English and Indian arbitration laws, the provisions being that the application to the court for stay of the suit must be made by a party before filing a written statement or taking any other step in the proceedings. If the condition is not fulfilled, no stay can be granted. It cannot thus be said that Sec. 3 of the Act or similar provisions in the prior Act of 1937 or the English Statutes were enacted to give effect in its entirety to the strict rule contained in the Protocol and the Conventions.

21. Another significant feature which cannot escape notice is that the Parliament in England and India must be presumed to have been aware when the English Act of 1950 and the Act were enacted that the expression 'submission' had been abandoned in the Arbitration Acts and, instead, the term 'arbitration agreement' had come to be defined as meaning what submission meant according to the definitions in the English Act of 1889 and Indian Arbitration Act of 1899. Notwithstanding this, the expression 'submission' was employed in Section 4 (2) of the English Act of 1950 and Section 3 of the Act. If the intention was to have the wider meaning the proper and correct term to use was "arbitration agreement" and logically those words would have been employed. It is more plausible that the Parliament by retaining the expression 'submission' wanted to give it the meaning of an actual submission, as by then there had been firm expression of opinion in the well-known work of Russell on Arbitration and by jurists like Prof. Arthur Nassbaum in an article "Treatise on Commercial Arbitration" in Vol. 56 of the Harvard Law Review, pointing to that meaning being given to 'submission'. In India the High Courts had uniformly and in unequivocal terms taken that view (See W. Wood & Son Ltd., AIR 1959 Cal 8 (Supra)).

22. The language in the relevant article of the Convention of 1958 had also undergone a change. According to Article II, the term "agreement in writing" was to include an arbitral clause in a contract or an arbitration agreement and that term was stated to mean something by which the parties undertook to submit to arbitration all or any differences which had arisen or which might arise between them in

respect of any defined legal relationship whether contractual or not concerning a subject matter capable of settlement by arbitration. Thus, the term "agreement in writing" embraced an arbitral clause or an agreement simpliciter to refer to arbitration as also an actual submission of the disputes to the arbitrator. It was equivalent to 'Arbitration Agreement' as defined in the Act. By not using that term and by employing the expression 'submission' in Section 3 the Parliament appears to have indicated an intention to restrict the meaning of that expression to an actual submission or a complete reference.

23. Whatever way Section 3 of the Act is looked at, it is difficult to reach the conclusion that 'submission' means an agreement to refer or an arbitral clause and does not mean an actual submission or completed reference, and that the word "agreement" means a commercial contract and not an agreement to refer or an arbitral clause.

24. The next question is whether the High Court was justified in granting an interim injunction restraining the Russian Firm from proceeding with arbitration at Moscow. The position of the Russian firm is that neither it nor the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce which is seized of the arbitration proceedings is amenable to the jurisdiction of the courts in India. The presence in India of the party sought to be enjoined is a condition pre-requisite for the grant of an injunction. Alternatively, the Indian Firm has been guilty of breach of the agreement to refer the matter to arbitration at Moscow and therefore it has disentitled itself to the exercise of the Court's discretion in its favour in the matter of granting an injunction.

25. Now, it is common ground that the point about the Russian Firm having no representative in India was not agitated before the High Court. The position taken up in the plaint was that the Russian Firm was carrying on business in the U.S.S.R. and at Madras. The controversy before the High Court appears to have been confined only to what is stated in Para. 5 of the counter-affidavit of the Russian Firm, namely, that in the presence of the Arbitration agreement in the con-

tract entered into between the parties, the only proper remedy for the Indian Firm was to submit the disputes to the arbitration tribunal at Moscow.

26. The rule as stated in Halsbury's Laws of England Vol. 21, at page 407, is that with regard to foreign proceedings, the court will restrain a person within its jurisdiction from instituting or prosecuting suits in a foreign court whenever the circumstances of the case make such an interposition necessary or proper. This jurisdiction will be exercised whenever there is vexation or oppression. In England, Courts have been very cautious and have largely refrained from granting stay of proceedings in foreign Courts (Cheshire's Private Industrial Law, 7th Ed. pages 108-110). The injunction is, however, issued against a party and not a foreign Court.

27. Although it is a moot point whether Section 35 of the Arbitration Act, 1940, will be applicable to the present case, (Shiva Jute Baling Ltd. v. Hindley and Co., Ltd., (1960) 1 SCR 569 = (AIR 1959 SC 1357), it was assumed that Section 35 applied to protocol arbitration), the principle embodied in that section cannot be completely ignored while considering the question of injunction. According to that section no reference nor award can be rendered invalid by reason only of the commencement of legal proceedings upon the subject of the reference, but when legal proceedings upon the whole of the subject matter of the reference have been commenced between all the parties to the reference and a notice thereof has been given to the arbitrators or umpire, all further proceedings in a pending reference shall, unless a stay of proceedings is granted under Section 34, be invalid.

28. If the venue of the arbitration proceedings had been in India and if the provisions of the Arbitration Act of 1940, had been applicable, the suit and the arbitration proceedings could not have been allowed to go on simultaneously and either the suit would have been stayed under Section 34 or if it was not stayed, and the arbitrators were notified about the pendency of the suit, they would have had to stay the arbitration proceedings because under Section 35 such proceedings would become invalid if there was identity between the subject-

matter of the reference and the suit. In the present case, when the suit is not being stayed under Section 3 of the Act it would be contrary to the principle underlying Section 35 not to grant an injunction restraining the Russian Firm from proceeding with the arbitration at Moscow. The principle essentially is that the arbitrators should not proceed with the arbitration side by side in rivalry or in competition as if it were a Civil Court.

29. Ordinarily, a party which has entered into a contract of which an arbitral clause forms an integral part should not receive the assistance of the Court when it seeks to resile from it. But in the present case a suit is being tried in the Courts of this country which, for the reasons already stated, cannot be stayed under Section 3 of the Act in the absence of an actual submission of the disputes to the arbitral tribunal at Moscow prior to the institution of the suit. The only proper course to follow is to restrain the Russian Firm which has gone to the Moscow Tribunal for adjudication of the disputes from getting the matter decided by the tribunal so long as the suit here is pending and has not been disposed of.

30. In this context, we cannot also ignore what has been represented during the arguments. The current restrictions imposed by the Government of India on the availability of foreign exchange of which judicial notice can be taken will make it virtually impossible for the Indian Firm to take its witnesses to Moscow for examination before the Arbitral tribunal and to otherwise properly conduct the proceedings there. Thus, the proceedings before that tribunal are likely to be in effect *ex parte*. The High Court was, therefore, right in exercising discretion in the matter of granting an interim injunction in favour of the Indian Firm.

31. The appeals fail and are dismissed but in view of the peculiar nature of the points involved, there will be no order as to costs.

RAMASWAMI, J.—32. I regret I am unable to agree with the judgment pronounced by Grover, J.

33. The first respondent had entered into a contract with the Government of India for the excavation work in the feeder canal of the Farakka

Barrage project. To fulfil this contract with the Government of India and for the excavation work the first respondent required certain construction machinery such as scrapers, both towed and motorised crawlers, tractors and bulldozers. The respondent No. 1 agreed to purchase them from the appellant and the latter agreed to supply and deliver and the terms and conditions of the contract were embodied in a document dated February 2, 1965 signed by both the parties. In pursuance of the contract the first respondent opened a confirmed irrevocable and divisible letter of credit with the second respondent for the entire value of the equipment, that is, Rs. 66,09,372 in favour of the appellant negotiable through the Bank of Foreign Trade of the U.S.S.R. Moscow. Under the said letter of credit the second respondent was required to pay to the appellant on production of the documents particularised in the letter of credit along with the drafts. One of the conditions of the letter of credit was that 25 per cent of the amount should be paid on the presentation of the specified documents and the balance of 75 per cent within one year from the date of the first payment. On the strength of the contract the appellant supplied all the machinery which it undertook to supply by about the end of December, 1965. After the machinery was used for some time the first respondent complained that the machinery did not conform to the terms and conditions of the contract and consequently it had incurred and continued to incur considerable loss. Meanwhile the Indian rupee was devalued on June 6, 1966 and in consequence the price of the machinery went up by about 57.48 per cent. The increase in the price of the machinery was in accordance with the gold clause of the contract entered into between the parties. Clause 13 of the Contract read as follows:

"The sellers and the buyers shall take all measures to settle amicably any disputes and differences which may arise out of or in connection with this contract. In case of the parties being unable to arrive at an amicable settlement, all disputes are to be submitted without application to the ordinary Courts for the settlement by Foreign Trade Arbitration Commission at the U.S.S.R. Chamber of Commerce

In Moscow in accordance with the Rules of Procedure of the said Commission. The Arbitration award will be final and binding upon both parties."

Ignoring this clause the first respondent instituted a suit C. S. 134 of 1966 in the Madras High Court and obtained an ex parte injunction against the appellant and the second respondent restraining them from negotiating the letter of credit. The appellant protested that the first respondent should not have instituted a suit in violation of the arbitration clause in the contract. By a subsequent agreement dated August 14, 1966 the appellant and the first respondent agreed to settle the matter amicably in accordance with the contract. The appellant consented to extend the payment of letter of credit by one year and the first respondent thereupon withdrew the suit in C. S. 134 of 1966. The respondent No. 1 is said to have accepted the devaluation drafts representing increase in the price of the machinery consequent on the devaluation of the Indian rupee in accordance with the clause in the contract. Though correspondence was going on between the parties, no settlement could be arrived at. When the time came for the payment of the balance of 75 per cent of the letter of credit the first respondent instituted a suit C. S. 118 of 1967 in the Madras High Court in violation of the arbitral clause and obtained an ex parte injunction against the appellant from operating the letter of Credit. On November 5, 1967 the appellant instituted arbitral proceedings before the Foreign Trade Arbitration Commission of U.S.S.R. Chamber of Commerce, Moscow in accordance with Clause 13 of the contract for payment of the price of the machinery. Notice was issued to the first respondent to choose its nominee to represent it in the Arbitration Commission and the date of hearing was also notified by the first respondent. But the first respondent failed to appear before the Foreign Trade Arbitration Commission. Thereafter the appellant entered appearance in C. S. 118 of 1967 under protest and filed an application No. 2604 of 1967 before the High Court under Sec. 3 of the Foreign Awards (Recognition and Enforcement) Act, 1961 (45 of 1961) for the stay of the suit. The first respondent also

filed an application No. 106 of 1968 before the High Court praying that the appellant should be restrained from taking part in the arbitration proceedings at Moscow. After hearing the parties Ramamurthi J., dismissed the application of the appellant No. 2604 of 1967. The learned Judge allowed the application of the first respondent and granted an injunction restraining the appellant from taking part in the arbitral proceedings at Moscow. The appellant preferred appeals O.S.A. 25 and 26 of 1968 against the orders of Ramamurthi J. The appeals were dismissed by a Division Bench of the High Court on December 16, 1968.

34. The question involved in this case is: What is the true interpretation and effect of Section 3 of the Foreign Awards (Recognition and Enforcement) Act 1961, (45 of 1961) (hereinafter referred to as the Act). Section 3 of the Act states:

"Notwithstanding anything contained in the Arbitration Act, 1940 or in the Code of Civil Procedure, 1908, if any party to a submission made in pursuance of an agreement to which the Convention set forth in the Schedule applies, or any person claiming through or under him commences any legal proceedings in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other step in the proceedings, apply to the Court to stay the proceedings and the Court unless satisfied that the agreement is null and void, inoperative or incapable of being performed or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred shall make an order staying the proceedings."

35. Section 3 refers to the Convention which is set forth in the Schedule. It is an international protocol to which this country was a signatory and which was effected at New York on June 10, 1968. Article 2 of this Convention has three clauses and reads as follows:

"1. Each Contracting State shall recognise an agreement in writing under which the parties undertake to

submit to arbitration all or any differences which have arisen or which may arise between them in respect of defined legal relationship, whether contractual or not, concerning a subject-matter capable of settlement by arbitration.

2. The term 'agreement in writing' shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.

3. The Court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed."

The argument of the first respondent is that Section 3 of the Act can be invoked by the appellant only if it had implemented the arbitration agreement by actually submitting the dispute to the arbitrator or arbitrators prior to the institution of the suit. In the present case if there was any such reference to arbitration it was only on November 4, 1967, that is, about three weeks after the suit had been filed in the High Court. The contrary view point was put forward by Mr. Mohan Kumaramangalam on behalf of the appellant. It was said that Section 3 of the Act should be interpreted in the context of the articles of the Convention set out in the schedule and it was not necessary that there should be an actual submission to arbitration before the institution of the suit. If there was an arbitral clause whether this was followed by reference to arbitration by any of the parties or not the very existence of this clause in the commercial agreement would render stay of the suit mandatory under Section 3 of the Act. The argument was that Article 2 of the Convention makes it clear that under the Convention the Court of contracting State must, when seized of such an action refer the parties to arbitration. Section 3 of the Act must be read in consonance with this obligation. Any interpretation of that section which will restrict this obligation could be justified only if the plain words necessitate such a reading. The argument of the appellant is that the

words "if any party to a submission made in pursuance of an agreement to which the convention set forth in the schedule applies" really means that the submission is the arbitral clause itself and the agreement is a commercial agreement which includes or embodies that clause.

36. It is necessary in this connection to refer to the legislative history of the section. The reason is that both the expressions "submission" and "agreement of arbitration" have got a special meaning because of the evolution of the statute law. The English Arbitration Act of 1889 (52-53 Vic. c. 49) is the first amending and consolidating statute relating to arbitration. Section 27 of the Act defined submission as follows:

"Submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named therein or not." There is no definition of "agreement" as such, and no difference is made between a mere arbitral clause that is an agreement to refer to an arbitration and an actual submission to arbitration after the disputes have arisen. A submission defined by Section 27 comprehends both meanings. Section 4 of the 1889 Act provided that if any party to a submission commenced any legal proceedings against any other party to a settlement the latter may apply to the Court concerned to stay the proceedings and the Court if it is satisfied that there is no reason why the matter should not be referred in accordance with the submission may make an order staying the proceedings. In the Indian Arbitration Act of 1899, Section 4 (b) defines "submission" in exactly the same terms as Section 27 of the English Act of 1889, that is, a submission means a written agreement to submit present or future differences to arbitration whether an arbitrator is named or not. In the Arbitration Clauses (Protocol) Act of 1924 (14 and 15 Geo. V c. 39) we have the phrase "submission made in pursuance of an agreement" and the phrase "submission" appears to be employed in the special statutory sense. Section 1 of this Act states:

"Staying of Court proceedings in respect of matters to be referred to arbitration under commercial agreements.—(1) Notwithstanding anything in the Arbitration Act, 1889, if any

party to a submission made in pursuance of an agreement to which the said protocol applies or any person claiming through or under him, commences any legal proceedings in any Court against any other party to the submission, or any person claiming through or under him, in respect of any matter agreed to be referred, any party to such legal proceedings may at any time after appearance, and before delivering any pleadings or taking other steps in the proceedings, apply to that Court to stay the proceedings, and that Court or a Judge thereof, unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, shall make an order staying the proceedings."

Clause I of the Schedule states:

"Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties, subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with such contract relating to commercial matters or to any other matter capable of settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject.

Each contracting State reserves the right to limit the obligation mentioned above to contracts as commercial under its national law. Any Contracting State which avails itself of this right will notify the Secretary-General of the League of Nations, in order that the other contracting States may be so informed."

37. In 1930 the Arbitration (Foreign Awards) Act, 1930 (20 Geo. 5, c. 15) was enacted in order to give effect to the 1927 Geneva Convention on the execution of arbitral awards. Section 8 of this Act explains the phrase "arbitration agreement" by reference to the 1924 Act.

38. The next statute in England is the Arbitration Act, 1934 (24-25 Geo. V c. 14). Section 8 read along with the First Schedule dealt with the powers of the Court among other matters, to pass various orders such as interim injunction, appointment of receiver, orders for preservation of properties or for protecting rights of

parties, etc. Section 21 of this Act defines the expression "arbitration agreement" to mean a written agreement to submit present or future differences to arbitration whether an arbitrator is named or not. Nothing was said about the definition of "submission" in Section 27 of the Act of 1889. Virtually the effect is that in the place of the word "submission" the phrase "arbitration agreement" is substituted and has a synonymous meaning.

39. In India the Arbitration Act, 1899 was repealed and replaced by the Arbitration Act of 1940. The Act dealt with only municipal or local arbitrations and so far as foreign arbitration was concerned, the Indian Protocol Act of 1937 (Act 6 of 1937) was enacted. Section 3 of this Act states:

"Notwithstanding anything contained in the Arbitration Act, 1899 (1940), or in the Civil P. C., 1908, if any party to a submission made in pursuance of an agreement to which the protocol set forth in the First Schedule as modified by the reservation subject to which it was signed by India applies, or any person claiming through or under him, commences any legal proceeding in any Court against any other party to the submission or any person claiming through or under him in respect of any matter agreed to be referred, any party to such legal proceedings may, at any time after appearance and before filing a written statement or taking any other steps in the proceedings, apply to the Court to stay the proceedings: and the Court unless satisfied that the agreement or arbitration has become inoperative or cannot proceed, or that there is not in fact any dispute between the parties with regard to the matter agreed to be referred, shall make an order staying the proceedings."

The First Schedule of this Act contains articles of the 1923 Convention of which Article 1 reads as follows:

"Each of the contracting States recognises the validity of an agreement whether relating to existing or future differences between parties subject respectively to the jurisdiction of different Contracting States by which the parties to a contract agree to submit to arbitration all or any differences that may arise in connection with contract relating to commercial matters or to any other matter capable of

settlement by arbitration, whether or not the arbitration is to take place in a country to whose jurisdiction none of the parties is subject."

The Second Schedule contains the 1927 Convention and Article 1 reads as follows:

"In the territories of any High Contracting Party to which the present Convention applies, an arbitral award made in pursuance of an agreement, whether relating to existing or future differences (hereinafter called 'a submission to arbitration') covered by the Protocol on Arbitration Clauses opened at Geneva on September 24, 1923, shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of one of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties.

To obtain such recognition or enforcement, it shall further be necessary:

(a) That the award has been made in pursuance of a submission to arbitration which is valid under the law applicable thereto;

(b) That the subject-matter of the award is capable of settlement by arbitration under the law of the country in which the award is sought to be relied upon;

(c) That the award has been made by the Arbitral Tribunal provided for in the submission to arbitration or constituted in the manner agreed upon by the parties and in conformity with the law governing the arbitration procedure;

(d) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to opposition, appeal or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending;

(e) That the recognition or enforcement of the awards not contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon."

It should be noticed that Article 1 of the 1927 Convention defines an "arbitration agreement" as "a submission to arbitration".

40. The next event in the legislative history is the New York Convention adopted at the United Nations Conference in June, 1958 on International and Commercial Arbitrations. It was felt that the international conventions up-till then reached did not effectuate a speedy settlement of disputes and did not meet the requirements of international trade and commerce and disputes arising therefrom and that there should be some modification and the Convention was agreed to by almost all the countries. India accepted the same and enacted the Foreign Awards (Recognition and Enforcement) Act, 1961, to implement the conventions so far as India was concerned. This Act of 1961 repealed the Protocol Act of 1937. With regard to Section 3, the provision concerning stay of proceedings in a Civil Court in violation of the arbitral clause, the language is the same as in the Protocol Act of 1937.

41. The question presented for determination is what is the true meaning and effect of the words "if any party to a submission made in pursuance of the agreement to which the said protocol applies"? in Section 3 of the Act. Even at the time of the Act of 1899 the word "submission" had received a special meaning as including a mere agreement to refer to arbitration as well as an actual reference or submission to arbitration and this special meaning was given statutory recognition in the Act of 1899 by defining "submission" in this special manner. In the Arbitration Clauses (Protocol) Act, 1924, the phrase "submission made in pursuance of the agreement" is used and the word "submission" is employed in the statutory sense. In the Indian Arbitration Act, 1899, Section 4 (b) defines submission in exactly the same terms as Section 27 of the English Act of 1889. In the English Arbitration Act of 1934 the word 'agreement' is defined in Section 21 (2) as a "written agreement to submit present or future differences to arbitration whether the arbitrator is named therein or not". It is clear, therefore, that the expression "arbitration agreement" and the word "submission" are synonymous

and connote the same idea. In my opinion the expression "submission made in pursuance of an agreement" in Section 3 of the Act must be construed in its historical setting. The word "submission" must, therefore, be interpreted to mean the arbitral clause itself and the word "agreement" as the commercial or the business agreement which includes or embodies that clause. In other words the word "submission" in the opening words of the section means an agreement to refer to arbitration and the words "the agreement to which the Convention set forth in the schedule applies" mean the business agreement or contract containing the arbitral clause. It follows, therefore, that if there is an arbitral clause whether this is followed by actual reference to arbitration or not, the very existence of this clause in the commercial agreement would render the stay of the suit mandatory under Section 3 of the Act.

42. The view that I have expressed is also consistent with the rule of construction that as far as practicable the municipal law must be interpreted by the Courts in conformity with international obligations which the law may seek to effectuate. It is well settled that if the language of a section is ambiguous or is capable of more than one meaning the protocol itself becomes relevant for there is a prima facie presumption that Parliament does not intend to act in breach of international law, including specific treaty obligations. In the words of Diplock L. J. in *Salomon v. Commrs. of Customs and Excise*, (1966) 3 All ER 871 at pages 875-876:

"If the terms of the legislation are clear and unambiguous they must be given effect to whether or not they carry out Her Majesty's treaty obligations, for the sovereign power of the Queen in Parliament extends to breaking treaties (See *Ellerman Lines Ltd. v. Murray*, (1930) 1 All ER 503) and any remedy for such a breach of an international obligation lies in a forum other than Her Majesty's own Courts. If the terms of the legislation are not clear, however, but are reasonably capable of more than one meaning, the treaty itself becomes relevant, for there is a prima facie presumption that Parliament does not intend to act in breach of international law, includ-

ing therein specific treaty obligations; and if one of the meanings which can reasonably be ascribed to the legislation is consonant with the treaty obligations and another or others are not, the meaning which is consonant is to be preferred. Thus, in case of lack of clarity in the words used in the legislation, the terms of the treaty are relevant to enable the Court to make its choice between the possible meanings of these words by applying this presumption."

Applying this principle to the present case it is manifest that Article 2 of the Convention which is contained in the Schedule to the Act imposes a duty on the Court of a contracting State when seized of such an action to refer the parties to arbitration. Section 3 of the Act must, therefore, be read in consonance with this international obligation and any interpretation of Section 3 which would restrict the obligation or impose a refinement not warranted by the Convention itself will not be justified.

43. This view is also borne out by the reasoning of Scarman, J., in 1965-2 WLR 250 at pages 262-263. In that case the plaintiffs' timber was shipped aboard the *Merak* under bills of lading which stated that the voyage was "as per charter dated April 21, 1961" and contained a clause incorporating "all the terms, conditions, clauses...including Clause 30 contained in the said charterparty". Clause 30 was irrelevant to a bill of lading and was inserted in mistake for the arbitration Clause 32. The incorporation clause was followed by a clause giving paramount effect to the Hague Rules. In the course of the voyage the cargo was damaged and just within 12 months of the final discharge of the cargo the plaintiffs, as indorsees of the bills of lading, issued a writ claiming damages from the *Merak*'s owners, who relying on the arbitration clause, moved for a stay of the proceedings under Section 4 of the Arbitration Act, 1950. The plaintiffs opposed the motion on the grounds that the arbitration clause was not incorporated in the bills of lading; that the dispute did not arise out of the April charterparty or any bills of lading issued thereunder; and that the arbitration clause must in any event be rejected because it was repugnant to the paramount clause giving effect to the Hague Rules, which

by Article III, Rule 6 provided for bringing 'suit' and not for arbitration. Scarman, J., holding that Section 4 (2) of the Arbitration Act, 1950, gave effect to the intention of the protocol on arbitration clauses to which the sub-section related, rejected the plaintiffs' contentions and, stayed the proceedings. In the course of his judgment Scarman, J., observed as follows :

'In my opinion, the sub-section must be read together with the protocol as it stands translated into the English of the First Schedule to the Act. Article 1 of the translated protocol provides for the recognition of the validity of an agreement whether relating to existing or future differences whereby the parties to a contract agree to submit to arbitration differences arising in connection with that contract, and expressly reserves to contracting states the right to limit the obligation of recognition to contracts which are considered commercial. Article 4 provides that the tribunals of the contracting states, on being seized of a dispute regarding a contract which includes an arbitration agreement whether referring to present or future differences, shall refer the dispute to arbitration. Thus the protocol is concerned with two agreements — one, a contract, commercial in character or giving rise to a difference relating to matters that are either commercial or otherwise capable of settlement by arbitration, between parties subject to the jurisdiction of different contracting states; the other, an arbitration agreement whereby the parties to such a contract agree to submit their differences to arbitration. It is clear from the protocol that the arbitration agreement may itself be included in and simultaneous with the commercial or business contract between the parties. In my opinion Section 4 (2) of the Act is intended to make the same distinction between the parties' business contract and their arbitration agreement, and no other distinction. It uses the term "submission to arbitration" to identify the protocol's agreement to submit their differences to arbitration and the term "agreement to which the protocol applies" to identify the commercial or business contract between the parties. Section 4 (2) in my opinion, applies to agreements to submit to arbitration made in pursuance of a contract to

which, because of its character and the character of its parties, the protocol applies. The words "in pursuance of" merely establish the link that there must be between the agreement to submit present or future differences to arbitration and the agreement of a commercial or business character between parties of a certain class to which the protocol applies. They have in this context no temporal significance.

I see no reason for having to construe 'submission to arbitration' as an actual submission of an existing dispute to a particular arbitrator. The Act of 1950 does not say that I must. It makes nonsense of the protocol so to do. The Act of 1924 which first introduced the sub-section, was an Act to give effect to the protocol and there is respectable, though now antiquated, authority, namely, the repealed Section 27 of the Act of 1889, for giving a wider meaning to 'submission' in the context so requires. The term 'submission to arbitration' is not now defined by statute, and must, in my opinion, be given a meaning appropriate to its context. While, no doubt, it is often convenient to use the term to distinguish an actual reference of a particular dispute to arbitration from an 'arbitration agreement' it would be wrong so to do in construing this particular sub-section. Accordingly, I find myself able to say that the sub-section gives effect to the intention of the protocol, the intention clearly being that when there is a business contract between parties subject to different contracting states those parties are to be referred to arbitration if they have so agreed, whether their agreement relates to present or future differences."

The same view is expressed in Dicey & Morris, *The Conflict of Laws*, 8th edn., p. 1075:

"Section 4 (2) of the Act imposes upon the court a duty to stay the proceedings if a party relies on 'a submission to arbitration made in pursuance of an agreement to which the Protocol applies'. This condition is satisfied if the parties have agreed to submit present or future disputes to arbitration. The term 'submission' includes an agreement to refer. The Court is therefore under a duty to stay the proceedings although no arbitrators have been appointed, and

the fact that an arbitration clause is included in the contract between the parties suffices for the application of Section 4 (2). There is thus no discrepancy between the section and Article 4 of the Protocol to which it purports to give effect. According to Article 4 the court must "refer the parties to the decision of the arbitrators" if the contract between the parties includes "an arbitration agreement whether referring to present or to future differences." The word "submission" used in Section 4 (2) must be regarded as synonymous with the term 'arbitration agreement' in the Protocol and the term 'agreement to which the protocol applies' is used in the section 'to identify the commercial or business contract between the parties'. The controversy surrounding the interpretation of Section 4 (2) (to which reference was made in the previous edition of this book) was left undecided in *Radio Publicity Ltd. v. Compagnie Luxembourgeoise de Radiodiffusion*, 1936-2 All ER 721 at p. 726. It was however, settled by the decision of Scarman, J., in the *Merak* (1965) 2 WLR 250 at pp. 262-263 and the point was not disputed in the Court of Appeal."

44. If the opposite view for which respondent No. 1 contends is adopted and if it is held that the section only applies if the parties have submitted an actual dispute to arbitration the purpose of Section 3 of the Act and of the ratification of the New York Protocol of 1958 by India would have been largely frustrated. Such an interpretation would be contrary to the avowed object and intention of the Act which is "to give effect to the Convention on the recognition and enforcement of foreign arbitral awards" done at New York on June, 10, 1958. When there is ambiguity in the language of the section it is the duty of the court to adopt that construction which will effectuate the object of the Act and not nullify the intention of Parliament and make the provision devoid of all meaning.

45. On behalf of the first respondent it was said that there was a presumption that the legislature in re-enacting a section of the law must be presumed to have been aware of the intervening judicial interpretation and to have given its approval to it. The classic statement of the rule is that of

James L. J. in *Ex. p. Campbell*: (1870) 5 Ch. A. 703 at p. 706.

"Where once certain words in an Act of Parliament have received a judicial construction in one of the Superior Courts, and the Legislature has repeated them without any alteration in a subsequent statute, I conceive that the legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them."

But the rule is better and more moderately stated by the Judicial Committee in *Webb v. Outrim*, 1907 AC 81 at p. 89, where the words of Griffith C. J. in the Australian case *D'Emden v. Pedder*, (1904) 1 CLR 91, are adopted: "When a particular form of legislative enactment, which has received authoritative interpretation, whether by judicial decision or by a long course of practice is adopted in the framing of a later statute, it is a sound rule of construction to hold that the words so adopted were intended by the Legislature to bear the meaning which has been so put upon them". Even in this qualified form, however, the rule has not been acknowledged without protest (see the speech of Lord Blanesburgh in 1933 AC 402). The presumption is weak and is passed on an optimistic fiction. The rule has been criticised by Dr. C. K. Allen:

"The second petrifying factor is the real or supposed rule (now, however, questioned) that once a word or phrase has been given a certain judicial meaning, it is doomed to bear that meaning not only in all subsequent cases, but in all subsequent statutes. This is an offshoot of the somewhat optimistic assumption that the legislature must be presumed to know the actual state of the law. Consequently, if a word has once been given a particular meaning in any case of authority, however obscure, in connection with any statute, however, recondite, the draftsman who uses that word in a later enactment is, so to speak, 'affected with notice' of the judicial interpretation, however remote it may be from the matter in hand. It need hardly be said that in the huge mass of our case law this assumption is a transparent fiction". (Law in the Making pp. 508-09).

46. Mr. Raman referred to the decisions of the Calcutta High Court

and of the Bombay High Court in *Bajrang Electric Steel Co. v. Commrs. for Port of Calcutta*, AIR 1957 Cal 240, AIR 1959 Cal 8 and *K. E. Corporation v. S. De Traction*, AIR 1965 Bom 114. It was held in these cases that before the Court stays proceedings under Section 3 of the Act there must be an actual submission by both the parties to arbitrators of the particular point in dispute. It was argued that in enacting Section 3 Parliament was not content with a mere readiness of the parties to go to arbitration but it insisted on something more, that is, the actual implementation of the arbitration agreement by the parties concerned by setting up the machinery of arbitration in motion. I am unable to accept this line of reasoning. It is not said that there is a long course of practice or a series of decisions of various High Courts taking a particular view of Sec. 3 of the Act. The decisions referred to by the respondent are not numerous and it is unsafe and unrealistic to draw the presumption that Parliament in re-enacting Sec. 3 of the Act was aware of the intervening judicial interpretation and set its seal of approval upon it. In *Pa v. Bow Road Domestic Proceedings Court*, (1968) 2 All ER 89 at p. 91, Lord Denning pointed out that though the decision in *R. v. Blane*, (1849) 13 QB 769, stood for over 100 years, if it was quite an erroneous precedent, the fact that Parliament had re-enacted the provisions of the statute, did not authorise the erroneous interpretation.

47. It is, however, maintained by the respondent that the words "submission" and "agreement" must be given their natural and grammatical meaning and the word "submission" made in pursuance of an "agreement" can only mean an actual submission of the disputes to the arbitral tribunal. So the word "agreement" can have reference to and can be construed only in the sense of an arbitration agreement or arbitral clause in a commercial contract. It cannot mean a commercial contract because an arbitration agreement cannot be stated to have been made pursuant to a commercial contract. The contention is that if submission has to be taken in the sense of an arbitration agreement it would render the words "submission made in pursuance of an agreement" meaning-

less and unintelligible. In my opinion the argument proceeds on a fallacy. A statute should not be construed as a theorem of Euclid but the statute must be construed with some imagination of the purpose which lies behind the statute. The doctrine of literal interpretation is not always the best method for ascertaining the intention of Parliament. The better rule of interpretation is that a statute should be so construed as to prevent the mischief and advance the remedy according to the true intent of the makers of the statute. The principle was for example, applied by Lord Halsbury in *Eastman Photographic Co. v. Comptroller General of Patents*, 1898 AC 571, where the question was whether the word 'solio' used as a trade mark, was an invented or a descriptive word. In examining this question Lord Halsbury said: "Among the things which have passed into canons of construction recorded in Heydon's case we are to see what was the law before the Act was passed, and what was the mischief or defect for which the law had not provided, what remedy Parliament appointed and the reason of the remedy". At page 575 Lord Halsbury proceeded to state:

"Turner L. J. in *Hawkins v. Gathercole*, (1855) 6 De M & G 1, and adding his own high authority to that of the Judges in *Stradling v. Morgan*, (1584) 1 Plowd 201 (204), after enforcing the proposition that the intention of the Legislature must be regarded, quotes at length the judgment in that case: that the Judges have collected the intention 'sometimes by considering the cause and necessity of making the Act...sometimes foreign circumstances' (thereby meaning extraneous circumstances), so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion. And he adds: "We have therefore, to consider not merely the words of this Act of Parliament but the intent of the Legislature to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances so far as they can justly be considered to throw light upon the subject."

48. For the reasons expressed I hold that the appellant is entitled under Sec. 3 of the Act for an order of stay of the proceedings in C. S. 118 of 1967 pending in the Madras High Court on the ground that in terms of the contract dated February 2, 1965 the parties expressly agreed that all disputes arising out of the contract should be settled by arbitration by the Foreign Trade Arbitration Commission of the U.S.S.R. Chamber of Commerce at Moscow.

49. It is not, however, possible to decide these appeals finally because the respondent has opposed the application for stay on other grounds also. Ramamurti J., found that the arbitral clause in the contract of February 2, 1965 had ceased to be effective as between the parties as a result of the agreement dated August 14, 1966 Ex. P-32 "and that it will be wholly unrealistic...to hold that the moment an amicable settlement as provided in Ex. P-32 proved futile, the entire contract, Ex. P-4 revived....." On the further aspect that admittedly Sec. 3 itself contains an exception that the mandatory obligation to stay is not incumbent on the Court if the Court is satisfied that "the agreement is null and void, inoperative or incapable of being performed" Ramamurti J. was apparently of the view that the alleged nullity of the contract on the basis of mutual mistake was a matter that the Court has to examine further after recording evidence and that was a ground on which proceedings cannot be stayed under Section 3.

50. I consider, therefore, that C. A. 1209 and 1834 of 1969 should be set down for further hearing on these points.

51. Civil Appeals Nos. 1208 and 1833 of 1969 arise out of the application No. 106 of 1968 filed by the first respondent for injunction to restrain the first respondent from taking further part in the arbitration proceedings in Moscow. Ramamurti J., took the view that since the application No. 2604 of 1967 for stay of the proceedings in the pending suit C. S. 118 of 1967 had been dismissed the first respondent's injunction petition should be allowed on the ground that the two forums were mutually exclusive. In the connected appeals I have taken the view that the appellant would be entitled to an

order of stay of the proceedings in C. S. 118 of 1967 under Sec. 3 of Act 45 of 1961. Even assuming that Sec. 3 of the Act is not applicable this is not a proper case in which the High Court should have issued an injunction restraining the appellant from proceeding with the arbitration. As a rule the Court has to exercise its discretion with great circumspection for it is imperative that the right of access to the tribunals of a country should not be lightly interfered with. It is not sufficient merely to show that two actions have been started for it is not prima facie vexatious to commence two actions about the same subject-matter, one here and one abroad. [See *McHenry v. Lewis*, (1882) 22 Ch D 397 (401).] The reason of this reluctance to exercise the jurisdiction is that owing to a possible difference between the laws of the two countries, the stay of one of the actions may deprive the plaintiff of some advantage which he is justified in pursuing. Thus he may have a personal remedy in one country and a remedy only against the goods in another; or a remedy against land in one State but no such remedy in another. The rule, therefore, is that a plea of *Lis alibi pendens* will not succeed and the Court will not order a stay of proceedings unless the defendant proves vexation in point of fact. He must show that the continued prosecution of both actions is oppressive or embarrassing, an onus which he will find it difficult to discharge if the plaintiff can indicate some material advantage that is likely to result from each separate action. Each case, therefore, depends upon the setting of its own facts and circumstances. In the facts of the present case I am of opinion that no case for injunction has been made out and the order of Ramamurti J., dated April 12, 1968 allowing the application of respondent No. 106 of 1968 should be set aside. I would accordingly allow the appeals Nos. 1208 of 1969 and 1833 of 1969 with costs.

ORDER:—52. In accordance with the opinion of the majority the appeals are dismissed. There will be no order as to costs.

Appeals dismissed.

**AIR 1971 SUPREME COURT 22
(V 58 C 2)**

(From Industrial Tribunal, Punjab)

**M. HIDAYATULLAH C. J.,
G. K. MITTER AND A. N. RAY, JJ.****M/s. Dalmia Dadri Cement Ltd., Ap-
pellant v. Murari Lal Bikaneria, Res-
pondent.****Civil Appeals Nos. 968-972 of 1966,
D/- 19-8-1970.****(A) Industrial Disputes Act (1947),
Sch. 2, Item 6 — Domestic enquiry —
Bias — Enquiry officer being junior
advocate and at times appearing on
behalf of management — No bias to
be inferred.**

Merely because the Enquiry Officer was a junior advocate and that he had on occasions, been engaged by the Management he would not necessarily be biased against the workmen. So also as the Works Manager was going to be a witness in the enquiry there was nothing unfair in entrusting the appointment of the Enquiry Officer to the Director of the Company. 1964-2 Lab LJ 139 (SC), Rel. on. (Para 19)

**(B) Industrial Disputes Act (1947),
Sch. 2, Item 6 — Domestic enquiry —
Bias — Enquiry officer being lawyer
and his report bearing stamp of a law-
yer's work — Circumstances do not
justify conclusion that he acted unduly
hastily. (Para 20)****(C) Industrial Disputes Act (1947),
Sch. 2, Item 6 — Domestic inquiry —
Bias — Whether Works Manager ap-
plied his mind to facts before ordering
dismissal of workmen — Mere fact
that Works Manager referred to
opinion of others did not exclude his
having formed his own opinion — His
view being same as that of Director no
exception could be taken to his having
referred to such opinion. (Para 21)****(D) Industrial Disputes Act (1947),
Sch. 2, Item 6 — Domestic inquiry —
Act of indiscipline — Worker blowing
whistle at the instance of another
worker leading to stoppage of work in
factory—Such act of indiscipline can-
not be tolerated by employer.**

(Para 23)

Cases Referred: Chronological Paras

(1964) 1964-2 Lab LJ 139 =

(1964) 9 Fac LR 7 (SC), Saran
Motors Private Ltd. v. Vishwa-
nath

22

The following Judgment of the Court was delivered by

MITTER, J. : These five appeals are by special leave from the judgment and order of the Industrial Tribunal, Punjab dated September 1, 1965. The Tribunal dismissed the appellant's applications under Section 33 of the Industrial Disputes Act for grant of permission to dismiss five employees of the company. They arose in the following circumstances.

2. The appellant is a public limited company engaged in the manufacture of cement with its registered office at Charkhi Dadri, District Mohindergarh. The respondents are all workmen employed by the appellant. One of them, Murari Lal Bikaneria, respondent in Appeal No. 968 of 1966 was suspended by way of punishment for four days from May 26, 1964 by the appellant on the ground of serious acts of misconduct relating to falsifying the records of the company. This was referred for adjudication to the Industrial Tribunal Punjab and the appellant's action was upheld by an award dated May 24, 1965 published in the Punjab Government Gazette on June 11, 1965. On May 27, 1964 the then Prime Minister of India expired and on receipt of the news, the appellant closed the cement factory in the general shift as a mark of respect and called a condolence meeting of the workers and staff of the factory at 3.30 p. m. on the same day.

3. According to the appellant, after the conclusion of the condolence meeting while the Works Manager of the appellant was in discussion with other officers including one Ishwar Nath, Power House and Mill House Superintendent, the respondent appeared in their midst all of a sudden and demanded that work in the entire factory should cease and all production should stop. The said Superintendent remarked that in a continuous process industry like a cement factory total production in all the shifts could not be stopped. The respondent became insolent and used insulting language to the said Superintendent. He also threatened to call the workmen on strike and stop the factory within a minute if his demand was not acceded to. The Works Manager consulted the Delhi office of the appellant over the telephone and came to learn that other sister factories were not going

to stop their plants completely and that only the work in the office and in the general shift was to be stopped and that the same procedure should be adopted by the appellant's factory. The Works Manager called the representatives of the three unions of workers and communicated to them his decision on the basis of the advice received. Notice to this effect was put up on the notice board of the appellant on the night of May 27, 1964. On the day following when the work in the general shift was closed and work in the shift from 2 a. m. to 10 a. m. was going on, the respondent came to the factory at about 8 a. m. with a number of workers and asked the Works Manager who was then in the company of the said Superintendent about their decision regarding the closure of the continuous process units. On coming to learn from the Manager of the decision arrived at the previous night the respondent said that it was not acceptable to him or to his followers. The respondent and three other workers called upon the Works Manager to address the workers and explain their standpoint. When this was done the respondent shouted to the workers that the Works Manager was a traitor, that they should not listen to what was said by him and that they should close the factory and stop work in all the units. The respondent in company with the said other persons went to the packing section and prevailed upon the workers to desist from working. After visiting different departments he went to the boiler fireman, Banwari Lal (respondent in one of these appeals) and made him blow on the whistle three times as a signal to workmen all over the factory to leave off work. Banwari Lal blew the whistle as directed. The respondent along with other workers then picketed the time office entrance and stopped workmen from going inside to their duty at the change of shift. As a result of this, the kiln had to be stopped at 10-10 A. M. and could only get re-started at 2-10 P. M. Charge sheets were issued to the respondent and others including the said Banwari Lal. The first charge sheet to be issued was that on Banwari Lal on the 2nd June followed by that against Murari Lal and others on June 4.

4. The charge against Murari Lal in the charge-sheet dated June 4, 1964 was that he had not only misbehaved with Ishwar Nath, the Superintendent but also incited and instigated workmen to disobey the orders of the management in connection with the working of the factory on May 28, and further that he had incited the above strike during the pendency of proceedings before the Industrial Tribunal. His acts were said to be subversive of discipline and amounted to indulgence in riotous and disorderly behaviour, specially during the period of his suspension when he was not supposed to enter the factory premises.

5. While Banwari Lal submitted his explanation on June 3, Murari Lal delayed filing it on one ground or other e.g., asking for Hindi translation of letters, taking objection to his being addressed in his personal capacity and not as the President of the Union etc. He even threatened the Works Manager with legal action for the alleged incorrect way of addressing him. Ultimately he submitted his reply to the charge-sheet of the 4th June on July 15. He did not deny therein that he had demanded the closure of the factory but disputed that he had collected the workmen on the morning of 28th May. He admitted having asked for a complete holiday and said that the charge sheet against him of attempting closure of the entire plant and getting Banwari Lal to blow the whistle was false. He went further and charged the Special Officer of the appellant, one Kapoor, with having distributed sweets to the workers on the day of demise of the former Prime Minister. The appellant took exception to this and submitted another charge-sheet to him for making false allegations against an officer of the company. A reply to this was submitted only on August 25. On the 29th August the Works Manager enclosed copies of charge-sheets to the respondents in the five appeals and stated that as he himself was a witness to some of these incidents he was forwarding the papers for necessary action to higher authorities.

6. According to the appellant as a number of officers were in some way or other involved in the charges against the respondent and some of them might have to figure as witnesses in the enquiry it was felt proper to

appoint an outsider, S. N. Bhandari, an advocate of Delhi, to conduct the enquiry. The Enquiry Officer issued notices fixing the date of the enquiry and adjourned the same from time to time; but notices of adjournment were all returned with the endorsement 'refused' by Murari Lal and the other respondents except Banwari Lal who attended the proceedings.

7. The report of the Enquiry Officer shows that he issued a notice on 9th September to each of the workmen to whom a charge-sheet had been given informing him that the enquiry would be held on the 16th September at 10.30 a. m. in the general office of the factory. On September 15 he received two telegrams asking for postponement one of which was from the respondent and the other from the respondents other than Banwari Lal. By his telegram the respondent asked for postponement of the enquiry by a month on the ground of serious illness of his wife while the telegram from the other workers contained a similar request in view of the respondent's inability to take part in the enquiry. On the 16th September the other workmen including Banwari Lal appeared before the Enquiry Officer. After hearing Vidya Sagar, the Management's representative the Enquiry Officer adjourned the matter till the 25th September as he did not think that a month's postponement was called for. He sent registered letters to the employees including the respondent about his decision. The second meeting was held on the 25th September in the Directors' Office of the cement factory but not one of the workmen who had been given a charge-sheet turned up at the appointed hours. An employee of the factory was sent out to contact the nine workmen including the respondent. The respondent in this appeal and the respondents in other appeals excepting Banwari Lal refused to come on the ground that they could not participate in the enquiry before disposal of their letter of objection regarding the personnel of the Enquiry Officer. The Enquiry Officer made another attempt on the same day to go on with the proceedings and fixed 3.30 p. m. for the purpose and tried to notify the concerned workmen about it. The messenger who was sent out on this occasion reported that the respondent and the

said three other workmen had refused to come. The Enquiry Officer directed that evidence should be recorded in the absence of these workmen and that if they desired to take part in the proceedings they could do so at the next meeting fixed for the 1st October. On that day workmen other than these four appeared. After recording the evidence adduced, the Enquiry Officer submitted his finding on October 17, 1964 taking the view that the respondent and the said three other workmen had behaved rudely with the manager and showed insolence to him. Murari Lal was described as the ring leader. The Enquiry Officer found on the evidence before him that the closing of the factory by Banwari Lal blowing the whistle three times was done at the instance of Murari Lal. He held Banwari Lal guilty of an act of insubordination in so acting under the direction of the respondent. Murari Lal's action was held to be all the more reprehensible because he was not supposed to enter the factory on the 27th or 28th of May when he was under suspension. According to the Enquiry Officer these four workmen had combined together to stop the working of the factory and had actually stopped certain sections of it by their coercive tactics. In the result he held that the charges against Murari Lal had been proved. He also went into the evidence with regard to the allegation of distribution of sweets by the management and found against Murari Lal.

8. The appellant had yet another grievance against the respondent in that while the above enquiry was pending, the respondent Murari Lal put in an application to the management for half a day's sick leave on September 30, 1964. This was granted by the Chief Chemist but the respondent absented himself from duty for the whole of that day. On the Head Time-keeper pointing this out to him, Murari Lal wanted to have a look at his application and on the same being produced made changes thereon unauthorisedly and initialled the same so that he could get a full day's leave on the basis of the amended application.

9. The Head Time-keeper made a report of the incident to the Manager whereupon a further charge-sheet was

issued on the 5th October 1964. In his reply thereto Murari Lal stated that he had got his leave application scribed by another person who had through mistake mentioned leave for half a day when he himself wanted a full day's leave. He admitted having taken the application from the custody of the Head Time-keeper and made some alteration thereon, at the same time stating that he had committed a mistake. He however, alleged that he had done so at the instance of Head Time-keeper. Not satisfied with the reply the Manager of the factory appointed S. N. Bhandari i.e., the same person as the Enquiry Officer and asked the respondent to attend thereat. Murari Lal again refused to participate in the enquiry. The Enquiry Officer who recorded the statements of witnesses in support of the charges found Murari Lal guilty. The second finding of the Enquiry Officer was rendered on October 20, 1964.

10. The findings of the Enquiry Officer were forwarded to the Director-Secretary along with the record of the proceedings. The note by the Director-Secretary thereupon forwarded to the Works Manager shows that he had considered the report of the Enquiry Officer, had gone through the proceedings thereof and was satisfied that the charges had been brought home against the five workmen and that they should be dismissed from service. The report of the Enquiry Officer and the recommendation of the Director/Secretary were both sent to the Works Manager. By order dated 28th October 1964 the said Manager recorded that the charges proved against the respondent were of a grave nature and that considering all the circumstances of the case his dismissal from service had been decided upon.

11. As the appellant felt some doubt whether Murari Lal was a protected workman it submitted an application for permission to dismiss him under the provisions of Section 3E (3) of the Industrial Disputes Act before the Industrial Tribunal. The other respondents were dismissed from service and tendered one month's wages. Applications for approval of the action taken against them were moved before the Industrial Tribunal on the same day.

12. Banwari Lal filed a reply confessing his guilt and did not take part in the proceedings.

13. The main grievance put forward in the reply of Murari Lal dated November 11, 1964 was that the appointment of an outsider as an Enquiry Officer was unprecedented and that the Enquiry Officer was biased against the workers and wanted to conclude the enquiry hastily without giving a reasonable opportunity to the workers to conduct their case. Murari Lal complained that all this was done with a view to victimise him because he was president of a recognised Union affiliated to the I. N. T. U. C. namely, Dalmia Dadri Cement Factory Men's Union. His further case was that the enquiry conducted ex parte was perverse and held in disregard of principles of natural justice.

14. Before the Tribunal a number of witnesses were examined including the enquiry officer, S. N. Bhandari, Vidya Sagar, the Chief Chemist, Damodardas Vyas, the Factory Manager, Vishnu Kumar, the Director-Secretary and Murari Lal. The points urged on behalf of the workmen were:

(1) That the enquiry was vitiated in that the rules of natural justice were not observed and the workmen concerned were not given any real opportunity to contest the case.

(2) The enquiry was unauthorised inasmuch as the person who could legally decide to hold enquiry did not take any decision about it.

(3) The Works Manager of the concern did not apply his own mind to the case and did not come to any independent finding but had abdicated his authority in favour of someone else and accepted the latter's recommendations blindly.

At the hearing before the Tribunal the appellant did not lead any independent evidence about the guilt of the workmen but relied solely on the domestic enquiry and the report of the Enquiry Officer who was examined as a witness.

15. The Tribunal held the Management guilty of delay in the issue of charge-sheets to Murari Lal and some of the other workmen. It also commented on the fact that though the charges were sent by the Works Managers the orders for holding the enquiry were not passed by him but by Vishnu Kumar, Director-Secretary

as late as August 29, 1964. He took exception to the Director-Secretary's approval of the report of the Enquiry Officer and his recommendation of the dismissal of the workmen. He was of the view that this should have been done by the Works Manager himself and although the orders of dismissal were nominally passed by the Works Manager, he had not applied his mind to the conclusions arrived at by the Enquiry Officer independently. Apparently he was impressed by the text of the order of the Works Manager and took the view that on the Enquiry Officer submitting his report to the Director the latter had accepted the findings and recommended the workmen's dismissal from service. The order of dismissal issued by the Works Manager in the case of the employees other than the respondent recorded inter alia:

"The papers have been forwarded to me for necessary action. Having regard to the fact that the appropriate authorities have found you guilty of the charges and the fact that the charges proved against you are sufficiently grave.....it has been decided to dismiss you. And you are accordingly dismissed from service with immediate effect."

The Tribunal read the above as meaning that the Works Manager had not brought his independent decision to bear on the question but had merely accepted the recommendation of the Director/Secretary. According to the Tribunal this vitiated the order of dismissal. It may be noted that the Tribunal was not right in thinking that the Works Manager had used the same formula as quoted above in all the cases. The text of the order of dismissal in the respondent's case is entirely different; the material portion thereof reads—

"I have gone through the enquiry proceedings and accept the findings of the Enquiry Officer. I am satisfied that proper opportunity was given to you to defend yourself and the charges have been duly proved in the enquiry."

16. The Tribunal also took exception to the appointment of an outsider as the Enquiry Officer. He noted that the Enquiry Officer was an advocate practising at Delhi and was a junior lawyer at times engaged to appear in cases with Anand Prakash, counsel

for the appellant. He remarked that the Enquiry Officer was

"at pains to prepare a very legalistic record which may ostensibly show that a very proper enquiry was made."

The Tribunal went further and observed:

"The manner in which the record has been prepared puts me in doubt that this was the record of a genuine enquiry. The record as a whole gives me an impression that this was carefully prepared for the purpose of showing that an enquiry was ostensibly held and some of the workmen were also made to sign or make their thumb mark on the said record."

In this connection he noted that two of the witnesses, R. Ws. 3 and 4 had stated before him that they were made to sit outside the office for some days and were made to affix their signatures or thumb impression on the record of the proceedings although they were not present in the enquiry room and although no enquiry was ever held in their presence. It is worthy of note that it was R. W. 3 alone who had stated that he was made to sit outside the enquiry office. The Tribunal did not find any reason to disbelieve these two persons and on the strength of this took the view that the enquiry was a farce and a made-up affair.

17. The Tribunal also accepted the evidence of Sahib Dayal, R. W. 6, Sham Sundar, R. W. 7, and Ravi Dutt, R. W. 8 that they had been threatened by the Enquiry Officer on the very first date of hearing and that the said officer's attitude was hostile to the workmen. According to the Tribunal the manner in which the orders of the Enquiry Officer had been passed lent support to the statement of the said three persons. The Tribunal inferred therefrom that the enquiry was conducted in an atmosphere in which the workmen could not possibly expect any justice.

18. The Tribunal did not think it necessary to record any findings on the second and the third charges against Murari Lal. With regard to the last charge contained in the charge-sheet dated October 5, 1964 it took the view that the evidence of Vidya Sagar and the two other witnesses examined on behalf of the appellant before the Enquiry Officer was fantastic and per-

verse. It was not satisfied that the enquiry on this charge was genuine and concluded that at the worst there had been some misunderstanding about the alterations in the leave application of the respondent by changing it to a full day in place of half a day but whatever was done by the respondent was concurred in by the management. It was therefore disposed to accept the version of Murari Lal that the management was out to victimise him by issuing charges on lapses of a technical character. It further found that the Works Manager was biased against Murari Lal because of the insult alleged to have been offered to him and the noting by the manager in support of the last charge was that "this was not the first occasion on which Murari Lal had been indulging in tampering with records" was not borne out and no opportunity had been given to the respondent to show that the allegation was false.

19. We find ourselves unable to accept the conclusions arrived at by the Tribunal. The Tribunal seems to have been greatly impressed by the fact that instead of appointing someone in the appellant's factory itself as the Enquiry Officer the Works Manager had brought in an outsider who was no other than a junior advocate occasionally assisting Anand Prakash, their counsel in some matters. The Tribunal's view that this was wholly unwarranted and done with the purpose of loading the dice against the workmen appears to be unreasonable. Merely because the Enquiry Officer was a junior advocate and that he had on occasions been engaged by the appellant, it is not possible to take the view that he would necessarily be biased against the workmen. Evidently some of the workmen had behaved rudely to some members in the managerial cadre and it would not have been at all difficult for the Works Manager to appoint as Enquiry Officer some person of the factory itself over whom he was likely to have greater influence than on an outsider. As he himself was going to be a witness in the enquiry he entrusted the appointment of the Enquiry Officer to the Director of the Company. We find nothing unfair in this and are unable to take any exception to the course adopted.

20. The other grounds mentioned by the Tribunal for holding that the enquiry was not a bona fide one appear to be equally unsustainable. The Enquiry Officer, as already noted, was a lawyer and if he made a report which bore the stamp of a Lawyer's work it would not be unexpected. The circumstances do not justify the conclusion that he had acted unduly hastily. He started the enquiry on the 9th September and concluded it nearly a month thereafter. He held several sittings; he adjourned the case to 25th September to suit the convenience of Murari Lal whose request for adjournment for a month to the middle of October does not appear to have been based on any genuine ground. He sent for the workmen when they failed to turn up and noted what the messenger deputed to summon them had stated. We have referred in some detail to the correspondence which passed prior to the enquiry merely to show that Murari Lal's attitude throughout was to delay the proceedings and to frustrate them if possible. His excuse for not appearing in the proceedings was frivolous. He purposely delayed giving his reply to the charges and raised all sorts of frivolous objections from time to time to hold up the enquiry. Moreover the delay in the holding of the enquiry, if any was not made a ground of complaint by Murari Lal and the Tribunal's comment in regard thereto appears to be unjustified.

21. We do not accept the view of the Tribunal that the Works Manager did not apply his mind to the facts before ordering dismissal of the workmen and that he was simply following the suggestion of "the approved authorities". The order passed by the Works Manager does not bear that interpretation and the mere fact that he had referred to the opinion of others in some of the orders did not exclude his having formed an opinion of his own and when his own view was the same as that of the Director no exception could be taken to the fact that he had also referred to such opinion.

22. In *Saran Motors v. Vishwanath*, (1964) 2 Lab LJ 139 (SC), this Court rejected the objection as to bias of the enquiry officer upheld by the Tribunal on the ground that the enquiry officer had at times been engaged by the appellant as a lawyer in industrial

matters and had been entrusted with the work of holding enquiries on some previous occasions observing that the mere fact of a person's occasional employment as a lawyer by the employer did not render him incompetent to hold a domestic enquiry.

23. In our view there was sufficient evidence before the enquiry officer to come to the conclusion arrived at by him. Banwari Lal admitted that he had blown the whistle at the instance of Murari Lal leading to the stoppage of work in the factory. Such an act of indiscipline on the part of a worker could hardly be expected to be tolerated by any employer who attaches any value to discipline in his factory whatever be the reason for the demand for cessation of work. The more so, because Murari Lal was then under orders of suspension and was not supposed to enter the factory premises. Leaving out of account the second and the third charges which were not pressed before the Tribunal, there was ample evidence before the Enquiry Officer to arrive at the conclusion he did. There was certainly a *prima facie* case established by the employer which could be controverted by Murari Lal adducing evidence to the contrary.

24. It was argued before us that the Tribunal's finding ought not to be upset in view of the fact that Murari Lal had been in service of the appellant for 27 years without any blemish on his record and that the incidents of 27th and 28th May, 1964 even if proved, were not of such a grave nature as called for dismissal and the management might have overlooked the fault, if any, committed by Murari Lal. In the evidence before the Tribunal, Murari Lal had stated that some charge-sheets had been issued to him during the years 1947-50 and also thereafter and that he could produce the charge-sheets if given an opportunity to do so. He could not however state the nature of the charges contained therein. Counsel for the appellant appears to have stated that the management had never issued charge-sheets to the respondent except on two occasions to which the dispute related and wanted Murari Lal to produce any charge-sheets particularly any after 1960. From the record of the case it is not possible to come to any conclusion whether any charge-sheets had in fact been issued to the respondent

before 1964. We cannot hold that the issue of four charge-sheets in the year 1964 between 4th June and early in October was evidence of motive to victimise. The charge regarding the incidents of 27th and 28th of May was sufficiently serious for the management to have proceeded in the way it did and merely because the respondent admitted that he had himself made the amendment to his leave application it cannot be said that the appellant should not have pressed that charge. It was said that for an incident like this no greater punishment than withholding of a day's pay was called for. There would have been much to be said in favour of the workman if that was the only charge on which he was being proceeded against.

25. In the result we hold that the Tribunal was not justified in coming to the conclusion on the facts of the case that there was no reason for according permission to the management for dismissing Murari Lal Bikaneria as a result of the enquiry held against him. We set aside the order and allow Appeal No. 968/1966. In the circumstances we make no order as to costs.

26. With regard to the other appeals, it is sufficient to state that the respondents have expressed regret for the part played by them as mentioned in the charge-sheets issued to them and the appellant is satisfied therewith and does not want to proceed with these appeals. The said appeals Nos. 969 to 972/1966 will therefore stand disposed of as not pressed without any order as to costs.

Appeal No. 968 of 1966 allowed.
Appeals Nos. 969 to 972 of
1966 not pressed.

AIR 1971 SUPREME COURT 28 (V 58 C 3)

(From: Calcutta)

S. M. SIKRI AND I. D. DUA, JJ.

Girdhari Lal Gupta and another,
Appellants v. D. N. Mehta, Assistant
Collector of Customs and another,
Respondents.

Criminal Appeals Nos. 211 and 212
of 1969 D/-18-8-1970.

(A) Evidence — Appreciation of —
Investigating officer conducting a
IN/IN/D968/70/KSB/M

search — No general rule can be laid down that his evidence cannot be relied upon unless it is corroborated — Question depends on facts of each case. (Para 19)

(B) Evidence Act (1872), S. 3 — Evidence — Slips containing entries seized in search of premises — They being part of things discovered during search, can be looked into as evidence if entries therein are carried out into account books seized along with them. (Para 20)

(C) Foreign Exchange Regulation Act (1947), S. 23-C (1) — Offence of attempting to export Indian Currency by firm of partners — Money belonging to firm and entries made in account books of firm — Acting partner would be liable for offence unless he proves absence of knowledge of contravention or that he exercised due diligence to prevent such contravention — Mere allegation that he was in Japan at time of contravention is not enough. (Para 22)

The following Judgment of the Court was delivered by

SIKRI, J.: These Appeals, by special leave, are directed against the judgment of the High Court at Calcutta whereby the High Court (A. K. Das and K. K. Mitra, JJ.) set aside the order of acquittal and convicted the appellants before us under S. 23 (1A) of the Foreign Exchange Regulation Act (VII of 1947)—hereinafter referred to as 'the Act'. The appellant, Girdharilal Gupta and the appellant Puranmall Jain, were sentenced to rigorous imprisonment for six months each and to pay a fine of Rs. 2,000 each, in default, to rigorous imprisonment for a further period of three months each. The appellant, Bhagwandeo Tewari was sentenced to rigorous imprisonment for three months and to pay a fine of Rs. 1,000, in default, to rigorous imprisonment for two months. The firm was sentenced to pay a fine of Rs. 2,000. It does not appear that any special leave was obtained on behalf of the firm.

2. In order to appreciate the contentions made before us it is necessary to state the relevant facts. On October 25, 1958, Customs Preventive Officer B. Roy examined a parcel (wooden case) which purported to contain Rasogolla, Achar, Papar and dried vegetable, booked for Hongkong, to be

taken by the Swiss Air of which the Indian Airlines Corporation had been the cargo-handling agent. The articles were declared to be worth Rs. 20 but the freight which had been paid came to Rs. 127-73 nP. This excited the suspicion of the Customs Preventive Officer, B. Roy, and on opening the parcel and breaking down the case, five hundred ten currency notes of the denomination of hundred rupees each, valuing Rs. 51,000, were found. The name of the consignor was Ramghawan Singh at Karnani Mansion, Park Street, Calcutta, but on enquiry no trace could be found of this Ramghawan Singh at Karnani Mansion. In the course of further investigation suspicion fell on M/s. Agarwala Trading Corporation of which the appellants Girdharilal Gupta and Puranmall Jain were the partners and the appellant Bhagwandeo Tewari was an employee. On January 22, 1959, the office of the firm at 191, Mahatma Gandhi Road and the alleged residence of the partners at 11-B, Jatindra Mohan Avenue were searched. The appellant, Bhagwandeo Tewari, on being identified by the Traffic Assistant of the Indian Airlines Corporation, Ambar Nath Sen, P.W. 4, and one loader of Thai Airways, S. K. Battu, P.W. 26, was arrested. Certain incriminating documents, including account slips and cash-books of the firm were seized.

3. On June 3, 1959, a complaint was lodged at the instance of the Assistant Collector of Customs, Calcutta. After stating the above facts it was alleged in the complaint that sending out money in Indian currency was prohibited under S. 8 (2) of the Act and any attempt to do the same was punishable under S. 23-B of the Act.

4. At the trial a number of witnesses were examined. B. Roy, Customs Preventive Officer, gave evidence regarding the discovery of Rs. 51,000 in Indian currency notes, apart from Rasogollas, pickles, etc., on October 25, 1958. No cross-examination was directed to show that this did not happen on October 25, 1958.

5. S. A. D. Moira, Traffic Assistant of the Indian Airlines Corporation, P.W. 2, who checks freight and does other transshipment work in course of his duties at Dum Dum Airport, deposed that he received the relevant documents on October 25, 1958, from

Calcutta office. He said that the documents were in the handwriting of N. Sen of the Freight Section of the Calcutta Office. Armed with the letter of authority, he took the parcel to the Customs Officer and P.W. 1, B. Roy, asked him to open the parcel and currency notes of the value of Rs. 51,000, along with other things were discovered.

6. R. R. Mukherjee, Traffic Office of the Indian Airlines Corporation, P.W. 3, is another witness to the recovery of the currency notes. P.W. 4, Amba Nath Sen, was the Traffic Assistant in the Indian Airlines Corporation, who had typed out the consignment note in respect of this parcel after seeing the shipping bill (Ext. 1). He identified the appellant, Bhagwandeo Tewari, as the person who had handed over the shipping bill to him and the letter of authority, Ext. 11. He said that he calculated the freight and received the freight from this appellant. He further said that this appellant signed the consignment notes in Hindi in his presence and he remembered having seen this appellant writing a postcard on the adjoining table while he was preparing the consignment notes. He further stated that his immediate superior officer, Mr. P. K. Chatterjee, was also present at the time this consignment was being booked. Apparently this is not the first time that this appellant had gone to the Indian Airlines Corporation because P.W. 4 says that seven days ahead of October 24, 1958, this appellant had called on him with another shipment although that consignment was booked by P. K. Chatterji.

7. Some days after October 25, 1958, this witness P.W. 4 was taken by the Customs Officer to some place to find the man who is alleged to have booked the parcel. Two or three months thereafter he was again taken by the Customs Officers to another place in the Burrabazar area, which was the place of Agarwal Trading Corporation, and he said that he pointed out the appellant, Bhagwandeo Tiwari, as the one who had taken the parcel to him on October 24, 1958. He was cross-examined in order to show that he could not remember customers. He admitted that it was not always possible for him to remember all the men who came in contact with him in the course of his work, but he said that

he had told C. R. Basu who was investigating the case that the person who brought the parcel was an oldish man and lean one, and had also described his nose. He further admitted that at the place he identified appellant Bhagwandeo Tiwari, he was the only oldish man there. He said that he did not think that he committed a mistake unless the man he identified had a double in the shape of a twin brother and the like. He further admitted that he had been trying to recollect the appearance of the man to reconstruct in his mind the outline of his appearance as far as he could.

8. The evidence of P.W. 4 impresses us and there is no reason why we should not place reliance on his evidence.

9. P. K. Chatterjee, P.W. 5, speaks of the earlier visit of the appellant Bhagwandeo Tiwari as the person who called on him with the shipping bill on October 17, 1958.

10. C. R. Basu, P. W. 6, Officer of the Customs who investigated the case, said that after making enquiries he applied for the issue of search warrant to search the premises No. 191, Mahatma Gandhi Road. He also applied for a search warrant to search the premises of the partners of the firm at 11-B, Jatindra Mohan Avenue. He did not himself search 11-B, Jatindra Mohan Avenue, but went to execute the search warrant at 191, Mahatma Gandhi Road, where on the identification of P.W. 4 he arrested the appellant Bhagwandeo Tiwari. He then conducted the search of the premises in the presence of the witnesses and took into possession one Rokar, one Khata bahi, one nakal bahi, the attendance register and three account slips which he marked 8, 9 and 10 (Exts. 9 and 9/1 and 9/2, respectively). We may reproduce his evidence regarding the discovery of these account slips because a great deal of argument has been addressed to us on the recovery of these slips. He stated:

"The three slips, about which I have spoken just now, are in the same condition today as I found them on the day when they were seized. The witnesses to the search I conducted are Eadhesyam Gupta and Lalit Kumar Chandu Lal Parekh. Here is the search list over my signature and the signature of the witnesses (Ext. 10)." In his cross-examination he states:

"You are right that Exhibits 9, 9/1 and 9/2 are included in Serial No. 38 of the search list, Ext. 10."

The search list does not mention the slips separately but only mentions loose sheets in a sealed parcel. It has been urged that there is no evidence to show when the seal was opened. It is suggested that these slips have been fabricated and planted. No such question was put to the witnesses and we are unable to presume that the investigating officer would go about fabricating account slips in order to rope in the appellants.

11. The prosecution produced two witnesses who had signed the recovery list. The evidence of Rachashyam Gupta, P. W. 7, must be discarded because although he was examined before the Chief Presidency Magistrate he was not made available for cross-examination. The learned counsel, Mr. Bhattacharya, suggested that if this witness had been produced for cross-examination he would have deposed against the prosecution. We are unable to draw any such presumption. The other witness was Lalit C. L. Parekh, P.W. 8. He had signed the search list but on cross-examination he stated that "Basu had taken slips of paper from the 'Agal Bagal' of the guddy, by which I mean from underneath the Takia on the bed". He further said that "bits of paper Basu found from a wooden case as well." He further stated as follows:

"You are right that Basu placed all these bits of papers at one and the same place. How many pieces? I cannot say. I did not count. By guess I can say that the number of bits of paper would run to 50 or 60. I signed all the pieces of paper which were found so."

12. The learned counsel fastens on the last line and says that these slips do not bear the signature of Lalit C. L. Parekh, and therefore, it is clear that these have been fabricated later. We are unable to sustain this contention. The witness had signed a number of documents including the search list and he may well have thought that he had signed every piece of paper which was seized. No such question was put to the investigating officer.

13. P.W. 11, N. R. Paul, who was the assistant attached to the Appraising Department of the Calcutta Customs deposed regarding the prepara-

tion of the shipping bill. It appears that the shipping bill bore the words "Thai Airways Co." and these words were scored out and "Swiss Air" written in hand. He could not say who corrected the entry but nothing turns on this because it may be that the original idea was to send the parcel by Thai Airways but later on for some reasons it was not possible to send that parcel through this airways. The prosecution led evidence to show that as a matter of fact appellant Bhagwandeo Tiwari had approached somebody in Thai Airways but we need not dwell on this part of the case.

14. The prosecution also produced Shridhar Chatterjee, handwriting expert, who examined the signature reading as "Ram Chandra" written in Hindi and in pencil in the twcway-bills, Exts. 3 and 4, and the specimen writing. He was of the opinion that the writer of the specimen writing was the writer of the signature "Ram Chandra" appearing in the airway bill. We may mention that Bhagwandeo Tiwari is alleged to have signed as "Ram Chandra". The expert also gave the opinion that the type-written papers, Exts. II and IX had been typed on the same machine.

15. Exhibit 9/2, one of the seized account slips, is a very important document. The official translation is printed in the records and reads:

"Translation of	
Ext. 9/2 dated	
24.10.58	
A/C 1	Rs. 2/8/- 4 cases—Godown
In Cash	-/8/- 3 „opened below
	and goods
	brought.
(Paper Torn) cases	
bound (Pettis) (?)	-/4/- Case T (Illegible)
	-/2/- Illegible
(Paper torn) Cases	
(Pettis) (Illegible)	-/15/- for coming &
2 R. B.	going to I. A. O.
Rs. 223/8/-	4/5/-
	127/73. Hongkong
	Shanghai (torn &
	illegible)"

The High Court had to translate it again and the last line was translated into "Hongkong Lagaya" in place of "Hongkong Shanghai".

16. In the account book of M/s. Agarwala Trading Corporation (Exts. 21 and 21/1) under the entries dated

October 24, 1958, on which date the booking is alleged by the prosecution to have been done, an entry appears as follows :

"Rs. 4/5/- Through Bhagwan Deo
 -/8/- Colli (Janka)
 -/15/- Rickshaw fare
 2/14/- Cart Charge
 1/8/- Through Ghanshyam & Pandey
 -/4/- Bus fair
 1/4/- Bus Tram"

It will be noticed that the same items appear in Ext. 9 (2). The break-up in Ext. 9 (2) is slightly different but in the account book the four annas and two annas entries have been added to Rs. 2/8/- to make Rs. 2/14/- as cart charge.

17. Again the entries in Ext. 9/1 are as follows :

"Rs. -/1/- Bus hire for going home
 1/4/- Came from home to Thai (?) Taxi
 -/12/- Riksha-hire from Thai
 -/1/- Coolie
 -/4/- Thai Office Colie
 2/6/-

Rs. 147/10/- In Cash"

The corresponding entry in the account books are as follows :

"Rs 2/6/- (Bus fare -/1/-
 Taxi fare
 Rs. 1/4/- Rickshaw
 Rs. -/12/-
 Coolie 5/-).

It is true that the entry of Rs. 127/73 which exists in Ext. 9/2 has not been carried over into the account books but perhaps that would have been even too much for an accountant to do. He never dreamt that these entries of Rs. 4/5/- and Rs. 2/6/- in the account books would be seized upon by the prosecution to complete the case against the appellants.

18. Be that as it may, the entries in the account books demolish the case of defence that these slips were fabricated and that they had nothing to do with the firm. Ex. 9/2, on the other hand, clearly shows that somebody had gone to the I. A. C. office and paid -/15/- for going and coming to the I.A.C. office and paid the incidental charges.

19. Mr. Bhattacharya, who followed Mr. Chagla for the appellants, contends that a serious question of law is involved, the question being that if an investigating officer conducts a search his evidence cannot be relied on unless it is corroborated. It is a novel

proposition and he has not been able to cite any authority or principle in support of it. It all depends on the facts in each case. At any rate, here we have the corroborative evidence of P. W. 8, who signed the search document and also the entries themselves in the account books and their tallying with the slips.

20. It was urged on behalf of the defence counsel that these slips could not be taken into consideration at all because they are not evidence. We are unable to appreciate why they are not evidence. These are part of the things discovered during search and if the entries therein are carried out into the account books there is no reason why these things could not be looked at.

21. The learned counsel has taken us through the judgments of the Chief Presidency Magistrate and the High Court. We are in agreement with the conclusions arrived at by the High Court. We have ourselves gone into the evidence as the High Court had reversed the order of acquittal and in one or two places made minor mistakes.

22. Mr. Chagla, while arguing on behalf of the partners, said that there was evidence that one partner was not in Calcutta on the 24th or 25th October, 1958, as he was in Japan. But even if we take this fact into consideration, which fact was not brought to the notice of the Chief Presidency Magistrate or the High Court, it does not help him at all. Entries were made in the account books and it was the firm's money which was spent and he being an active partner is clearly liable under Section 23C (1) of the Act which reads :

"23C (1). If the person committing a contravention is a company, every person who, at the time the contravention was committed, was in-charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention."

This sub-section deems the appellant Girdhari Lal Gupta guilty. The question is: Has he proved that the contravention took place without his knowledge and he exercised due diligence to prevent such contravention? What he said in his statement under Sec. 342, Criminal P. C., was that he alone looks after the affairs of the firm. There is also no evidence to show that the contravention took place without his knowledge or that he exercised due diligence to prevent such contravention. The entries were there in his account books and the only thing that he had to say about these entries in his account books is that they pertain to the routine work of the firm. Under the circumstances we are unable to exonerate him of the charge.

23. As far as the other partner, Puranmall Jain is concerned, he stated that he does not look after the affairs of the firm and further that he stays all along at Sriganganagar in Rajasthan and does not stay in Calcutta. The prosecution has not led any reliable evidence to prove that he took any active part in the conduct of the business of the firm. In these circumstances we are inclined to give him the benefit of doubt and acquit him.

24. In the result the appeal of Puranmall Jain is allowed and he is acquitted of the charge. His bail bond shall stand cancelled. The appeals of Girdhari Lal and Bhagwandeo Tewari are dismissed.

Order accordingly.

AIR 1971 SUPREME COURT 33
(V 58 C 4)

(From: Allahabad)

J. C. SHAH AND K. S. HEGDE, JJ.

L. Hirday Narain, Appellant v. Income-Tax Officer, Bareilly, Respondent.

Civil Appeals Nos. 193 and 448 of 1970, D/- 21-7-1970.

(A) Income-tax Act (1922), Ss. 16 (3) (a) (ii) and 3 — Assessment in capacity as Hindu undivided family — S. 16 (3) (a) (ii) is not applicable — Income of minor children of assessee cannot be included in his income.

(Para 7)

(B) Income-tax Act (1922), S. 3 — Hindu undivided family — Act does not contemplate that family to become taxable entity must consist of two or more male members. AIR 1966 SC 1523 & AIR 1970 SC 14, Rel. on.

(Para 8)

(C) Constitution of India, Art. 226 — Alternative remedy — Petitioner filing writ petition instead of availing of statutory remedy — High Court entertaining petition and giving hearing on merits — Petition cannot thereafter be rejected on ground that statutory remedy was not availed of.

(Para 12)

(D) Income-tax Act (1922), S. 35 — Rectification of mistake — Power of — Nature — Mistake apparent on record brought to notice of Income-tax Officer — He cannot refuse to exercise power under Sec. 35 — Decision of Allahabad High Court, Reversed.

It cannot be said that the jurisdiction of the Income-tax Officer under Section 35 to rectify mistake is discretionary and therefore even if the conditions for its exercise are shown to exist, he can decline to exercise the power. Exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the Revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial function under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceedings. Decision of Allahabad High Court, Reversed. (Paras 12, 14, 15)

If a statute invests a public officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are prima facie enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforce-

ment of a right — public or private — of a citizen. (1880) 5 AC 214, Referred to. (Para 12)

(E) Income-tax Act (1922), Sec. 35 — Rectification of mistake — Application — Income-tax Officer cannot modify status of assessee without first giving him notice.

Where an application for rectification was filed on ground that the assessee being Hindu Undivided family, income of minor sons was included by wrongly applying Section 16 (3) (a) (ii), the Income-tax Officer was not entitled to suo motu modify the status of the assessee as "Individual" without giving opportunity to establish that his status as HUF was in law correct. Right to obtain the benefit of rectification could not be refused by changing the status on the basis of which the original assessment was made without investigating, after due notice, whether in assessing the income a mistake in fact was committed. (Para 11)

Cases Referred: Chronological Paras

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| (1970) AIR 1970 SC 14 (V 57) = | |
| (1969) 74 ITR 190, N. V. Narendra Nath v. Commr. of Wealth Tax | 8 |
| (1966) AIR 1966 SC 1523 (V 53) = | |
| (1966) 60 ITR 293, Gowli Budanna v. Commr. of Income-tax, Mysore | 8 |
| (1880) 5 AC 214 = 49 LJQB 577, Julius v. Bishop of Oxford | 13 |

The following Judgment of the Court was delivered by

SHAH, J.—These appeals arise out of orders passed in petitions praying for a writ of mandamus to rectify orders of assessment relating to income assessed to tax for the years 1951-52 and 1952-53. The corresponding previous years for the assessment years were October 1, 1949 to September 30, 1950 and October 1, 1950 to September 30, 1951.

2. Hirday Narain and his five sons were members of a Hindu undivided family. Till the assessment year 1950-51 the income received by Hirday Narain was assessed to tax as the income of a Hindu undivided family. On November 19, 1949 the property of the joint family was partitioned between Hirday Narain and his sons. In assessing the Income for the assessment year 1951-52 the Income-tax Officer recorded an order that the property was partitioned, but he still

assessed the income received by Hirday Narain as income of a Hindu undivided family. In appeal the Appellate Assistant Commissioner treated Rs. 18520/- earned between October 1, 1949 and November 18, 1949 as income of the former Hindu undivided family and directed that it be "excluded from the assessment."

3. Pursuant to that order, the Income-tax Officer made two orders of assessment—(1) assessing Rs. 18,520/- as income of the Hindu undivided family of Hirday Narain and his five sons; and (2) assessing Rs. 1,06,156/- also as income of a Hindu undivided family and liable to tax in the hands of Hirday Narain by the application of Sec. 16 (3) (a) (ii) of the Indian Income-tax Act, 1922.

4. Hirday Narain then applied for rectification of a mistake in the order of assessment which he claimed was apparent from the record. He submitted that:

"the assessment of x x x Hirday Narain has been made in the status of Hindu undivided family comprising of himself and his minor son Satendra Prakash. Section 16 (3) (a) (ii) does not apply to cases of 'Hindu undivided family', but only to those of 'Individuals'. It is therefore requested that such of the income as has by mistake been included in the assessment of the Hindu undivided family for the said year under Section 16 (3) (a) (ii) may kindly be excluded under Sec. 35 as the mistake is apparent from record." The Income-tax Officer accepted the plea that to income assessed to tax in the hands of Hirday Narain in the status of a Hindu undivided family, Sec. 16 (3) (a) (ii) of the Income-tax Act, 1922, did not apply, but he declined to give relief holding that for the period November 19, 1949 to September 30, 1950 Hirday Narain should have been assessed as an individual.

5. Hirday Narain then moved a petition before the High Court of Allahabad under Article 226 of the Constitution challenging the order of the Income-tax Officer. A single Judge of the High Court rejected the petition holding that at the stage of the original assessment the question that the income was not liable to be assessed under Sec. 16 (3) (a) (ii) of the Income-tax Act was not raised and that the assessee had not applied in

revision to the Commissioner under Sec. 33-A of the Act. A Division Bench of the High Court confirmed that order in appeal, observing that the rectification under Sec. 35 of the Act was "discretionary", and if the Income-tax Officer thought that proceedings were "substantially fair" he was "not bound to rectify the assessment on technical grounds".

The High Court also observed that "it was not clear that after November 19, 1949 there was a Hindu undivided family which Hirday Narain represented and therefore it was possible to say with certainty that the Income-tax Officer was wrong in proceeding on the footing that the assessment could be supported as assessment of an individual."

6. With special leave, Hirday Narain has appealed to this Court.

7. In respect of the period November 19, 1949 to September 30, 1950 the income was assessed in the hands of Hirday Narain in the status of a Hindu undivided family. Section 16 of the Indian Income-tax Act, 1922, by subsection (3) (a) (ii) provides:

"In computing the total income of any individual for the purpose of assessment, there shall be included—

(a) so much of the income of a wife or minor child of such individual as arises directly or indirectly—

x x x x x

(ii) from the admission of the minor to the benefits of partnership in a firm of which such individual is a partner." Income for the period November 19, 1949 to September 30, 1950 being assessed to tax as the income of a Hindu undivided family and not of an individual, Section 16 (3) (a) (ii) plainly did not apply and the income of the minor children of Hirday Narain could not be included in the income of Hirday Narain assessed as a Hindu undivided family.

8. Under the Income-tax Act it is not predicated of a Hindu undivided family as a taxable entity that it must consist of two or more male members: *Gowli Buddanna v. Commr. of Income-tax, Mysore*, (1966) 60 ITR 293 = (AIR 1966 SC 1523), see also *N. V. Narendranath v. Commr. of Wealth Tax*, (1969) 74 ITR 190 = (AIR 1970 SC 14) (a case under the Wealth Tax Act). Hirday Narain received a share in the properties of the Hindu undivided family

of which he and his wife were members. It may again be noticed that before the previous year expired, Hirday Narain's wife gave birth to a son on April 6, 1950. We are therefore unable to agree that the income accruing between November 19, 1949 and September 30, 1950 could be assessed in the hands of Hirday Narain as an individual.

9. But the Solicitor-General submitted that Hirday Narain had filed his return in the status of an individual, and since the Appellate Assistant Commissioner had also passed an order when he directed separate assessment of the total receipts during the year October 1, 1949 to September 30, 1950 as the income of two distinct assessable entities, the Income-tax Officer was bound to assess the income for the period November 19, 1949 to September 30, 1950, as the income of Hirday Narain as an individual, and to that income, the income of his minor children arising out of the partnership to which they were admitted was liable to be added under Section 16 (3) (a) (ii) of the Income-tax Act, and the Tax Officer was entitled and indeed bound to rectify the assessment when his attention was invited to the error.

10. There is no clear evidence on the record about the status in which Hirday Narain submitted the return of income. If the order of assessment made by the Income-tax Officer furnishes any indication, the return was probably filed in the status of a Hindu undivided family. By the order dated December 16, 1953 the total income of the relevant year was ordered to be assessed in the hands of Hirday Narain in the status of a Hindu undivided family. It is true that in the appeal before the Appellate Assistant Commissioner it was contended by Hirday Narain that the Income-tax Officer "had erred in including a sum of Rs. 18,520 to the income of the appellant (Hirday Narain) as an 'individual' and in not assessing it separately as the income of the 'Hindu undivided family.'" The Appellate Assistant Commissioner observed that the income of Rs. 18,520/- related to the period when the family of the appellant was undivided, but by an order under Section 25-A the Income-tax Officer had held that the appellant and his sons had partitioned the property of the family. He there-

fore directed that the amount of Rs. 18,520/- which belonged to the erstwhile Hindu undivided family be excluded from the assessment which accordingly stood reduced from Rupees 1,24,676/- to Rs. 1,06,156/. The Appellate Assistant Commissioner did not direct that the status in which the income was sought to be assessed for the period November 19, 1949 to September 30, 1950 be altered. Pursuant to the order of the Appellate Assistant Commissioner the Income-tax Officer assessed the income for that period as income of a Hindu undivided family represented by Hirday Narain. There was in fact an existing Hindu undivided family of which, for a part of the period Hirday Narain and his wife were members, and for the rest, besides the two, their infant son was a member.

11. The order of the Income-tax Officer is subject to a procedural infirmity as well. In rejecting the application under Section 35, Income-tax Officer apparently assumed that in an application made by an assessee he could exercise his power *suo motu* and modify the status of the assessee even without giving an opportunity to the assessee to establish that the order assessing him in the status of a Hindu undivided family was in law correct. Hirday Narain had claimed that the income of his minor children was not liable to be included in his assessment in the status of a Hindu undivided family. There was no defence to the claim for rectification on the merits of that application. Right to obtain the benefit of rectification could not be refused by changing the status on the basis of which the original assessment was made without investigating, after due notice, whether in assessing the income for the period November 19, 1949 to September 30, 1950 a mistake in fact was committed.

12. An order under Section 35 of the Income-tax Act is not appealable. It is true that a petition to revise the order could be moved before the Commissioner of Income-tax. But Hirday Narain moved a petition in the High Court of Allahabad and the High Court entertained that petition. If the High Court had not entertained his petition, Hirday Narain could have moved the Commissioner in revision, because at the date on which the petition was moved the period prescribed

by Section 33-A of the Act had not expired. We are unable to hold that because a revision application could have been moved for an order correcting the order of the Income-tax Officer under Section 35, but was not moved, the High Court would be justified in dismissing as not maintainable the petition, which was entertained and was heard on the merits.

The High Court observed that under Sec. 35 of the Indian Income-tax Act, 1922, the jurisdiction of the Income-tax Officer is discretionary. If thereby it is intended that the Income-tax Officer has discretion to exercise or not to exercise the power to rectify, that view is in our judgment erroneous. Sec. 35 enacts that the Commissioner or Appellate Assistant Commissioner or the Income-tax Officer may rectify any mistake apparent from the record. If a statute invests a public Officer with authority to do an act in a specified set of circumstances, it is imperative upon him to exercise his authority in a manner appropriate to the case when a party interested and having a right to apply moves in that behalf and circumstances for exercise of authority are shown to exist. Even if the words used in the statute are *prima facie* enabling, the Courts will readily infer a duty to exercise power which is invested in aid of enforcement of a right—public or private—of a citizen.

13. In *Julius v. Bishop of Oxford*, (1880) 5 AC 214 it was observed by Cairns L. C. at pp. 222-223 that "the words 'it shall be lawful' conferred a faculty or power, and they did not of themselves do more than confer a faculty or power. But there may be something in the nature of the thing empowered to be done, something in the object for which it is to be done, something in the conditions under which it is to be done, something in the title of the persons for whose benefit the power is to be exercised, which may couple the power with a duty, and make it the duty of the person in whom the power is reposed to exercise that power when called upon to do so." Lord Blackburn observed in the same case at pp. 244-245 that the enabling words give a power which *prima facie* might be exercised or not, but if the object for which the power is conferred is for the purpose of effectuating a right

there may be a duty cast upon the donee of the power to exercise it for the benefit of those who have that right when required on their behalf. Lord Penzance and Lord Selborne made similar observations at pp. 229 and 235.

14. Exercise of power to rectify an error apparent from the record is conferred upon the Income-tax Officer in aid of enforcement of a right. The Income-tax Officer is an Officer concerned with assessment and collection of revenue, and the power to rectify the order of assessment conferred upon him is to ensure that injustice to the assessee or to the Revenue may be avoided. It is implicit in the nature of the power and its entrustment to the authority invested with quasi-judicial functions under the Act, that to do justice it shall be exercised when a mistake apparent from the record is brought to his notice by a person concerned with or interested in the proceeding.

15. The High Court was, in our judgment, in error in assuming that exercise of the power was discretionary and the Income-tax Officer could, even if the conditions for its exercise were shown to exist, decline to exercise the power.

16. For the assessment year 1952-53 the assessee is also entitled to relief claimed by him.

17. The appeals must therefore be allowed and the order passed by the High Court set aside. Writs will issue directing that the assessment of Hirday Narain for the years 1951-52 and 1952-53 be rectified by deleting the income of his minor sons included under Section 16 (3) (a) (ii) of the Income-tax Act, 1922 from assessment. The appellant will be entitled to his costs in this Court and in the High Court. One hearing fee.

Appeal allowed.

**AIR 1971 SUPREME COURT 37
(V 58 C 5)**

(From Andhra Pradesh: 64 ITR 106)
J. C. SHAH AND K. S. HEGDE, JJ.
Income Tax Officer, Gudur and another, Appellants v. Maramreddy Sulochanamma, Respondent.

Civil Appeals Nos. 529-538 of 1967,
D/- 7-8-1970.

IN/IN/D870/70/CWM/P

(A) Income-tax Act (1922), Ss. 24-B, 34 — Reassessment of income of deceased person in hands of his legal representatives — Notices under Section 34 relating to period subsequent to the death are invalid. (Para 6)

(B) Income-tax Act (1922), Ss. 24-B, and 34 — Reassessment of income of deceased person — Notices must be issued to all executors under the will or all legal heirs as the case may be.

If a person dies executing a will appointing more than one executor or dies intestate leaving behind him more than one heir, the Income-tax Officer has to proceed to assess the total income of the deceased against all the executors or all the legal representatives as the case may be. The notices under Section 34 to reopen assessment of the deceased for the period prior to his death have to be issued to all the executors or all the legal representatives as the case may be. (1965) 57 ITR 168 (SC), Rel. on.

(Paras 5, 10)

[The Supreme Court remanded the matter to High Court for reconsideration of the case after ascertaining (1) who were all in possession and management of the estate of the deceased (a) immediately after his death (b) at the time when notices were issued, (2) whether the will purported to have been executed by the deceased was a true and genuine document and if so who were the executors and if not who were the legatees, (3) if the will was not genuine who were his heirs. After ascertaining these facts the High Court was directed to determine whether the officer had made any bona fide enquiry before issuing notice under Section 34 or whether he had issued notices to all the legal representatives of the deceased.]

(Paras 10 and 11)

Cases Referred: Chronological Paras
(1965) AIR 1965 SC 1049 (V 52)

= (1965) 1 SCR 231, Daya Ram

v. Shyam Sundari

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(1965) 57 ITR 168 (SC), First
Addl. Income Tax Officer
Kozhikode v. Mrs. Suseela
Sadanandan

5, 10

The following Judgment of the Court was delivered by

HEGDE, J.: These appeals by special leave arise from the decision of the High Court of Andhra Pradesh in Writ Appeals Nos. 13 to 22 of 1965 on its file. Only one question of law

arose for decision in those appeals, the very question arising for decision in these appeals and that question is whether the notices issued by the Income-tax Officer under Section 34 of the Indian Income-tax Act, 1922 (which will be hereinafter called the Act) in March, 1962 on the respondent and her sisters are valid in law.

2. One Narayana Reddy was an income-tax assessee. He died on March 26, 1948, leaving behind him his widow Ramanamma and five daughters. On his death his widow took possession of the estate and was managing it. Subsequently misunderstanding appears to have arisen between her and some of her daughters. One of the daughters by name Sreedevamma filed a suit for removing her mother from management of the estate and for the appointment of a receiver. In that suit a Commissioner was appointed to take an inventory. The Commissioner, while taking the inventory, found an unregistered will dated March 4, 1948, in the safe. That will was purported to have been executed by Narayana Reddy. It is said that in that will various dispositions were made including some provision for certain charities. It is further said that two of the sons-in-law of Narayana Reddy were designated therein as the executors. After the discovery of that will the widow Ramanamma instituted a suit challenging the genuineness of that will. One of the sons-in-law of Narayana Reddy instituted another suit for administration of the estate of his father-in-law claiming to be an executor appointed under the will. During the pendency of these suits the parties compromised their disputes and filed a compromise petition on April 15, 1954. A decree in terms of the compromise was made. Under the terms of the compromise the estate of Narayana Reddy was divided between the widow of Narayana Reddy, his mother and his five daughters. Some provision for certain charities was also made thereunder and for managing those charities some trustees were appointed. It is said that the parties were in possession and enjoyment of their respective shares ever since the compromise decree. Narayana Reddy's widow died on September 5, 1956. Before her death she bequeathed her share in the property to her last three daughters.

3. After the death of Narayana Reddy the income-tax authorities dealt with his widow as his sole legal representative. On that basis the authorities collected from her the tax due from the estate of the deceased Narayana Reddy. They also took re-assessment proceedings under Sec. 34 of the Act and collected some additional tax from her. On March 17, 1962, the respondent, who is one of the daughters of Narayana Reddy and who had obtained a share in the estate of Narayana Reddy under the compromise decree referred to earlier, was served with notices under Sec. 34 of the Act seeking to reopen the assessment of Narayana Reddy for the years 1941-42 to 1949-50. She filed as many as nine writ petitions challenging the validity of the notices served on her. The main question for decision is, as mentioned earlier, whether the said notices are valid.

4. Section 24B (1) of the Act provides:

"Where a person dies, his executor, administrator or other legal representative shall be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person, or any tax which would have been payable by him under this Act if he had not died."

5. Interpreting that provision this Court ruled in First Addl. Income-tax Officer, Kozhikode v. Mrs. Suseela Sadanandan, (1965) 57 ITR 168 (SC), that if a person dies executing a will appointing more than one executor or dies intestate leaving behind him more than one heir, under Sec. 24B of the Act, the Income-tax Officer has to proceed to assess the total income of the deceased against all the executors or all the legal representatives as the case may be. It was further ruled therein that if there are more than one executor of the deceased person all of them will be his representatives and for the purpose of Sec. 24B (2) all of them jointly can represent the estate of the deceased. In that decision the principle laid down by this Court in Dayaram v. Shyam Sundari, AIR 1965 SC 1049, that where a plaintiff or an appellant, after diligent and bona fide enquiry ascertains who the legal representatives of a deceased defendant or respondent are, and brings them on

record within the time limited by law, there is no abatement of the suit or appeal and those legal representatives sufficiently represent the estate of the deceased and a decision obtained with them on record will bind not merely those impleaded but the entire estate including those not brought on record was held to be not confined to any suit and appeals but is of general application. It was observed therein that there is no reason why that principle cannot be invoked in the case of assessment of the income of a deceased person in the hands of his legal representatives.

6. It is clear that notices issued in respect of the assessment for the assessment year 1949-50 are clearly invalid as they relate to a period subsequent to the death of Narayana Reddy. Hence we are concerned with the validity of the notices relating to the other assessment years.

7. It is now established that the copies of the notices impugned in the writ petitions had been sent to all the daughters of Narayana Reddy but no notice was sent to his mother or to the Trustees. The respondent in her writ petitions pleaded that she is not a legal representative of Narayana Reddy. That averment cannot be correct. The question whether the will purported to have been executed by Narayana Reddy is a genuine one or not has not been gone into. If intermeddling with the properties of the deceased is adopted as the test for determining his legal representatives then his mother and the trustees appointed for the management of the charities would become his legal representatives. The Income-tax Officer has not taken any positive stand as to how he came to the conclusion that the daughters of Narayana Reddy alone are his legal representatives. It is not made clear whether he relied on the will. If he relies on the will then he should have issued notices to the executors appointed thereunder, if executors had been appointed as alleged. The will is not before the Court. Therefore we cannot be definite as to its terms. If on the other hand the Income-tax Officer relies on the general Hindu Law then again it is not clear whether he made enquiry as to who were all the legal representatives of Narayana Reddy on the day he issued the notices.

8. The allegations in the writ petitions are vague and confused. The respondent's assertion therein that she is not one of the legal representatives of her father appears to have no basis. She does not say who were all the legal representatives of her father. It is not clear what her stand is as regards the will said to have been executed by her father. She does not deny that under the compromise decree, she obtained a portion of her father's properties. The averments in her petitions are bald and lacking in particulars.

9. Equally confused is the case pleaded by the Income-tax Officer. Apart from asserting that he had issued notices to all the legal representatives of Narayana Reddy, he did not disclose his basis for coming to the conclusion that the daughters of Narayana Reddy alone are his legal representatives. It is not clear whether he takes his stand on the general Hindu Law or the will alleged to have been executed by Narayana Reddy or the compromise decree. He did not even aver that he made any bona fide enquiry before issuing the impugned notices.

10. The facts and circumstances disclosed in this case are somewhat similar to those in Mrs. Suseela Sadanandan's case, (1965) 57 ITR 168 (SC) (Supra). Hence in the interest of justice we think it proper to allow these appeals and remand the case to the High Court for reconsideration of the case after ascertaining—

(1) Who were all in possession and management of the estate of Narayana Reddy (a) immediately after his death (b) at the time when the notices under S. 34 were issued by the Income-tax Officer;

(2) Is the will purported to have been executed by Narayana Reddy a true and genuine document, if so, were any executors appointed under the will, if so, who were those executors; if not, who were the legatees under that will;

(3) If the will is held to be not genuine, who were the heirs of Narayana Reddy in accordance with law by which he was governed and

(4) Who all were in possession of the properties of Narayana Reddy under the terms of the compromise decree.

11. After ascertaining these facts the High Court must determine whether the Income-tax Officer had made any bona fide enquiry before issuing notices under Section 34 or whether he had issued notices to all the legal representatives of Narayana Reddy.

12. In our opinion for the resulting confusion the Income-tax Officer is primarily responsible. Hence the Revenue should pay the costs incurred by the respondent both in the High Court and this Court upto this stage irrespective of the result of the case. So far as the future costs are concerned it shall be in the discretion of the High Court.

Order accordingly.

**AIR 1971 SUPREME COURT 40
(V 58 C 6)**

(From Delhi: 1970 Serv LR 213)

J. C. SHAH AND K. S. HEGDE, JJ.

Union of India, Appellant v. J. N. Sinha and another, Respondents.

Civil Appeal No. 381 of 1970, D/- 12-8-1970.

(A) Civil Services — Fundamental Rules, R. 56 (j) — Rule is not invalid. AIR 1965 SC 280, Foll. (Para 6)

(B) Constitution of India, Arts. 310, 309 and 311 — "Doctrine of pleasure" — It is subject to rules or law made under Art. 309 as well as conditions prescribed under Art. 311. (Para 7)

(C) Natural justice — Rules of — Nature — Conflict between rules of natural justice and statutory provision — Latter prevails.

Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. Their aim is to secure justice or to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with the principles of natural justice, the courts should do so. But if a statutory provision either specifically or by necessary implication excludes the application of any rules of natural justice then the court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a

power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power. AIR 1970 SC 150, Foll. (Para 7)

(D) Civil Services — Fundamental Rules, R. 56 (j) — Compulsory retirement — Appropriate authority forming bona fide opinion to do so in public interest is condition precedent — Show cause notice against retirement not required — Constitution of India, Articles 310, 311.

Where an appropriate authority bona fide forms opinion that a Government servant be retired in public interest, he can pass order of compulsory retirement. That opinion cannot be challenged before courts. Nor R. 56 (j) requires that the opportunity to show cause against compulsory retirement must be given. Order of compulsory retirement can be challenged only on ground that either the requisite opinion was not formed or that the order was passed arbitrarily or on collateral grounds. 1970 Serv LR 213 (Delhi), Reversed. (Paras 7, 8, 10)

Fundamental Rule 56 (j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest. Compulsory retirement involves no civil consequences. Rule 56 (j) is not intended for taking any penal action against the Government servants. That rule merely embodies one of the facets of the 'pleasure doctrine' embodied in Article 310 of the Constitution. (Para 8)

Cases Referred: Chronological Paras

- (1970) AIR 1970 SC 150 (V 47) =
 (1970) 1 SCR 457, Kraipak v. Union of India 7, 11, 13
 (1967) AIR 1967 SC 1269 (V 54) =
 (1967) 2 SCR 625, State of Orissa v. Dr. (Miss) Binapani Dei 11, 12
 (1965) AIR 1965 SC 280 (V 52) =
 (1967) 2 Lab LJ 246, T. G. Shivacharana Singh v. State of Mysore

The following Judgment of the Court was delivered by

HEGDE J.—In this appeal by certificate the only question that was canvassed before us was as regards the validity of the order contained in memorandum No. F. 16-42/68-S. 1, dated August 13, 1969 issued by the Government of India, Ministry of Education and Youth Services, retiring the 1st respondent compulsorily from Government service in exercise of the powers conferred under clause (j) of Fundamental Rule 56 with effect from August 14, 1969. That order was attacked before the High Court on various grounds. The High Court rejected some of those grounds. It did not find it necessary to decide a few others but accepting the contention of the respondent that in making the order, the appellant had violated the principles of natural justice, it held that the impugned order is invalid. The High Court accordingly issued a writ of certiorari quashing that order.

2. Before us the only contention presented for our decision was whether the High Court was right in holding that in making the impugned order the appellant had violated the principles of natural justice. No other contention was taken before us. Hence we shall address ourselves only to that question.

3. Before proceeding to examine the contention above formulated, it is necessary to set out the material facts. The 1st respondent herein Col. J. N. Sinha successfully competed in the examination held by the Federal Service Commission in 1938 for the post of Extra-Assistant Superintendent in the Survey of India Service. After selection, he was appointed as an Extra-Assistant Superintendent. He worked as probationer for a period of three years and thereafter he was confirmed in that post in 1941. During the second world war, he volunteered for active service in the army and was granted an emergency Commission in the army. He was granted a regular commission in the army with effect from October 23, 1942.

4. In exercise of the powers conferred by the proviso to Article 309 of the Constitution, the President of India made on August 17, 1950 rules called the Survey of India (Recruitment from Corps of Engineering Offi-

cers) Rules, 1950 for regulating the recruitment and conditions of service of persons appointed from the Corps of Engineering Officers of the Defence Ministry to the Survey of India Class I Service. Rule 2 of the said Rules provides for the recruitment of Military Officers to the Survey of India Class I Service and Rule 3 provides that the recruited officers will be on probation for two years which may be extended by the Government on the advice of the Surveyor General. The 1st respondent was taken into the Survey of India Class I Service under Rule 2 of the aforesaid 1950 Rules as Deputy Superintendent Surveyor with effect from June 1951. Thereafter the President of India in exercise of the powers under the proviso to Art. 309, made on July 1, 1960, the Survey of India Class I (Recruitment) Rules, 1960 for regulating the recruitment of Survey of India Class I Service. The 1st respondent was subsequently promoted firstly as Superintending Surveyor and then as Deputy Director. After some time he was promoted as Director and lastly as Director (Selection Grade). The last mentioned promotion was made with effect from October 27, 1966. On May 17, 1969, Fundamental Rule 56 (j) was amended. Thereafter on August 13, 1969, the Ministry of Education and Youth Services issued the impugned order. The 1st respondent was given three months' pay and allowances in lieu of three months' notice prescribed in Fundamental Rule 56 (j). The 1st respondent being aggrieved by that order, challenged the validity of the same. As mentioned earlier, the High Court accepted his plea. The Union of India has appealed against that order.

Fundamental Rule 56 (j) reads:

"Notwithstanding anything contained in this Rule the appropriate authority shall, if it is of the opinion that it is in the public interest so to do have the absolute right to retire any Government servant by giving him notice of not less than three months in writing or three months' pay and allowances in lieu of such notice

(i) if he is in Class I or Class II Service or post the age limit for the purpose of direct recruitment to which is below 35 years, after he has attained the age of 50 years.

(ii) In any other case after he has attained the age of 55 years.

Provided that nothing in this clause shall apply to a Government servant referred to in clause (e) who entered Government service on or before 23rd July, 1966 and to a Government servant referred to in clause (f)."

5. The order impugned merely says that in pursuance of clause 56 (j), the President was pleased to decide that in public interest the 1st respondent should retire from Government service with effect from August 13, 1969 and that he would be given three months' pay and allowances in lieu of three months' notice provided in the said rule. No reasons are given for compulsorily retiring the 1st respondent. Admittedly no opportunity was given to him to show cause against his compulsory retirement. The failure on the part of the concerned authority to give an opportunity to the 1st respondent to show cause against his compulsory retirement was held by the High Court to have amounted to a contravention of the principles of natural justice.

6. The validity of Fundamental Rule 56 (j) was not questioned before the High Court nor before us. Its validity is not open to question in view of the decision of this Court in *T. G. Shivacharana Singh v. State of Mysore*, AIR 1965 SC 280.

7. Fundamental Rule 56 (j) in terms does not require that any opportunity should be given to the concerned Government servant to show cause against his compulsory retirement. A Government servant serving under the Union of India holds his office at the pleasure of the President as provided in Article 310 of the Constitution. But this "pleasure" doctrine is subject to the rules or law made under Article 309 as well as to the conditions prescribed under Art. 311. Rules of natural justice are not embodied rules nor can they be elevated to the position of fundamental rights. As observed by this Court in *Kraipak v. Union of India*, AIR 1970 SC 150, "the aim of rules of natural justice is to secure justice or to put it negatively to prevent miscarriage of justice. These rules can operate only in areas not covered by any law validly made. In other words they do not supplant the law but supplement it." It is true that if a statutory provision can be read consistently with the principles of natural justice, the Courts should

do so because it must be presumed that the legislatures and the statutory authorities intend to act in accordance with the principles of natural justice. But, if on the other hand, a statutory provision either specifically or by necessary implication excludes the application of any or all the rules of principles of natural justice then the Court cannot ignore the mandate of the legislature or the statutory authority and read into the concerned provision the principles of natural justice. Whether the exercise of a power conferred should be made in accordance with any of the principles of natural justice or not depends upon the express words of the provision conferring the power, the nature of the power conferred, the purpose for which it is conferred and the effect of the exercise of that power.

8. Now coming to the express words of Fundamental Rule 56 (j), it says that the appropriate authority has the absolute right to retire a Government servant if it is of the opinion that it is in the public interest to do so. The right conferred on the appropriate authority is an absolute one. That power can be exercised subject to the conditions mentioned in the rule, one of which is that the concerned authority must be of the opinion that it is in public interest to do so. If that authority bona fide forms that opinion, the correctness of that opinion cannot be challenged before Courts. It is open to an aggrieved party to contend that the requisite opinion has not been formed or the decision is based on collateral grounds or that it is an arbitrary decision. The 1st respondent challenged the opinion formed by the Government on the ground of mala fide. But that ground has failed. The High Court did not accept that plea. The same was not pressed before us. The impugned order was not attacked on the ground that the required opinion was not formed or that the opinion formed was an arbitrary one. One of the conditions of the 1st respondent's service is that the Government can choose to retire him any time after he completes fifty years if it thinks that it is in public interest to do so. Because of his compulsory retirement he does not lose any of the rights acquired by him before retirement. Compulsory re-

retirement involves no civil consequences. The aforementioned Rule 56 (j) is not intended for taking any penal action against the Government servants. That rule merely embodies one of the facets of the 'pleasure' doctrine embodied in Art. 310 of the Constitution. Various considerations may weigh with the appropriate authority while exercising the power conferred under the rule. In some cases, the Government may feel that a particular post may be more usefully held in public interest by an officer more competent than the one who is holding. It may be that the officer who is holding the post is not inefficient but the appropriate authority may prefer to have a more efficient officer. It may further be that in certain key posts public interest may require that a person of undoubted ability and integrity should be there. There is no denying the fact that in all organizations and more so in Government organizations, there is good deal of dead wood. It is in public interest to chop off the same. Fundamental Rule 56 (j) holds the balance between the rights of the individual Government servant and the interests of the public. While a minimum service is guaranteed to the Government servant, the Government is given power to energise its machinery and make it more efficient by compulsorily retiring those who in its opinion should not be there in public interest.

9. It is true that a compulsory retirement is bound to have some adverse effect on the Government servant who is compulsorily retired but then as the rule provides that such retirements can be made only after the officer attains the prescribed age. Further a compulsorily retired Government servant does not lose any of the benefits earned by him till the date of his retirement. Three months' notice is provided so as to enable him to find out other suitable employment.

10. In our opinion the High Court erred in thinking that the compulsory retirement involves civil consequences. Such a retirement does not take away any of the rights that have accrued to the Government servant because of his past service. It cannot be said that if the retiring age of all or a section of the Government servants is fixed at 50 years, the same would involve

civil consequences. Under the existing system there is no uniform retirement age for all Government servants. The retirement age is fixed not merely on the basis of the interest of the Government servant but also depending on the requirements of the society.

11. The High Court was not justified in seeking support for its conclusion from the decisions of this Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, (1967) 2 SCR 625 = (AIR 1967 SC 1269) and AIR 1970 SC 150 (supra).

12. In *Binapani Dei's* case, (1967) 2 SCR 625 = (AIR 1967 SC 1269) (supra), Dr. Binapani Dei's date of birth was refixed by the Government without giving her proper opportunity to show that the enquiry officer's report was not correct. It is under those circumstances this Court held that the order refixing the date of birth was vitiated for failure to comply with the principles of natural justice. Therein the impugned order took away some of the existing rights of the petitioner.

13. In *Kraipak's* case, AIR 1970 SC 150 (supra), a committee consisting of Chief Conservator of Forest, Kashmir and others was appointed to recommend names of the officers from Kashmir Forest Service for being selected for the Indian Forest Service. The Chief Conservator of Forests, Kashmir was one of the candidates for selection. Further it was established therein that some of the officers who competed with him had earlier challenged his seniority and consequently his right to be the Chief Conservator and that dispute was pending. Under those circumstances this Court held that there was contravention of the principles of natural justice.

14. For the reasons mentioned above, we are unable to agree with the conclusion reached by the High Court that the impugned order is invalid. We accordingly allow this appeal, set aside the judgment and decree of the High Court and dismiss the writ petition. In the circumstances of the case we make no order as to costs.

Appeal allowed.

AIR 1971 SUPREME COURT 44
(V 58 C 7)

(From: Bombay)*

S. M. SIKRI, G. K. MITTER AND
K. S. HEGDE, JJ.

Hira H. Advani etc., Appellants v.
State of Maharashtra (In all Appeals),
Respondent.

Criminal Appeals Nos. 86 to 90 of
1968, D/- 13-8-1969.

(A) Evidence Act (1872), Sec. 114, illus. (f) — Presumption as to common course of business—Marine Insurance—Insurance of export cargo—In usual course of business of insurance company, marine premium debit note always prepared at the time when policy was issued and a copy thereof attached to copy of policy kept in the office records — Court entitled to rely on presumption afforded by illus. (f) of Section 114 that the practice of insurance company of attaching such a note to the policy had been followed in a particular case and proof of preparation of original premium note not required. (Para 26)

(B) Sea Customs Act (1878), Section 171-A — Power of Customs Officers to summon persons to give evidence and produce documents — Statements made to Customs Officers in inquiry under Section 171-A — Admissible in evidence against maker in criminal proceedings launched against him.

Far from being authorities bound by any rules of evidence or procedure established by law and invested with power to enforce their own judgments or orders, the Sea Customs Authorities are merely constituted administrative machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act. They are not a Judicial Tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a Court or Judicial Tribunal necessary for the purpose of supporting a plea of double jeopardy. AIR 1953 SC 325, Rel. on; AIR 1959 SC 375, Ref. (Para 30)

*Criminal Appeals Nos. 497 to 499, 516 and 500 of 1965, D/- 13-1-1968 — Bom.

DN/EN/D963/69/VBB/M

At the stage envisaged by Section 171-A, a Customs Officer is given the power to interrogate any person in connection with the smuggling of any goods which it is his duty to prevent. Such a person may have nothing to do with the smuggling of any goods although he may know where such goods are or who has or had them. Sub-section (3) of Section 171-A does not compel any person to make a statement but if he makes a statement he has to state the truth so as to avoid punishment under Section 193, I. P. C. At that stage nothing may be known as to whether an offence has been committed or who has committed it and the person interrogated at that stage is not a person accused of or charged with an offence. He is merely called upon to give evidence to facilitate the inquiry. He is not a witness giving evidence in a Court and his testimony will make him liable under Section 193, I. P. C. only because of the express provision of law in sub-section (4) of S. 171-A. (Para 36)

(C) Evidence Act (1872), Section 132 — Witness not excused from answering on ground that answer will criminate him — Interrogations by Customs Officer under Sec. 171-A, Sea Customs Act — Section 132 not attracted.

The Evidence Act is a complete Code repealing all rules of evidence not to be found therein. There is no scope for introduction of a rule of evidence in criminal cases unless it is within the four corners of Section 132 or some other provision of the Evidence Act. As the Evidence Act does not apply to interrogations by a Customs Officer exercising powers under Section 171-A of the Sea Customs Act, Section 132 of the Evidence Act cannot be attracted. (Para 39)

(D) Oaths Act (1873), Section 4 — Authority to administer oaths etc. — No application to interrogatories by Customs Officer under Section 171-A, Sea Customs Act. (Paras 34, 35)

(E) Evidence Act (1872), Section 1 — Criminal case — Act is complete Code — Importation of any principle of English Common Law relating to evidence (maxim 'Nemo tenetur seipsum accusare' (No one is bound to accuse or criminate himself)) to the contrary — Not permissible. AIR 1941 PC 16, Ref. (Para 39)

(F) Civil P. C. (1908), Pre — Maxim — “Nemo tenetur seipsum accusare” (No one is bound to accuse or criminate himself) of English Common Law relating to evidence in criminal cases not applicable in India. (Para 39)

(G) Sea Customs Act (1878), Section 171-A — Power of Customs Officers to summon persons, etc. — There is nothing in Section 171-A which limits the right of interrogation to question the answers whereto may not incriminate the person interrogated. (Para 41)

(H) Sea Customs Act (1878), Section 171-A (4) — Power of Customs Officers to summon persons etc. — Statement under Section 171-A (4) containing inculpatory and exculpatory portions—Statement did not stand at par with a confession — Portion inculpatory against maker can be accepted excluding exculpatory. AIR 1969 SC 422, Foll. (Para 42)

(I) Evidence Act (1872), Section 24 — Confession caused by inducement, threat etc. — Statement under Section 171-A, Sea Customs Act, did not stand at par with a confession. (Para 42)

(J) Constitution of India, Article 20 (2) — Double jeopardy — Statement before Customs Officer in inquiry under Section 171-A, Sea Customs Act — Admissible in evidence — Article 20 (2) no bar. (Para 30)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 422 (V 56) = Criminal Appeal No. 190 of 1966, D/- 2-12-1968 = 1969 Cri. LJ 671, Nishi Kant Jha v. State of Bihar 42
- (1967) 1967-1 All ER 177 = (1967) 1 AC 760, Commr. of Customs and Excise v. Hira 40
- (1964) AIR 1964 SC 1140 (V 51) = (1964) 7 SCR 594 = 1964 (2) Cri. LJ 234, Indo-China Steam Navigation Co. Ltd. v. Jasjit Singh, the Addl. Collector of Customs 32
- (1964) AIR 1964 SC 1154 (V 51) = (1964) 6 SCR 700 = 1964 (2) Cri LJ 249, Lalji Haridas v. State of Maharashtra 32, 33, 37
- (1961) AIR 1961 SC 264 (V 48) = 1961-1 SCR 933, Amba Lal v. Union of India 38
- (1959) AIR 1959 SC 375 (V 46) = 1959 Supp (1) SCR 274 = 1959 Cri LJ 392, Thomas Dana v. State of Punjab 31

(1953) AIR 1953 SC 325 (V 40) = 1953 SCR 730 = 1953 Cri LJ 1432, Maqbool Hussain v. State of Bombay 30, 35

(1951) 1951-2 All ER 473 = 1952 AC 15, St. Aubyn v. Attorney General 37

(1941) AIR 1941 PC 16 (V 28) = ILR (1941) 1 Cal 468, Sris Chandra Nandi v. Rakhala-nanda 39

(1888) ILR 12 Bom 36, Queen Empress v. Tulja 36

(1856) 169 ER 909 = Dears & Bell 47, Regina v. Benjamin Scott 38

M/s. R. Jethamalani, K. N. Mirchandani and U. P. Singh, Advocates, for Appellant (In Cri. Appeal No. 86 of 1968), M/s. Nur-ud-din Ahmed, K. N. Mirchandani and U. P. Singh, Advocates for Appellant (In Cri. Appeal No. 87 of 1968); Mr. A. S. R. Chari, Senior Advocate, (Mr. J. M. Mirchandani and Mrs. K. Hingorani, Advocates, with him), for Appellant (In Cri. Appeal No. 88 of 1968); Mrs. K. Hingorani, Advocate, for Appellant (In Cri. Appeal No. 89 of 1968); Mr. N. H. Hingorani, Advocate for Mrs. K. Hingorani, Advocate, for Appellant (In Cri. Appeal No. 90 of 1968); Dr. L. M. Singhvi, Senior Advocate, (M/s. B. D. Sharma and S. P. Nayar, Advocates, with him), for Respondent (In all the Appeals).

The following Judgment of the Court was delivered by

MITTER, J.—This group of appeals by a certificate under Art. 134 (1) (c) of the Constitution of India granted by the High Court of Bombay disposing of Criminal Appeals Nos. 497 to 500 and 516 of 1965 upholding substantially the conviction and sentences passed against the appellants by the Presidency Magistrate, 2nd Court, Mazgaon, Greater Bombay.

2. The appellants before us and two others were prosecuted by the Assistant Collector of Bombay for offences of conspiracy and substantive offences punishable under Sec. 167 (81) of the Sea Customs Act and Sec. 5 of the Imports and Exports (Control) Act, 1947. The gist of the complaint was that all the accused knowingly and with intent to defraud the Government of India of duty payable thereon and/or to evade the prohibitions and restrictions for the time being in force under or by virtue of the Sea Customs

Act with respect thereto viz., Sec. 3 (2) of the Imports and Exports (Control) Act, 1947 entered into a conspiracy in Bombay and other places during the period commencing from August 1958 and August 1959 to acquire possession and to be concerned in carrying, removing, concealing and otherwise dealing with prohibited and restricted goods in very large quantities of the C.I.F. value of not less than Rs. 1,45,328/- and in relation to the said contraband goods to be knowingly concerned in fraudulent evasion of or attempt at evasion of the duty chargeable thereon and of the prohibition and restriction as aforesaid applicable to the said goods and thus committed offences under Sec. 120-B of the Indian Penal Code read with Sec. 167 (81) of the Sea Customs Act as amended and Sec. 120-B of the Indian Penal Code read with Sec. 5 of the Imports and Exports (Control) Act, 1947.

3. After recording the evidence of a large number of witnesses, charges were framed against all the accused by the Magistrate in December 1962. The second and the third charge related to consignments brought into India by s. s. Canton and s. s. Star Arcturus respectively. The fourth and fifth charges related to consignments of s. s. Nissan Maru. The sixth charge related to s. s. Hikone Maru; the seventh charge related to s. s. Obra; the eighth charge to s. s. Nagara Maru and the ninth to s. s. Wakasima Maru. Accused No. 6 was not before the court as he was absconding and accused No. 7 was acquitted of all the charges. The Magistrate by his judgment dated February 25, 1965 convicted all the appellants of the main charge and each of the accused excepting accused No. 7 of diverse charges under the main heading of charges 2, 3, 4 and 5 respectively. Sentences of imprisonment and fine were imposed on all the accused. Excepting for setting aside the conviction in respect of some of the charges which it is not material to state, the High Court of Bombay in appeal upheld the conviction and sentences passed against all the accused.

4. The particulars of the different accused according to the prosecution were as follows. The first accused, appellant in Appeal No. 86 of 1968, acted as manager of a concern carry-

ing on business in the name of Messrs. H. B. Advani Brothers at 251, Hornby Road, Bombay. He had proprietary and financial interest in the business and was at the material time in sole charge of that business. The second accused Moti H. Advani, appellant in Appeal No. 87 of 1968, was a brother of accused No. 1 and carried on business in the name of Messrs. Indo Far-East Traders. His business premises were at 2, Waterloo Mansion, Colaba, Bombay. Accused No. 3, Megharaj Gopaldas Jham, appellant in Appeal No. 88 of 1968 carried on business in the name of Fine Art Traders along with his partner, accused No. 5 Arjan Ghanshyamdas Tejwani, appellant in Appeal No. 90 of 1968. The business premises of Fine Art Traders was at 250, Carnac Road, Bombay. Accused No. 5 had also a family concern in the name of Fine Art Museum carried on at the same place. Kishanchand Assandass Megnani, accused No. 4 appellant in Appeal No. 89 of 1968 was at the material time working with the clearing agents M/s. Tarasingh and Sons and held a dock permit. Accused No. 6 Bhagwant D. Advani who had several aliases was a cousin of the first and second accused and carried on business at the material time at Hong Kong in various names and styles. Accused No. 7 Ramchand Thanwardes Ramchandani was the proprietor of a concern named Miller and Miller carrying on business in Bombay.

5. The prosecution case was that although the first and the second accused as shown above were purporting to carry on business separately they were in fact carrying on business together, accused No. 1 being the brain behind the business conducted in the name of H. B. Advani Brothers and/or Indo Far-East Traders while accused No. 2 helped him substantially in his business. The first, second and sixth accused were said to have hatched a conspiracy to import prohibited goods from Hong Kong to Bombay by evading the provisions of law and payment of import duty. In this they took advantage of the practice of the Customs Officers at Bombay at that time who passed examination order in respect of alternate cases imported and the choice as to which of the two indicated in the examination order should be actually opened for examination was left to the importer or

his representative. The conspiracy according to the prosecution case was to take advantage of this practice by sending genuine goods in the middle case where the consignment was of three cases and importing contraband goods in the remaining two. Where the consignment consisted of only two cases the importer or his representative present at the time of getting the examination order or at the time of actual examination of the cases by the Customs Officers used to manoeuvre to get only the case containing the genuine goods examined and take delivery of the consignment containing contraband goods without actual examination. In some instances where the consignment consisted of only two cases they bore different marks 'MIM' and 'MTM' it being known to the conspirators as to which mark indicated the contraband goods. Further the conspirators were said to have taken advantage of the trafficking in licences by purchasing the benefit thereof from the holders and importing contraband goods and some genuine goods on those licences in the names of those licence holders and successfully manoeuvring to clear the same on arrival of the consignments in Bombay with the help of the relevant documents retired (received?) from the bank or with the documents directly received from the exporter. In all this it was necessary to have the help of a person of their confidence to clear the goods and the services of accused No. 4 who was experienced in clearing work and held a dock permit were availed of. This was done by the fourth accused getting Sunderdas Tarasingh the proprietor of Tarasingh and Sons to lend only the name of his concern by accepting a small remuneration for preparing the relevant bills of entry and leaving the actual work of clearing the goods to accused No. 4 who applied for and obtained a dock permit as an employee of Tarasingh and Sons in May, 1959.

6. Further, according to the prosecution, accused 3 and 5 had some business connection with accused 1 and 2 and had joined the conspiracy a little later. These two accused used to get clearing work done through one Dalal, "Raut and Sons" where P. W. Kambli was working as a clerk. The services of Kambli who was an experienced

clerk were availed of to help accused 4 in clearing all the consignments in which the conspirators were interested. Accused 3 had gone to Hong Kong on or about 10th June 1959 and returned to Bombay a month later. The prosecution alleged that the object of the visit was to import contraband goods with the help of accused 6.

7. Pursuant to the above conspiracy, various consignments were alleged to have been despatched from Hong Kong, the destiny being Bombay in all cases. Two cases were sent on s. s. Canton on the import licence held by Indo Far-East Traders (accused No. 2). The ship sailed on 6-7-1959 and reached Bombay on 19-7-1959. Case No. 1 contained genuine goods while case No. 2 contained contraband goods. This consignment was the subject-matter of charge No. 2. A consignment of three cases by s. s. Star Arcturus leaving Hong Kong on 20-6-1959 reached Bombay on 9th July 1959. The consignment was covered by the import licence of Aarkay Saree Museum. Of this, the middle case No. 21 contained genuine goods while the other two contained contraband. Accused 2 is alleged to have purchased the benefit of the licence from Aarkay Saree Museum on July 4, 1959. This consignment was the subject-matter of charge No. 3. Two consignments each containing three cases were sent by s. s. Nissan Maru on 24th June 1959 on the import licence of (i) Laxminarayan Mahavirprasad and (ii) Continental Exports Corporation Limited. In both the consignments the middle case contained genuine goods while the other two contained contraband goods. The ship reached Bombay on 23rd July 1959. Laxminarayan Mahavirprasad disclaimed any connection with the consignment. According to the prosecution, accused 3 and 5 had purchased the benefit of import licence of Continental Exports Corporation for which payment was made through accused 5 on 9th July 1959. This formed the subject-matter of charges 4 and 5. It is not necessary to take any note of the charges on which there was no conviction.

8. Investigation started consequent on information received by the Customs Officers at Bombay. The business premises of H. B. Advani Brothers were searched on 21st July 1959 when accused 1 was personally present

there. He claimed to be only the manager of the firm. There is no dispute that as a result of the search a number of documents and things were seized from a drawer of the table in the room searched or recovered from a wallet in his possession. These were severally marked as Exs. B, B-1, C, C-1, C-2, C-3, D, E, E-1, F, F-1, F-2 and the last three being recovered from the said wallet. According to accused No. 1 the exhibits other than the last three were recovered from the office premises of H. B. Advani Brothers but not from the table belonging exclusively to him. There is a concurrent finding of fact by two courts on this point against accused No. 1 but it is challenged before us. Ex. B was the envelope addressed to H. B. Advani Brothers. Ex. B-1 were three shipping samples which represented genuine parts of the consignment of all the three ships s. s. Canton, Arcturus and Nissan Maru as regards the consignment covered by the licence of Continental Exports Corporation Limited. Ex. C was the envelope in which were found Exhibits C-1, C-2 and C-3, C-1 was a paper wrapper containing Ex. C-2 the cover of a pack of Bonus cards and Ex. C-3 a sample of genuine Bonus cards, these cards being contraband goods. Two brands of cards including Bonus cards were in the consignment of the two ships other than s. s. Canton. Ex. D was a document on which were jotted a number of figures which according to the prosecution was an account of the contraband goods on some of the ships. Exs. E and E-1 were catalogues of Roamer and Fevreleuba watches. It is admitted that some Roamer watches were in the s. s. Canton consignment but not in other ships. Exs. F and F-1 obviously contained some kind of code which could not be deciphered and about which no reference was made in the judgments of the courts below. Ex. F-2 contains an account of s. s. Canton consignment the document being headed with the word "Ton". A panchanama was duly made regarding the search being Ex. A. Very soon after the search a telegram appears to have been sent by one Advani H. giving his telephone No. 264248 to accused No. 6 at Hong Kong reading:

"Stop everything. Attend telephone tomorrow."

This telephone admittedly stood registered in the personal name of the first accused. On the next day i.e., 22nd July 1959 a trunk call was booked on this telephone by one Lal. Hotchand to accused No. 6. There was evidence that the call had become effective. Statements of the first and the second accused were recorded by Customs Officer on 22nd July 1959. Summons under Section 171-A of the Sea Customs Act were served on the first accused and certain documents were produced. Sunderdas, the proprietor of Tarasingh and Sons was asked by the Customs Officer to produce the bills of entry relating to the three consignments for the three ships mentioned, namely, s. s. Canton, Arcturus and Nissan Maru. Under his instructions his son Shyamlal contacted accused No. 4 to get the bills of entry. Shyamlal and accused No. 4 went to the residence of accused No. 2. The bills were not immediately forthcoming and accused 2 handed over to Shyamlal a chit Ex. Z-2 to the effect that the bills of entry of s. s. Canton had been received by him on 21st July, 1959. This chit was handed over to Sunderdas and by him produced before the Customs Officer. Statements of Sunderdas, Shyamlal and Kambli were recorded on July 23, 1959. Further statement of the second accused was recorded on 24th July and while making this statement accused No. 2 produced bills of entry relating to s. s. Canton and Star Arcturus along with other documents relating to/or in respect of these consignments. Further attempts were made to get hold of the bills of entry relating to s.s. Nissan Maru by the Customs Office. Accused 3 and 5 were also contacted over this. Accused 5 stated that they would be found with accused No. 2. Ultimately accused No. 4 brought forward the bill of entry Ex. Z-5. The consignment of s.s. Star Arcturus was examined on 24th July 1959 and that of s.s. Nissan Maru on August 1, 1959. Statements of accused 3 were recorded on 11th and 12th August 1959. Further searches were made in the business premises of H. R. Advani Brothers, Indo Far East Traders, Fine Art Traders and Aarkay Saree Museum and other documents were seized. Statements of various persons were recorded up

to December 1959 and ultimately a complaint was filed, as already mentioned. All the accused put in separate written statements. They were also examined under Section 342 Cr. F. C. It appears that every one of the accused tried to put the blame on to another or others.

9. Put shortly the defence of the accused was as follows. The first accused admitted the search of the premises of H. B. Advani Brothers on 21st July 1959 and the seizure of the documents and articles mentioned in the panchnama Ex. A. He denied exclusive possession of the premises or even the table having the drawer which according to the prosecution case contained Exts. B to H. He claimed to be merely a manager of the firm which belonged to his father and uncle and denied any financial interest therein. His version was that accused No. 2 used to keep some of his documents and goods in the premises of H. B. Advani Brothers. He did not deny the correctness of his statement before the Customs Officer Ex. Z-142 and the only point made about it was that it was inadmissible in evidence in view of the provisions of Section 171-A of the Sea Customs Act, Section 132 of the Evidence Act and Article 20 (3) of the Constitution. (After referring to the defence of accused 2 to 5, and the relevant details with regard to the consignments on the three ships (in Paras 10 to 18), the judgment proceeded):

19. In holding the accused guilty of offences of conspiracy the High Court relied on several circumstances. The first of these was the outcome of the search of the premises of H. B. Advani Brothers on 21st July 1959 when various documents and articles were seized. The two exhibits which require special attention are Exs. B-1 and F-2. Ex. B-1 mentioned all the three ships s. ss. Nissan Maru, Arcturus and Canton, although the importers of the goods were all different. Ex. F-2 was held by the High Court to give a complete account of the goods found on s. s. Canton.

20. The second circumstance was the origin of all the shipments, the shipper in each case being accused 6. The third circumstance relied upon by the prosecution was the virtual admission that accused 3 was staying in Hong Kong with accused 6 from 10th

June to 10th July 1959 during which period all the consignments were put on board.

21. The next circumstance was that accused 4 though not a clearing agent himself was utilising the name of Tarasingh & Sons for clearing all the goods of all the consignments in question.

22. The manner in which the examination orders of the goods were obtained from the customs officers for examination of the middle cases in respect of consignments consisting of three cases was also significant. According to the prosecution the conspirators knew and had arranged that genuine goods should always be put in the middle case.

23. The association between the accused, specially accused 2, 3 and 4 in respect of the steps taken for clearing the goods covered by the consignments in question according to the High Court went to prove the conspiracy. Further according to the prosecution the cable sent to Hong Kong on 21st July 1959 after the search and the trunk telephone call on 22nd July support the same.

24. The High Court dealt generally with the charge of conspiracy against all the accused and individually with respect to the charges raised against each accused and considered the explanations given by them with regard to the circumstances tending to criminate them. Mr. Jethmalani who argued the case of the first appellant at some length raised various questions of law with regard to the admissibility of the evidence afforded by statements before the Customs Officers under Section 171-A, the conclusion of the High Court that his client had custody or possession of all the exhibits found as a result of the search of the premises of H. B. Advani Brothers on 21st July, 1959, the correctness of the finding of the High Court that Ex. F-2 contained a complete account with regard to the consignment per s. s. Canton, the finding of the High Court that the C. I. F. value of the goods exceeded the invoice value many times over by relying on the evidence of an appraiser of the Customs department and the absence of any overt act on the part of his client after the search on 21st July, 1959. The argument with regard to

the admissibility of evidence of the statements was adopted by counsel for all the other accused and need not be dealt with separately. Mr. Jethmalani virtually conceded that if his contentions on the above heads were not accepted by this Court, it would be futile for him to argue that the High Court had gone wrong in coming to the conclusion as to the guilt of his client on the strength of the evidence before it and the inference which could legitimately be drawn therefrom.

25. We propose to deal with the other points before examining the contention with regard to the admissibility of the statements made in pursuance of powers exercised by the customs officers under Section 171-A. With regard to the finding of the High Court in agreement with that of the Magistrate that accused 1 had the custody or possession of exhibits, B to F-2, counsel argued that except those seized from his wallet the others were found in the drawer of the table of the premises searched, there was no evidence to show that the said table was the table of his client and as there was no proof that his client had any financial or proprietary interest in the firm of H. B. Advani Brothers; there was nothing to warrant the conclusion that the exhibits other than those in wallet were in his custody. The High Court dealt elaborately with this point and we do not think it necessary to re-examine the same except to note the comment made before the High Court as well as before us that the evidence of Mr. Darne, the panch witness who had said that at the time of the search accused 1 was sitting at the table in a drawer of which the incriminating exhibits were found, was unbelievable. It was argued that inasmuch as the panchnama did not record this fact Darne who gave evidence in 1962 should not have been believed when he claimed to have remembered the fact of accused 1 sitting at the table mentioned. Both the Courts accepted Darne's statement and we see no good reason to take a different view. After all it would not be extraordinary for any person to recollect even after a considerable lapse of time that when he entered the room which was going to be searched, he found a particular person seated at a certain table inas-

much as this would be the very first thing which would attract anybody's attention.

26. With regard to Ex. F-2 which according to the prosecution case — accepted by the Courts below — contained an account with regard to the consignment per s. s. Canton the prosecution case was that the figures on the left-hand side indicated the rates and the figures on the right-hand side indicated the total C. I. F. value of the goods of each type in that consignment. Before us exception was taken to the two figures 80.80 and 11.02 appearing on the right-hand side. According to the prosecution the figure 11.02 was the amount of insurance premium in dollars paid in respect of the consignment on s.s. Canton. As the original which should have been with accused 2 was not produced, a copy of the insurance policy was put in and marked as Ex. Z-301. Ex. Z-259-F-1 was a copy of the same produced by accused 2 before the customs officers on 24th July 1959 as was borne out by the statement of accused 2. The contents of the two exhibits were found to be the same by both the courts. The Claim Superintendent of the insurance company in Bombay produced the copy of the premium note in respect of the said policy showing the amount of premium as \$11.02 and said to have been received by the Bombay office of the insurance company. Objection was raised to the admissibility of evidence of one Martin, Assistant Manager of New Zealand Insurance Company Hong Kong Branch who had joined that branch in 1963 i.e., long after the issue of the policy in 1959 although he had been an employee of the said company since 1952 and claimed to be familiar with the procedure of insurance of export cargo followed by the company. According to this witness, the company used to prepare as many copies of the policy as were required by the insurer. A carbon of the original was always kept in the office record. Martin produced an office copy of the policy in respect of the consignment on s. s. Canton to which was attached a marine premium debit note and it was his evidence that in the usual course of business of the company such a debit note was always prepared at the time when the policy was issued and a copy

thereof was attached to the copy of the policy kept in the records. Counsel objected to the reception of the copy of the premium note on the ground that there was no proof of its making or its correctness. The High Court accepted the evidence of Martin that the copy of the premium debit note had been attached to the policy kept in the office record relying on the presumption afforded by illustration (f) to Section 114 of the Evidence Act that the practice of the insurance company of attaching such a note to the policy had been followed in this particular case. In our view the High Court was entitled to do so and no objection can be allowed to be raised on the ground that there was no proof of the preparation of the original premium note. (The judgment here discussed the evidence as to the amount of the freight charged (Paras 27-29), and proceeded):

30. We now come to the question as to the admissibility of the statements made to the customs officers under Section 171-A of the Sea Customs Act. At the outset it has to be noted that this section came into the statute Book in the year 1955 and there was nothing similar to it in the Act before such inclusion. The section reads:

"(1) Any officer of Customs duly employed in the prevention of smuggling shall have power to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other things in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce documents or other things may be made for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and to produce such documents and other things as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908 shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of S. 193 and Section 228 of the Indian Penal Code."

In *Maqbool Hussain v. State of Bombay*, 1953 SCR 730 = (AIR 1953 SC 325) where provisions of the Sea Customs Act were considered at some length by this Court before the amendment of 1955 by insertion of Section 171-A it was said (at p. 742) (of SCR) = (at p. 330 of AIR):

"All this is for the enforcement of the levy of and safeguarding the recovery of the sea customs duties. There is no procedure prescribed to be followed by the Customs Officer in the matter of such adjudication and the proceedings before the Customs Officers are not assimilated in any manner whatever to proceedings in courts of law according to the provisions of the Civil or the Criminal Procedure Code. The Customs Officers are not required to act judicially on legal evidence tendered on oath and they are not authorised to administer oath to any witness All these provisions go to show that far from being authorities bound by any rules of evidence or procedure established by law and invested with power to enforce their own judgments or orders the Sea Customs Authorities are merely constituted administrative machinery for the purpose of adjudging confiscation, increased rates of duty and penalty prescribed in the Act.

We are of the opinion that the Sea Customs Authorities are not a judicial tribunal and the adjudging of confiscation, increased rate of duty or penalty under the provisions of the Sea Customs Act do not constitute a judgment or order of a court or judicial tribunal necessary for the purpose of supporting a plea of double jeopardy".

The Court in that case was dealing with the question as to whether an order of confiscation was a punishment inflicted by a court or a judicial tribunal within the meaning of Art. 20 (2) of the Constitution.

31. In *Thomas Dana v. State of Punjab*, 1959 Supp (1) SCR 274 at p. 286 = (AIR 1959 SC 375 at p. 380) the provisions of the Sea Customs Act were examined again and referring to Section 187-A it was said:

"This section makes it clear that the Chief Customs Officer or any other officer lower in rank than him in the Customs department, is not a "court", and that the offence punishable under item 81 of the Schedule to section 167, cannot be taken cognizance of by any court, except upon a complaint in writing, made as prescribed in that section."

With regard to the use of the word offence indiscriminately all over the Act it was said:

"All criminal offences are offences, but all offences in the sense of infringement of a law are not criminal offences but when a trial on a charge of a criminal offence is intended under any one of the entries of the Schedule aforesaid, it is only the Magistrate having jurisdiction, who is empowered to impose a sentence of imprisonment or fine or both".

It was argued before us that the position became entirely different as a result of the inclusion of Sec. 171-A as sub-section (4) of the section went to show that an enquiry by customs authorities wherein statements of persons recorded was "to be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code." Counsel argued that such proceeding was a judicial proceeding also for the other purposes thus attracting the operation of Section 132 of the Evidence Act. Apart from the point as to non-exercise of a claim of privilege (about which we express no opinion) there can be no question that if the said section of the Evidence Act is to be attracted to such a proceeding statements made by him in any such inquiry could not be proved against him in the criminal proceedings launched. It was argued that sub-section (3) of Section 171-A made it obligatory on the persons summoned to state the truth upon any subject respecting which he was examined and if the proceeding was a judicial proceeding there was nothing to exclude the applicability of Section 132. Our attention was drawn to Section 1 of the Indian Evidence Act which made

the Statute applicable to all judicial proceedings in or before any Court in the whole of India. As 'Court' in S. 3 included all Judges and Magistrates and all persons except arbitrators, legally authorised to take evidence, it was contended that the customs officer being authorised by Section 171-A of the Sea Customs Act were 'courts' within the meaning of the definition of Section 3. Reference may also be made to the definition of 'evidence' in the said section which shows that the word means and includes inter alia all statements which the court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry.

32. Reference was also made to S. 4(1) of the Code of Criminal Procedure, 1898 under which 'investigation' for purposes of the Code includes all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf; and cl. (m) which defines "judicial proceeding" as including any proceeding in the course of which evidence is or may be legally taken on oath. Counsel relied strongly on the judgment of this Court in *Lalji Haridas v. State of Maharashtra*, (1964) 6 SCR 700 = (AIR 1964 SC 1154) where this Court had to consider whether an Income-tax Officer exercising powers under S. 37 of the Income-tax Act, 1922 was a 'court' within the meaning of S. 195(1) (b) of the Code of Criminal Procedure making the sanction thereunder obligatory for the filing of a complaint in respect of an offence alleged to have been committed under S. 193 of the Penal Code. Sub-sections (1) to (3) of S. 37 of the Income-tax Act were worded somewhat differently from those of sub-sections (1) to (3) of S. 171-A of the Sea Customs Act. The words in sub-section (4) of S. 37 are for all practical purposes identical with those used in S. 171-A (4). There this Court by a majority of three to two were of opinion that the proceedings before the Income-tax Officer were judicial proceedings not only under S. 193 of the Indian Penal Code but were also to be treated as proceedings in any court for the purpose of S. 195(1) (b) of the Code of Criminal Procedure. The majority Judges referred to the sections in the Indian

Penal Code and the Criminal P. C. mentioned above and to provisions in various other Acts wherein the legislature had expressly mentioned that S. 195, Criminal P. C. would apply to proceedings before diverse authorities and accepted the argument that reading S. 193, I. P. C. and S. 195(1) (b), Criminal P. C. together it would be reasonable to hold that proceedings which are judicial under the former should be taken to be proceedings under the latter. According to the minority Judges although the words "judicial proceeding" were wide enough to include not only proceedings before a 'Court' but proceedings before certain tribunals it was clear from a decision of this Court in *Indo-China Steam Navigation Co., Ltd. v. Jasjit Singh The Addl. Collector of Customs*, (1964) 7 SCR 594 = (AIR 1964 SC 1140) that a Customs Officer "was not "a Court or Tribunal" and S. 37 (4) of the Income-tax Act should not be given a meaning different to that given in Section 171-A (4) of the Sea Customs Act."

33. In our view if the Legislature intended that the inquiry under Section 171-A was to be considered a judicial proceeding not within the narrow limits therein specified but generally, it could have used suitable words to express its intention. Although this Court gave a wider meaning to the expression 'judicial proceeding' in *Lalji Haridas's case*, (1964) 6 SCR 700 = (AIR 1964 SC 1154) (supra) there is nothing in that judgment to warrant a still wider interpretation of that definition.

34. Mr. Jethmalani referred to the provisions in the Indian Oaths Act (X of 1873) and on the basis of his argument that the statements under Section 171-A (4) were made on oath contended that the proceeding became a judicial proceeding in the wider sense of the word. In our view the Oaths Act has no application here. The preamble to the Act shows that it was an Act to consolidate the law relating to judicial oaths, affirmations and declarations and was enacted because the Legislature thought it "expedient to consolidate the law relating to judicial oaths, affirmations and declarations and to repeal the law relating to official oaths, affirmations and declarations." Section 4 of the Act provided that:

"The following Courts and persons are authorised to administer, by themselves or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers imposed or conferred upon them respectively by law:

(a) all Courts and persons having by law or consent of parties authority to receive evidence."

The relevant portion of Section 5 runs—

"Oaths or affirmations shall be made by the following persons:—

(a) all witnesses, that is to say, all persons who may lawfully be examined or give, or be required to give, evidence by or before any Court or person having by law or consent of parties authority to examine such persons and to receive evidence:"

35. Counsel argued that a Customs Officer was a person who had authority by law to receive evidence within the meaning of Section 4 of the Oaths Act and anybody who could be lawfully examined before such a person would be a witness within the meaning of Section 5 and as such it would be necessary to administer oath to them. In our view, the argument proceeds on a complete misconception of the provisions of the Act. The preamble to the Act shows that the oaths referred to are only judicial oaths and Section 7 shows that all such oaths had to be administered according to such forms as the High Court might prescribe. The Customs Officers have nothing to do with such forms and nothing has been shown to us that any such formality was ever complied with. Neither do the records show that any oath was administered to any person making a statement under Section 171-A. In *Maqbool Hussain's case*, 1953 SCR 730 = (AIR 1953 SC 325) (Supra) this Court stated expressly that the Customs Officers were not authorised to administer oath and the position according to us is not altered by the insertion of Section 171-A in 1955.

36. Mr. Jethmalani referred us to the decision in *Queen Empress v. Tulja*, (1888) ILR 12 Bom 36 at page 42 and to certain observations of West, J., in that case. There it was held that a Sub-Registrar under the Registration Act (III of 1877) was not a Judge, and, therefore, was not a 'Court' within the meaning of Section 195 of the

Code of Criminal Procedure and as such his sanction was not necessary for a prosecution for forgery in respect of a forged document presented for registration in his office. West, J., had however observed that:

"An inquiry is judicial if the object of it is to determine a jural relation between one person and another, or a group of persons; between him and the community generally; but even a judge, acting without such an object in view, is not acting judicially."

Relying on this observation counsel argued that the object of an inquiry under Section 171-A was to find out and establish the jural liability of the persons making the statement, viz., whether he had committed an offence or not, and as such the inquiry was a judicial proceeding. In our view the argument is not worthy of acceptance. At the stage envisaged by Section 171-A a Customs Officer is given the power to interrogate any person in connection with the smuggling of any goods which it is his duty to prevent. Such a person may have nothing to do with the smuggling of any goods although he may know where such goods are or who has or had them. Sub-section (3) of Section 171-A does not compel any person to make a statement but if he makes a statement he has to state the truth so as to avoid punishment under Section 193, I. P. C. At that stage nothing may be known as to whether an offence has been committed or who has committed it and the person interrogated at that stage certainly is not a person accused of or charged with an offence. He is merely called upon to give evidence to facilitate inquiry. He is not a witness giving evidence in a Court and his testimony will make him liable under Section 193, I. P. C. only because of the express provision of law in sub-section (4) of Section 171-A.

37. Counsel also argued that as a Customs Officer according to all the decisions of this Court already mentioned, is to act judicially, a proceeding for recording evidence before him was a judicial proceeding. This is wholly without any force because even administrative officers have to act judicially. Counsel further argued that a deeming provision in a statute was not necessarily designed to give an artificial construction to a word or a phrase but it might be used for

other purposes also. He referred to the case of *St. Aubyn v. Attorney-General*, 1951-2 All ER 473 at page 498 where it was said:

"The word 'deemed' is used a great deal in modern legislation. Sometimes it is used to impose for the purpose of a statute an artificial construction for a word or phrase that would not otherwise prevail. Sometimes it is used to put beyond doubt a particular construction that might otherwise be uncertain. Sometimes it is used to give a comprehensive description that includes what is obvious, what is uncertain and what is, in the ordinary sense, impossible."

It was argued that the Legislature might well have used the word "deemed" in sub-section (4) of Section 171 not in the first of the above senses but in the second, if not the third. In our view the meaning to be attached to the word "deemed" must depend upon the context in which it is used. In *Lalji Haridas's case* (1964) 6 SCR 700 = (AIR 1954 SC 1154), this Court went elaborately into the question as to the extent of this deeming provision which would have been wholly redundant if the word 'deemed' in Section 171-A (4) was used in any sense other than to give an artificial construction.

38. The second branch of Mr. Jethmalani's argument under this head was that the principle underlying Section 132 of the Evidence Act was a principle of Common Law well known to criminal jurisprudence and as such was applicable even if Section 132 in terms was not attracted. In this connection, he referred us to certain observations of Subbarao, J., (as he then was) in *Amba Lal v. Union of India*, 1961-1 SCR 933 = (AIR 1961 SC 264) where in his dissenting judgment on the interpretation of Sections 168 and 171-A of the Act his Lordship had observed that:

"To such a situation, though the provisions of the Code of Criminal Procedure or the Evidence Act may not apply except in so far as they are statutorily made applicable, the fundamental principles of criminal jurisprudence and of natural justice must necessarily apply."

Counsel also referred us to the decision in *Regina v. Benjamin Scott*, (1856) 169 ER 909. The question before the Court in that case was whether the answers to the questions put to the

defendant before the Court of bankruptcy relating to his trade dealings and estate tending to disclose a fraud of concealment of his property was admissible evidence against him on an indictment charging him with altering, mutilating and falsifying his books with intent to defraud his creditors. The examination was taken in conformity with Section 117 of the Bankrupt Law Consolidation Act (12 and 13 Vict. c. 196) which enacted that a bankrupt may be examined by the Court "touching all matters relating to his trade, dealings or estate, or which may tend to disclose any secret grant, conveyance or concealment of his lands etc.". There was no dispute that the questions put were relevant as touching matters relating to his trade etc. Delivering judgment in which three other Judges concurred, Lord Campbell, C. J., held that the defendant was bound to answer the questions although by his answers he might criminate himself. According to the learned Chief Justice:

".....and we think it would be contravention of the expressed intentions of the Legislature to permit the bankrupt to refuse to answer such questions; for ever since the reign of Elizabeth successive statutes have been passed, purporting to guard against frauds in bankruptcy and the bankrupt, when called upon to answer questions respecting his estate and effects, should not be allowed to avail himself of the common law maxim "nemo tenetur se ipsum accusare." With regard to the maxim relied on by the defendant's counsel he said:

"But Parliament may take away this privilege, and enact that a party may be bound to accuse himself, that is, that he must answer questions by answering which he may be criminated."

He further held that the maxim could not be treated as an implied proviso to be subjoined to the 117th section.

39. Mr. Jethmalani however relied on certain observations of Coleridge, J., in his dissenting judgment. In our view the maxim of the English Common Law can have no application here. Our law of evidence which is a complete Code does not permit the importation of any principle of English Common Law relating to evidence in criminal cases to the contrary. Section 2 of the Indian Evidence Act be-

fore its repeal by the Repealing Act (I of 1938) provided as follows:

"2. On and from that day (1st September 1872) the following laws shall be repealed:

(1) All rules of Evidence not contained in any Statute, Act or Regulation in force in any part of British India;

(2) All such rules laws and regulations as have acquired the force of law under the 25th section of the 'Indian Councils Act, 1861' in so far as they relate to any matter herein provided for; and

(3) The enactments mentioned in the schedule hereto, to the extent specified in the third column in the said schedule.

But nothing herein contained shall be deemed to affect any provision of any Statute, Act or Regulation in force in any part of British India and not hereby expressly repealed."

We may usefully refer to the judgment of the Privy Council in *Sris Chandra Nandi v. Rakhalananda* (deceased) ILR (1941) 1 Cal 468 = (AIR 1941 PC 16) where the Judicial Committee approved of the statement of the law contained in the judgment of the High Court reading:

"It is to be noticed in this connection that Section 2 (1) of the Indian Evidence Act repeals the whole of the English common law on evidence so far as it was in force in British India before the passing of the Indian Evidence Act, and that provision of the law in effect prohibits the employment of any kind of evidence not specifically authorised by the Act itself."

Lord Atkin who delivered the judgment of the Judicial Committee pointed out that evidence which was not admissible under the Indian Evidence Act could not be let in for the purpose of bringing out the truth and said:

"What matters should be given in evidence as essential for the ascertainment of truth, it is the purpose of the law of evidence, whether at common law or by statute to define. Once a statute is passed, which purports to contain the whole law, it is imperative. It is not open to any Judge to exercise a dispensing power, and admit evidence not admissible by statute, because to him it appears that the irregular evidence would throw light upon the issue. The rules of evidence, whether

contained in a statute or not, are the result of long experience, choosing no doubt to confine evidence to particular forms, and therefore eliminating others which it is conceivable might assist in arriving at truth."

The question there related to the admissibility of evidence which according to the Judicial Committee should not have been adduced. The question before us is somewhat different but if the Indian Evidence Act is a complete Code repealing all rules of evidence not to be found therein there is, in our opinion, no scope for introduction of a rule of evidence in criminal cases unless it is within the four corners of Section 132 or some other provision of the Evidence Act. As the Act does not apply to interrogations by a Customs Officer exercising powers under Section 171-A of the Sea Customs Act, Section 132 of the Evidence Act cannot be attracted.

40. Lastly it was contended that Section 171-A did not authorise interrogation of a subject to extract admissions from him which could be used against him on a future occasion. In aid of this proposition reliance was placed on a decision of the House of Lords in *Commrs. of Customs and Excise v. Harz*, (1967) 1 All ER 177. The main question there was whether the answers given by the respondents in the course of interrogation by Customs Officer were admissible in evidence. The power to interrogate was said to be derived from the Finance Act 1946, Section 20 (3) which provided in substance that every person concerned with the purchase or importation of goods etc., shall furnish to the Commissioners within such time and in such form as they may require information relating to the goods or to the purchase or importation thereof etc., and shall upon demand made by any officer or other persons authorised in that behalf by the Commissioners produce any books or accounts or other documents of whatever nature relating thereto for inspection by that officer or person. On a construction of that provision Lord Reid was of the view that there was nothing therein to require the trader to give answers which might incriminate him. His Lordship also observed that the section gave the officer no right to submit the respondents to prolonged interrogation they had to undergo and the respondents

could not have been prosecuted if they had refused to answer. His Lordship observed that the right of the Commissioners to require information was quite different and said:

"If a demand for information is made in the proper manner the trader is bound to answer the demand within the time and in the form required whether or not the answer may tend to incriminate him, and if he fails to comply with the demand he can be prosecuted. If he answers falsely he can be prosecuted for that, and, if he answers in such a manner as to incriminate himself, I can see no reason why his answer should not be used against him. Some statutes expressly provide that incriminating answers may be used against the person who gives them and some statutes expressly provide that they may not. Where, as here, there is no such express provision the question whether such answers are admissible evidence must depend on the proper construction of the particular statute. Although I need not decide the point it seems to me to be reasonably clear that incriminating answers to a proper demand under this section must be admissible if the statutory provision is to achieve its obvious purpose."

Prima facie these provisions are against the contention of the appellant. In that case the House of Lords in effect held that the provision of law did not entitle the Commissioners "to send a representative to confront the trader, put questions to him orally and demand oral answers on the spot; and.....that it does not entitle them to send their representative to subject the trader to a prolonged interrogation in the nature of a cross-examination." The provisions of Sec. 171-A are in sharp contrast to the provision of law before the House of Lords. Here the statute expressly authorises officers of customs to secure the attendance of persons to give evidence or produce documents or things relevant in any enquiry in connection with the smuggling of goods. A limit is set to the right to obtain production in subsection (2) of the section and subsections (3) and (4) lay down that if a person summoned does not state the truth in such an examination he may be proceeded against under Sec. 193, I. P. C. for giving false evidence.

41. Counsel also drew our attention to the new Sections 107 and 108 of the Customs Act, 1962 where the power to examine persons has been given to all officers of customs by the first of the above-mentioned sections and the power to summon persons to give evidence and produce documents as in Sec. 171-A is given to a gazetted officer of customs under Section 108 of the new Act. In our view, this difference is immaterial for the purpose of this case and there is nothing in Section 171-A which limits the right of interrogation to questions the answers whereunto may not incriminate the person interrogated.

42. The High Court considered at some length the question as to whether the statement of the accused under Section 171-A (4) should be considered as a whole or whether reliance could be placed upon portions thereof rejecting the rest. It was argued before the High Court that inasmuch as the statements were sought to be relied upon as a confession the Court was bound to take into account not only the portions containing admissions but also the explanations which followed. The High Court held that a statement under S. 171-A did not stand at par with a confession so that it had to be taken as a whole or rejected as a whole. Even with regard to the statements portions of which are inculpatory against the maker and other portions which are not, it has been held in a recent decision of this court that the inculpatory portion can be accepted if the exculpatory portion is found to be inherently improbable.....vide *Nishi Kant v. State of Bihar*, Cri. A. 190 of 1966, D/- 2-12-1968 and reported so far in AIR 1969 SC 422. In this case the explanations contained in the statements were considered by the courts below and for reasons given they thought fit to reject the same and we see no reason to come to a different view.

(Rest of the Judgment (Paras. 43-52) is not material for purposes of reporting — Ed.)

Order accordingly.

AIR 1971 SUPREME COURT 57
(V 58 C 8)

(From Madhya Pradesh: AIR 1967 Madh Pra 56)

J. C. SHAH, K. S. HEGDE, A. N. GROVER, A. N. RAY AND I. D. DUA, JJ.

Janapada Sabha, Chhindwara etc., Appellants v. The Central Provinces Syndicate Ltd. and another etc., Respondents.

Civil Appeals Nos. 125 to 134 of 1967, D/- 23-2-1970.

(A) Madhya Pradesh Koyala Upkar (Manyatakaran) Adhiniyam (18 of 1964), Sec. 3 — Act does not validate levy of cess exceeding 3 pies per ton.

The Madhya Pradesh Koyala Upkar (Manyatakaran) Adhiniyam (M. P. Coal Cess (Validation) Act, 18 of 1964) does not give legal effect to the imposition of cess at the rate of 4 pies, 7 pies or 9 pies per ton under the notifications issued by the Independent Mining Local Board nor to anything done in pursuance of those notifications. Consequently, the Local Board or its successor the Janapada Sabha cannot levy cess on coal exceeding 3 pies per ton. (Para 10)

The Validation Act (18 of 1964) purports to amend the C. P. Local Self Government Act (4 of 1920) and the Rules framed thereunder. But the Act does not set out the amendments intended to be made in the enactments. By a fiction it deems the Act of 1920 and the rules framed thereunder to have been amended without disclosing the text or even the nature of the amendments. The Act is limited to one Local Board in its application and to certain specific notifications and hence cannot operate to repeal Section 51 (2) of Act 4 of 1920 insofar as it applied to other Boards. Nor is there anything which enacts that the notifications issued without the sanction of the State Government must be deemed to have been issued validly under Sec. 51 (2) without the sanction of the Local Government. On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of Supreme Court which it cannot do. AIR 1967 Madh Pra 56, Affirmed.

(Paras 8, 9, 10)

(B) Interpretation of Statutes — Language used in statute not carrying

IN/IN/B141/70/DVT/B

out its object — Court cannot supply deficiencies. (Para 7)

Cases Referred: Chronological Paras

- (1969) AIR 1969 SC 812 (V 56) =
 (1969) 1 SCR 651, Commr. of
 Income-tax v. B. M. Kharwar 7
 (1965) AIR 1965 SC 1358 (V 52) =
 (1965) 55 ITR 741, Commr. of
 Income-tax v. Ajax Products
 Ltd. 7
 (1964) AIR 1964 SC 1013 (V 51) =
 1963 Supp (1) SCR 172, Amal-
 gamated Coalfields Ltd. v.
 Janapada Sabha Chhind-
 wara 4, 11
 (1961) AIR 1961 SC 964 (V 48) =
 (1962) 1 SCR 1, Amalgamated
 Coalfields Ltd. v. Janapada
 Sabha Chhindwara 4
 (1946) 27 Tax Cas 206 = 1946
 AC 119, Canadian Eagle Oil
 Co., Ltd. v. King 8
 (1921) 12 Tax Cas 358 = 1921-
 2 KB 403, Cape Brandy Syndi-
 cate v. Commrs. of Inland
 Revenue 7

Mr. B. Sen, Senior Advocate (M/s. S. K. Seth and I. N. Shroff Advocate, with him), for Appellant; (in Civil Appeals Nos. 125 to 133 of 1967); Mr. I. N. Shroff, Advocate, for Appellant and Respondent No. 6 (In Civil Appeal No. 134 of 1967); Mr. N. D. Karkhanis, Senior Advocate, (Mr. A. G. Ratnaparkhi, Advocate with him), for Respondent No. 1 (In Civil Appeals Nos. 125 to 133 of 1967); Mr. Sachin Choudhary, Senior Advocate, (Mr. K. P. Shanker Das and Mrs. A. K. Verma, Advocates and Mr. O. C. Mathur, Advocate of M/s. J. B. Dadachanji and Co., with him), for Respondents Nos. 1 and 2. (In Civil Appeal No. 134 of 1967).

The following Judgment of the Court was delivered by

SHAH, J.—These appeals are filed by the Janapada Sabha, Chhindwara—hereinafter called ‘the Sabha’—against the judgment of the High Court of Madhya Pradesh declaring that the Madhya Pradesh Koyala Upkar (Man-yatakaran) Adhiniyam [Madhya Pradesh Coal Cess (Validation) Act] 18 of 1964 does not “give legal effect to the imposition of cess at the rate of 4 pies, 7 pies and 9 pies per ton under the notifications” issued by the Independent Mining Local Board on December 22, 1943, July 29, 1946 and July 13, 1947 respectively, “nor to anything

done in pursuance of those notifications”.

2. The Independent Mining Local Board, Chhindwara, a Board constituted under the Central Provinces Local Self-Government Act 4 of 1920, resolved on March 12, 1935 to levy a cess under Sec. 51 of the Act at the rate of 3 pies per ton on coal extracted within the area. Sanction of the local Government was obtained to that levy. On December 22, 1943, the rate was enhanced to 4 pies per ton: it was enhanced on July 29, 1946 to 7 pies per ton and on July 19, 1947 the cess was enhanced to 9 pies per ton. The Central Provinces Local Self-Government Act 4 of 1920 was repealed with effect from June 11, 1948 by the C. P. and Berar Local Government Act 38 of 1948. By Sec. 192 of Act 38 of 1948 it was enacted, inter alia, that all rules, bye-laws and orders made, notifications and notices issued, taxes imposed or assessed, cesses, fees, tolls or rates levied under Act 4 of 1920 and in force immediately before the commencement of Act 38 of 1948 shall continue to be in force and shall be deemed to have been respectively made, issued, granted, imposed or assessed, levied and taken under Act 38 of 1948, and all rates, taxes and cesses due to the Independent Local Board shall be deemed to be due to the Sabha to whose areas they pertain.

3. The levy of coal cess by the Sabha was challenged by the Amalgamated Coalfields Ltd. and Others on diverse grounds in petitions filed in this Court under Art. 32 of the Constitution. This Court rejected the petitions, holding that Act 4 of 1920 had received the assent of the Governor-General and its validity was not liable to be challenged and that “on a proper interpretation of Section 51 of the Act the levy of coal cess was not excluded from the purview of the local authority”. It was also held that the levy of the cess was valid even after the coming into force of the Government of India Act, 1935, and the Constitution of India, in view of Sec. 143 of the Government of India Act, 1935 and Art. 277 of the Constitution. But the Court declined to allow the petitioners to urge that the increase in the rate of tax by resolutions in the years 1943, 1946 and 1947 was invalid: Amalgamated Coal Fields

Ltd. v. Janapada Sabha, Chhindwara, (1962) 1 SCR 1 = (AIR 1961 SC 964).

4. Validity of the enhanced levy was then challenged in petitions filed before the High Court of Madhya Pradesh by the Amalgamated Coal Fields Ltd. and Others. In appeals against the order of the High Court of Madhya Pradesh, this Court held that since neither the Act nor the Rules prescribed a ceiling on the levy, the expression "first imposition" occurring in Sec. 51 (2) would include every increase of the levy after its initial imposition and the increased levy would require the previous sanction of the Local Government and such sanction not being there, the levy at the rate of 9 pies per ton was illegal. The Court accordingly allowed the appeals and ordered that the appropriate directions be issued restraining the Janapada Sabha from recovering the tax at a rate higher than 3 pies per ton and also restraining the Sabha from recovering any additional tax in respect of the years for which tax had already been assessed against the petitioners Amalgamated Coalfields Ltd. v. The Janapada Sabha, Chhindwara, 1963 Supp (1) SCR 172 = (AIR 1964 SC 1013).

5. To rectify the defect pointed out by this Court in the imposition of the cess, the Legislature of Madhya Pradesh enacted the Madhya Pradesh Koyala Upkar (Manyatakaran) Adhinyam, Act 18 of 1964. By Sec. 2 (a) "Board" means "the Independent Mining Local Board, Chhindwara, constituted under the Central Provinces Local Self-Government Act, 1920 (IV of 1920), and its successor body, the Janapada Sabha, Chhindwara, constituted under the Central Provinces and Berar Local Government Act, 1948 (XXXVIII of 1948)". Section 2 (b) defines "cess" as meaning "a cess imposed by the Independent Mining Local Board, Chhindwara, or its successor body, on coal, coal dust or coke, from time to time, as the case may be, produced or manufactured at the mines, sold for export outside the State, or sold otherwise than for export by rail within the territorial jurisdiction of the said Board," and by Sec. 2 (c) "enactment" is defined as meaning "the Central Provinces Local Self-Government Act, 1920 (IV of 1920), or the Central Provinces and Berar Local Government Act, 1948

(No. XXXVIII of 1948), as the case may be, and rules made thereunder." By Sec. 3 it is provided:

"(1) Notwithstanding anything contained in any judgment, decree or order of any Court, cesses imposed, assessed or collected or purported to have been imposed, assessed or collected by the Board in pursuance of the notifications/notices specified in the Schedule shall, for all purposes, be deemed to be, and to have always been, validly imposed, assessed or collected as if the enactment under which they were so issued stood amended at all material times so as to empower the Board to issue the said notifications/notices and according to:—

(a) all acts, proceedings or things done or taken by the Board or by any officer of the Board in connection with the imposition, assessment or collection of such cess shall, for all purposes, be deemed to be and to have always been done or taken in accordance with law;

(b) any cess imposed or assessed in pursuance of the said notifications/notices before the 20th day of May, 1964 but not collected before such date may be recovered (after assessment of the cess where necessary) in the manner provided therefor;

(c) no suit or other proceeding shall be maintained or continued in any Court against the Board or any person or authority whatsoever for the refund of any cess so paid;

(d) no Court shall enforce any decree or order directing the refund of any cess so paid.

"(2) For the removal of doubts, it is hereby declared that nothing in subsection (1) shall be construed as preventing any person—

(a) from questioning in accordance with the provisions of the enactment, the assessment of such cess for any period.

(b) for claiming refund of the cess paid to him in excess of the amount due from him under the enactment." In the Schedule, notifications dated December 22, 1943, July 29, 1946 and July 19, 1947, enhancing the rate of cess were referred to.

6. The levy of coal cess validated by the provisions of Act 18 of 1964 was again challenged by the Central Provinces Syndicate Ltd. and other producers of coal, by petitions filed in the High Court of Madhya Pradesh.

It was claimed by the petitioners that Act 18 of 1964 was "ultra vires and ineffective", and the notices issued pursuant thereto were liable to be quashed. Dixit, C. J., and Pandey, J., who heard the petitions differed. In the view of the learned Chief Justice the Amending Act which purported to amend Act 4 of 1920 by seeking to empower the Mining Board to issue the notifications specified in the Schedule to the Act without reviving the Act of 1920 was ineffective, and that in any event the Act did not validate the levy of coal cess which had been imposed under the three notifications. Pandey, J., expressed a contrary view. He held that the provisions of Sec. 3 of Act 18 of 1964 were not invalid, "nor were they ineffective". The petitions were then referred to Shiv Dayal, J. The learned Judge agreed with Dixit, C. J., and held that Act 18 of 1964 "did not give legal effect to the imposition of cess at the rate of 4 pies, 7 pies or 9 pies per ton under the notifications issued by the Independent Mining Local Board nor to anything done in pursuance of those notifications."

7. The preamble of the Act states that it is "An Act to validate the imposition and collection of cess on coal by certain local authorities". Act 18 of 1964 is a taxing statute which purports to rectify the defects pointed out by this Court. This Court declared invalid the levy of cess by the Independent Mining Local Board, Chhindwara, at a rate exceeding three pies per ton. If the Act does not by the plain language used therein carry out the object, the Court will not be justified in supplying deficiencies in the Act. As observed by Rowlatt, J., in *Cape Brandy Syndicate v. Commrs. of Inland Revenue*, (1921) 12 Tax Cas 358.

"In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

These observations were approved by the House of Lords in *Canadian Eagle Oil Co., Ltd. v. King*, (1946) 27 Tax Cas 206. This Court has also adopted the same rule in *Commr. of Income-tax v. Ajax Products Ltd.*, 55 ITR

741 = (AIR 1965 SC 1358) and *Commr. of Income-tax v. B. M. Kharwar*, (1969) 1 SCR 651 = (AIR 1969 SC 812).

8. The relevant words which purport to validate the imposition assessment and collection of cess on coal may be recalled : they are "cesses imposed, assessed or collected by the Board in pursuance of the notifications/notices specified in the Schedule shall, for all purposes, be deemed to be, and to have always been validly imposed, assessed or collected as if the enactment under which they were so issued stood amended at all material times so as to empower the Board to issue the said notifications/notices". Thereby the enactments, i.e. Act 4 of 1920 and the Rules framed under the Act pursuant to which the notifications and notices were issued, must be deemed to have been amended by the Act. But the Act does not set out the amendments intended to be made in the enactments. Act 18 of 1964 is a piece of clumsy drafting. By a fiction it deems the Act of 1920 and the rules framed thereunder to have been amended without disclosing the text or even the nature of the amendments.

9. Mr. B. Sen appearing on behalf of the Sabha contended that the intention of the Legislature was to repeal with retrospective effect sub-sec. (2) of Sec. 51 of Act 4 of 1920. By Sec. 51 of Act 4 of 1920 it was provided :

"(1) Subject to the provisions of any law or enactment for the time being in force, a District Council may, by a resolution passed by a majority of not less than two-thirds of the members present at a special meeting convened for the purpose, impose any tax, toll or rate * * *

(2) The first imposition of any tax, toll or rate under sub-section (1) shall be subject to the previous sanction of the Provincial Government.

* * * * *

But the Act in terms is limited in its application to the Independent Mining Local Board, Chhindwara, and its successor body the Janapada Sabha, Chhindwara constituted under Act 38 of 1948, and only in respect of the three notifications specified in the Schedule. Obviously the Act limited to one local Board in its application

and to certain specific notifications cannot operate to repeal the clause insofar as it applied to other Boards.

10. The nature of the amendment made in Act 4 of 1920 has not been indicated. Nor is there anything which enacts that the notifications issued without the sanction of the State Government must be deemed to have been issued validly under Sec. 51 (2) without the sanction of the Local Government. On the words used in the Act, it is plain that the Legislature attempted to overrule or set aside the decision of this Court. That, in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of an Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a Court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court.

11. This Court in Amalgamated Coalfields Ltd.'s case, 1963 Supp (1) SCR 172 = (AIR 1964 SC 1013), held that the cess was not validly imposed and levied because the sanction of the State Government was not obtained at the time of enhancing the rate of levy of tax. That judgment was binding between the parties and also by virtue of Article 141 binding on all Courts in the territory of India. The Legislature could not say that declaration of law was either erroneous, invalid or ineffective either as a precedent or between the parties.

12. It is unnecessary then to consider whether the repealed Act may be amended without re-enactment.

13. The appeals fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 61
(V 58 C 9)

(From: Bombay)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

M/s. Filmistan Private Ltd., Bombay, Appellant v. M/s. Bhagwandas Santprakash and another, Respondents.

Civil Appeal No. 262 of 1969, D/- 21-8-1970.

(A) Civil P. C. (1908), Section 75 — Power of Court to issue commissions — Power is discretionary — Fact that witnesses examined on commission cannot be effectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with discretion of Court in appeal — Question whether witnesses would appear before the Commissioner or not is also irrelevant. It is for the party to produce the witnesses before the Commissioner.

(Para 2)

(B) Civil P. C. (1908), Ss. 77, 75 — Power of Court to issue letter of request — Section 77 read with Sec. 75 empowers Court to issue letter of request to any person other than Court to examine witnesses residing at any place not within India — Power is not subject to any reciprocal agreement between the Governments. (Para 4)

The following Judgment of the was delivered by

HEGDE J.: This appeal by special leave is directed against the order issued by Vimadalal J. in S. Suit No. 109 of 1962 on the Original Side of the High Court of Judicature at Bombay directing the issue of a letter of request to our ambassador at Kabul to examine certain witnesses who are residing in Kabul on commission.

2. Admittedly the witnesses sought to be examined at Kabul are relevant witnesses. All of them are living outside the jurisdiction of the Court and hence they are not amenable to the process of the Court. It was said on behalf of the appellant that one of the witnesses sought to be examined is an agent of the 1st defendant and therefore that defendant could have produced him in Court for examination. As regards the other witnesses, it was said that the facts that they were expected to depose could have been

established by other evidence. We have no doubt that these facts must have been considered by the learned trial Judge. The order under appeal is essentially a discretionary order. We do not think that a case is made out for interfering with the discretion of the learned trial Judge. The fact that the witnesses examined on commission cannot be effectively cross-examined or their examination will entail heavy costs are not sufficient circumstances to interfere with the discretion of the learned trial Judge.

3. It was urged on behalf of the appellant that the Commissioner cannot compel the witnesses to appear before him for examination and therefore the attempt to examine them is a futile one. We think this consideration is irrelevant at this stage. We do not know whether the witnesses in question are willing to be examined by the Commissioner or not. It is for the defendant to produce them before the Commissioner, if he wants them to be examined.

4. It was further urged that as there is no reciprocal agreement between our Government and the Government of Afghanistan, the witnesses cannot be lawfully examined in Kabul. Section 77 of the Code of Civil Procedure read with Section 75 empowers the Court to issue a letter of request to any person other than a Court to examine witnesses residing at any place not within India. This power of the Court is not subject to any reciprocal agreement between the Governments. We do not know whether there is any law in Afghanistan prohibiting the examination of witnesses by Consular authorities. Nor is there any material before us on the basis of which we can decide whether the Commissioner can administer oath or not. These questions do not appear to have been urged before the trial court. The question whether the evidence recorded by the Commissioner is legally admissible or not can certainly be canvassed at the trial of the case. It is not necessary to go into that question at present.

5. For the reasons mentioned above this appeal fails and the same is dismissed — no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 62
(V 58 C 10)

I. D. DUA, J.

Talib Hussain, Petitioner v. State of Jammu and Kashmir, Respondent.

Writ Petn. No. 109 of 1970, D/- 7-7-1970.

(A) Constitution of India, Article 32 — Habeas corpus proceedings — For issue of writ Court has to consider legality of detention on date of hearing — No writ can be issued if detention on that date is lawful.

(Para 6)

The following Judgment of the Court was delivered by

DUA, J.:— Talib Hussain @ Abdul Rehman son of Feroz Din forwarded through Central Jail, Jammu his application for a writ of habeas corpus. According to the averments made therein the petitioner was arrested on September 4, 1968 but the warrant for his detention was dated September 10, 1968. Upto December 12, 1969 he was neither shown the warrant of detention nor were the grounds of his detention communicated to him. He was served with a copy of the warrant of detention on December 12, 1969. The petitioner had by then already filed an application for a writ of habeas corpus (W. P. No. 400 of 1969) but that application was withdrawn by him. On December 5, 1968 the petitioner was transferred from interrogation centre to the Central Jail, Jammu. On December 10, 1968 he was told that the grounds of detention could not be disclosed to him and this was long after the expiry of ten days from his arrest. The petitioner was tortured at the interrogation centre, Jammu, and his signatures were forcibly obtained on a piece of blank paper. The petitioner claimed to be a permanent resident of village Azamabad, police station Thana Darhal, Tahsil and District Rajouri. His arrest was alleged to be mainly due to personal grudges of Fazal Hasan and Nazir Hasan.

2. According to the return the petitioner was detained on September 11, 1968 pursuant to the order dated September 10, 1968. The petitioner was informed that it was against public interest to disclose to him the grounds

IN/IN/D522/70/RGC/T

on which the order of his detention had been made. The Government approved the order of detention on September 30, 1968. The order of detention was read out to the petitioner and its contents explained to him in Urdu and the petitioner at the time of detention affixed his signature on the order as a token of having understood the same. The order under Section 8 read with Section 13-A of the J & K Preventive Detention Act to the effect that it was against public interest to disclose to the petitioner the grounds of detention was made on September 10, 1968 and not on December 10, 1968 as suggested by the petitioner. The date December 10, 1968 on the copy attached to the reply of the Government was due to a typing error.

3. On behalf of the petitioner it was argued that the petitioner's detention started prior to the order of detention and that his detention must on that account be held to be illegal from its inception and therefore wholly void justifying his release. It was further submitted that there was no material showing that the orders made against the petitioner were explained to him in his own language.

4. I had a look at the original records produced by the respondent. It is clear that the order of detention dated September 10, 1968 was explained to the petitioner on September 11, 1968. The order of detention is as under:

"Whereas I, C. B. Budgular, I. A. S. District Magistrate, Rajouri, am satisfied that with a view to preventing Shri Talib Hussain @ Abdul Rehman s/o Feroz Din r/o Azamabad p/s Darhal now Gujran Wala, West Pakistan from acting in a manner prejudicial to the security of the State it is necessary so to do.

Now, therefore, in exercise of the powers conferred by Section 3 (2) read with Section 5 of the Jammu & Kashmir Preventive Detention Act, 1964, I, C. B. Budgular, I. A. S. District Magistrate, Rajouri hereby direct that the said Talib Hussain @ Abdul Rehman s/o Feroz Din be detained in Additional Police Lock up p/s Saddar, Jammu, subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified in the Jammu and Kashmir Detenus General Order of 1968."

The order under Sec. 8 read with Section 13-A of the Jammu and Kashmir Preventive Detention Act dated September 10, 1968 reads thus:

"Whereas Shri Talib Hussain @ Abdul Rehman s/o Feroz Din r/o Azamabad p/s Darhal now Gujranwala, West Pakistan, has been detained in pursuance of order No. DIR/27/68 dated 10-9-1968 made by me under Sec. 3 (2) read with Section 5 of the Jammu & Kashmir Preventive Detention Act, 1964 with a view to preventing him from acting in any manner prejudicial to the security of the State and

Whereas, I consider it against the public interest to disclose the grounds of detention to the said Talib Hussain @ Abdul Rehman s/o Feroz Din.

Now, therefore, in pursuance of Section 8 read with Section 13-A of the said Act I hereby direct that the said Talib Hussain @ Abdul Rehman be informed that it is against the public interest to disclose to him the grounds on which his detention order was made."

At the back of this order there is an endorsement dated September 13, 1968 by Shri B. M. Dhar that the contents of the order had been explained to the detenu in the language understood by him. It is thus clear that the petitioner was informed that it was against public interest to disclose to the petitioner the grounds of his detention.

5. Now, the petitioner having been detained with a view to preventing him from acting in a manner prejudicial to the security of the State and it having been considered against public interest to disclose to him the grounds of his detention, it is clear that by virtue of the provisions of Sec. 13-A (2) (b) (ii) of the Jammu and Kashmir Preventive Detention Act, Section 8 (1) of that Act, and by virtue of Section 13-A (2) (c), Sec. 10 of that Act, were both inapplicable to this case. These provisions merely serve to demonstrate that the question of security of the State is of paramount importance and is placed above the right to personal liberty of an individual whose activities are a danger to such security. Activities prejudicial to the security of the State always pose a threat to the public peace and safety and in the event of a crisis arising out of such activities, the rights of individuals have to be postponed to the larger considerations of State.

6. In regard to the submission that the petitioner was arrested and deprived of his personal liberty long before the order of his arrest and this invalidated his detention, it is sufficient to point out that in habeas corpus proceedings the Court has to consider the legality of the detention on the date of hearing. If on the date of hearing it cannot be said that the aggrieved party has been wrongfully deprived of his personal liberty and his detention is contrary to law, a writ of habeas corpus cannot issue.

7. I am expressing no opinion in this case on the question of the effect of the withdrawal of the earlier petition by the petitioner.

8. The petitioner's detention cannot, therefore, be considered to be contrary to procedure established by law and cannot be held to be illegal so as to justify his release. This petition fails and is dismissed.

Petition dismissed.

**AIR 1971 SUPREME COURT 64
(V 58 C 11)**

(From: Bombay)

K. S. HEGDE AND I. D. DUA, JJ.

Challappa Ramaswami, Appellant v.
State of Maharashtra, Respondent.

Criminal. Appeal No. 195 of 1967,
D/- 13-8-1970.

Criminal P. C. (1898), Sec. 421 —
"May dismiss the appeal summarily"
Appeal against conviction involving
substantial point which is prima facie
arguable — Dismissal by High Court
of appeal summarily without giving
indication of its view on the points
raised is improper. AIR 1970 SC 1033
and AIR 1970 SC 977, Followed. Deci-
sion of Bombay High Court, Reversed.
(Para 2)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 977 (V 57) =

(1970) 1 SCC 547 = 1970 Cri

LJ 891, Siddanna Apparao

Patil v. State of Maharashtra

(1970) AIR 1970 SC 1033 (V 57) =

1970 Cri LJ 995, Govinda

Kadtuji Kadam v. State of
Maharashtra

The following Judgment of the
Court was delivered by

DUA, J.—The short and the only
point raised in this appeal by special
leave pertains to the justification of

the High Court in summarily dismissing in limine the appeal preferred by the appellant in that Court against his conviction and sentence of life imprisonment by the Court of Session, Greater Bombay under Section 302, I. P. C.

2. We do not consider it necessary to enter into an exhaustive discussion of the prosecution story and the evidence led in its support. Suffice it to say that the trial Court relied in support of its order on two eye witnesses — one of whom is stated to be the uncle of the deceased. That Court also noticed that in the dying declaration by the deceased made to his uncle the name of the accused as his assailant was not mentioned. In a case like this, therefore, in our opinion, it was incumbent on the High Court to issue notice to the State and hear the appeal with the record before it and after evaluating the evidence, to record a speaking order so that this Court could also have before it the reasoning of the High Court for upholding the appellant's conviction. The dismissal of the appeal by the High Court with one word "dismissed" has left us guessing about the line of reasoning which the High Court would have adopted after appropriate scrutiny of the material on the record. This Court has very recently in Govinda Kadtuji Kadam v. State of Maharashtra, AIR 1970 SC 1033 at p. 1034, on a review of the case law reiterated the legal position in these words:

"We may at the outset point out that though on appeal under Sec. 410, Criminal P. C. by a person convicted at a trial held by a Sessions Judge or an Additional Sessions Judge the appellant is entitled under Section 418 of the Code to challenge the conclusions both of facts and of law and to ask for a reappraisal of the evidence, the appellate Court has nevertheless full power under Sec. 421, Criminal P. C. to dismiss the appeal in limine even without sending for the records, if on perusal of the impugned order and the petition of appeal it is satisfied with the correctness of the order appealed against. This power, it may be emphasised, has to be exercised after perusing the petition of appeal and the copy of the order appealed against and after affording to the appellant or his pleader a reasonable opportunity

of being heard in support of the appeal. The summary decision is accordingly a judicial decision which vitally affects the convicted appellant and in a fit case it is also open to challenge on appeal in this Court. An order summarily dismissing an appeal by the word "rejected", as is the case before us, though not violative of any statutory provision removes nearly every opportunity for detection of errors in the order. Such an order does not speak and is inscrutable giving no indication of the reasoning underlying it. It may at times embarrass this Court when the order appealed against prima facie gives rise to arguable points which this Court is required to consider without having the benefit of the views of the High Court on those points. In our opinion, therefore, when an appeal in the High Court raises a serious and substantial point which is prima facie arguable it is improper for that Court to dismiss it summarily without giving some indication of its view on the points raised. The interest of justice and fairplay require the High Court in such cases to give an indication of its views on the points argued so that this Court, in the event of an appeal from that order being presented here, has the benefit of the High Court's opinion on those points."

A month later this Court again in *Siddanna Apparao Patil v. State of Maharashtra*, (1970) 1 SCC 547 = (AIR 1970 SC 977) reaffirmed that view. It was undoubtedly open to this Court to go into the evidence led in this case and consider the appellant's conviction on the merits, notwithstanding that the present appeal is by special leave. But, in our opinion, it would be more appropriate and would serve the ends of justice better, if the High Court hears and decides the appeal in the light of the aforesaid decisions. This appeal accordingly succeeds and allowing the same we set aside the order of summary dismissal and remit the case back to the High Court for hearing and deciding the appeal in accordance with law. It may be pointed out that this order is not to be considered as containing any expression of opinion on the merits of the case.

Appeal allowed.

AIR 1971 SUPREME COURT 65 (V 58 C 12)

(From: Allahabad)

J. C. SHAH AND K. S. HEGDE, JJ.

M/s. Sarin Chemical Laboratory,
Appellant v. Commissioner of Sales
Tax, U. P., Respondent.

Civil Appeals Nos. 262-265 and 266-267 of 1970, D/- 7-8-1970.

Sales Tax — U. P. Sales Tax Act (15 of 1948), S. 3 (A) — Notification No. 905/X, D/- 31-3-1956, entry 6 — Tooth powder is a toilet — Its turnover is liable to be taxed at single point under S. 3 (A) read with Entry 6.

The tooth powder is a toilet. Neither the expression "cosmetic" nor "toilet requisite" has been defined in the Act. The names of articles, the sales and purchases of which are liable to be taxed given in a statute, unless defined in the statute, must be construed not in a technical sense but as understood in common parlance. In common parlance tooth powder is considered as a toilet. That meaning accords with the dictionary meaning as well. Consequently its turnover is liable to be taxed at single point under S. 3 (A) read with entry 6 of the notification No. 905/X, D/- 31-3-1956. Decision of Allahabad High Court, Affirmed; (1963) 14 STC 943 (Mad) & (1968) 22 STC 169 (Bom), Approved; AIR 1961 SC 1325, Foll. (Paras. 3, 4, 5)

Cases Referred: Chronological Paras

(1968) 22 STC 169 (Bom), Commr. of Sales Tax v. Vicco Laboratories	5
(1963) 14 STC 943 = (1963) 2 Mad LJ 523, Somasundara Mudaliar v. State of Madras	5
(1961) AIR 1961 SC 1325 (V 48) = (1961) 12 STC 286, Ramavatar Budhaiprasad v. Asst. Sales Tax Officer, Akola	5

The following Judgment of the Court was delivered by

HEGDE, J.:— These are connected appeals by special leave. The only question raised in these appeals is whether 'Sarin Tooth Powder' manufactured by M/s. Sarin Chemicals Laboratory is "cosmetic" or a "toilet requisite" as held by the High Court of Allahabad or it is an unspecified commodity liable to sales tax at all points of sale as held by the Addi-

IN/IN/D869/70/YPB/B

tional Judge (Revisions) Sales Tax, Agra.

2. The contention of M/s. Sarin Chemical Laboratory who is the appellant in all the appeals is that the turn-over relating to the sales of tooth powder is liable to be taxed at the rate of 3 pies per rupee under Sec. 3 of the U. P. Sales Tax Act (to be hereinafter referred to as the Act) whereas Commissioner of Sales Tax, U. P. contends that the said turn over is liable to be taxed at single point under Section 3 (A) of that Act read with entry 6 of the notification No. 905/X dated March 31, 1956. The High Court has accepted the contention of the Commissioner. In these appeals the assessee challenges the conclusion reached by the High Court and supports the view taken by the Additional Judge (Revisions) Sales Tax, Agra, who held that the tooth powder is an unspecified commodity liable to tax under Sec. 3 of the Act.

3. Neither the expression 'cosmetic' nor 'toilet requisite' has been defined in the Act. The dictionary meaning of the expression 'cosmetic' (see Webster's International Dictionary) is "A preparation to beautify or alter appearance of the body or for cleansing, colouring, conditioning or protecting skin, hair, nails, eyes or teeth". The same dictionary gives the meaning of the expression "toilet" thus: 'an act or process of dressing, especially formerly of dressing hair and now usually cleansing and grooming of one's person'. The word "toiletry" is explained in the said dictionary as meaning "an article or preparation used in making one's toilet such as soap, lotion, cosmetic, tooth paste, shaving cream, cologne etc."

4. According to the dictionary meaning tooth powder is regarded both as an item of cosmetic and toilet but as observed by this Court in *Ramavatar Budhaiprasad v. Asst. Sales Tax Officer, Akola*, 12 STC 286 = (AIR 1961 SC 1325), the names of articles, the sales and purchases of which are liable to be taxed given in a statute unless defined in the statute must be construed not in a technical sense but as understood in common parlance. Therein this Court was called upon to consider whether 'betel leaves' could be considered as 'vegetable' under Item No. 6 of Schedule II of the C. P. & Berar Sales Tax Act, 1947.

In that case this Court observed that the word 'vegetable' had not been defined in the Act and being a word of every day use, it must be construed in a popular sense meaning "that sense which people conversant with the subject-matter with which statute is dealing would attribute to it." Applying that test this Court ruled that betel leaves cannot be considered as 'vegetable'. In common parlance a tooth powder is considered as a toilet. That meaning accords with the dictionary meaning as well.

5. The question whether tooth powder can be considered as a toilet came up before the Madras High Court in *V. P. Somasundara Mudaliar v. State of Madras*, (1963) 14 STC 943 (Mad), and before the Bombay High Court in *Commr. of Sales Tax v. Vicco Laboratories*, (1968) 22 STC 169 (Bom). Both the Courts took the view that the tooth powder is a toilet. The same view has been taken by the Allahabad High Court. We are in agreement with that view.

6. In the result these appeals fail and they are dismissed with costs — hearing fee one set.

Appeals dismissed.

AIR 1971 SUPREME COURT 66 (V 58 C 13)

(From Patna)

K. S. HEGDE AND I. D. DUA, JJ.

Khedu Mohton and others, Appellants v. State of Bihar, Respondent.

Criminal Appeal No. 162 of 1967, D/- 17-8-1970.

(A) Criminal P. C. (1898), Ss. 417, 423 — Appeal against acquittal — High Court not to interfere with conclusions of lower Court merely because it is inclined to take different view of evidence — Decision of Patna High Court, Reversed.

Though the powers of the High Court in considering the evidence on record in appeals under Sec. 417 are as extensive as its powers in appeals against convictions the Court should bear in mind the presumption of innocence of accused. Where the lower court has found the accused not guilty, unless the conclusions reached by it are palpably wrong or based on erroneous view of the law or that its

IN/IN/D964/70/DHZ/M

decision is likely to result in grave injustice, the High Court should be reluctant to interfere with its conclusion. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in support of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal. Decision of Patna High Court, Reversed.

(Para 3)

(B) Criminal P. C. (1898), Section 4 (1) (h) — Delay in filing complaint — It is the duty of prosecution to explain delay satisfactorily — Failure to do so is circumstance of considerable importance.

(Para 5)

(C) Criminal P. C. (1898), S. 431 — Appeal against acquittal — Death of appellant — Appeal does not abate. Patna High Court Decision, Reversed. AIR 1958 Mad 624, Overruled.

An appeal under Sec. 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact that the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other. AIR 1925 All 620, Disting.; AIR 1958 Mad 624, Overruled. Patna High Court Decision, Reversed.

(Para 8)

Cases Referred: Chronological Paras

(1958) AIR 1958 Mad 624 (V 45) =

1958 Cri LJ 1488, Thothan v.

Murugan

7

(1925) AIR 1925 All 620 (V 12) =

26 Cri LJ 1008, Hafiz Nahal

Ahmad v. Ramji Das

7

The following Judgment of the Court was delivered by

HEGDE, J.:— This appeal by special leave is directed against the decision of single Judge of the High Court of Judicature at Patna setting aside the acquittal of the appellants and convicting them under Ss. 379/149, I. P. C. as well as under Section 143, I. P. C.

2. The appellants were prosecuted before the Munsiff Magistrate, 1st Class, Arrah for dishonestly cutting and removing the paddy crop in plots Nos. 340 and 346 pertaining to khata No. 82 in village Ibrahim Nagar Dis-

trict Shahbad. The complainant's case is that those lands belonged to him and the appellants unlawfully trespassed into that property on November 19, 1961 and harvested the rice crop. The appellants pleaded not guilty to the charge. The learned trial Magistrate held the appellants guilty and convicted them as mentioned earlier. In appeal the learned District Judge, Shahbad acquitted the appellants. He felt unable to rely on the prosecution case for three different reasons. Firstly he came to the conclusion that the witnesses who spoke about the occurrence are all interested witnesses and it is unsafe to place reliance on their testimony. He secondly came to the conclusion that there was considerable delay in filing the complaint and the delay in question has not been explained by the prosecution and that circumstance throws doubt on the prosecution case. Lastly he held that the non-examination of the police inspector who is said to have come to the place of occurrence at the time of the occurrence and seen some of the appellants harvesting the crop casts further doubt on the prosecution case. The High Court differing from the 1st appellate Court held that there was no delay in filing the complaint nor was the non-examination of the police inspector a circumstance that went against the prosecution. It did not deal with the finding of the 1st appellate Court that it is unsafe to place reliance on the evidence of P. Ws. 1 to 4 as they were interested witnesses.

3. It is true that the powers of the High Court in considering the evidence on record in appeals under Section 417, Criminal P. C. are as extensive as its powers in appeals against convictions but that Court at the same time should bear in mind the presumption of innocence of accused persons which presumption is not weakened by their acquittal. It must also bear in mind the fact that the appellate Judge has found them not guilty. Unless the conclusions reached by him are palpably wrong or based on erroneous view of the law or that his decision is likely to result in grave injustice, the High Court should be reluctant to interfere with his conclusion. If two reasonable conclusions can be reached on the basis of the evidence on record then the view in sup-

port of the acquittal of the accused should be preferred. The fact that the High Court is inclined to take a different view of the evidence on record is not sufficient to interfere with the order of acquittal.

4. The learned appellate Judge has come to the conclusion that P. Ws. 1 to 4 are interested witnesses and it is unsafe to place reliance on their testimony. It is established in evidence that P. Ws. 1 to 3 are interested witnesses. They are the enemies of the appellants. This aspect of the case was not considered by the High Court at all.

5. The occurrence is said to have taken place on November 19, 1961 but the complaint in respect of the same was filed on November 27, 1961. The explanation given by the complainant for this inordinate delay was that he laid information about the occurrence before the police on the date of the occurrence itself; he was expecting the police to take up the investigation; as the police did not take up the investigation, he filed the complaint on 27-11-1961. This explanation has been rejected by the 1st appellate Court. The complaint said to have been filed by the complainant has not been summoned nor proved. No satisfactory proof of any such complaint has been adduced before the Court. If a complaint under Section 154 had been filed, the same would have been registered and a final report under S. 173 submitted. None of those documents have been summoned much less proved. Curiously enough, the learned Judge of the High Court says that if the learned Sessions Judge had looked into the diary of the Magistrate, he would have found reference to the complaint filed by the complainant. In this Court we requested the Counsel for the State to look into the original records and inform us whether there is any reference to a complaint filed by the complainant. After examining the records, he told us that there is no such reference. We do not know how the learned Judge formed the impression that there was some reference in some record about the information laid before the police. In fact in this Court Counsel for the State told us that what had happened was that before the occurrence, the complainant appears to have filed an application before the police mention-

ing that there was an apprehension of breach of peace. The delay of about 8 days in filing the complaint in a case of this nature throws a great deal of doubt on the prosecution story. It was the duty of the prosecution to explain the delay satisfactorily. Failure of the prosecution to do so undoubtedly is a circumstance of considerable importance.

6. According to the complainant, as the appellants were reaping the crop the Police Inspector happened to come there and that he had seen some of the appellants harvesting the crop. If that be so the Inspector of Police would have been an extremely important witness. His evidence would have been useful in determining the guilt of the accused. He is a disinterested person. No explanation was given for not examining him. Strangely enough the learned Judge of the High Court opined that there was no purpose in examining the Inspector when he had failed to investigate the complaint made before him. As seen earlier, the alleged complaint appears to be an imaginary one. Therefore the inference that the Inspector of Police was guilty of dereliction of duty was unwarranted.

7. In view of our above conclusion, it is unnecessary for us to consider the question of law canvassed by Mr. E. C. Aggarwal, learned Counsel for the appellant. But as the same has been argued we shall go into it. The appeal before the High Court was brought after obtaining special leave under sub-sec. (3) of Sec. 417, Criminal P. C. It appears that during the pendency of the appeal, the appellant died. It was contended before the High Court and that contention was repeated before us that the appeal abated in view of the death of the appellant. This contention was rejected by the High Court. In support of that contention, Counsel for the appellant relied on two decisions, one of Allahabad High Court in Hafiz Nehal Ahmad v. Ramji Das, AIR 1925 All 620 and the other of Madras High Court in Thothan v. Murugan, AIR 1958 Mad 624. The first decision has no application to the facts of the present case. That was an appeal under S. 476-B of the Criminal P. C. It is true that the Madras decision was rendered in an appeal under Sec. 417 (3) of the

Criminal P. C. In our opinion, the learned single Judge of the Madras High Court erred in thinking that the decision of the Allahabad High Court lent any support to his conclusion that an appeal filed under Section 417 (3), Criminal P. C. abates on the death of the appellant. The question of abatement of criminal appeals is dealt with by Section 431 of Criminal Procedure Code. That section reads:

"Every appeal under Section 411-A, sub-section (1) of Section 417 shall finally abate on the death of the accused and every other appeal under this Chapter (except an appeal from a sentence of fine) shall abate on the death of the appellant."

8. From this section it is clear that an appeal under Section 417 can only abate on the death of the accused and not otherwise. Once an appeal against an acquittal is entertained by the High Court, it becomes the duty of the High Court to decide the same irrespective of the fact the appellant either does not choose to prosecute it or is unable to prosecute it for one reason or the other. The argument that while introducing sub-section (3) to Section 417, Criminal P. C., the Parliament overlooked the provisions contained in Section 431, does not deserve consideration. The language of Section 431 is plain and unambiguous. Therefore no question of interpretation of that provision arises.

9. In view of our finding on the merits of the case, we allow this appeal, set aside the judgment of the learned single Judge of the High Court and restore that of the Sessions Judge. The appellants are on bail. Their bail bonds do stand cancelled.

Appeal allowed.

AIR 1971 SUPREME COURT 69
(V 58 C 14)

(From: Patna)

K. S. HEGDE AND I. D. DUA, JJ.

Awadhi Yadav and another, Appellants v. The State of Bihar, Respondent.

Criminal Appeal No. 128 of 1967, D/- 17-8-1970.

Evidence — Appreciation of — Circumstantial evidence — Accused when

IN/IN/D962/70/YPB/T

can be convicted solely on circumstantial evidence.

Before a person can be convicted on the strength of circumstantial evidence, the circumstances in question must be satisfactorily established and the proved circumstances must bring home the offence to the accused beyond reasonable doubt. If those circumstances or some of them can be explained by any other reasonable hypothesis then the accused must have the benefit of that hypothesis. But in assessing the evidence imaginary possibilities have no place. What is to be considered are ordinary human probabilities. (Para 3)

Where it was established that there was bitter enmity between accused and deceased, that the accused were seen carrying the dead body and at that time they were also carrying parsa and bhalla, and it was also proved that the deceased died of injuries which could have been caused by the weapons they were carrying, and the accused gave no explanation as to how they happened to carry the dead body, all these circumstances establish that the deceased must have been murdered by the accused shortly before they were seen carrying dead body. Therefore, their conviction under Section 302/34 was proper. That the facts that the witnesses saw the accused having parsa and bhalla was not mentioned in F. I. R. and that they did not state in their depositions that those weapons were bloodstained were of no consequence when the information was not given by them and when they saw the accused carrying dead-body at about 8 P. M. Judgment of Patna High Court, Affirmed.

(Paras 5, 6, 8, 9, 10)

The following Judgment of the Court was delivered by

HEGDE, J.:— The appellants Awadhi Yadav and Bhulla Yadav are two of the eleven persons tried before the Additional Sessions Judge, Darbhanga. All of them were charged with offences under Section 302/34, I. P. C. In addition, the appellants as well as A-2 to 4 and A-6 to 8 were also charged with offences under Section 201/511, I. P. C. The learned trial Judge convicted Accused 1 to 8 both under Section 302/34 as well as Section 201/511, I. P. C. Under the former section, he sentenced them to suffer imprisonment for life. He did not impose separate

sentence under Section 201/511, I. P. C. In appeal the High Court of Patna affirmed the convictions of the appellants both under Section 302/34 as well as Section 201/511, I. P. C. The other accused were acquitted of the charge under Section 302/34, I. P. C. For the offence under Section 201/511, I. P. C. they were sentenced to undergo rigorous imprisonment for 3½ years. Only the appellants have appealed against the decision of the appellate Court. This Court while granting special leave to appeal to this Court directed that the appeal should be confined to the question of conviction under Section 302 read with Section 34, I. P. C. Therefore, the appellants are precluded from canvassing the correctness of their conviction under Section 201/511, I. P. C. Hence no arguments were advanced before us on that question.

2. The prosecution case is that the appellants and some others, as a result of bitter enmity between some of the appellants and the deceased, Kishunlal Yadav joined together and murdered him on March 26, 1963 in the village of Basudeopur Tola Arnama and thereafter carried away the dead body of Kishunlal Yadav with the intention of screening the offenders from legal punishment.

3. The case against the appellants in respect of the charge under Section 302/34, rests on circumstantial evidence. No one has witnessed the murder. That part of the case rests entirely on circumstantial evidence. The High Court has held that the circumstances established are not sufficient to convict the accused persons other than the appellants for offence under Section 302/34, I. P. C. The question is whether the High Court was justified in holding that the evidence is sufficient to convict the appellants under that charge. Before a person can be convicted on the strength of circumstantial evidence, the circumstances in question must be satisfactorily established and the proved circumstances must bring home the offence to the accused beyond reasonable doubt. If those circumstances or some of them can be explained by any other reasonable hypothesis then the accused must have the benefit of that hypothesis. But in assessing the evidence imaginary possibilities have no place. What is to be considered are ordinary human probabilities.

4. We shall now examine the evidence against the appellants to see what all are the circumstances put forward against them; whether those circumstances are established and further whether the proved circumstances bring home the guilt to the appellants beyond all reasonable doubt.

5. There is no dispute that there was bitter enmity between the appellants and the deceased. This part of the case is admitted. Hence we shall say no more about it.

6. It is also established beyond dispute that the deceased died as a result of injuries inflicted on him by sharp cutting weapons like bhallas and parsas. This circumstance is satisfactorily proved by the medical evidence adduced in the case.

7. The appellants and some others were seen carrying the dead body of the deceased at about 8 p. m. P. W. 6 saw them and raised a hue and cry. Then they dropped the dead body and ran away from that place. This part of the prosecution evidence is the main basis for the conviction of the appellants and others under Section 201/511, I. P. C. That evidence was not challenged nor could it have been challenged in view of the order made by this Court at the time of granting special leave.

8. The appellants have given no explanation as to how they happened to carry the dead body of the deceased.

9. Three of the witnesses namely P. Ws. 4, 5 and 6 who saw the appellants and others carrying the dead body of the deceased have spoken to the fact that at the time they were carrying the dead body of the deceased, the 1st appellant had a parsa and the second had a bhalla in his hand. They had given consistent evidence on this point. Their evidence in this regard was not even challenged in cross-examination. As seen earlier all the injuries found on the person of the deceased, according to the medical evidence, could have been caused by parsas and bhallas. It was urged on behalf of the appellants that we should not accept the evidence of P. Ws. 4 to 6 when they spoke about the appellants having parsas and bhallas on two grounds namely (1) that the said fact was not mentioned in the First Information Report and (2) that the witnesses in question had not stated in

their depositions that those weapons were stained with blood. So far as the omission in the First Information Report is concerned, it must be remembered that the information was not given by any one of those who had witnessed the occurrence. It was given by a relative of the deceased on the basis of the information given by P. W. 6. Hence that omission has no significance. There is nothing surprising if those witnesses were not able to see any blood stains on the weapons in question. As mentioned earlier those witnesses saw the appellants and others carrying the dead body at about 8 p. m. On the other hand the appellants have offered no explanation how they happened to carry the weapons mentioned above. In this context it may be mentioned that the prosecution evidence establishes that the deceased must have been murdered shortly before the witnesses saw the appellants and others carrying the dead body.

10. We are satisfied that the circumstances mentioned above have been satisfactorily proved and those circumstances establish beyond reasonable doubt that the appellants were responsible for the murder of the deceased.

11. In the result this appeal fails and the same is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 71 (V 58 C 15)

(From: Andhra Pradesh)*

J. M. SHELAT, C. A. VAIDIALINGAM
AND I. D. DUA, JJ.

Sree Raja Kandregula Srinivasa Jagannadharao Panthulu Bahadur Guru (dead) by his legal representatives, (In both the Appeals), Appellants v. The State of Andhra Pradesh and others, (In both the Appeals), Respondents.

Civil Appeals Nos. 1619 and 1620 of 1968, D/- 9-10-1969.

(A) Civil P. C. (1908), Section 9 — Exclusion of Civil Court jurisdiction in respect of decisions of Tribunals — Principles stated exhaustively. AIR

*(Appeal Suits Nos. 21 of 1959 and 362 of 1958, D/- 17-4-1964 — Andh. Pra.)

EN/FN/F169/69/RGD/P

1940 PC 105 and AIR 1969 SC 78, Rel. on.

(Para 7)

(B) Andhra Pradesh (Andhra Area) Estates Land (Reduction of Rent) Act (30 of 1947), Section 8 (i) — Exclusion of Civil Court jurisdiction — Notification under Section 3 (2) based on decision of Special Officer under Section 2, which itself was based on no material — Notification can be challenged in Civil Court. Appeal Suits Nos. 21 of 1959 and 362 of 1958, D/- 17-4-1964 (Andh Pra), Reversed.

The Special Officer has an obligation under Section 2 of the Reduction of Rent Act to determine in respect of a village (village of Kalipatnam) the average rate of cash rent per acre for each class of ryoti land in existence at the time of the commencement of the Act, such as, wet, dry and garden. This has to be determined on the basis of relevant material. When the determination is solely based on the settlement register containing no entry in regard to the village (Kalipatnam) this is irrelevant material and cannot constitute a rational basis for founding thereon the determination of the Special Officer. His determination must, therefore, be held to be based on no evidence, with the result that it must be held to be in violation of the fundamental principles of judicial procedure. A fortiori the order of the Government made under Section 3 (2) exclusively on the basis of the recommendation of the Special Officer must in consequence be held to be not in conformity with the provisions of the Reduction of Rent Act, and, therefore, outside the purview of S. 3 (2) of that Act. S. 8 (i) would accordingly be inapplicable and the jurisdiction of Civil Courts cannot be excluded to entertain and decide suit questioning the legality of the notification (dated 2-11-1948) reducing the rates of rent in respect of the delta dry ryoti lands in the village (village of Kalipatnam) under Section 3 (2). (Notification struck down as contrary to law and ultra vires the Reduction of Rent Act. Appeal Suits Nos. 21 of 1959 and 362 of 1958, D/- 17-4-1964 (Andh Pra), Reversed.

(Para 13)

(C) Civil P. C. (1908), Section 9 — Exclusion of Civil Courts' jurisdiction — Notification under Section 3 (2) of Andhra Pradesh (Andhra Area) Estates Land (Reduction of Rent) Act based on decision of Special Officer under

Section 2 of the Act which itself is based on no material — Notification can be challenged in Civil Court. Appeal Suits Nos. 21 of 1959 and 362 of 1958, D/- 17-4-1964 (Andh Pra), Reversed. (Para 13)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 78 (V 56) =
 (1968) 3 SCR 662, Dhulabhai
 v. State of Madhya Pradesh 7
 (1968) Civil Appeal Nos. 1011-
 1016 of 1965, D/- 31-7-1968
 (SC), O. K. Muthuswamy
 Mudaliar v. State of Madras 8
 (1940) AIR 1940 PC 105 (V 27) =
 67 Ind App 222, Secy. of State
 v. Mask and Co. 7

Mr. D. Narasaraju, Senior Advocate (M/s. B. Parthasarathy and Subba Rao, Advocates, and M/s. J. B. Dada-
 chanji and Co., Advocates, with him),
 for Appellants, (In both the Appeals);
 Mr. A. V. Rangam, Advocate (for Nos.
 1 to 3) (In both the Appeals) and M/s.
 K. R. Chaudhuri and K. Rajendra
 Chaudhuri, Advocates (for No. 6) (In
 both the Appeals), for Respondents.

The following Judgment of the Court was delivered by

DUA, J.— These two appeals (Civil Appeals Nos. 1619 and 1620 of 1963) on certificate by the High Court arise out of the same suit and are directed against a common judgment and decree of the High Court disposing of two cross-appeals presented in that Court and will, therefore, be disposed of by one judgment. The principal question canvassed lies within a narrow compass. It relates to the jurisdiction of the Civil Courts to entertain and decide the present suit questioning the legality of the notification Ex. A-13 dated November 2, 1948 reducing the rates of rent in respect of the delta dry ryoti lands in village Kalipatnam under the Madras Estates Land (Reduction of Rent) Act XXX of 1947, (hereafter called the Reduction of Rent Act). The trial Court decreed the suit in part but the High Court to which both parties preferred appeals held that the Civil Courts had no jurisdiction to entertain the suit. It is this short question which requires determination in these appeals.

2. It is unnecessary to state at length the past history of the landed estate in question. The necessary relevant facts in brief may only be mentioned. Shree Raja Kandregula

Srinivasa Jagannadha Rao Panthulu Bahadur was the Inamdar of village Kalipatnam in Narsapuram Taluk in the West Godavari District. On November 2, 1948, the Government issued a notification (Ex. A-13) under Section 3 (2) of the Reduction of Rent Act reducing the rates of rent payable in respect of delta dry ryoti lands in Kalipatnam village. The Inam Settlement Officer, Vijayawadha, then took proceedings to determine whether Kalipatnam was an "inam estate" as defined in Sec. 2 (7) of the Madras Estates (Abolition and Conversion into Ryotwari) Act XXVI of 1948. After inquiry he made the order dated May 31, 1950 (Ex. A-1) holding that the suit village was an inam estate. Feeling aggrieved by these two orders the appellant instituted the suit, out of which the present appeals arise. The short question canvassed before us, as observed earlier, is whether the Civil Courts have jurisdiction to entertain the suit.

3. It may be stated at the outset that the appellant's counsel conceded at the bar that the question as to the kind of grant can only be decided by the Tribunal appointed under the Reduction of Rent Act and Civil Courts have no jurisdiction to adjudicate upon such a controversy. The suit challenging the validity of Ex. A-1 declaring Kalipatnam village as an inam estate was accordingly conceded to be incompetent. Challenge to Exhibit A-1 was thus not pressed in this Court. It was, however, submitted that any finding by the Civil Court on the kind of grant would have to be completely ignored by the Tribunal while considering this question under the Reduction of Rent Act. The submission seems to us to be justified.

4. We are thus left only with the relief sought in respect of Ex. A-13. The appellant questioned the validity of this notification on the ground that it cannot be considered in law to have been made under Section 3 (2) of the Reduction of Rent Act so as to be immune from challenge in the Civil Courts. In order to appreciate and determine this argument it is desirable to turn first to the provisions of the Reduction of Rent Act. This Act was enacted in order to provide for the reduction of rents payable by ryots in estates governed by the Madras Estates Land Act, 1908 ap-

proximately to the level of the assessments levied on lands in ryotwari areas in the neighbourhood and for the collection of such rents exclusively by the State Government. The purpose of collection of rent exclusively by the State Government was added in 1951 with retrospective effect. The heading of the Act, as originally enacted, was changed, on the creation of Andhra Pradesh, to A. P. (Andhra Area) Estates Land (Reduction of Rent) Act XXX of 1947. Suitable adaptations necessitated by the creation of the separate Andhra Pradesh were also duly made. Section 2 of this Act which empowers the State Government to appoint a Special Officer for any estate or estates for the purposes of recommending fair and equitable rates of rent for the ryoti land provides as under:

"Appointment of Special Officer to recommend rates of rent in estates.— 2 (a) (1) The State Government may appoint a Special Officer for any estate or estates for the purpose of recommending fair and equitable rates of rent for the ryoti land in such estate or estates.

(b) The Special Officer so appointed shall also recommend fair and equitable rates of rent for all lands in such estate or estates which became ryoti lands after the commencement of the Act.

(ii) The Special Officer shall first determine in respect of each village (hereinafter in this section referred to as "principal village") in an estate:—

(a) the average rate of cash rent per acre prevailing at the commencement of this Act for each class of ryoti land which was in existence in the principal village at such commencement; such as wet, dry and garden;

Provided that where no cash rents are prevalent in the principal village in respect of any class of land, the Special Officer shall determine the average rate of cash rent per acre prevailing at such commencement for such class of land in the nearest village in the estate in which cash rents are prevalent for such class of land and in which conditions are generally similar to those obtaining in the principal village, or where there is no such village in the estate, in the nearest village in the nearest estate in respect of which village both the re-

quirements specified above are satisfied;

"(b) the average rate of assessment per acre prevailing at such commencement in respect of each of the said classes of land in the nearest ryotwari area in which conditions are generally similar to those obtaining in the principal village.

(3) The Special Officer shall then compare the average rates of cash rent as determined under clause (a) of sub-section (2) with the average rates of assessment as determined under clause (b) of that sub-section, and after making due allowance for any difference in the conditions prevailing in the two cases, and also in cases falling under the proviso to clause (a) of sub-section (2), for any difference in the conditions prevailing in the village referred to in that proviso and in the principal village, determine (i) the extent, if any to which the rates of rent payable for each class of ryoti land in the principal village should in his opinion, be reduced and (ii) the rates of rent payable for each such class of lands after such reduction.

Explanation I. The Special Officer shall have power only to determine that the rents payable for any class of ryoti land in the principal village shall be reduced; and he shall have no power to determine that such rents shall be enhanced.

Explanation II. The extent of reduction, if any, determined by the Special Officer under this sub-section shall also apply where rent in the principal village is paid in kind or on the estimated value of a portion of the crop or at rates varying with the crop, whether in cash or in kind, or partly in one of these ways and partly in another, or partly in one or more of these ways and partly in cash. In every such case the Special Officer shall also determine the rent payable, whether in kind or in cash or partly in kind and partly in cash, as the case may be.

(3-1) In the case of lands in an estate which became ryoti lands after the commencement of this Act, the Special Officer shall determine for each class of such lands in the principal village the rates of rent per acre payable thereof under this Act. The rates of rent so determined shall be the same as those fixed under sub-sec. (2) of Section 3 for similar ryoti lands in the same village;

"Provided that where the rates of rent payable in respect of ryoti lands in the principal village have not been fixed under sub-section (2) of Sec. 3, or where there are no similar ryoti lands in the principal village, the rates of rent so determined shall be the same as those fixed under sub-section (2) of Section 3 for similar ryoti lands in the nearest village in the estate, or, if there is no such village, in the nearest village in the nearest estate in which conditions are generally similar to those obtaining in the principal village.

(4) Where the conditions in a group of two or more villages in an estate are generally similar the Special Officer may perform the functions under sub-ss. (2), (3) and (3-A) in respect of such group of villages as a whole, instead of separately in respect of each village in the group."

Section 3 so far as relevant for our purpose may now be reproduced.

"Power of State Government to reduce rates of rent after considering Special Officer's recommendations.—

3 (i) "After completing his work in any estate, the Special Officer shall submit his recommendations to the State Government through the Board of Revenue specifying in case of ryoti lands which were in existence at the commencement of this Act, (i) the extent, if any, to which the rents for each class of such lands in each village or group of villages in the estate, should in his opinion, be reduced and (ii) the rate of rent payable for each such class after such reduction, and in the case of lands in each village or group of villages in the estate which became ryoti land after the commencement of this Act the rate of rent determined by him in accordance with the provisions of sub-section (3-A) of Section 2.

* * * * *

(2) After considering the recommendations of the Special Officer and the remarks of the Board of Revenue thereon, the State Government shall, by order published in the Fort. St. George Gazette, fix the rates of rent payable in respect of each class of ryoti in each village in the estate."

"Provided that where the rate of rent so fixed in respect of any class of ryoti lands which were in existence at the commencement of this Act, or in respect of any class of lands which

became ryoti lands in any fasli year after such commencement exceeds the rate of rent payable in respect thereof at such commencement or in that fasli year as the case may be, only the latter rate of rent shall be payable in respect of such land."

* * * * *

5. It is not necessary to reproduce the rest of the sections. Section 7 empowers the State Government to make rules to carry out the purpose of the Act and Section 8 ousts the jurisdiction of the Courts of Law to question the validity of certain orders and proceedings. Section 8 reads as under:

"Validity of certain orders and proceedings not to be questioned—

8. The validity of the following orders and proceedings shall not be liable to be questioned in any Court of Law:

(i) any order made under Section 3, sub-section (2);

(ii) any recovery of rent effected by the Provincial Government under Section 3, sub-section (4) or any payment made by them to the landholder under the same sub-section;

(ii-a) any order made under sections 3a and 3c;

(iii) any determination of the net income or average net income or average net income made under Section 5, sub-section (2)."

6. The precise question requiring decision by us is whether the present suit questioning the validity of the fixation of rent in Ex. A-13 is excluded from the jurisdiction of the Civil Courts by virtue of Sec. 8 (i). There is no dispute that clause (i) is the only relevant clause to be considered in this connection. The appellant's learned counsel submitted that the exclusion of jurisdiction of the Civil Courts cannot be extended to orders which were not made in strict compliance with the provisions of Sec. 3 (2) because unless so made they cannot be considered to be hit by Sec. 8 (i). According to the respondent's learned counsel, on the other hand, Ex. A-13 was made pursuant to the power conferred by Sec. 3 (2) and is therefore covered by Sec. 8 (i). He further submitted that there being a complete machinery provided by the statute itself for challenging the orders made in proceedings taken thereunder, the Civil Courts are precluded from considering the correctness of those

orders. According to him Sections 2A and 3B provide for rectification of errors committed by the Special Officer and that looking at the statutory scheme it must be held that an order purporting to be made under Sec. 3(2) of the Reduction of Rent Act is immune from challenge in the Civil Courts.

7. The general principle on which the jurisdiction of Civil Courts can successfully be excluded in respect of decisions by special Tribunals is well settled. The difficulty usually arises in its application to given cases. As observed by the Privy Council in *Secy. of State v. Mask and Co.*, 67 Ind App 222 = (AIR 1940 PC 105), "the exclusion of the jurisdiction of the Civil Courts must either be explicitly expressed or clearly implied. Further even if the jurisdiction is so excluded the Civil Courts have jurisdiction to examine into the cases where the provisions of the Act have not been complied with or the statutory Tribunal has not acted in conformity with the fundamental principles of judicial procedure. It is unnecessary to refer to other cases dealing with this question. We need only refer to the recent decision of this Court in *Dhulabhai v. State of Madhya Pradesh*, (1968) 3 SCR 662 = (AIR 1969 SC 78), in which after an exhaustive discussion of the case law the legal position was summarised by the Court speaking through Hidayatullah C. J. as follows:

"(1) Where the statute gives a finality to the orders of the special tribunal the Civil Courts' jurisdiction must be held to be excluded if there is adequate remedy to do what the Civil Courts would normally do in a suit. Such provision, however, does not exclude those cases where the provisions of the particular Act have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure.

(2) Where there is an express bar of the jurisdiction of the court, an examination of the scheme of the particular Act to find the adequacy or the sufficiency of the remedies provided may be relevant but is not decisive to sustain the jurisdiction of the civil court.

Where there is no express exclusion the examination of the remedies and

the scheme of the particular Act to find out the intendment becomes necessary and the result of the inquiry may be decisive. In the latter case it is necessary to see if the statute creates a special right or a liability and provides for the determination of the right or liability and further lays down that all questions about the said right and liability shall be determined by the tribunals so constituted, and whether remedies normally associated with actions in Civil Courts are prescribed by the said statute or not.

(3) Challenge to the provisions of the particular Act as ultra vires cannot be brought before Tribunals constituted under that Act. Even the High Court cannot go into that question on a revision or reference from the decision of the Tribunals.

(4) When a provision is already declared unconstitutional or the constitutionality of any provision is to be challenged, a suit is open. A writ of certiorari may include a direction for refund if the claim is clearly within the time prescribed by the Limitation Act but it is not a compulsory remedy to replace a suit.

(5) Where the particular Act contains no machinery for refund of tax collected in excess of constitutional limits or illegally collected a suit lies.

(6) Questions of the correctness of the assessment apart from its constitutionality are for the decision of the authorities and a civil suit does not lie if the orders of the authorities are declared to be final or there is an express prohibition in the particular Act. In either case the scheme of the particular Act must be examined because it is relevant enquiry.

(7) An exclusion of the jurisdiction of the Civil Court is not readily to be inferred unless the conditions above set down apply."

8. According to the appellant's counsel the first proposition covers the present case. He submitted that there is no statutory definition to which one can turn for the purpose of determining wet, dry and garden lands as contemplated by the Reduction of Rent Act. The matter has therefore necessarily to be decided by holding an inquiry into the factual position. This, the counsel argued, was not done. We were taken through the relevant portions of Ex. B-24 which is

a report from the Special Assistant to the Special Officer for rent reduction. It is observed therein that there are no wet or garden lands in village Kalipatnam and that the entire land is delta dry in which wet paddy is raised under Kalipatnam project channel. The ryots pay to the Government Rs. 5/- per acre by way of water rate. It was emphasised by the appellant's learned counsel that the fact that wet paddy is raised in this land, which is described as delta dry and that water rate is paid to the Government, must conclusively show that the land is not delta dry but wet. It is the factual position and not bare entry in the settlement register which should be the guiding factor. Support for this submission was also sought from the recent unreported decision of this Court in *O. K. Muthuswamy Mudaliar v. State of Madras*, Civil Appeals Nos. 1011-1016 of 1965, D/- 31-7-1968 (SC), in which the following observations occur:

"The mere fact that the lands are registered dry does not affect their value. The lands are fertile and are cultivated with wet crop. They are irrigable with the waters of the river Bhavani. There is abundant supply of water throughout the year. The land-owners had the right to take water for the irrigation of 400 acres."

9. In this connection the appellant's learned counsel also criticised the following observation in the judgment of the High Court:

"In the Statements Ex. B-5 and Ex. B-6, furnished by the plaintiff himself, the classification of the land is shown as dry though it is also mentioned that the lands were cultivated with double crop of paddy. If a proprietor owns a certain land but does not own the water source from which water is being taken for irrigating that land, he will not be in a position to classify it as wet land for the benefit of claiming rent for himself in the same way as he would be if he owned a water source and supplied 'water therefrom as a guaranteed supply' to lands registered under that source as ayacut. In the present case, water, was Government water which was brought from Government project."

10. On behalf of the appellant it was submitted that this observation is unsound and is not supportable by any

provision of law. The respondent's counsel was unable to support this observation of the High Court.

11. Reverting to Ex. B-24 Kalipatnam village was compared with Losaragutlapadu, an adjacent village. In regard to that village also it is mentioned that there is an extensive wet cultivation in delta dry land under project channels as in Kalipatnam. Shri J. Sambamurthy, to whose inspection note dated July 1, 1948 reference is made in Ex. B-24 appeared as D. W. 5 and the counsel took us through his statement. In cross-examination he deposed as follows:

"I cannot say whether there are 4,000 acres of land which are double crop land. There are some lands in which double crops are grown. I cannot say their extent. There are small extents of garden lands. There are single crop lands under extension channel. All these lands are treated as dry lands rents reduced. The Kalipatnam is at the tail end of the delta.....The Losaragutlapadu is in Bhimavaram taluk Yanamadula Drain intervenes Kalipatnam and Losaragutlapadu. Gollavanithippa lands have come under cultivation previously. It is part of Losaragutlapadu. I cannot say whether there are 11,000 acres of land uncultivated in Losaragutlapadu. Probably it is forest area. There were small extents of land in Muthyalapalli and Vempa under the Project Channel. Ex. B-4 shows that there are lands of double crop. Under the Act the plaintiff has to furnish a statement of lands etc. The plaintiff's agent furnished Exhibit B-6. The soil of Losaragutlapadu was examined. This is contained in Exhibit B-24. The Settlement Officer classified the soils under contained Diglot Registers. An extract of it is contained in Exhibit B-24. I cannot say readily now without reference to Settlement Manual what the figures given in the Diglot Register are relating to the soils. That statement contained in the file relates to the Losaragutlapadu. A similar statement for Kalipatnam was not taken. There is no such statement for that village. I did not write to the Settlement Department to prepare such a statement for suit village. I do not know whether the Government analyse the soil through Agricultural Department before the project was started.....I examined the soils at one

or two places and I consulted the Settlement Register at that time. I cannot say whether those one or two places were under extension project. I remember I have taken description of the soil from the Settlement Register and Manual.....I do not know about the construction of the project."

12. Shri J. Satyanarayana, Tahsildar, who appeared as D. W. 7 stated in his cross-examination that the lands in Kalipatnam were sanctioned with two crops, though he could not say whether they were under cultivation since 1948. He was also unable to say whether the Settlement Register from Kalipatnam was available in Taluk Office. According to him water rate in the year 1958 was increased 50 per cent for all lands including Kalipatnam. The cess was also increased proportionately. He was unable to explain the figures given under the description of the soil in Ex. B-24 and indeed he expressed his ignorance about the existence of any register for Kalipatnam on this subject.

13. The appellant's argument strongly pressed before us was that the class of land had been determined to be delta dry land exclusively on the basis of the settlement register which did not contain any entry with respect to Kalipatnam. The entry in the settlement register with respect to the soil of Losaragutlapadu could not be taken to cover the soil in Kalipatnam in the absence of evidence that the soil in these two villages was similar in this respect. Stress was also led on the submission that description in the settlement register could not be considered to be conclusive and that proper factual inquiry was necessary because the determination affects the appellant's proprietary rights. The submission appears to us to possess merit. The Special Officer had an obligation under Sec. 2 of the Reduction of Rent Act to determine in respect of Kalipatnam village the average rate of cash rent per acre for each class of ryoti land in existence at the time of the commencement of the Act, such as, wet, dry and garden. This had to be determined on the basis of relevant material. The Special Officer, however, proceeded to found his determination only on the report of the Special Assistant (Ex. B-24) which, as discussed above, only took into account the entry in the settlement

register with respect to the soil of Losaragutlapadu. This really means that the determination of the Special Officer is solely based on the settlement register containing no entry in regard to Kalipatnam. This material is irrelevant and cannot constitute a rational basis for founding thereon the determination of the Special Officer. His determination must, therefore, be held to be based on no evidence, with the result that it must be held to be in violation of the fundamental principles of judicial procedure. A fortiori the order of the Government made under Sec. 3 (2) exclusively on the basis of the recommendation of the Special Officer must in consequence be held to be not in conformity with the provisions of the Reduction of Rent Act, and, therefore, outside the purview of Sec. 3 (2) of that Act. Section 8 (i) would accordingly be inapplicable and the jurisdiction of Civil Courts cannot be excluded. The notification Ex. A-13 must, therefore, be struck down as contrary to law and ultra vires the Reduction of Rent Act.

14. We accordingly allow the appeals with costs and strike down the report of the Special Officer as also the notification Ex. A-13. As observed earlier challenge to Exhibit A-1 was not pressed at the hearing by the appellant. It would be open to the authorities concerned to proceed to reduce the rent in accordance with law. One set of costs.

Appeal allowed.

AIR 1971 SUPREME COURT 77 (V 58 C 16)

(From: Madhya Pradesh)*

V. RAMASWAMI AND I. D. DUA, JJ.
Meharbansingh and others, Appellants v. Nareshsingh and others, Respondents.

Civil Appeal No. 1438 of 1967, D/- 27-10-1969.

Tenancy Laws — M. B. Zamindari Abolition Act (13 of 1951), Section 4 (1) (f) — Suit for redemption and possession of mortgaged land by proprietors — Enforcement of Act during

(*C. S. A. No. 310 of 1960, D/- 27-9-1962 — M. P.)

EN/FN/F621/69/VBB/Z

pendency of suit — Effect of Section 4 (1) (f) on the rights of plaintiffs — On redemption, plaintiffs held were entitled to show that land in question was Khud-kasht and they could remain in possession thereof in accordance with Section 4 — C. S. A. No. 310 of 1960, D/- 27-9-1962 (M. P.), Reversed.

Where, during the pendency of a suit for redemption and possession of the mortgaged land by the proprietors, the M. B. Act 13 of 1951 was enforced in that area;

Held, that in view of the provisions of that Act, the plaintiffs were not only entitled to redeem the mortgage by paying the mortgage money but it was also open to them as proprietors to show, on the basis of entries in the village papers, that the land in question was Khud-Kasht, and therefore, in accordance with Section 4 (1) (f), they were entitled to remain in possession thereof notwithstanding that their rights, title and interests in the land had vested in the State from the date of the notification. The High Court was in error in dismissing the plaintiffs' claim for possession on the ground that the plaintiffs could only claim compensation from the Government on the basis of their proprietary rights after redeeming the mortgage. C. S. A. No. 310 of 1960, D/- 27-9-1962 (M. P.), Reversed. AIR 1962 SC 1230 and AIR 1961 SC 1790 and AIR 1962 SC 914 and AIR 1963 SC 454, Distinguished. (Paras 3, 8, 12)

Cases Referred: Chronological Paras

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| (1963) AIR 1963 SC 454 (V 50) —
1963-3 SCR 290, Suraj Ahir v.
Prithinath Singh | 10 |
| (1962) AIR 1962 SC 914 (V 49) —
1962 Supp (2) SCR 119, Sailendra
Narayan Bhaj Deo v.
Jagat Kishore Prasad Narayan
Singh | 10 |
| (1962) AIR 1962 SC 1230 (V 49) —
(1962) Supp 1 SCR 123, Haji
Sk. Subhan v. Madho Rao | 3, 9, 12 |
| (1961) AIR 1961 SC 1790 (V 48) —
(1962) 2 SCR 441, Rana Sheo
Ambar Singh v. Allahabad
Bank Ltd., Allahabad | 10 |
| (1956) 1956 Madh BLJ 1302, Rameshwar
v. Bhogiram | 2 |

Mr. S. T. Desai, Sr. Advocate, (Mr. P. C. Bhartari, Advocate, and M/s. J. B. Dadachanji and Co., Advocate with him), for Appellant; Mr. B. C.

Misra, Sr. Advocate, (Miss Bhajan Ramrakhyani and Mrs. Urmila Kapoor, Advocates, with him), for Respondents Nos. 1 to 4, 8 and 10 to 12.

The Judgment of the Court was delivered by

DUA, J.:— This is the plaintiffs' appeal by special leave from a common judgment and decree of a learned Single Judge of the Madhya Pradesh High Court at Gwalior dated September 27, 1962 partially allowing the defendants' second appeal and dismissing that of the plaintiffs.

2. It is not necessary to state the detailed facts of the case. Facts necessary for the purpose of this appeal alone may briefly be stated. In May, 1939, Samle Singh and Jomdar Singh created a mortgage of the suit land in favour of Munshi Singh for a sum of Rs. 2242/14/-. It is said that in May, 1943 notice given by the mortgagors for redemption of the mortgage was refused by the mortgagee. In June, 1943 the suit giving rise to the present appeal was instituted for redemption of the mortgage. Some other persons who were found to be in possession of the land, claiming to be tenants, were also impleaded as defendants. On May 25, 1951, Madhya Bharat Zamin-dari Abolition Act XIII of 1951 was enforced. It appears that an application to amend the plaint as a result of the new enactment was disallowed by the trial Court, but on revision the Madhya Pradesh High Court by its order dated October 10, 1955 reversed the order of the trial Court and permitted the plaintiffs to amend the plaint. The pleadings after the amendment gave rise to nearly 17 issues on the merits. On October 10, 1958 the suit was decreed in respect of the relief for redemption but claim in regard to mesne profits was disallowed. Preliminary decree for redemption was accordingly granted. In the course of its judgment the trial Court observed under issue No. 10 as follows:

"I have in preceding paras shown that as per allegations in the written statements and the patwari papers, it appears that the suit lands have been in possession of Hanumantsingh, Shambhoosingh, Khemsingh, Mansingh and Ramdassingh. It will be discussed later whether they and descendants of Munshisingh are joint owners or

not. Before abolition of zamindari, the records show half of the suit lands as the Khudkasht of the above defendants and half as the tenancy holding of Ramdas (Kastkari). These entries however do not confer any title on the parties. Their right to remain in possession is limited i.e., till such time as the property is redeemed by the mortgagors i.e., the plaintiffs. These entries or the rights shown therein cannot prejudice the right of the plaintiffs." The Court while deciding issues Nos. 16 and 17 observed thus:

"I have discussed these issues earlier in a different context. I may briefly add that Abolition of Zamindari Act does not affect the right of the plaintiffs to recover possession of lands which were placed in possession of the mortgagees (1956 Madh BLJ 1302, Rameshwar v. Bhogiram). Defendants Hanumantsingh and others did not acquire possession of the suit lands by virtue of the sale in favour of their father Daulat Singh because they had purchased only an equity of redemption as will appear from the judgment in Civil Suit No. 21/2001 filed on record. Entries as Pacca Krishak cannot affect the rights under the mortgage bond. I find accordingly."

3. Three appeals were presented in the District Court against the decree founded on this judgment, one of them being by the plaintiffs challenging refusal by the trial Court to grant mesne profits. In October, 1960 the plaintiffs' appeal was partly allowed and mesne profits decreed from the date of deposit of the mortgage amount in Court. The other two appeals were dismissed. That Court disposed of all appeals by a common judgment and came to the conclusion that the lands had been mortgaged with possession by Samle Singh and Jomdar Singh with Munshi Singh and that they were under self-cultivation of the plaintiffs before the mortgage, the mortgagees having come into possession by reason of the mortgage. The matter was taken by the defendants to the High Court on second appeal, the plaintiffs having also preferred an appeal in that Court against the decree of the first appellate Court declining to give full relief claimed in regard to mesne profits. In the High Court also three appeals were presented. The High Court partially allowed the defendants' appeal in view of the provisions of the

Madhya Bharat Zamindari Abolition Act XIII of 1951. The plaintiffs were held entitled to redeem the mortgage by paying the mortgage money but disentitled to get possession of the mortgaged land. The proprietary rights including the right to get possession having vested in the State under the aforesaid Act the plaintiffs, according to the High Court, could only claim compensation from the Government on the basis of their proprietary rights after redeeming the mortgage by making payment of the mortgage money. In support of this view the High Court relied on this Court's decision in Haji Sk. Subhan v. Madho Rao (1962) Supp 1 SCR 123 = (AIR 1962 SC 1230), considering that decision to be decisive of the point in issue. That decision, however, appears to us to be directly concerned with the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act 1 of 1951).

4. Before us the short question raised on behalf of the appellants is that reliance on the Madhya Bharat Zamindari Abolition Act XIII of 1951 for the first time in the High Court was improper and that in any event without affording an opportunity to the appellants to show that the said Act did not apply to the case in hand, their suit could not have been dismissed. The submission is not wholly correct. There was in fact an amendment of the plaint pursuant to the enactment of the Madhya Bharat Abolition of Zamindari Act (sic) and additional issues were framed on the amended pleadings. The parties and the Courts were thus not ignorant of the existence of the said Act on the statute book.

5. Turning to the Act in question, it was brought on the statute book in 1951, as the preamble shows, in order "to provide for the public purposes of the improvement of agriculture and financial condition of agriculturists by abolition and acquisition of the rights of proprietors in villages, mahals, chaks or blocks settled on zamindari system which is only a system of keeping an intermediary between the State and the tenants injurious to the betterment of agriculture as well as the agriculturists in Madhya Bharat and for other matters connected therewith."

6. "Proprietor" as defined in Section 2 (a) means, "as respects a village, muhal or land settled on zamindari system, a person owning whether in trust or for his own benefit such village, muhal or land and includes:

(1) a Malguzar as defined in sub-clause (12) of Section 2 of Qanoon Mal, Gwalior State, Samvat 1983; and

(2) as respects a chak or block a chakdar or blockdar whose lease granted to him by the Government under any Act, Rule or Circular relating to chaks and blocks, includes also, amongst its other conditions, a condition that he shall acquire the proprietary rights in respect of that chak or block when the conditions of the lease are fulfilled;

(3) the heirs and successors in interest of a proprietor."

7. Section 2 (c) defines "Khudkasht" to mean "land cultivated by the Zamindar himself or through employees or hired labourers and includes sir land." Sections 3 and 4 which occur in Chapter II dealing "vesting of proprietary rights in the State" provide as under:

"3. Vesting of proprietary rights in the State.

(1) Save as otherwise provided in this Act and subject to the provisions of Section 8, on and from a date to be specified by a notification by the Government in this behalf (hereinafter referred to as the date of vesting all proprietary rights in a village, muhal land, chak or block in Madhya Bharat vesting in a proprietor of such village, muhal, land, chak or block as the case may be, or in a person having interest in such proprietary right through the proprietor shall pass from such proprietor or such other person to and vest in the State free of all encumbrances.

(2) After issue of a notification under sub-section (1) no right shall be acquired in or over the land to which the said notification relates except by succession or under a decree or order of a Court or under a grant or contract in writing made or entered into by or on behalf of the Government; and no fresh clearings for cultivation or for any other purpose shall be made in such land except in accordance with such rules as may be made by the Government in this behalf.

(3) The Government may by notification published in the Gazette vary the date specified under sub-section (1) at any time before such date.

4. Consequences of the vesting of an estate in the State.

(1) Save as otherwise provided in this Act when the notification under Section 3 in respect of any area has been published in the gazette, then, notwithstanding anything contained in any contract, grant or document or in any other law for the time being in force, the consequences as hereinafter set forth shall from the beginning of the date specified in such notification (hereinafter referred to as the date of vesting) ensue, namely:—

(a) all rights, title and interest of the proprietor in such area, including land (cultivable, barren or bir), forest, trees, fisheries, wells (other than private wells), tanks, ponds, water channels, ferries, path ways, village-sites, hats and bazars and mela-grounds and in all sub-soil including rights if any, in mines and minerals, whether being worked or not shall cease and be vested in the State free from all encumbrances;

(b) all grants and confirmation of title of or to land in the property so vesting of or to any right or privilege in respect of such property or land revenue in respect thereof shall, whether liable to resumption or not, determine;

(c) all rents and cesses in respect of any holding in the property so vesting for any period after the date of vesting which, but for such vesting would have been payable to the proprietor, shall vest in the State and be payable to the Government and any payment made in contravention of this clause shall not be a valid discharge of the person liable to pay the same:

Explanation— The word "Holding" shall for the purpose of this clause be deemed to include also land given, on behalf of the proprietor, to any person on rent for any purpose other than cultivation;

(d) all arrears of revenue, cesses or other dues in respect of any property so vesting and due by the proprietor for any period prior to the date of vesting shall continue to be recoverable from such proprietor and may, without prejudice to any other mode of recovery, be realised by deducting the amount from the compensation money

payable to such proprietor under Chapter V;

(e) the interest of the proprietor so acquired shall not be liable to attachment or sale in execution of any decree or other process of any Court, civil or revenue, and any attachment existing at the date of vesting or any order for attachment passed before such date shall, subject to the provisions of Section 73 of the Transfer of Property Act, 1882, cease to be in force.

(f) every mortgage with possession existing on the property so vesting or part thereof on the date immediately preceding the date of vesting shall, to the extent of the amount secured on such property or part thereof, be deemed without prejudice to the rights of the State under Section 3, to have been substituted by a simple mortgage.

(2) Notwithstanding anything contained in sub-section (1) the proprietor shall continue to remain in possession of his khud-kasht land, so recorded in the annual village papers before the date of vesting.

(3) Nothing contained in sub-section (1) shall operate as bar to the recovery by the outgoing proprietor of any sum which becomes due to him before the date of vesting in virtue of his proprietary rights."

8. A plain reading of these sections would show that all rights, title and interest of the proprietors in the area notified were to cease and were instead to vest in the State free from all encumbrances with effect from the date of notification and after such vesting in the State every mortgage with possession existing on the property so vested or part thereof on the date immediately preceding the date of vesting, to the extent of the amount secured on such property or part thereof, is to be deemed, without prejudice to the right of the State under Section 3 to have been substituted by a simple mortgage. The proprietor, however, notwithstanding other consequences of the vesting in a State, is entitled to continue to remain in possession of his khud-kasht land which is so recorded in the annual village papers before the date of vesting. Now it was clearly open to the plaintiffs to show that the land in question was khud-kasht and, therefore, in accordance with Section 4 they were

entitled to remain in possession thereof.

9. On behalf of the appellants also our attention was invited to the decision of this Court in the case of Haji S. K. Subhan, (1962) Supp 1 SCR 123 = (AIR 1962 SC 1230) (supra) and specific reliance was placed on observations at p. 139 (of SCR) = (at p. 1237 of AIR) of the report which suggests that a person continuing in possession on the basis of entries in the village papers, which had to be presumed to be correct, was not affected by the Act. Reference was also made to the observation at page 142 (of SCR) = (at page 1238 of AIR) of the report where right to possess was upheld in favour of the party who had obtained a declaration of being an owner in possession.

10. On behalf of the respondents reliance was placed on Rana Sheo Ambar Singh v. Allahabad Bank Ltd., Allahabad, 1962-2 SCR 441 = (AIR 1961 SC 1790) but that decision does not deal with the Madhya Bharat Act which concerns us. That decision is concerned with the U. P. Zamindari Abolition and Land Reforms Act I of 1951, the scheme of which is not shown to be similar to that of the Madhya Bharat Act so far as it concerns us in the present case. That decision is therefore, of little assistance in construing the Madhya Bharat Act. Another decision on which the respondents' learned Advocate has placed reliance is Sailendra Narayan Bhaj Deo v. Jagat Kishore Prasad Narayan Singh, 1962 Supp (2) SCR 119 = (AIR 1962 SC 914) which again deals with the Bihar Lands Reforms Act and not with the Madhya Bharat Act. The scheme of the Bihar Act being also dissimilar from that of the Madhya Bharat Act, this decision too cannot be of much help.

11. The last decision relied on by Shri Mishra is Suraj Ahir v. Prithinath Singh, AIR 1963 SC 454 which is concerned with the Bihar Lands Reforms Act XXX of 1950 as amended by Act XVI of 1959. This decision is equally unhelpful.

12. In our opinion the High Court was in error in allowing the appeal before it and in dismissing the plaintiff-appellants' suit for possession on the authority of this Court's decision in the case of Haji S. K. Subhan, (1962) Supp 1 SCR 123 = (AIR 1962

SC 1230) (supra). In the reported case the word "document" as occurring in Section 4 (1) of the M. P. Abolition of Proprietary Rights Act (M. P. Act 1 of 1951) was construed to include a decree of the Court and it was held that the principle that the executing Court cannot question the decree and has to execute it, had no operation on the facts of that case, because the objection was not based on the invalidity of the decree but on the effect of the aforesaid Act on the rights of the decreeholder proprietor to retain possession. The facts of that case were, therefore, different and so was the problem requiring solution. The precise question requiring decision by the Court in the present case was lost sight of and not properly adverted to. We are required in the present case to consider the effect of Section 4 (1) (f) of the M. B. Act XIII of 1951 on the rights of the plaintiff-appellants to redeem the mortgage and secure possession of the mortgaged land.

13. It may be pointed out that both the contesting parties — the appellants and the respondents — before us claim for themselves actual possession of the land in dispute as khud-kasht and also assert that the relevant entries in the annual village papers before the date of vesting showed them in such possession. On this basis they both claim right to retain possession even against the State. These rival controversial claims pressed by both the parties was the central question involving proper appraisal of material on the record and this basic dispute had to be first adverted to and judicially determined and thereafter the Court had to consider the applicability of the relevant provisions of the M. B. Act XIII of 1951 to the facts found. As the question of vesting of title in the State was also of vital importance it was, in our opinion, fit and proper for the Courts below to have issued notice to the State as well, thereby enabling it to be impleaded as a party, if it so desired. The approach of the High Court is erroneous and its decision highly unsatisfactory. The controlling question seems to have been missed. We, therefore, allow the appeal and remit the case back to the High Court for a fresh decision of the appeal after notice to the State and after hearing it in case it desires to be heard. It would also be open to the

High Court, if it considers just and proper, to implead the State and if necessary to permit it to adduce evidence before the High Court or to remit the case to the trial Court for that purpose. In the circumstances of the case, parties would bear their own costs in this Court.

Appeal allowed; case remanded.

AIR 1971 SUPREME COURT 82
(V 58 C 17)

(From Kerala: (1967) 2 Lab LJ 821)

V. BHARGAVA AND K. S. HEGDE, JJ.

The Provident Fund Inspector, Trivandrum (in all Appeals), Appellant v. The Secretary, N.S.S. Co-operative Society, Changannacherry (in all Appeals), Respondent.

Criminal Appeals Nos. 145 to 156 of 1968, D/-17-9-1969.

(A) Employees' Provident Funds Act (1952), S. 16 (1) (b) — Act not to apply to certain infant establishments — Establishment first set up in year 1946 — Merely because Act becomes applicable to establishment from April 1961 it does not become a new establishment — Period of exemption of three years for purposes of applying Section 16 (1) (b) would run from date on which establishment had been set up and not from date on which Act became applicable to it. (1967) 2 Lab LJ 821 (Ker.), Reversed; AIR 1968 SC 1367, Foll. (Para 2)

(B) Employees' Provident Funds Act (1952), Sec. 14 — Prosecution under, for contravention of Employees' Provident Funds Scheme on basis that establishment was old one and not one set up in 1961 when Act became applicable to it — Burden of proving that old establishment had continued and that new establishment was not set up in 1961 lies on prosecution. (Para 4)

(C) Employees' Provident Funds Act (1952), Section 16 (1) (b) — Existing establishment — When can be said to become new establishment for claiming exemption under S. 16 (1) (b) — Proof.

A printing press established in 1946 was sold in 1961 and the accused in this case became the new owner. The work of the press was stopped on sale

and was restarted after a break of about three months, the machinery in the press was also altered, the persons employed previously were not continued in service, while a fresh recruitment of employees took place amongst whom only six happened to be previous employees, and compensation was paid to the workmen at the time of the sale by the previous owner.

Held that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that, the benefit of non-applicability of the Act under S. 16 (1) (b) of the Act for a period of three years was available to the accused from June or July 1961, when the new establishment was set up. (1966) 1 Lab LJ 741 (SC) & AIR 1963 Cal 513 & AIR 1957 Cal 702 and AIR 1965 Mad 462, Dist.; AIR 1965 Mad 508, Rel. on; 1967-2 Lab LJ 821 (Ker), Affirmed. (Para 5)

Cases Referred: Chronological Paras

- (1968) AIR 1968 SC 1367
(V 55) = (1968) 2 SCR 819,
R. Ramakrishna Rao v. State
of Kerala 2
(1966) 1966-1 Lab LJ 741 =
(1966) 12 Fac LR 229 (SC),
Lakshmi Rattan Engineering
Works v. Regional Provident
Fund Commr., Punjab 6
(1965) AIR 1965 Mad 462 (V 52) =
ILR (1965) 2 Mad 99, Devi
Press v. Regional Provident
Fund Commr., Madras 6
(1965) AIR 1965 Mad 508 (V 52) =
1966 Lab LJ 240, Vittaldas
Jagannathadas v. Regional
Provident Fund Commr. 6
(1963) AIR 1963 Cal 513 (V 50) =
(1963) 1 Lab LJ 96, Jamnadas
Agarwalla v. Regional Provi-
dent Fund Commr., West
Bengal 6
(1957) AIR 1957 Cal 702 (V 44) =
61 Cal WN 694, Bharat Board
Mills Ltd. v. Regional Provi-
dent Fund Commr. 6

Mr. R. H. Dhebar, Advocate and
Miss Lily Thomas, Advocate for Mr.
S. P. Nayar Advocate, for Appellant
(in all Appeals); Mr. A. S. Nambiar, Ad-
vocate, for Respondent (in all Appeals).

The following Judgment of the
Court was delivered by

BHARGAVA, J.—These twelve con-
nected appeals arose out of twelve
prosecutions instituted by the appel-

lant, Provident Fund Inspector, Tri-
vandrum, against the respondent,
Secretary, N.S.S. Co-operative Society,
Changanacherry, for offences punish-
able under the Employees' Provident
Funds Act, 1952 (hereinafter referred
to as "the Act") on the ground of
contravention of the provisions of the
Employees' Provident Funds Scheme,
1952 (hereinafter referred to as "the
Scheme"). The specific charges relat-
ed to the failure of the respondent (1)
to pay to the Employees' Provident
Fund the employees' and the employ-
er's share of contribution together
with administrative charges for the
twelve quarters comprised between May
1961 and February, 1964; (2) to submit
the returns in Forms 5 and 10 for the
same twelve quarters; (3) to send
statements of recoveries of contribu-
tions in Form 12 for the same 12
quarters; and (4) to send the initial
return in Form 9 showing the parti-
culars as on 30th April, 1961 along
with Form 2 in the manner specified
in the Scheme. The payment of the
employer's and employees' contribution
to the Provident Fund, and the ques-
tion of sending the various statements
arose in respect of a Press which was
purchased by the N.S.S. Co-operative
Society on the 21st March, 1961 from
the Travancore-Cochin Central Print-
ing and Publishing Co-operative
Society Limited. According to the ap-
pellant, this establishment of the
Printing Press had been set up in the
year 1946 and it continued in existence
even subsequently when, in March,
1961, the Press was purchased by the
N.S.S. Co-operative Society. Until the
purchase by the N.S.S. Co-operative
Society, the establishment was em-
ploying only 9 workmen; but, after
the N.S.S. Co-operative Society start-
ed working the Press, the number of
workmen increased beyond 20, so that
the Act became applicable to this
establishment. The case was that,
since the Act became applicable w.e.f.
April, 1961, it was the duty of the re-
spondent to comply with the require-
ments of the Act and pay the contribu-
tion and send the various returns
which the respondent failed to do. On
trial, the Magistrate recorded the find-
ing that the establishment as run by
the N.S.S. Co-operative Society after
1961 could not be held to be an old
establishment set up in the year 1946,
had emerged as a new establishment

in 1961, and, consequently, for a period of three years from April, 1961, the provisions of the Act would not apply to this establishment because of the provision contained in Section 16 (1) (b) of the Act. On this view, the Magistrate acquitted the respondent in all the cases. The respondent appealed to the High Court of Kerala. The High Court disagreed with the Magistrate and held that even though there was change of management, change of workers and change of machinery when the N.S.S. Co-operative Society purchased the Press in 1961, the business that was carried on was the same as it was at the time of purchase, so that it could not be held that a new establishment had come into existence different from the one which existed before the purchase. The High Court, however, took the view in law that, under Section 16 (1) (b) of the Act, an establishment is given exemption for a period of 3 years from the date on which it came within the purview of the Act, treating the establishment as an infant establishment standing in need of protection. The High Court, therefore, held that this establishment was protected from the applicability of the Act for a period of 3 years from 21st March, 1961 which would cover the period in respect of which prosecutions were launched by the appellant. On this ground, the High Court upheld the orders of acquittal passed by the Magistrate. The appellant has now come up in these appeals against this decision of the High Court by special leave granted by this Court.

2. It is quite clear that, on the question of law decided by the High Court in favour of the respondent, that decision cannot be upheld in view of the decision of this Court in *R. Ramakrishna Rao v. State of Kerala*, (1968) 2 SCR 819 = (AIR 1968 SC 1367), where it was held that, under Sec. 16 (1) (b), in the case of a new establishment, the period of five years (laid down by subsequent amendment) is counted forward from the date the establishment is set up, but, in the case of an existing establishment, from the date the establishment "has been" set up. In the present case, since the establishment was first set up in the year 1946, the period of exemption for purposes of applying Sec. 16 (1) (b) of the Act would run from the date on which the establishment had been set

up and could not be counted from April, 1961 when the Act became applicable to this establishment. In view of that decision of this Court, the acquittal of the respondent on the ground given by the High Court cannot be maintained.

3. However, on behalf of the respondent, it was argued that, on the evidence in this case, the High Court was not justified in recording the finding that this establishment as set up in the year 1946 continued to exist as it was before, even after the purchase by the N.S.S. Co-operative Society in 1961. It was urged that, on facts, the correct finding that should have been recorded was that the old establishment ceased to exist and an entirely new one was set up in the year 1961. In support of this plea, we were taken by learned counsel for the parties through the evidence which was tendered during the trial before the Magistrate and, after going through it, we are inclined to accept the submission made on behalf of the respondent.

4. The burden of proving that the old establishment had continued and that a new establishment was not set up in the 1961 was on the appellant, as the appellant had filed criminal cases for prosecution of the respondent. The first prosecution witness was the Provident Fund Inspector, Raghunathan, but most of his evidence relates to facts discovered by him and not in his personal knowledge. It is he who made a report for the prosecution of the respondent and in that report itself he admitted that the strength of the establishment was less than 20 till 16th April, 1961 when it was purchased by the N.S.S. Co-operative Society. He added that there were only 9 employees at the date of purchase. Of these 9 employees, 6 were re-employed by the purchasers. Significance attaches to the word "re-employed" which implies that there was no continuity of employment even of those 6 employees. That witness also admitted that, after the purchase, the Press was removed from its original place and additional machineries were purchased and added to the Press. According to him, he also received information that compensation due to the workers till the date of sale was disbursed by the previous owner, T. C. Central Co-operative Printers and Publishers. He added

that the persons working in the Press at the time of his evidence were all persons who had been appointed by the N.S.S. Co-operative Society. This, his evidence does not prove that the establishment run by the N.S.S. Co-operative Society was the same as the establishment which was being run by the previous owner of the Press. The owner changed, the machinery changed, the location of the Press was altered, and even the employees were not the same as before. In fact, none of the employees, according to his evidence, was continued in service. The only witness on whom reliance could be placed on behalf of the appellant to prove continuity of the business was P. W. 2, Sadasivan Nair, who claimed to be one of the employees in this Press of the previous employer and who stated that he continued to be employed by the N.S.S. Co-operative Society. His evidence has rightly been criticised on the ground that he is a disgruntled person who lost his service some years later when the press was being run by the N.S.S. Co-operative Society. Further he stated on oath that the Press was taken over with all its workers which is clearly a wrong statement and is contradicted by P. W. 1, the Provident Fund Inspector himself. It is also significant that, according to the Provident Fund Inspector, compensation was paid to the previous employees by the previous employer which clearly shows that the previous employees were not continued in service, and that they were paid compensation for termination of their services on transfer of the Press presumably in accordance with the provisions of Section 25FF of the Industrial Disputes Act. The prosecution could have easily produced the accounts of the previous owner to show that there were at least some employees who were continued in service and who were not paid compensation, but no such attempt was made on behalf of the appellant. Even the sale-deed in favour of the N. S. S. Co-operative Society has not been put in the paper-book before us and its absence is significant in view of the statement made by D. W. 1, one of the Directors of the N. S. S. Co-operative Society, who stated that the N. S. S. Co-operative Society neither purchased the establishment as a going concern, nor did it continue to run the same

establishment. According to D. W. 1, after the purchase of the Press, there was a closure for a period of about 3 months and a new business was started in June or July, 1961 when a new establishment was set up. The workmen employed by the previous owner were not taken over on their old conditions of service. Fresh appointments were made and all workers were newly recruited, though, at the time of this recruitment, some of the old employees were also taken in service. This evidence would clearly show that a new establishment was set up by the N. S. S. Co-operative Society after the purchase of the press by it from the previous owner and that there was no continuity of the old establishment. As we have said earlier, the appellant could have summoned the accounts of the previous owner to show that these facts alleged by D. W. 1 are not correct. Even the N. S. S. Co-operative Society is maintaining accounts and registers and no attempt was made on behalf of the prosecution to seize or summon those registers. It is true that the respondent himself, on his own initiative, did not produce those registers in defence but, in a criminal case, such a circumstance cannot justify raising a presumption that the registers would have contradicted the evidence of D. W. 1. D. W. 1 also stated that there was a specific provision in the sale-deed that none of the workers, who were working in the press purchased, were to be taken in service and nobody was, in fact, taken. This statement could easily have been challenged before us if the sale-deed had been included in the Paper-book. In the absence of the sale-deed which has not been brought to our notice, we see no reason to disbelieve the statement of D. W. 1 and we consider that his evidence is decidedly preferable to that of P. W. 2 whose evidence we have mentioned above.

5. The only other prosecution witness who need be mentioned is P. W. 3 who was also employed by the N.S.S. Co-operative Society in this Press after the purchase. He was, however, not an employee in this press before its purchase by N.S.S. Co-operative Society. He was employed in another press which was also purchased by this Co-operative Society, so that his evidence about continuity of his service cannot indicate that this parti-

cular establishment was a continuation of the old establishment set up by the previous owner. On a discussion of the entire evidence and in view of the fact that the burden of proof lay on the appellant, we think that the conclusions of fact which must be accepted are: that, at the time of the purchase, a new owner came in place of the previous owner; the work of the Press was stopped on sale and was re-started after a break of about three months; the machinery in the Press was also altered; the persons employed previously were not continued in service, while a fresh recruitment of employees took place, amongst whom only six happened to be previous employees; and compensation was paid to the workmen at the time of the sale by the previous owner. On these facts, no other conclusion can be drawn, except that the old establishment was completely closed when the transfer of ownership took place and an entirely new establishment was set up three months later, so that, in this case, the benefit of non-applicability of the Act under Sec. 16 (1) (b) of the Act for a period of three years was available to the respondent from June or July, 1961 when the new establishment was set up.

6. In this connection, learned counsel appearing for the appellant drew our attention to a few decisions, including one of this Court, to urge that we should not hold that this establishment was newly set up in the year 1961. The first of these decisions is *Lakshmi Rattan Engineering Works v. Regional Provident Fund Commr., Punjab*, (1966) 1 Lab LJ 741 (SC), in which this Court held that a change in location of an establishment or a change in the line of business would not have the effect that a new establishment has been set up provided there was continuity of working. That case cannot apply to the facts as found by us in the present case where there was no continuity of the business and there were the additional factors of termination of services of all the workmen and new establishment being set up by fresh recruitment of workmen, in addition to alteration in machinery in the Press. The decisions in *Jamnadas Agarwalla v. Regional Provident Fund Commr., West Bengal*, AIR 1963 Cal 513 and *Bharat Board Mills Ltd. v. Regional Provident Fund*

Commr., AIR 1957 Cal 702, are also inapplicable to the facts before us in the present case. A good deal of reliance was placed on a decision of a learned single Judge of the Madras High Court in *Devi Press v. Regional Provident Fund Commr., Madras*, AIR 1965 Mad 462; but even in that case the facts were different. One of the prominent facts before the Judge was that the particular business transferred was being run under licences and those licences were also transferred by the seller to the purchaser. In view of this transfer, the learned Judge held that it was a case of sale of a going concern and there was continuity of business. Without expressing any opinion as to whether the learned Judge was correct in holding that there was continuity of business in that case, the very fact that he held the establishment not to have been newly set up on the ground that it was a case of a transfer of a going concern distinguishes that case from the case before us. In the present case, the facts established show that the old business was closed and was re-started as a new business after recruiting new workmen. The principle to be applied in arriving at a decision in such a case appears to us to have been rightly explained in a decision of a learned single Judge of the Madras High Court in *Vittaladas Jaganathadas v. Regional Provident Fund Commr.*, 1966-1 Lab LJ 240 = (AIR 1965 Mad 508). The learned Judge held:—

"If, in a particular case, it appears that the new establishment is not genuinely such, but is only an old one formally resuscitated in order to avoid the legal obligation, it is always open to the Court to hold that it is the old establishment which is substantially continuing, and that the liability to contribute must be affixed to the apparently new form also. But where, in reality, the old establishment has come to an end, and there is a new establishment, this establishment is entitled to infancy protection in its own right, even if it happens by coincidence to have employed a large part of the personnel of the previous establishment."

This principle, applied to the facts of the present case, can only lead to the conclusion that the N.S.S. Co-opera-

tive Society had set up a new establishment and the provisions of Section 16 (1) (b) of the Act have to be applied on the basis that the new establishment was set up in June or July 1961, so that there was no liability to pay Provident Fund contributions or to file the various returns during the period to which the prosecutions related. The acquittal of the respondent was, therefore, fully justified. The appeals are dismissed.

Appeals dismissed.

AIR 1971 SUPREME COURT 87 (V 58 C 18)

(From Allahabad: AIR 1965 All 10)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The State of U. P., Appellant v. Ramkrishan Burman (dead) by his legal representatives and others, Respondents.

Civil Appeal No. 444 of 1966, D/- 26-9-1969.

Court-fees and Suits Valuations — Court-fees Act (1870), Section 7 (iv-A) (U. P.) — "Decree for money and other property" — Expression does not include decree concerning money or other property.

A decree for declaration of title to money or other property is not "a decree for money or other property." The expression in Sec. 7 (iv-A) (U. P.) means only a decree for recovery of money or other property. It does not include a decree concerning title to money or other property. (Para 5)

A decree in invitum is not an instrument securing money or other property: such a decree is a record of the formal adjudication of the Court relating to a right claimed by a party to a suit. It does not by its own force secure money or property.

A suit for a mere declaration that the plaintiff is a owner of certain properties does not fall under S. 7 (iv-A) (U. P.) AIR 1965 All 10, Affirmed.

(Para 6)

Mr. N. D. Karkhanis, Sr. Advocate, (Mr. O. P. Rana, Advocate, with him), for Appellant; Mr. R. Gopalakrishnan, Advocate, for Respondents Nos. 1 (i) to (iv), (vii) and (xi).

DN/DN/E880/69/RGD/P

The following Judgment of the Court was delivered by

SHAH, J.—One Radhey Lal instituted Suit No. 4 of 1950 in the Court of the Civil Judge, Jaunpur, for a declaration that he was the "owner in possession" of the estate left by Dhan Devi. To that suit Ram Krishan Burman was impleaded as a party-defendant. This suit was decreed ex parte. Ram Krishan then filed Suit No. 14 of 1956 in the Court of the Civil Judge, Jaunpur, against the heirs of Radhey Lal (who had died since the passing of the decree in Suit No. 4 of 1950), claiming that he was "appointed an heir by Dhan Devi" of properties described in lists B, J & D in the plaint, that the dispute concerning the inheritance to the estate left by Dhan Devi was settled between him and Radhey Lal, that Radhey Lal admitted his title to the properties in Lists B, J & D and it was agreed that in the properties in Lists A, B, J & D Radhey Lal had 11/16th share and that he had 5/16th share, that a memorandum was drawn up in that behalf, and that Radhey Lal represented to him that a compromise decree will be obtained in that suit, but thereafter taking advantage of his ignorance Radhey Lal obtained a decree ex parte. The following substantive reliefs were claimed by the plaintiff.

"(a) that a declaratory decree in favour of the plaintiff and against the defendants declaring the plaintiff as the owner of the properties in Lists A, B, J & D be passed;

(b) in case in the opinion of the Court prayer (a) cannot be granted, then, alternatively, declaration declaring the plaintiff as the owner of properties in B J & D being the stridhana of Rani Dhan Dei Kaur be issued, decree in Suit No. 4 of 1950 has no adverse effect on the rights of the plaintiff;"

The plaintiff valued the properties in dispute at Rs. 5,99,503/6/3, but on the footing that he had claimed a mere declaration paid Rs. 18/12/- as court-fees as in a claim under Sch. II Cl. 17 (iii) of the Court-Fees Act.

2. The Inspector of Stamps reported to the Civil Judge that in his view the case fell within Sec. 7 (iv-A) as incorporated by the U. P. State Legislature, and court-fee was chargeable according to the value of the subject-matter, and the plaintiff was liable to

pay Rs. 3,522/8/- as court-fee on the plaint. The Civil Judge ordered the plaintiff to amend the plaint and to pay the court-fee remaining due.

3. The plaintiff appealed against the order of the Civil Judge to the High Court of Allahabad. The High Court held that the court-fee paid by the plaintiff was proper and set aside the order holding that the case did not fall within S. 7 (iv-A) of the Court-Fees Act. The State of U. P. has appealed to this Court with special leave.

4. Section 7 (iv-A) of the Court-Fees Act as enacted by the U. P. State Legislature insofar as it is relevant, reads:

"In suits for or involving cancellation of or adjudging void or voidable a decree for money or other property having a market value, or an instrument securing money or other property having such value.

(1) where the plaintiff or his predecessor-in-title, was a party to the decree or the instrument, according to the value of the subject-matter, and

x x x x x"

There is no dispute that the plaintiff claimed a declaration adjudging void the decree in Suit No. 4 of 1950 declaring Radhey Lal to be the "owner in possession of the estate of Dhan Devi". The plaintiff by his plaint had claimed two declarations in the alternative, and prima facie, the plaint was of the description in Sch. II, Cl. 17 (iii) of the Court-Fees Act. But counsel for the State of U. P. contends that the reliefs claimed fell within Sec. 7 (iv-A) of the Court-Fees Act. Counsel says that the expression "decrees for money or other property" does not mean a decree awarding money or other property, but a decree concerning or relating to money or other property, and he says that where the Court declares the plaintiff's title to money or property simpliciter, the decree is one for money or for other property. We are unable to agree with that contention. The expression "for" occurs twice in the opening part of the clause. Evidently the expression "for" when it occurs for the first time means "for obtaining a decree ordering (payment or recovery of)". The expression "for" also occurs in several other clauses of the Court-Fees Act. In Sec. 7 of the Court-Fees Act as amended by the

U. P. Legislature which deals with computation of court-fee payable in certain classes of suits, following clauses occur:

"(i) In suit for money * * *
(ii) (a) In suits for maintenance and annuities or other sums payable periodically:—

* * *

(b) In suits for reduction or enhancement of maintenance and annuities or other sums payable periodically—

(iii) In suits for moveable property other money, where the subject-matter has a market value—

(iv) In suits:—

(b) for accounts.

(iv) B. In suits—

(a) for a right to some * * *
to arise out of land.

(iv) C. In suits—

(a) for the restriction of conjugal rights,

(b) for establishing or annulling or dissolving a marriage,

(c) for establishing a right to the custody or guardianship of any person.

(v) A. In suits for possession * *

(v) B. In suits for possession between rival tenants—

(vi) A. In suits for partition.

(vii) In suits for the interest of an assignee of land-revenue.

(ix) In suits against a mortgagee for the recovery of the property mortgaged.

(x) In suits for specific performance—

(xi) In the following suits between landlord and tenant—

(a) for the delivery by a tenant of the counter-part of a lease,

* * *

(c) for the delivery by a landlord of a lease,

(cc) for the recovery of immoveable property from a tenant,****

(f) for abatement of rent,

(g) for commutation of rent,

* * *

In all these clauses the expression "for" is used as meaning "for obtaining a decree ordering (payment or recovery of)". If the expression "for" occurring for the first time in Section 7 (iv-A) means in the context in which it occurs obtaining a decree for cancellation of or adjudging void or voidable a decree, it would be difficult to hold that the expression "decree for money or other property" has a

wider connotation and means a decree which concerns or relates to money or other property.

5. A decree for declaration of title to money or other property is not a decree for money or other property. In our judgment the expression "decree for money or other property" means only a decree for recovery of money or other property. It does not include a decree concerning title to money or other property.

6. It was urged that in any event the plaintiff had sued for adjudging void or voidable an "instrument" securing money or other property having market value. But a decree in invitum is not an instrument securing money or other property: such a decree is a record of the formal adjudication of the Court relating to a right claimed by a party to a suit. It does not by its own force secure money or property. A consent decree in certain cases may be regarded as an instrument securing money or other property, where the decree proceeds upon a contract which had that effect, but that is only because a consent decree is a record of the contract between the parties to which is super added the seal of the Court. In our view the High Court was right in holding that the court-fee paid on the plaint was proper. It may be pointed out that the plaintiff had claimed nothing more than a declaration with regard to certain properties.

7. We are also unable to accept the contention of counsel for the State that the relief for declaration was a mere device or subterfuge intended to conceal the true purport of the claim. It is evident that the District Magistrate, Jaunpur was in possession of the property in dispute and if the Civil Court declared the title of the plaintiff, he would be entitled to secure recognition of his rights.

8. Before parting with the case we must observe that we have felt greatly perturbed by the course which this litigation has taken. The suit was filed in 1956. And after 13 years only the question of court-fee payable on the plaint is decided. In the meanwhile the original plaintiff died. The delay is largely attributable to the rigid attitude of the State which has by insisting upon a comparatively small claim, held up the proceedings for all these

long years by raising contention which had no merit. We trust the Court of First Instance will take up this suit for hearing with the least practicable delay and dispose of the suit according to law. The State to pay in this appeal the costs of the heirs of the original plaintiff.

Appeal dismissed.

AIR 1971 SUPREME COURT 89
(V. 58 C 19)

(From : Punjab & Haryana)*

J. M. SHELAT, C. A. VAIDIALINGAM
AND DUA, JJ.

Mula and others, Appellants v.
Godhu and others, Respondents.

Civil Appeal No. 1156 of 1967, D/-
28-8-1969.

Punjab Pre-emption Act (1 of 1913)
as amended by Act (10 of 1960), Section 31 — Section is retrospective — Appellate Court must give effect to amendment — Pre-emption decree by trial Court—Appeal — Appellants deprived of their right in 1960 by amendment — Appellate Court cannot pass decree in favour of appellant — Decree passed — Appellant appealing to Supreme Court for enhancement of pre-emption amount in favour of respondent — Appeal cannot be allowed — Section 28 of the Act and Order 20, Rule 14 of Civil P. C. cannot be ignored.

Section 31 as amended by Act 10 of 1960 is plain and comprehensive enough to require an appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it is one against a decree granting pre-emption or one refusing that relief. It is not open to the Supreme Court to pass a decree of pre-emption in favour of the appellants who were deprived in 1960 of their right to secure such a decree in the suit. Indeed it was not open even to the High Court to pass a decree of pre-emption in favour of the appellants on January 6, 1967. The argument that the appellants had already secured decree in their favour by the trial Court, which decree has become final, and that they have fully compli-

*(Civil Regular First Appeal No. 152 of 1958, D/- 6-1-1967 — Punj. & Har.)

ed with its terms and further that in the appeal, they are merely seeking modification of the decree of the High Court in favour of respondents by getting the amount of pre-emption money enhanced without claiming any right of pre-emption in their own favour, is unsustainable. This argument ignores that the scheme of Section 28 of the Act read with Order 20, Rule 14, Civil P. C. does not postulate decrees of pre-emption in favour of rival pre-emptors on payment of different amounts of purchase money in respect of the same sale. AIR 1963 SC 553, Rel. on. (Para 7)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 553 (V 50) =

(1963) 3 SCR 858, Ram Sarup
v. Munshi

5, 7

M/s. Brij Bans Kishore, Mahabir Prasad Jain and J. P. Gupta, Advocates, for Appellants; M/s. V. C. Mahajan and M. S. Gupta, Advocates, for Respondents Nos. 1 and 2.

The following Judgment of the Court was delivered by

DUA, J.:— This appeal on certificate has been preferred by one set of pre-emptors (plaintiffs in suit No. 556 of 1958) against the judgment and decree of the High Court of Punjab and Haryana allowing the rival plaintiffs-pre-emptors' appeal by reducing the pre-emption money and passing a decree of pre-emption on payment of Rs. 1,05,800 instead of Rs. 1,35,000 as directed by the trial Court.

2. On behalf of the rival pre-emptors (plaintiffs in suit No. 559 of 1958) who are arrayed as respondents 1 to 3 in this Court, a preliminary objection was taken to the competency of the present appeal. The appellants' right to appeal was challenged on the ground that the amendment of the Punjab Pre-emption Act (hereinafter called the Act) by the Punjab Act X of 1960 had deprived them of their right of pre-emption with retrospective effect. The appellants had based their right of pre-emption in their suit on the ground of their being proprietors of the village. They were deprived of this right by the Amending Act of 1960 and Section 31 of the Act as amended made the amendment retrospective in its operation by prohibiting the Courts from passing decrees inconsistent with the Amended Act. The right of respondents 1 to 3 who had sued as sons

of the vendors remained undisturbed by the amendment. It was on this basis that the preliminary objection was pressed before us.

3. The facts relevant for the present appeal may now briefly be stated. The land in suit was sold by a registered sale deed on June 18, 1957 by Kashi, Marchand and Bhagoo (respondents 4 to 6 in this Court) to respondents 7 to 18 for an ostensible consideration of Rs. 1,35,000. The appellants and respondents 1 to 3 instituted two separate suits for pre-emption in respect of this sale. In both the suits the sale price as inserted in the sale deed was questioned. The two suits were consolidated and the plaintiffs in each suit were joined as defendants in the other suit as contemplated by Section 28 of the Act. It appears that on April 28, 1958, a statement was made on behalf of the vendees admitting the right of the pre-emptors in both the suits and conceding that a decree be passed in favour of respondents 1 to 3 in the first instance and on their failure to pay the amount, the appellants be held entitled to a decree on payment of Rs. 1,35,000. Apparently all other objections raised by the vendees to the right of the pre-emptors were dropped. Counsel for the appellants also made a statement expressing his willingness to pay a sum of Rs. 1,35,000. Counsel for the respondents 1 to 3 however did not accept the amount of consideration as entered in the sale deed and wanted the issue in regard to the pre-emption money to be decided on the merits. The trial Court by its judgment and decree dated June 30, 1958 granted to the plaintiffs in both the suits a decree in the following terms:

"It is ordered that a decree is granted to the plaintiffs for possession of land in suit by pre-emption on payment of Rs. 1,35,000 on the condition that the plaintiffs deposit this amount in the Court for payment to the vendees-defendants within one month on or before 30th July, 1958, otherwise this suit shall stand dismissed. In case of default by the plaintiffs Godhu etc. Moola and other rival pre-emptors, who are plaintiffs in suit No. 556 of 1958 shall be entitled to deposit the above amount as pre-emption money on or before 30th October, 1958, and get the possession of the land in suit." This decree was apparently framed in

the light of the provisions of Section 28 of the Act and Order 20, Rule 14, Civil P. C. Section 28 which provides for concurrent hearing of two or more suits for pre-empting the same sale lays down that each decree shall state the order in which each claimant is entitled to exercise his right of pre-emption. Order 20, Rule 14 (1) (a) lays down that the decree in a pre-emption suit shall, when purchase money has not been paid in the Court, specify a day on or before which the same shall be paid and Order 20, Rule 14 (2) (b) provides inter alia that in so far as the claims decreed are different in degree, the claim of the inferior pre-emptor shall not take effect unless and until the superior pre-emptor has failed to comply with the provisions of sub-rule I.

4. Respondents 1 to 3, feeling dissatisfied with the decision on the amount of deposit to be made, preferred an appeal to the Punjab High Court. On January 6, 1967 the High Court allowed the appeal and reduced the amount of deposit to Rs. 1,05,800. While framing the decree the High Court allowed the plaintiffs — pre-emptors a period of three months from January 6, 1967, for depositing in Court the amount of Rs. 1,05,800 failing which their suit was directed to stand dismissed. Nothing was stated in the decree as regards the claim of the appellants. Attention of the High Court apparently does not seem to have been drawn to the provisions either of Section 28 of the Act or of Order 20, Rule 14, Civil P. C. or of para 3 of Chapter I-M (c) at page 58 of Volume I of the Punjab High Court Rules and Orders. Para 3 aforesaid emphasises the importance of specifying a definite date for the deposit of money in Court.

5. It may at this stage appropriately be observed that the omission to state in the decree the order in which the two rival claimants were entitled to exercise their right of pre-emption might have been due either to the fact that the appellants (who were impleaded as respondents in the High Court) in view of Section 31 as interpreted in *Ram Swarup v. Munshi*, (1963) 3 SCR 858 = (AIR 1963 SC 553) did not press their claim, and did not ask for the inclusion of a direction regarding their right in the High Court decree, or to the fact that they may

have felt that having expressed their willingness in the trial Court to deposit Rs. 1,35,000 it was no longer open to them to question this valuation. It is also not unlikely that in view of the decision in *Ram Swarup's* case (supra) the High Court thought that the only right of pre-emption subsisting on January 6, 1967 was that of respondents 1 to 3 and that there was, therefore, no occasion for making any consequential order in favour of the appellants under Order 41, Rule 33, Civil P. C. The judgment of the High Court does not contain any discussion on the point as to why no reference was made to the appellant's claims. It would certainly have been more helpful if the High Court had stated something in its judgment on this aspect. In the circumstances of this case, however, we need say nothing more on this point.

6. It is against the decree of the High Court reducing the amount of deposit to be made by respondents 1 to 3 that the appellants — pre-emptors have come to this Court on appeal and their right to appeal is challenged on the ground that the existing law of pre-emption has retrospectively deprived them of their right to pre-empt by prohibiting the Courts from passing a decree for pre-emption inconsistent with the Act as amended. The challenge seems to be well founded.

7. This Court had in *Ram Swarup's* case (1963) 3 SCR 858 = (AIR 1963 SC 553) (supra) occasion to construe the effect of Section 31 of the Act. According to that decision, Section 31 is plain and comprehensive enough to require an appellate Court to give effect to the substantive provisions of the Amending Act whether the appeal before it is one against a decree granting pre-emption or one refusing that relief. Following the ratio of this decision it must be held that it is not open to this Court to pass a decree of pre-emption in favour of the appellants who were deprived in 1960 of their right to secure such a decree in the present suit. Indeed it was not open even to the High Court to pass a decree of pre-emption in favour of the appellants on January 6, 1967 and the decree of that Court is unexceptionable in this respect. The argument that the appellants had already secured a decree in their favour by the

trial Court, which decree has become final, and that they have fully complied with its terms and further that in the present appeal, they are merely seeking modification of the decree of the High Court in favour of respondents 1 to 3 by getting the amount of pre-emption money enhanced to Rs. 1,35,000, without claiming any right of pre-emption in their own favour is unsustainable. This argument ignores that the scheme of Section 28 of the Act read with Order 20, Rule 14, Civil P. C. does not postulate decrees of pre-emption in favour of rival pre-emptors on payment of different amounts of purchase money in respect of the same sale. Such a course may lead to conflicting decisions on the question of value of the property sought to be pre-empted for the purposes of pre-emption suit. Besides, the appellants' right to pre-empt the sale under the unamended law was admittedly inferior to that of respondents 1 to 3 and the appellants could only be held entitled to exercise their right after the failure of the said respondents to comply with the terms of the decree in their favour. The right of respondents 1 to 3 was determined by the High Court and it was claimed on their behalf at the Bar of this Court that they had already deposited the pre-emption money as required by the High Court decree. Indeed this assertion was not disputed on behalf of the appellants. We are accordingly unable to hold that the appellants have successfully executed the decree of pre-emption in their favour.

8. The appellants further developed their argument by submitting that the decree passed by the trial Court in their favour was never appealed against and that the same has become final and binding on all parties. The only appeal preferred by respondents 1 to 3, according to this submission was from the decree in their own suit, with the result that the decree in favour of the appellants passed by the trial Court in their suit has by now become conclusive and unassailable. We cannot accept this submission. There is nothing on the record to show that the appeal presented in the High Court by respondents 1 to 3 was directed against the decree passed in their suit. Apparently, the appeal was filed against the decree passed in the consolidated suits dealing with the

rights of both the rival pre-emptors, and all the parties interested in the right of pre-emption were impleaded in the appeal. Besides, this contention seems to us to be only another way of putting the same argument, namely, that there can be two or more different determinations of the amount of pre-emption money in the two consolidated suits for pre-empting the sale in question. It also postulates a claim by an inferior pre-emptor to pre-empt the sale by making the deposit of the pre-emption money before the superior pre-emptor has failed to comply with the terms of the decree in his favour. This argument, as the foregoing discussion shows, is without merit. In the present case, a further question arises as to whether or not it was open to the appellants to ask the High Court not to vary the determination of pre-emption money in the appeal preferred by respondents 1 to 3 without formally preferring a separate appeal from the other decree considered to have been passed in the other suit because passing of such an inconsistent decree on appeal on the question of valuation would not be permissible in law. No argument on these lines was addressed in the High Court. The effect of this omission has not been canvassed in this Court either. We would, therefore, express no opinion on this aspect. The final decree relating to the rival claims of pre-emption in respect of the sale in question, however, seems to be that of the High Court which may well be considered to be binding on all the parties to it. And then, if the appellants' claim that the decree passed in their favour by the trial Court in their suit has already become final and their right is unaffected by the decree of the High Court, then they cannot be considered to be aggrieved by the impugned decree and, therefore, they cannot claim any locus standi to appeal against it.

9. From whichever point of view one looks at the position, the appellants cannot claim a right of appeal from the decree of the High Court determining the pre-emption money to be Rs. 1,05,800/-. The right to appeal against that decree can only be exercised by a person whose claim of pre-emption in respect of the sale in question can be considered to have

been adversely affected by it. The appellants on their own argument possess no such right.

10. The preliminary objection, therefore, succeeds and allowing the same we dismiss the appeal with costs. Respondents 1 to 3 claim to have deposited the amount within the time specified by the High Court and as the appellants do not as indeed cannot claim a decree in their favour from this Court, it becomes unnecessary for us to specify any date for the payment of such deposit.

Appeal dismissed.

**AIR 1971 SUPREME COURT 93
(V 58 C 20)**

(From: Punjab)*

**J. C. SHAH, V. RAMASWAMI
AND A. N. GROVER, JJ.**

Sheolal and others, Appellants v. Sultan and others, Respondents.

Civil Appeal No. 1115 of 1966, D/- 15-9-1969.

(A) Redemption of Mortgages (Punjab) Act (2 of 1913), S. 9 — Petition for redemption dismissed because it raised complicated questions of law and mortgagor relegated to Civil Suit—Order does not fall under Sec. 9 — Limitation under Article 14 Limitation Act does not apply.

Where the Assistant Collector did not pass the order under the Act dismissing the petition under the Act for redemption of the mortgage for any reason recorded by him but merely ordered that the case raised complicated questions of fact and law which could not be tried in a summary proceeding such an order does not fall within the terms of Sec. 9 of Act 2 of 1913. Even if by the order the petition was dismissed, not the form of the order, but its substance will determine the application of the period of limitation prescribed by Art. 14 of the Limitation Act. An order relegating the mortgagor to a civil suit for obtaining an order of redemption even if it becomes final does not bar a suit for redemption, for it raises no cloud on the title of the mortgagor arising out

* (S. A. No. 1169 of 1962, D/- 18-11-1965 Punj.)

of the mortgage. Such an order is not one which is required to be set aside. An order required to be set aside is one which the officer making it has jurisdiction to make it and has the effect of barring the claim for relief unless it is set aside. The order of the Assistant Collector merely declared the rights of the plaintiff under the common law; it did not bar the claim to relief for redemption in civil suit, and on that account it was not an order which was required to be set aside. AIR 1943 Lah 176 (FB) and AIR 1965 Punj 502, Rel. on. (Para 6)

(B) Limitation Act (1908), Article 14 — Order in summary proceeding dismissing petition on ground that it raised complicated questions of law and petitioner relegated to civil suit — Order does not fall under Art. 14.

(Para 6)

Cases Referred: Chronological Paras
(1965) AIR 1965 Punj 502 (V 52) =

ILR (1966) 1 Punj 193, Dewan

Chand v. Raghbir Singh

(1943) AIR 1943 Lah 176 (V 30) =

ILR (1944) Lah 1 (FB), Tulsi

Das v. Diala Ram

M/s. Rameshwar Dial and A. D. Mathur, Advocates, for Appellants; Mr. K. S. Chawla, Advocate and M/s. L. K. Mehta and S. K. Mehta, Advocates of M/s. K. L. Mehta and Co., for Respondents Nos. 1 to 7.

The following judgment of the Court was delivered by

SHAH, J.—Ram Sarup was the owner of a piece of land measuring 30 bighas 12 biswas. By a deed dated August 16, 1935, Ram Sarup mortgaged without possession a part of the land measuring approximately 26 bighas with one Meda. Ram Sarup on November 27, 1941, mortgaged with possession the entire area of the land to Ananda. Ram Sarup then sold his rights in 27 bighas and 1 biswas of the land on May 14, 1943 to Buru and others—who may be collectively called 'the plaintiffs'—for Rs. 6,000/-. The plaintiffs then applied on May 23, 1951, under Sec. 4 of the Redemption of Mortgages (Punjab) Act 2 of 1913 for redeeming the mortgage in favour of Meda. This application was rejected on June 29, 1951. Thereafter the plaintiffs instituted on August 20, 1960, a suit in the civil court for redemption of the mortgage. The suit was resisted, inter alia, on the ground that the period of limitation prescrib-

ed by Art. 14 of the Indian Limitation Act, 1908, had expired. It was submitted that the plaintiffs had moved an application for redemption of mortgage under Sec. 4 of the Redemption of Mortgages (Punjab) Act 2 of 1913 but the same was dismissed on June 29, 1951, by the Assistant Collector and since no suit was filed within one year from that date, the suit for redemption of the first mortgage in favour of Meda was barred. The Trial Court dismissed the suit for redemption of the mortgage in favour of Meda, and granted a decree for redemption of the second mortgage dated November 27, 1941. The plaintiffs appealed to the District Court, Gurgaon. The District Court allowed the appeal and ordered redemption of the land including the mortgage in favour of Meda. The decree passed by the District Court was confirmed in second appeal by the High Court of Punjab. With special leave, this appeal has been preferred by sons of Meda.

2. The record of the proceedings before the Assistant Collector was, it was reported, destroyed before the suit was filed, and an extract from the register of redemption applications could be tendered in evidence. The last column of the extract contained the entry: "The application is rejected and should be consigned to the record room." An endorsement on the docket maintained by the Advocate who appeared in the case before the Assistant Collector showed an endorsement dated June 29, 1951: "Application rejected. The petitioner has today been ordered to file a civil suit." The Trial Court and the District Court held that the petition for redemption was not tried by the Assistant Collector; he rejected the petition holding that the application raised complicated questions of fact and law, and on that account was not triable in exercise of the summary jurisdiction prescribed under Act 2 of 1913. With this view the High Court agreed.

3. Counsel for the appellants contends that the order of the Assistant Collector rejecting the petition under Sec. 4 of the Punjab Act 2 of 1913 became final by virtue of Sec. 12 of the Act and the mortgagor could not sue to redeem the mortgage in favour of Meda after the expiry of one year from the date of the order.

4. The relevant provisions of the Redemption of Mortgages (Punjab) Act 2 of 1913 may first be noticed.

5. By Sec. 4 it is provided:

"The mortgagor or other person entitled to institute a suit for redemption may, at any time after the principal money becomes payable and before a suit for redemption is barred, present a petition to the Collector applying for an order directing that his mortgage be redeemed, and where the mortgage is with possession that he be put in possession of the mortgage property."
* * *

Sections 5, 6 and 7 deal with the procedure to be followed in the trial of applications under the Act.

Section 8 provides:

"where both parties appear when the petition is called on for hearing, the Collector shall enquire from the mortgagee whether he admits that the petitioner is entitled to redeem, whether he is willing to accept the sum in deposit in full discharge of the mortgage debt, and where the mortgage is with possession whether he is willing to surrender possession of the mortgaged property.

If the mortgagee replies in the affirmative, the Collector shall make an order as laid down in Section 6 (a), (b), (c) and (d) of this Act.
* * *

Section 9 on which reliance is primarily placed provides:

"If the mortgagee raises objection on any ground other than the amount of the deposit, or if the petitioner is not willing to pay the sum demanded by the mortgagee, the Collector may either (a) for reasons to be recorded dismiss the petition, or (b) make a summary enquiry regarding the objection raised by the mortgagee or regarding the sum due."

Section 10 provides for enquiry into objections raised by the mortgagee and Sec. 11 provides for enquiry regarding the sum due under the mortgage and further provides for making deposit by the mortgagor within the period to be fixed by the Collector. Section 12 provides by the first paragraph:

"Any party aggrieved by an order made under Sections 6, 7, 8, 9, 10 or 11 of this Act may institute a suit to establish his rights in respect of the mortgage; but, subject to the result of

such suit, if any, the order shall be conclusive."

Article 14 Schedule I of the Limitation Act, 1908, provides that a suit to set aside any act or order of an officer of Government in his official capacity, not herein otherwise expressly provided for, shall be filed within one year of the date of the act or order.

6. We are unable to agree with the appellant's contention that since no suit was filed within one year of the date on which the application of the plaintiffs was rejected by the Assistant Collector, the order dismissing the application was conclusive, and the suit for redemption by the plaintiffs was not maintainable. Section 9 (1) (a) of the Act authorises the Collector to dismiss the petition for reasons to be recorded, where the mortgagee raises objection on a ground other than the amount of deposit or if the mortgagor is not willing to pay the sum demanded by the mortgagee. There is no evidence that the mortgagor declined to pay the sum demanded by the mortgagee. Again the Assistant Collector did not pass an order dismissing the petition for any reasons recorded by him. He merely ordered that the case raised complicated questions of fact and law which could not be tried in a summary proceeding. Such an order, in our judgment, does not fall within the terms of Sec. 9 of Act 2 of 1913. Even if by the order the petition was dismissed, not the form of the order, but its substance will determine the application of the period of limitation prescribed by Article 14 of the Limitation Act. An order relegating the mortgagor to a civil suit for obtaining an order of redemption even if it becomes final does not bar a suit for redemption, for it raises no cloud on the title of the mortgagor arising out of the mortgage. Such an order is not one which is required to be set aside. An order required to be set aside is one which the officer making it has jurisdiction to make it and has the effect of barring the claim for relief unless it is set aside. The order of the Assistant Collector merely declared the rights of the plaintiff under the common law; it did not bar the claim to relief for redemption in a civil suit, and on that account it was not an order which was required to be set aside.

7. In *Tulsi Das v. Dila Ram*, ILR (1944) Lah 1 = (AIR 1943 Lah 176) (FB), Tek Chand, J., delivering the principal judgment of the Court dealt with the question which falls to be determined in this case. The learned Judge observed:

".....the suit referred to in Sec. 12 is to establish the "erroneous nature of the order". Now what is the error committed by the Collector in his order which the mortgagor must seek to have set right by a declaratory suit? No civil court can grant a declaration that the Collector's view that the matter was too difficult for summary redemption was wrong and compel him to proceed with the summary enquiry. The order of the Collector does not affect the rights of the parties in any way; it is conclusive to this extent only that the petition for summary redemption has been dismissed and no other petition under the Act would lie. No suit under Section 12 being necessary or competent, there was no bar to the mortgagor suing for redemption in the civil courts within the period allowed by law in ordinary course."

The same view was expressed in a judgment of the Punjab High Court *Dewan Chand v. Raghubir Singh*, ILR (1966) 1 Punj 193 = (AIR 1965 Punj 502). The Court, in that case pointed out, in our judgment rightly, that Art. 14 of Sch. I to the Limitation Act does not apply to a suit which does not seek to set aside the order of an officer of the Government. When the Collector decides nothing against the mortgagor and directs that the matter be settled in a civil court, the Collector's decision does not stand in the way of the suit for redemption.

8. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 95
(V 58 C 21)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income Tax, Delhi (Central), New Delhi, Appellant v. M/s. Singh Engineering Works (P) Ltd., Kanpur, Respondent.

Income Tax Reference Cases Nos. 1 and 2 of 1969, D/- 11-8-1970.

IN/IN/D875/70/GKC/T

Income-tax Act (1961), Sections 273, 297 (2) (g) — Assessment proceedings for the years 1960-61 and 1961-62 initiated under Sec. 18-A of Income-tax Act (1922) — Completion of assessment after 1-4-1962 — Income-tax Officer taking view that assessee had furnished inaccurate and untrue estimates of tax without satisfactory explanation — He is entitled to impose penalty under Sec. 273. AIR 1970 SC 778, Rel. on. (Para 4)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 778 (V 57) =

Civil Appeal No. 1593 of 1969,

D/- 18-11-1969, M/s. Jain Bros.

v. Union of India

(1969) AIR 1969 SC 408 (V 56) =

71 ITR 806, Third Income-tax

Officer, Mangalore v. Damodar

Bhat

The following judgment of the Court was delivered by

GROVER, J.—The respondent company which is an assessee was required by the Income-tax Officer by notices issued under Sec. 18-A (1) of the Indian Income-tax Act 1922, hereinafter called the "Old Act" to make an advance payment of tax amounting to Rs. 3,17,077 for the assessment year 1960-61 and Rs. 3,54,911 for the assessment year 1961-62. The assessee chose to file its own estimate of tax under Section 18-A (2) and in accordance therewith it paid two instalments of advance tax of Rs. 38,333/- each for the assessment year 1960-61 and three instalments of Rs. 12,875/- each for the assessment year 1961-62. Thereafter the assessee filed revised estimates of tax in the month of March 1960 and March 1961 respectively estimating the tax at Rs. 1,80,000/- for each of the assessment years on a total income of Rs. 4 lakhs. The balance of advance tax as per its revised estimate was paid in time after deducting the instalments which had already been paid. The assessee subsequently filed its returns of income for the aforesaid two years declaring the total income of Rs. 4,53,942/- and Rupees 7,02,383/- respectively. The Income-tax Officer completed the assessment of total income of Rs. 5,35,000/- and Rs. 8,99,029/- for the assessment years 1960-61 and 1961-62 on January 21, 1963 after the Income-tax Act 1961, hereinafter called the "New Act" had come into force. The Income-tax Officer took the view that the assessee

had furnished inaccurate and untrue estimates of tax and had not given any satisfactory explanation in respect of them. He imposed penalties under Sec. 273 of the new Act amounting to Rs. 13,700/- and Rs. 12342/- for the assessment years 1960-61 and 1961-62 respectively. Appeals to the Appellate Assistant Commissioner in the matter of imposition of penalty were rejected. The Appellate Tribunal held that the penalties could not have been imposed under the provisions of Sec. 273 of the new Act in respect of the two assessment years in question. It was said, *inter alia* that in the absence of any deeming provision in the new Act the default under Sec. 18-A of the old Act could not be treated as a default under Sec. 212 of the new Act and that Section 297 (2) (g) of the new Act did not save the proceedings under Sec. 18-A of the old Act. A question of law was referred directly to this Court under the provisions of Sec. 257 of the new Act owing to the conflict between the decision of the various High Courts.

2. Section 18-A of the old Act makes provision for advance payment of tax. Sub-section (9) provides, *inter alia*, for the imposition of penalty if the Income-tax Officer is satisfied that the assessee has furnished estimates of the tax payable by him which he knew or had reason to believe to be untrue. In the new Act S. 212 makes provision for the estimate by the assessee and payment of tax in accordance with that estimate. Section 273 of the new Act empowers the Income-tax Officer to levy penalty on an assessee where he finds at the time of regular assessment that the assessee had furnished, under Sec. 212, an estimate of the advance tax payable by him which he knew or had reason to believe to be untrue.

3. As stated before the Tribunal was of the opinion that Sec. 297 (2) (g) of the new Act did not save proceedings under Sec. 18-A of the old Act. According to that provision any proceeding for the imposition of a penalty in respect of any assessment for the year ending on 31st day of March 1962 or any earlier year which is completed on or after the first day of April 1962 may be initiated and any such penalty may be imposed under the new Act.

4. In M/s. Jain Bros. v. The Union of India, Civil Appeal No. 1593 of 1969, D/- 18-11-1969 = (reported in

AIR 1970 SC 778), this Court examined the provision of Section 271 which also appears in Chapter XXI under which Sec. 273 is to be found and the provision of S. 297 (2) (g) of the new Act. This is what was stated in that case :

"We are further unable to agree that the language of Sec. 271 does not warrant the taking of proceedings under that section when a default has been committed by failure to comply with a notice issued under Section 22 (2) of the Act of 1922. It is true that clause (a) of sub-section (1) of Sec. 271 mentions the corresponding provisions of the Act of 1961 but that will not make the part relating to payment of penalty inapplicable once it is held that Section 297 (2) (g) governs the case. Both Sections 271 (1) and 297 (2) (g) have to be read together and in harmony and so read the only conclusion possible is that for the imposition of a penalty in respect of any assessment for the year ending on March 31, 1962 or any earlier year which is completed after first day of April 1962 the proceedings have to be initiated and the penalty imposed in accordance with the provisions of Section 271 of the Act of 1961. Thus the assessee would be liable to a penalty as provided by Sec. 271 (1) for the default mentioned in Sec. 28 (1) of the Act of 1922 if his case falls within the terms of Sec. 297 (2) (g). We may usefully refer to this Court's decision in Third Income-tax Officer, Mangalore v. Damodar Bhat, 71 ITR 806 = (AIR 1969 SC 408), with reference to Section 297 (2) (j) of the Act of 1961. According to it in a case falling within that section in a proceeding for recovery of tax and penalty imposed under the Act of 1922 it is not required that all the sections of the new Act relating to recovery or collection should be literally applied but only such of the sections will apply as are appropriate in the particular case and subject, if necessary, to suitable modifications. In other words, the procedure of the new Act will apply to cases contemplated by Sec. 297 (2) (i) of the new Act mutatis mutandis. Similarly the provision of Section 271 of the Act of 1961 will apply mutatis mutandis to proceedings relating to penalty initiated in accordance with Sec. 297 (2) (g) of that Act."

1971 S. C./7 I G—7

In our judgment Sec. 297 (2) (g) is clearly applicable to the present case inasmuch as the assessment was completed on or after the first day of April 1962. The provisions of the new Act contained in Section 273 will apply mutatis mutandis to proceedings relating to penalty initiated in accordance with Sec. 297 (2) (g) of the new Act. The question which has been referred to us is answered in the affirmative and in favour of the Commissioner of Income-tax who will be entitled to his costs in this court.

Reference answered in affirmative.

AIR 1971 SUPREME COURT 97 (V 58 C 22)

(From: Madhya Pradesh)*

K. S. HEGDE AND A. N. RAY JJ.

The Municipal Corporation, Indore, Appellant v. Niyamatulla (dead) by his legal representatives, Respondents.

Civil Appeal No. 1733 of 1966, D/- 21-8-1969.

(A) Civil P. C. (1908), O. 41, R. 2 — First appeal — Plea of special period of limitation as defence — Plea not taken in pleadings or in trial Court — Appellate Court should not entertain such plea. (Para 10)

(B) Municipalities — Indore Municipal Act (1909), Section 135 (2) — Special period of limitation for suit in respect of any act done under the Act — Dismissal of plaintiff by order of officer other than the Municipal Commissioner — No order of Government under Sec. 13 appointing the officer to act in place of Municipal Commissioner produced — Dismissal is without jurisdiction and therefore not an act done under the Act — Suit for declaration that dismissal is illegal does not fall within mischief of Section 135 (2) and it is governed by Article 120 of Limitation Act (1908). AIR 1966 SC 247, Applied.

(Paras 9, 10, 12)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 247 (V 53) = (1965) 3 SCR 499, Bharat Kala Bhandar Ltd. v. Municipal Committee Dhamangaon 12

* (Second Appeal No. 341 of 1964, D/- 30-3-1966 — Madh. Pra.)

DN/EN/E448/69/CWM/D

Mr. M. C. Bhandare, Advocate and Mr. P. C. Bhartari, Advocate, for M/s. J. B. Dadachanji and Co., for Appellant; M/s. S. K. Mehta, A. P. Tayal and K. L. Mehta, Advocates, for Respondents.

The following Judgment of the Court was delivered by

RAY, J.:— This is an appeal from the judgment dated 30 March, 1966 of the High Court of Madhya Pradesh (Indore Bench) allowing the appeal and setting aside the decree of the lower appellate Court and restoring the decree of the trial court with costs.

2. The plaintiff's suit against the Indore Municipal Corporation was for a declaration that the dismissal of the plaintiff was illegal and that the plaintiff was still on the post of Removal Sub-Inspector and a decree against the defendant for Rs. 7,488/- on account of salary at the rate of Rs. 104/- p. m. from 15 April, 1953 till the date of institution of the suit viz., 15 April, 1959 and other reliefs. The trial court decreed the suit. The lower appellate court set aside the decree. The High Court restored the decree passed by the trial court.

3. The case of the plaintiff Niyamatulla was that the plaintiff was suspended by the order of the Municipal Engineer dated 15 April, 1953. One Shri Ghatpande who acted in place of the Municipal Commissioner in the month of May, 1953, directed the dismissal of the plaintiff. The plaintiff contended that the dismissal could have been only under the orders of the Municipal Commissioner. The plaintiff further contended that there was no opportunity given to the plaintiff against the proposed dismissal.

4. The defence of the Municipal Corporation was that the plaintiff preferred a review petition to the Municipal Commissioner who rejected the same. The plaintiff thereafter preferred an appeal to the Appeal Committee of the Municipal Corporation which was dismissed. Thereafter, a revision petition against the order was heard by the Minister-in-charge of the Government of Madhya Bharat and the same was rejected in the month of September, 1955. It was, therefore, contended that the plaintiff had no right to file the suit. Another defence was that the suit was barred by limitation.

5. Counsel for the appellant canvassed three grounds. First, that the order of dismissal was valid and Shri Ghatpande had jurisdiction to pass the order of dismissal. Secondly, the suit was barred by limitation. Thirdly, the provisions of Section 135 of the Indore Municipality Act was a plea in bar of the suit.

6. The authority of Shri Ghatpande to dismiss the plaintiff was based on the provisions contained in Section 13 of the Indore Municipal Act, 1909. Section 13 of the Indore Municipal Act, inter alia, reads as follows:

"(1) The Municipal Commissioner for the City of Indore shall, from time to time, be appointed by the Government.

* * * *

(2) (a) Leave of absence may be granted to the Commissioner, from time to time, according to the Indore Civil Service Regulations.

(b) During such absence of the Commissioner the Government may appoint any person to act as Commissioner. Every person so appointed shall exercise the powers and perform the duties conferred and imposed by the Act or by any other enactment at the time in force on the person for whom he is appointed to act, and shall be subject to the same liabilities, restrictions and conditions to which the said person is liable and shall receive such monthly salary as may be determined by the Government.

* * * *

In order to rest the defence on Section 13 of the Indore Act it has to be first found out that there is an appointment by the Government of any person to act as Commissioner. The finding of fact by the High Court is that no order of the Government was produced to show that Shri Ghatpande was appointed to act in place of Shri Rao who was the then Municipal Commissioner. The further finding of fact was that the order of dismissal was passed by Shri Ghatpande.

7. The defence of limitation pleaded by the Indore Municipal Corporation was in general terms that this suit was barred by limitation. The plaintiff in the plaint alleged that the cause of action arose on 15 April, 1953 and on 1 May, 1953 when the plaintiff was dismissed from service and on

11 January, 1954 when it was passed by the Appeal Committee of the Indore Municipality. At the trial the plaintiff contended that the suit was well constituted and was governed by Article 120 of the Limitation Act, 1908.

8. At the time of the hearing of the appeal before the District Judge, Indore, the Municipal Corporation, Indore contended that under Sec. 135 (2) of the Indore Municipal Act, 1909 a suit in respect of any act done or purporting to be done under the Act by an officer or servant of the municipality or by any person acting under the order of the Government was to be filed within six months from the date of the accrual of the cause of action. The District Judge accepted the plea. The alternative contention on behalf of the Municipal Corporation before the District Judge was that Article 115 of the Limitation Act, 1908 will apply if the special period of limitation prescribed by the Act did not apply. The District Judge did not accept that contention on the reasoning that the plaintiff was not under any contract of service and Article 115 applied to compensation for breach of contract. The District Judge held that Article 14 of the Limitation Act, 1908 would apply when an order of an officer in his official capacity was set aside and no special period of limitation was prescribed.

9. In the High Court the Municipal Corporation repeated the plea under Section 135 of the Indore Municipal Act, 1909. The High Court, however, repelled that contention by holding that Shri Ghatpande was not the Commissioner when he passed the order, and, therefore, the order being without jurisdiction, the provisions contained in Section 135 (2) of the Indore Municipal Act were inapplicable and the plaintiff's suit was governed by Article 120 of the Limitation Act, 1908.

10. The provisions of the Code of Civil Procedure enjoin that if any special plea of limitation is a defence such a defence of limitation should be pleaded. In the present case, the Municipal Corporation did not plead Section 135 of the Indore Municipal Act, 1909 as a defence. Such a plea was not taken in the pleadings or in the trial Court and the District Judge should have not entertained such a plea. The provisions contained in Sec-

tion 135 of the Indore Municipal Act will be applicable to things done under the Act. It is manifest that in the present case the order of the dismissal passed by Shri Ghatpande was beyond his jurisdiction and is therefore not an act done under the Act.

11. Furthermore, Section 8 (1) (b) of the Indore Act says that the Council shall bear the name of the Municipal Council of the Indore City and be a body corporate and have perpetual succession and a common seal and by such name may sue and be sued. A distinction is to be noticed between suing the Municipal Council of the Indore City as contemplated in Section 8 (1) (b) of the Act and suits against the Commissioner or any officer or servant of the Municipality or any person acting under the direction of the Government or the Commissioner as contemplated in Section 135 of the said Municipal Act. One of the purposes of Section 135 of the Municipal Act is to afford an opportunity to the persons mentioned in the section to make amends within the period of notice. The suit that was filed in the present case was not in respect of any act done or purported to be done under the Act.

12. This Court in the case of Bharat Kala Bhandar Ltd. v. Municipal Committee, Dhamangaon, (1965) 3 SCR 499 = (AIR 1966 SC 247), examined the provisions of Section 48 of the Central Provinces and Berar Municipalities Act, 1922 which was to the effect that no suit shall be instituted against any Committee or any member, officer or servant thereof or any person acting under the direction of any such committee, member, officer or servant for anything done or purporting to be done under the Act, until the expiration of two months next after notice in writing stating the cause of action, the name and place of abode of the intending plaintiff and the relief which he claims. Section 48 of the said Central Provinces and Berar Municipalities Act further provided that every such suit shall be dismissed unless it was instituted within six months from the date of the accrual of the cause of action. The appellant in that case contended that it was a case of recovery of an illegal tax and therefore a claim for its refund fell outside the provisions of Section 48 of the said Act. The respondent, on the

other hand, contended there that the collection of tax was not without jurisdiction but only irregular and therefore the suit would be in respect of a matter purporting to be done under the Act. This Court held that where power existed to assess and recover a tax up to a particular limit the assessment or recovery of an amount in excess was wholly without jurisdiction. To such a case the statute under which action was purported to be taken could afford no protection. On logic principle the same reasoning applies to the provisions contained in Section 135 of the Indore Municipal Act, 1909 with the result that the suit in the present case is not within the mischief of Section 135 of the Indore Municipal Act.

13. For these reasons, the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 100
(V 58 C 23)

(From Bombay)*

J. M. SHELAT AND G. K. MITTER, JJ.
Asbestos Cement Ltd., Appellant v.
P. D. Sawarkar and others, Respondents.

Civil Appeal No. 2448 of 1969, D/-
23-2-1970.

Constitution of India, Article 133 (1)
— Final order in a civil proceeding
— Order dismissing writ petition to
quash industrial award, is a final
order.

An order dismissing a writ petition challenging the validity of an industrial award, though such award has disposed of only one of the items of a charter of demand by the workmen, leaving the rest of the items to be adjudicated by a subsequent award, is a final order in a civil proceeding of the High Court within the meaning of Article 133 (1) and is appealable to the Supreme Court. (Para 7)

30 days from the date of publication and award becomes final and, so far as the dispute relating to the item disposed of by the award it becomes final and binding on the parties.

(Para 5)

*Civil Appln. No. 2687 of 1968, D/-
25-11-1968 — Bom.

IN/IN/B146/70/MKS/B

Apart from this the petition for writ under Article 226 is a civil proceeding which is independent of the original controversy between the parties. And if the effect of the order passed in such proceeding, be it to interfere with the impugned proceeding or decline to do so, is to determine the controversy before the Court, the order must be regarded as final for the purpose of an appeal to the Supreme Court. AIR 1966 SC 1445 and AIR 1968 SC 733, Rel. on. (Para 6)

Therefore, the effect of the dismissal of the writ petition being that the award subject to an appeal to the Supreme Court, cannot be questioned on the grounds alleged in the writ petition, the order finally determines the controversy between the parties on the question raised in the petition and is therefore appealable. (Para 7)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 733 (V 55) =

(1968) 2 SCE 685 = 1968 Cri

LJ 876, Mohanlal Maganlal v.

State of Gujarat

6

(1966) AIR 1966 SC 1445 (V 53) =

(1966) 3 SCR 198, Ramesh v.

Gendalal

6, 7

Mr. V. M. Tarkunde, Senior Advocate (Mr. P. N. Tiwari, Advocate, and Mr. O. C. Mathur, Advocate of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. B. Sen, Senior Advocate, Mr. S. K. Dholakia, Advocate, with him), for Respondent No. 4.

The following Judgment of the Court was delivered by

SHELAT, J.:— This appeal, by special leave, raises the question as to whether an order dismissing a writ petition challenging the validity of an industrial award, which disposes of one of the items of a charter of demands by workmen but leaves the rest of the demands to be adjudicated by a subsequent award, is a final order in a civil proceeding of a High Court within the meaning of Article 133 (1) of the Constitution.

2. The following are the relevant facts:

The appellant-company conducts factories at Mulund in Greater Bombay, Kymore, Calcutta and Podanur. The present dispute relates to the factory at Mulund where the company employs more than 1700 workmen and has its Head Office also.

3. On September 21, 1962 the 4th respondent union on behalf of the

workmen of the Mulund factory submitted a charter of demands consisting of 20 items including the demand for increased dearness allowance. By an agreement dated November 26, 1964 between the appellant-company and the 4th respondent union made under Section 10-A of the Industrial Disputes Act, 1947, the said demands were referred for adjudication to a board of arbitrators consisting of respondents 1 to 3. A notification dated December 5, 1964 referring the said disputes to respondents 1 to 3 was issued by the Maharashtra Government and published in the Government Gazette. Demand No. 1-A in the said charter of demands related to dearness allowance to be paid to both monthly and daily rated workmen at the rates therein set out. The arbitrators decided to hear and dispose of, first the dispute as to dearness allowance and then to deal with the rest of the disputes relating to other demands. Accordingly, the parties were heard and ultimately the arbitrators gave their award which they called Part I Award dated March, 27, 1965. The said award was a majority decision in the sense that one of the arbitrators dissented from the opinion of the other two. So far as the present appeal is concerned, it is not necessary to set out the contents of the award. The said Part I award was thereafter published in the Government Gazette dated April 15, 1965 and became enforceable under Section 17-A of the Act on the expiry of 30 days from the date of its publication. If the Appellant-company were to be right, the said award imposed a burden of about Rs. 40 lacs by way of arrears, the award having been made retrospective in operation, and Rs. 5.58 lacs as and by way of recurring liability every year.

4. Aggrieved by the said award the appellant-company filed a writ petition under Article 226 of the Constitution being Special Civil Application No. 824 of 1965 in the High Court of Bombay for quashing the said award on diverse grounds. The writ petition came up for hearing before a Division Bench and was dismissed on merits by an order dated April 10, 1968. The appellant-company thereupon filed an application being Supreme Court Civil Application No. 2687 of 1968 for leave to appeal to this Court. That application was re-

jected by an order dated November 25, 1968 which stated:

"No application lies under Article 226 of the Constitution as there is further arbitration."

It appears that the words "Article 226" were mentioned in the said order through inadvertence. What was meant was that as the arbitration proceedings were still pending and the board of arbitrators had yet to adjudicate on the rest of the reference, the disputes between the parties could not be said to have been finally disposed of, and that therefore, the said Part I award was an interlocutory order. Consequently, neither that award nor the order dismissing the writ petition against that award was a final order within the meaning of Article 133 (1). This appeal challenges the correctness of this order.

5. The only question arising in this appeal is whether the High Court's order dated November 23, 1968 dismissing the writ petition is a final order within the meaning of Article 133 (1). There is no dispute that the question of dearness allowance along with several other questions was by agreement between the parties, referred to the arbitration of respondents 1 to 3 as provided by Section 10-A of the Act and that a copy thereof was published in the Government Gazette as required by sub-section (3) of that section. There is similarly no dispute that the arbitrators, instead of determining all the disputes at one time, first took up the question of dearness allowance, deciding to take up the rest of the disputes at a subsequent stage and gave their award calling it Part I Award. Under sub-section (4) of Section 10-A, the arbitrators submitted the said Part I Award duly signed by all of them to the Government. As required by Section 17 (1), the said Part I Award was published in the manner prescribed therefor by the State Government and thereupon under Section 17 (2) it became final and could not be called in question by any Court in any manner whatsoever. Under Section 17-A (1), the award became enforceable on the expiry of 30 days from the date of its publication under Section 17 — in the present case, as from May 15, 1965. Therefore, so far as the question of dearness allowance, among other disputes, was concerned, Part I Award became

final and binding on the parties and nothing further remained to be done or determined in respect of the controversy between the parties on the question of dearness allowance. The award, therefore, was not an interlocutory order in the sense of any dispute in respect of its subject-matter remaining to be finally adjudicated by the arbitrators or the rights of the parties in relation thereto remaining pending any further determination. In this sense there can be no doubt that so far as the dispute as to dearness allowance was concerned, the arbitrators by the said Part I Award finally adjudicated it and gave their decision leaving nothing to be adjudicated or decided upon at any subsequent stage of the arbitration.

6. Quite apart from this consideration, the petition filed by the appellant-company for a writ of certiorari and for quashing the said Part I Award under Article 226 was a proceeding independent of the dispute between the parties. Such a writ proceeding was not an interlocutory proceeding nor was the order dismissing it an interlocutory order leaving any question raised in the writ petition to be determined at any later stage. Once the High Court dismissed the writ petition, the controversy between the parties raised therein was finally determined and therefore came to an end. In *Ramesh v. Gendalal*, (1966) 3 SCR 198 = (AIR 1966 SC 1445) a similar question arose for consideration and this Court held that a writ petition under Article 226 is a civil proceeding of a High Court that such a proceeding is quite independent of the original controversy between the parties and that a decision in exercise of jurisdiction under that article, whether interfering with the proceedings impugned or declining to do so, is a final decision in so far as the High Court is concerned, if the effect is to terminate the controversy before it and the order must in that case be regarded as final for the purpose of an appeal to the Supreme Court. (see also *Mohanlal Maganlal Thacker v. State of Gujarat*, (1968) 2 SCR 685 = (AIR 1968 SC 733).

7. It is clear that the effect of the dismissal of the writ petition by the High Court was that the said Part I Award, subject to any appeal to this Court, was not liable to be questioned on the grounds alleged in that writ petition and the appellant-company

would be bound to pay to its workmen dearness allowance at the rates provided in that award. The controversy between the parties on questions raised in the writ petition was finally determined and brought to an end as a result of the order of dismissal. In view of the decision in *Ramesh v. Gendalal*, the High Court must be said to be in error in holding that its order dismissing the writ petition was not a final order within the meaning of Article 133 (1) and that no appeal, therefore, lay therefrom to this Court.

8. The appeal succeeds. The High Court's order dated November 25, 1968 is set aside and the case is sent back to the High Court for disposal in accordance with law. In the circumstances of the case there will be no order as to costs. The Special Leave Petition No. 148 of 1969 filed against the High Court's judgment and order dated April 10, 1968 dismissing the said writ petition is allowed to be withdrawn. Stay granted by this Court will continue for ten days from today.

Appeal allowed.

AIR 1971 SUPREME COURT 102 (V 58 C 24)

(From : Bombay)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Tayabali Jaferbhai Tankiwala, Appellant v. M/s. Ahsan and Co. and others, Respondents.

Civil Appeal No. 1741 of 1966, D/- 24-9-1969.

T. P. Act (1882), Section 113, Illustration (b) — Landlord giving first notice to quit on grounds of arrears of rent — Tenant not vacating — Second notice after about a year and demanding rent for period between 1st and 2nd notice — In suit for ejectment landlord claiming damages for use and occupation for period subsequent to second notice, showing that landlord was aware of distinction between rent and compensation for use and occupation — Held that first notice was waived and that the landlord had treated the tenancy as subsisting.

*(Spl. Civil Appln. No. 475 of 1966, D/- 18-3-1966 — Bom.)

DN/EN/E872/69/RGD/M

(1947) 1 KB 342, Distinguished.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1966) Civil Appeal No. 387 of
1964, D/- 5-8-1966 (SC), Raghu-
nath Ravji Dandekar v. Anant
Narayan Apte

(1947) 1947-1 KB 342 = 1947-1
All ER 116, Loventhal v. Van-
houte

(1918) AIR 1918 PC 102 (V 5) =
45-Ind App 222, Harihar Banerji
v. Ramsashi Roy

Mr. M. C. Chagla, Senior Advocate,
(Mr. S. S. Shukla, Advocate, with him),
for Appellant; Mr. S. T. Desai, Senior
Advocate, (Mr. D. N. Mishra, Advoca-
te, and M/s. J. B. Dadachanji and Co.,
Advocates, with him), for Respondent
No. 1.

The following Judgment of the
Court was delivered by

GROVER, J.:— This is an appeal by
special leave from a judgment of the
Bombay High Court and arises in the
following circumstances.

2. The suit premises consisting of
a shed at 130, Shuklaji Street, Bombay
are the property of the appellant, and
were let out to the respondent as a
monthly tenant. By means of a notice
dated June 13, 1956 the tenant was in-
formed by the landlord that he was
in arrears of rent since July 1, 1953
and was liable to pay to the landlord
a sum of Rs. 1826 being the amount
of rent calculated up to the date of
the notice. As he was an habitual
defaulter and had been making illegal
use of a passage attached to the pre-
mises without the consent of the land-
lord his tenancy was being terminated.
He was further called upon to make
payment of the amount of arrears.
The tenant did not vacate the premises
and a second notice was sent dated
October 18, 1957 calling upon him to
deliver vacant possession of the pre-
mises which were stated to be in his
occupation as a monthly tenant. In
the second notice another ground was
mentioned for getting the premises
vacated. It was that the same were
required for the personal use and oc-
cupation of the landlord. It may be
mentioned that prior to the despatch
of the second notice the landlord had
been paid and he has received the
amount of arrears which were said to
be due in the first notice. In other
words the rent had been received upto

March 1955. On October 30, 1957 the
tenant made a tender by means of a
cheque of the full amount of arrears
then due but the cheque was returned
by the landlord.

3. On March 31, 1958 the land-
lord filed a suit for ejectment and for
recovery of rent from April 1955 to
November 1957 and compensation for
use and occupation from December
1957 to February 1958 as also for a
certain amount for vacant possession
being rack rent of twelve months' rent,
the total amount of all the items
being Rs. 2448.12 Np. In July 1960
the plaintiff sought and was allowed
to amend the plaint by introducing
the following paragraph:

"Notice dated 13th June 1956 under
Section 12 of the Bombay Rent Con-
trol Act was given by the plaintiff's
advocates to the defendants demand-
ing payment of arrears of rent from
1st July 1953 upto date 1956, which
has been duly acknowledged. Copy of
the said notice is hereto annexed and
marked Ex. 'A'."

The ejectment was claimed on the
ground of default in payment of
arrears of rent and for personal use
and occupation. The learned trial
Judge held that by serving a second
notice and by various acts and conduct
the landlord showed a clear intention
to waive and condone the ground of
default in payment of arrears contain-
ed in the first notice. As regards the
ground of personal requirement the
trial court was not satisfied that the
premises were reasonably and bona
fide required by the plaintiff for his
own use. The suit for eviction was
dismissed although a decree for
Rs. 1822.97 was granted. The matter
was taken in appeal to the Court of
Small Causes. The appeal court held
that there was no waiver on the part
of the landlord as regards the default
committed by the tenant in not paying
the arrears of rent within one month
after the receipt of the first notice. In
other words the service of a second
notice and other facts which had been
found by the trial court did not
amount to a waiver of the first notice.
But it was of the view that the demand
of the arrears of rent made in the
notice dated June 13, 1956 was exces-
sive and illegal which made the notice
invalid. The other point about per-
sonal necessity appears to have been
abandoned by the plaintiff before the

appeal court. The landlord filed a petition under Article 227 of the Constitution in the High Court which was dismissed in limine.

4. It has been contended before us on behalf of the landlord that the view of the appeal court on the effect of an excessive demand having been made in the notice was altogether erroneous. In Civil Appeal No. 387 of 1964, D/-5-4-1966 (SC) [Raghunath Ravji Dandekar v. Anant Narayan Aptel], this court laid down that a notice to quit under the Transfer of Property Act would not be bad because by mistake or oversight more was demanded in the notice under Sec. 12 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act 1947 (Act LVII of 1947), hereinafter called the Act than was due. It is urged that since the aforesaid infirmity in the notice dated June 13, 1956 alone had prevailed with the appeal court the High Court ought to have entertained the petition under Art. 227 and after setting aside the judgment of the appeal court the suit for ejectment should have been decreed. Reliance has been placed on Sec. 12 (3) (a) of the Act according to which where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the court shall pass a decree for eviction in any such suit for recovery of possession. It is argued that the notice dated June 13, 1956 was the only notice which after the amendment introduced in the plaint by paragraph 3A was to be treated as a valid notice and since there had been non-compliance with the demand made in that notice the court was bound to pass a decree for eviction. As there was failure to exercise jurisdiction the High Court had the power and the authority to interfere in a petition under Art. 227 of the Constitution.

5. It seems to us that on the facts which have been established the landlord was bound to fail. It is abundantly clear that he had, in the second notice dated October 18, 1957, treated the tenancy as subsisting and not only the respondent was described as a

monthly tenant but also in the plaint, even after the amendment had been allowed, rent was claimed upto November 1957; thereafter the amount due was described as compensation for use and occupation. The plaintiff was thus fully alive to the distinction between rent and damages for use and occupation and it cannot be said that he had abandoned the second notice and asked for the same to be treated as non est or that he had relied solely on the first notice dated June 13, 1956. Under Sec. 113 of the Transfer of Property Act a notice given under Section 111, clause (h) is waived with the express or implied consent of the person to whom it is given by any act on the part of the person giving it showing an intention to treat the lease as subsisting. Illustration (b) is in the following terms:

"(b) A, the lessor, gives B, the lessee, notice to quit the property leased. The notice expires and B remains in possession. A gives to B as lessee a second notice to quit. The first notice is waived."

If only the language of the illustration were to be considered as soon as the second notice was given the first notice would stand waived. Counsel for the appellant has relied on the observation of Denning J., (as he then was) in *Lowenthal v. Vanhoute*, 1947-1 KB 342, that where a tenancy is determined by a notice to quit it is not revived by anything short of a new tenancy and in order to create a new tenancy there must be an express or implied agreement to that effect and further that a subsequent notice to quit is of no effect unless, with other circumstances, it is the basis for inferring an intention to create a new tenancy after the expiration of the first. The Privy Council in *Harihar Banerji v. Ramsashi Roy*, 45 Ind App 222 = (AIR 1918 PC 102), had said that the principles governing a notice to quit under Sec. 106 of the Transfer of Property Act were the same in England as well as in India. For the purpose of the present case it is wholly unnecessary to decide whether for bringing about a waiver under Sec. 113 of the Transfer of Property Act a new tenancy by an express or implied agreement must come into existence. All that need be observed is that Section 113 in terms does not appear to indicate any such requirement and all

that has to be seen is whether any act has been proved on the part of the present appellant which shows an intention to treat the lease as subsisting provided there is an express or implied consent of the person to whom the notice is given.

6. In the present case there can be no doubt that the serving of the second notice and what was stated therein together with the claim as laid and amplified in the plaint showed that the landlord waived the first notice by showing an intention to treat the tenancy as subsisting and that this was with the express or implied consent of the tenant to whom the first notice had been given because he had even made payment of the rent which had been demanded though it was after the expiration of the period of one month given in the notice.

7. It further appears that the rent was sent by the tenant treating the tenancy as subsisting and not as having come to an end by virtue of the first notice. There is another significant fact which shows that it was the second notice which was considered by the landlord to be the effective notice. It was in the notice sent in October 1957 that the landlord, for the first time, raised the ground of personal necessity. In the suit requirement of personal necessity was made one of the main grounds on which eviction was sought. In the first notice which was sent in June 1956 no such requirement or ground had been mentioned. It was not open therefore, to the landlord to say that he did not want to rely on the second notice and should be allowed to base his action for eviction only on the first notice containing the ground of the default in payment of arrears of rent. We are satisfied that the suit of the landlord was rightly dismissed though we have sustained its dismissal on different reasoning.

8. The appeal, therefore, fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 105
(V 58 C 25)

(From: Gujarat)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Chandrakant Madhavrav Dhaibar and another, Appellants v. Patel Parshottamdas Shamalbhai and another, Respondents.

Civil Appeal No. 684 of 1970, D/- 4-9-1970.

Tenancy Laws — Bombay Tenancy and Agricultural Lands Act (67 of 1948), Sec. 32F (1) (a) — Exemption of lands from being deemed to be purchased by tenant under Sec. 32 (1) — Minor, a member of joint family, claiming benefit under Sec. 32F (1) (a) on ground that there was partition of joint family estate — Held, on fact, that minor was not entitled to benefit of Section 32F (1) (a) there being no proper partition. (Para 6)

Mr. H. R. Gokhale, Senior Advocate, (Mr. K. Rajendra Chaudhuri, Advocate, for Mr. K. R. Chaudhuri, Advocate, with him), for Appellants; Mr. M. V. Goswami, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

HEGDE, J.:— The appellants are father and son, the second appellant being a son of the 1st appellant. They own some lands in Baroda in Gujarat State. It is said that those lands were owned by a Hindu joint family consisting of the 1st appellant and his four sons. The suit lands formed part of the lands owned by that family. The suit lands were in possession of the respondents as tenants. Under Sec. 32 (1) of the Bombay Tenancy and Agricultural Lands Act, 1948 (which will hereinafter be referred to as the Act), the suit lands were deemed to have been purchased by the tenants on April 1, 1957. It is said that the father and the sons divided their lands in Baroda on March 12, 1958 and 1/5th share of those lands was given to the second appellant. The suit lands formed part of the lands allotted to the second appellant. At the time of the partition the second appellant was a minor. When the Mamlatdar took steps to fix the value of the suit lands

*(Special Civil Appln. No. 737 of 1964, D/- 11-4-1969 — Guj.).

IN/IN/E105/70/GKC/T

for the purpose of fixing compensation due to the landlord, the second appellant objected to the same on the ground that the suit lands cannot be deemed to have been purchased by the respondents in view of Sec. 32F (1) (a) of the Act. The Mamlatdar rejected that contention but in appeal the District Deputy Collector reversed the decision of the Mamlatdar accepting the contention of the appellants that the suit lands came within the scope of Section 32F (1) (a). He remanded the case to the Mamlatdar to find out whether the share given to the appellant was a proper share. On a further appeal to the tribunal, the order of the District Deputy Collector was reversed and the decision of the Mamlatdar restored. Thereafter the appellants moved the High Court of Gujarat under Art. 226 of the Constitution but the same was dismissed. Hence this appeal by special leave.

2. Section 32F (1) (a) of the Act reads:

"Notwithstanding anything contained in the preceding sections,—

(a) where the landlord is a minor, or a widow, or a person subject to any mental or physical disability — the tenant shall have the right to purchase such land under Section 32 within one year from the expiry of the period during which such landlord is entitled to terminate the tenancy under Section 31:

Provided that where a person of such category is a member of a joint family, the provisions of this sub-section shall not apply if at least one member of the joint family is outside the categories mentioned in this sub-section unless before the 31st day of March 1958 the share of such person in the joint family, has been separated by metes and bounds and the Mamlatdar on inquiry is satisfied that the share of such person in the land is separated having regard to the area, assessment, classification and value of the land, in the same proportion as the share of that person in the entire joint family property, and not in a larger proportion."

3. The Mamlatdar came to the conclusion that the partition alleged did not come within the scope of Sec. 32F (1) (a) of the Act as it was only a partial partition in view of the fact that the members had not divided the

house that they had at Baroda as well as their lands in Kadu in Poona District. The appellate authority opined that a partial partition also comes within the scope of Section 32F (1) (a) and hence it set aside the order of the Mamlatdar and remanded the case back to him for determining whether the second appellant had been given a proper share in the family properties which question the Mamlatdar did not go into earlier in view of his conclusion that a partial partition does not come within the scope of Sec. 32F (1) (a). In the further appeal the tribunal agreeing with the Mamlatdar opined that in order to have the benefit of Sec. 32F (1) (a), the entire family properties must have been partitioned. The same view commended itself to the High Court.

4. In this Court it was urged on behalf of the appellants that on the facts of the present case, no question of partial partition arises; the lands referred to in Sec. 32F (1) (a) do not include any house; further the lands in Kadu did not belong to the family of the 1st appellant and his sons but to a larger family consisting of the 1st appellant and his cousins. It was also urged that the landlord in this case is the smaller family consisting of the 1st appellant and his sons and not the larger family consisting of the 1st appellant and his cousins.

5. These contentions are challenged on behalf of the respondents.

6. It is not necessary for us to go into these contentions in this appeal. The tribunal the final fact finding authority has come to the conclusion that on the admitted facts, the share given to the second appellant, having regard to the area, assessment, classification and value of the lands is not in the same proportion as his share in the entire joint family property. It was admitted before the tribunal that at the time of the partition the 1st appellant's wife (second appellant's mother) was alive. It was further admitted that under law, she was entitled to a 1/6th share in the suit lands. Admittedly she was not given any share. The proper share to which the second appellant was entitled in the lands owned by the 1st appellant and his sons is 1/6th and not 1/5th. But in fact he was given 1/5th share in the same. That being so, the second appellant is not entitled to the benefit of Sec. 32F

(1) (a). A somewhat half-hearted attempt was made in this Court to show that the wife of the 1st appellant had renounced her share. This contention is opposed to the admission made before the tribunal. Therefore it cannot be accepted.

7. In the result this appeal fails and the same is dismissed with costs.
Appeal dismissed.

**AIR 1971 SUPREME COURT 107
(V 58 C 26)**

(From: Bar Council of India,
New Delhi)*

**M. HIDAYATULLAH, C. J.,
G. K. MITTER AND A. N. RAY, JJ.**

O. N. Mohindroo, (In both the Appeals), Appellant v. The Dist. Judge, Delhi and another, Respondents; Supreme Court Bar Association (in both the Appeals), Intervener.

Civil Appeals Nos. 2637 and 2638 of 1969, D/- 4-9-1970.

(A) Advocates Act (1961), Sec. 38 — Powers of Supreme Court — Appeal lies both on facts and law — Supreme Court can review its previous order in appropriate cases — (Constitution of India, Art. 137).

The appeal to the Supreme Court under Sec. 38 is not a restricted appeal. It is not an appeal on law alone but also on fact. The Supreme Court can entertain subsequent petitions from a person whose case has been dealt with by disciplinary Committee. The Supreme Court must in all cases go into the matter to satisfy itself that justice has been done by the disciplinary committee or committees. The Supreme Court possesses under the Constitution a special power of review and further may pass any order to do full and effective justice. Where the Supreme Court is moved to take action and the Bar Council of India and the Bar Association of the Supreme Court are unanimous in asking the Supreme Court to go into the matter and have the order against the appellant lawyer disbaring him from practice set aside

*(Review Petn. No. 2 of 1969, D/- 4-10-1969 — Bar Council of India — New Delhi.)

JN/JN/E101/70/DHZ/C

and the case presents some unusual circumstances the Supreme Court will review its previous order and set aside the order. (Paras 19, 36, 37, 39)

(B) Advocates Act (1961), Ss. 37, 44 — Bar Council — Powers of appeal and review stated.

Though an appeal preferred to the Bar Council of India is heard by the disciplinary committee, in the initiation of proceedings and again in the matter of appeal the Bar Council is mentioned and not the disciplinary committee. Therefore the general superintendence of ethics and etiquette of the profession and questions of misconduct of the members are not wholly outside the ken of the Bar Councils of the State or of India and are always within their respective jurisdictions. The Bar Council therefore does not act wrongly in entertaining subsequent petitions from a person whose case has been dealt with by the disciplinary committee. The power of review is expressly granted to the Disciplinary Committee of the Bar Council which may on its own motion or otherwise review any order passed by it. The word 'otherwise' is wide enough to cover a case referred by the Bar Council for review. There is a proviso which makes the Bar Council of India the final judge because no order of a disciplinary committee of a State Bar Council on review has effect unless it is approved by the Bar Council of India. The powers of review are not circumscribed by the Act. Such powers may be exercised in a suitable case for or against an advocate even after the matter has gone through the hands of the Disciplinary Committee at some stage or even through the Supreme Court. These matters are also not governed by the analogy of autrefois convict or autrefois acquit in the Code of Criminal Procedure.

(Paras 18, 19, 20, 21)

M/s. C. K. Daphtary, A. N. Mulla, Bishan Narain and W. S. Barlingay, Senior Advocates, (Mr. O. N. Mohindroo Advocate in person, with them), for Appellant; Mr. M. Natesan, Senior Advocate, (Miss Uma Mehta, M/s. D. N. Misra and B. P. Singh, Advocates, with him), for Respondent No. 2 (In C. A. No. 2637 of 1969); Mr. A. S. R. Chari, Advocate, (Mr. B. Datta, Advocate, with him), for the Intervener (In both the Appeals).

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.—The appellant in these two appeals is an advocate of this Court, who on complaint by the District Judge, Delhi, 29 February, 1964, to the Bar Council of the State of Delhi, was held guilty of professional misconduct and suspended from practice for a year by the disciplinary committee of the said Bar Council. He appealed to the disciplinary committee of the Bar Council of India under Sec. 37 of the Advocates Act. The appeal was dismissed. His appeal to this Court under Sec. 38 of the Act was dismissed summarily at the preliminary hearing. The charge against him was that while inspecting a judicial record in the company of Mr. Kuldip Singh Advocate, he tore out 2 pieces of paper from an Exhibit (C-I). The pieces were thrown by him on the ground. The clerk-in-charge reported the incident to the District Judge and the complaint followed.

2. The suit, record of which was being inspected, arose in the following circumstances. On February 6, 1963 Mr. Anant Ram Whig, an advocate, sent a notice on behalf of one Sarin to a certain Ramlal Hans and his wife claiming a sum of Rs. 4370/- as reward for the success of their daughter at an examination including tuition fees. Sarin was preparing the girl for the B. A. examination. The claim of Sarin was repudiated by Ramlal Hans in a reply dated February 11, 1963. The matter was referred to the arbitration of Mr. Mansaram, Municipal Councillor Delhi by an agreement dated February 24, 1963. The arbitrator gave an award for Rs. 1000/- in favour of Sarin. The award was filed in the Court of Mr. Brijmohanlal Aggarwal, Sub-Judge, Delhi for being made a rule of the court. Ramlal Hans engaged the appellant as advocate. The appellant in his turn engaged two other advocates to conduct the actual cases and also filed his vakalatnama. A copy of the notice sent by Mr. Whig was filed in the case (Ex. C-I) but was not yet proved.

3. On February 24, 1963 the appellant went for the inspection of the record of the case in the company of his junior lawyer. The file was given by Amrik Singh, the junior clerk of the Bench. Amrik Singh then went out

of the room but soon returned to his seat. Later he charged the appellant of having torn 2 pieces from a document (which was Ex. C-I) and picked up the alleged pieces from the floor. Mr. Aggarwal then arrived on the scene. The statement of the appellant was recorded. The Sub-Judge also obtained reports from his junior and Assistant clerks and made a report. With the report he sent the Exhibit said to be mutilated and the two pieces said to be the torn pieces of Ex. C-I in a sealed envelope. A complaint was also made to the District Judge by Sarin. The District Judge then made a report and wrote that the document was important in the case and action was, therefore, called for.

4. The disciplinary committee of the Bar Council of the Union Territory of Delhi took up the matter under Sec. 35 of the Advocates Act. The explanation of the advocate was called for. He explained that the charge was false and it was due to the ill-will of Mr. Aggarwal and his staff because earlier he had made some serious allegations against Mr. Kalra, Sub-Judge III Class in a transfer petition and had also started contempt proceedings. According to the appellant this led to hostility between the Judges and their staff and him. He denied that the document was important or that he had mutilated it. He asked inter alia for summoning the torn document and the pieces and they were summoned. The original document was received but not the pieces. The District Judge informed the Committee that the pieces were misplaced and were not found. The appellant maintained that they were put in the same envelope with the exhibit and he alleged that they were suppressed to deny him a legitimate defence that they were not a part of the same document.

5. Oral evidence was recorded. On the basis of the oral evidence of Amrik Singh, the petitioner was held guilty of having wantonly mutilated the document. The petitioner wanted to take a size to size photostat of the exhibit but his request was turned down.

6. As stated already his appeal to the Bar Council of India was dismissed by the disciplinary Committee of the Bar Council of India and later his appeal to this Court was dismissed

summarily on April 18, 1966 at the preliminary hearing. Mr. A. K. Sen appeared for the appellant.

7. The appellant then seems to have lost his head. He made successive applications of various kinds. He filed a review petition on April 23, 1966 before the disciplinary Committee of the Bar Council of India but it was rejected on April 29, 1966. The appellant then filed a writ petition in the High Court of Punjab (Delhi Bench) on May 23, 1966 challenging Sec. 38 of the Advocates Act and Rule 7 of Order V of the Rules of this Court as ultra vires Art. 138 (2) of the Constitution. The Writ Petition was admitted and a rule nisi was issued. The appellant before this had filed a review petition in this Court and on September 12, 1966 this Court issued a notice to the District Judge to find out the torn pieces. The District Judge reported on September 22, 1966 that the mutilated document was a copy of a lawyer's notice and that only a small piece of $\frac{1}{2}$ " was missing from the bottom of the second sheet. The pieces were not traceable. He also reported that the junior clerk was not sure that anything was written on the torn pieces but according to his recollection the words 'True Copy' followed by the signature 'Vir Bhan' were written, that this was not stated by him in his earlier statements, and that the Assistant Clerk also said that according to his recollection something was written in ink on those pieces but could not say what it was. The Supreme Court dismissed the review petition on September 26, 1966. The appellant appeared in person at the hearing.

8. The writ petition in the High Court was also dismissed by a single Judge on October 12, 1966. The order shows that the original of Ex. C-I was not relied upon by Mr. Vir Bhan and that he had not attempted to prove the copy, as there was no context about the notice. It was contended before the High Court that there was no motive to tear two tiny pieces from a document which was not in issue. The High Court seemed to agree with this but speculating as to possible motives held that in view of the evidence of Amrik Singh, the question of motive was immaterial. The High Court did not go further than this into facts.

9. The learned single Judge considered the objection to the constitutionality of the rules of this Court and overruled it. He held that questions of fact could not be gone into in view of the successive appeals and review petitions dismissed by the appropriate authorities. A Letters Patent appeal was filed against the single Judge's judgment and order. That appeal was heard by a Division Bench of the High Court of Delhi and dismissed on December 22, 1966. Before the Division Bench the validity of Sec. 38 of the Advocates Act alone was challenged. An objection on merits was rejected because the order of the disciplinary committee of the Bar Council of the Union Territory was said to have merged in the order of the disciplinary committee of the Bar Council of India and later in that of this Court. The High Court granted a certificate. This Court was represented at the hearings as it was made a party to the writ petition.

10. The appeal filed in this Court as a result (C. A. No. 240 of 1967) was dismissed by the Constitution Bench on January 8, 1968. Only the validity of Sec. 38 of the Advocates Act and rules of this Court was considered. The hearing was on 14 and 15 December 1967. The appellant was in person. The Bar Council of Delhi and their disciplinary committee were represented by Mr. Avadh Behari Advocate, Mr. P. Rama Reddy and Mr. A. V. Rangam represented the disciplinary committee of the Bar Council of India, the Supreme Court (a party) was represented by Mr. Purshotam Tricumdas and Mr. I. N. Shroff and the Attorney General was represented by Mr. P. Tricumdas and Mr. S. P. Nayyar. The hearing time was taken up by the appellant and Mr. Purshotam Tricumdas, Mr. P. Rama Reddy argued for 10 minutes and Mr. Avadh Behari was not called upon.

11. The appellant then tried another review petition (No. 21 of 1968) on the basis of the fresh evidence and report of the District Judge Delhi. This Court (on December 2, 1968) summoned the record and allowed the petitioner to take photostats of the Exhibit C-I. The appellant also filed a writ petition under Art. 32 of the Constitution (W. P. No. 69 of 1968). He first applied (C. M. P. 1171/68) for withdrawal of the writ petition and

then withdrew that application itself. The two matters were placed before the Court on April 11, 1968 and at one time it appeared that Shri A. K. Sen had argued both of them but later Shri A. K. Sen said he had only appeared in the writ petition and not in the review petition and it was still undisposed of. As a result on August 12, 1968, the review petition was ordered to be placed again for hearing. On the Court observing that on the basis of new material, review should be asked for from the Bar Council of India, the review petition was withdrawn on January 6, 1969. The review application was not dismissed on merits.

12. The appellant then went before the Bar Council asking for reconsideration of his case under Sections 44 and 10 (3) of the Advocates Act. The Bar Council passed an order through its Chairman (Mr. H. D. Shrivastava). The Bar Council of India held that it had no jurisdiction of any kind to reopen this matter although the embarrassment involved in reconsidering the matter was removed by the observations of the Supreme Court. According to the Bar Council the disciplinary committee was not acting as a subordinate delegate of the Council and the general power to safeguard the interests of the Bar or any individual member could only refer to such interests as had not been negated by judicial process under the Advocates Act. The petition was, therefore, dismissed. The Bar Council, however, went on to observe:

".....But we cannot part with this matter without expressing our sense of uneasiness which arises from the production before us of fresh material particularly a photostat of the document said to have been torn by the petitioner. A look at the document opens out a reasonable possibility, that a reconsideration by the disciplinary committee of this Council may lead to a different result. The petitioner may if so advised formally ask for a review by the Disciplinary Committee."

13. The appellant then again applied for review of the order by the disciplinary committee of the Bar Council of India. In a fairly long order the disciplinary Committee declined to reopen the case. The disciplinary committee found fault with

the single Judge of the High Court of Punjab for not rejecting the writ petition on the short ground that the High Court could not issue a writ to the Supreme Court. The disciplinary committee also found it necessary to comment upon the order of this Court inquiring from the District Judge, Delhi how the pieces kept in safe custody were lost. The disciplinary committee also commented upon the action of the District Judge in re-examining witnesses who had been examined before.

14. The disciplinary committee pointed out that in the second review petition decided by the Committee on February 26, 1967, it refused to take into consideration the report of the District Judge as it was not evidence in the case and because the Supreme Court also did not appear to have acted upon it when dismissing the review petition before it. The Supreme Court's order was not a speaking order but had merely dismissed the review petition summarily.

15. The disciplinary committee next considered how the matter came before them. They refused to take into account a 'casual observation' of the Judges in the course of arguments before them in the review petition in this Court. They speculated that perhaps the appellant was advised to withdraw the review petition which otherwise could have had to be dismissed. The Committee very reluctantly looked into the statements of witnesses recorded by the District Judge when he reported about the loss of the two pieces of paper. The matter was heard and the disciplinary committee took time to consider their order. The disciplinary committee held that in considering review applications to themselves they should not be over-technical and that they would have granted review if there was any material on which it could be granted. They however observed:

"..... It is however axiomatic that no Court or Tribunal can rewrite or alter its Judgment once a Judgment has been signed and delivered. We could entertain the review petition only on some ground similar or analogous to those as mentioned in Section 114 and Order 47, Rule 1 of the Code of Civil Procedure. But in this case there is no such ground available to the petitioner."

They held that as the order of the disciplinary committee had merged in the decision of the Supreme Court, a review granted by them would be incompetent. Having held this two members went on to consider the merits, a procedure with which the third member dissented. His observations in the circumstances were quite correct. This is what he said:

"If what the petitioner says about the observations of the Supreme Court that his remedy should be by a Petition for review, is correct, the forum lies elsewhere and we cannot just entertain it. In this view of the matter the observations made by the Bar Council of India in their resolution dated 12th July, 1969, which are entitled to our respect, may well be left alone mad (sic) need be commented upon." The majority of the disciplinary committee however refused to be guided by the observations of the Bar Council of India. They observed that looking at the photostat copy did not advance the matter any further and they had previously seen the original itself and on the evidence they were satisfied that there was some writing on the pieces to show that it was a true copy signed by the attestor. This was proved by the evidence of Mr. Vir Bhan accepted by the disciplinary committees of the two Bar Councils. They discarded the fresh evidence of the two clerks as not of any use to the appellant. They went to the length of saying:

"Even if these witnesses had entirely contradicted their earlier statements that would not have been a ground for review....."

Having said this they went on to say:

".....However in the present case we have also examined the depositions recorded by Shri Jagjit Singh and we do not find any substantial difference between what they had stated earlier and what they stated before him."

The fact that writing on the pieces was not mentioned earlier by the clerks was not noticed. The majority then severely commented upon the conduct of the appellant in charging the subordinate judiciary with hostility and held this to be 'frivolous and unworthy of notice.' They observed as follows:

"Even in our earlier Judgment we pointed out that a defence of this nature calculated to deter and intimi-

date responsible officers from discharging their public duty was highly reprehensible."

They accordingly dismissed the review application expressing the hope that that would be a close to this chapter. In two paragraphs thereafter the majority commented strongly on other conduct of the appellant in Court cases and outside it which according to them was deplorable. It is obvious that the disciplinary committee was annoyed at the repeated attempts of the appellant to have his case reconsidered by the superior authorities and the hearing he had got.

16. From the respective orders of the Bar Council of India and the disciplinary Committee these two appeals are brought. We granted special leave in the matter arising out of the Bar Council's order limited to the following two questions:

"(1) Whether the Bar Council has no jurisdiction to direct the Disciplinary Committee to rehear the matter; and

(2) Whether the Disciplinary Committee was right in not considering the matter afresh."

In the other appeal the question is: whether the disciplinary committee was right in refusing review and whether we should, therefore, review the matter ourselves, if we are satisfied that the case deserves it.

17. In so far as the Jurisdiction of the Bar Council of India is concerned we think the Bar Council acted correctly when they refused to review the matter themselves. For the Bar Council to do so would be an exercise of appellate power. That power the Bar Council of India does not possess. But the Bar Council of India was right in saying that the question raised before themselves was sufficiently important for reconsideration and recommending it for reconsideration to their Disciplinary Committee.

18. The provisions of the Advocates Act are no doubt precise in the matters of appeals and review. In all cases tried by the Disciplinary Committee of the Bar Council of a State (which term includes the Union Territory of Delhi) an appeal lies to the Bar Council of India. The appeal is, however, heard by the Disciplinary Committee of the Bar Council of India and they dispose of it as they deem fit. The Act does

not say that the Disciplinary Committee is a reporting body and the executable order must be made by the Bar Council of India. This is made clear by the section that follows. It speaks of an appeal to this Court against the order of the Disciplinary Committee. If an order of the Bar Council were intended to be interposed (whether endorsing or refusing to endorse the order of the Disciplinary Committee) one would expect the appeal to this Court to lie against the order of the Bar Council. But in the initiation of the proceedings and again in the matter of appeal, the Bar Council is mentioned and not the disciplinary Committee. Indeed under Sections 35 (1) and 36 (1) the Bar Council of the State or of India, as the case may be, must be satisfied that a prima facie case exists before they will refer the matter to their Disciplinary Committee. This is in keeping with the jurisdiction of the Bar Councils of the States laid down by Section 6 (1) (c) under which Bar Council is to entertain and determine cases of misconduct against advocates on its rolls and under Clause (d) with the duty to safeguard the rights and privileges and interests of advocates on its rolls. In regard to the Bar Council of India the same position obtains under S. 7 (1) (d) (which is ipsissima verba with the corresponding provisions of Section 6) read with Section 7 (1) which lay down the jurisdiction of the Bar Council of India to deal with and dispose of any matter arising under the Act. Therefore, the general superintendence of ethics and etiquette of the profession and questions of misconduct of the members are not wholly outside the ken of the Bar Councils of the State or of India and are always within their respective jurisdictions.

19. Next, the appeal to this Court is not a restricted appeal. It is not an appeal on law alone but also on fact. Indeed Section 38 gives the Supreme Court jurisdiction to pass in such appeals any order it deems fit. Therefore the appropriate Bar Council or this Court do not act wrongly if they entertain subsequent petitions from a person whose case had been dealt with by a disciplinary committee.

20. The power of review is expressly granted to the Disciplinary Committee of the Bar Council which may on its own motion or otherwise review

any order passed by it. The word otherwise is wide enough to cover a case referred by the Bar Council for review. There is a proviso which makes the Bar Council of India the final judge because no order of a disciplinary committee of a State Bar Council on review has effect unless it is approved by the Bar Council of India.

21. The powers of review are not circumscribed by the Act. The analogy of the Civil Procedure Code must not be carried too far. Such powers may be exercised in a suitable case for or against an advocate even after the matter has gone through the hands of the Disciplinary Committee at some stage or even through this Court. These matters are also not governed by the analogy of autrefois convict or autrefois acquit in the Code of Criminal Procedure. Disciplinary proceedings against a lawyer involve not only the particular lawyer but the entire profession. The reputation of the legal profession is the sum total of the reputation of the practitioners. The honour of the lawyer and the purity of the profession are the primary considerations and they are intermixed.

22. During the hearing we gave an illustration which we may also give here. Suppose an advocate is charged with embezzling the money of his client. The advocate pleads that he paid the money in cash to the client and obtained his receipt but the receipt is misplaced and he cannot find it. He is disbelieved by the Disciplinary Committees and even by this Court. Subsequently he finds the receipt and wishes to clear his good name. The matter can be gone into again on the fresh material. It is not only his right but also the duty of those including this Court to reconsider the matter. The Bar Council in any event can restart the matter to clear him whether before any of the authorities which dealt with the matter before. The facts in the illustration may be reversed to see the converse position where an advocate gets off on a false plea of not having received the money at all, if he can be successfully confronted with his own receipt which the client had misplaced and could not lay hands upon in the first instance.

23. From this it follows that questions of professional conduct are as

open as charges of cowardice against Generals or reconsideration of the conviction of persons convicted of crimes. Otherwise how could the Hebron brothers get their conviction set aside after Charles Peace confessed to the crime for which they were charged and held guilty?

24. The fact of the matter in this case is that too much emphasis was laid on the oral evidence of a clerk who alone said that he had seen the appellant tear two pieces from Ex. C-1. The Advocate's denial was not accepted although there was word against word. There was no evidence that the pieces found on the floor matched the tear. No witness spoke of having taken the elementary care of matching the pieces with Ex. C-1. Indeed the pieces having been lost the only corroboration regarding the pieces has disappeared. The only corroboration now is that the edges of Ex. C-1 show such a tear.

25. The question is whether this by itself is sufficient. There is no evidence against the appellant except that of Amrik Singh. It is true that there is no personal allegation against him of harbouring any grudge or hostility beyond saying that the staff of the Courts were against the appellant. As against this, one consideration is what was the gain to the appellant by tearing the tiny pieces? We shall presently show how tiny they were. The charge is a serious one; and we have to see the matter in the whole setting of the evidence. The document said to be torn is a copy of a notice which Sarin's Counsel had sent to the opposite side. The counsel for Sarin said that he had not proved the document. Further the original notice could be summoned. Exhibit C-1 was in two sheets 30.5 cm. × 20.5 cm. and 34.6 cm × 21.5. The second sheet was extraordinarily long and its edges appear very much frayed. It was suggested at the hearing it must have protruded from the rest of the file and thus got damaged in the handling of the file. This was not given due weight.

26. We have examined the document carefully. It is a carbon copy of a notice. The document ends thus:

Note: Copy of this notice is being sent under postal certificate to your wife.

Yours faithfully,

1971 S. C./8 I G—8

The tear occurs 1.5 cm. to the left of 'ficate' and ends below the letter 'a' in 'postal'. The letters of 'faithfully' are missing except for the head of 'f' and so also letters 'der' in 'under' and parts of 'p' and 'o' in 'postal' are missing. The complainant claimed that the document had an attestation 'true copy' followed by a signature and that it had been torn out. The two clerks who had seen the pieces do not definitely say that the pieces had any writing and as the pieces have disappeared we cannot get corroboration. They had originally not said this but now at a later stage they have deposed about the writing on the pieces. We have, therefore, done the best to discover the truth. This is the result of our observations:

27. The document is a rectangular foolscap sheet, rather old paper which is frayed along the edges. As the fraying edges were falling off we have secured them with transparent scotch tape. One piece actually fell off when the paper was being examined by us but the piece has been secured in situ with scotch tape. Another piece found in the file could not be matched and has been secured in the margin with scotch tape so that it may not be lost. It belongs to the same paper. Now for a description of the paper.

28. Fortunately the machine cut edges are available on all four sides enabling us to measure the paper and to find out the exact measurements of missing parts. This will enable us to find out if an attestation and a signature could have been written at all on these papers. It is obvious that the tearing, if deliberate, as is suggested, must have been to tear out not the blank space left on the bottom of the typewritten portion but of some writing, typed or manuscript.

29. The paper is exactly 34.6 cm × 21.5 cm. As no portion is alleged to be torn from the top or the sides we may ignore the measurement of the breadth except to compare it with the tear. The tear today is found along 17.5 cm. out of the total breadth of 21.5 cm. We have already said that except for 1.5 cm. to the left of the letters 'ficate' the tear falls directly below the typed portion and that is 15.5 cm. in length. 7.5 cm. are below the portion where the last line of typing 'ficate to your wife' and the words 'yours faithfully' occur. The bottom of these

typed letters are exactly 34.4 cm. from the top leaving a strip which would be .2 cm. In other words out of tear of 17.5 cm., 8 cm. allow only a space of .2 cm. for any writing.

30. Now for the remaining 8 cm. This is made up of 2.5 cm. below 'tal certi' which is almost whole and there is no writing on this portion. That leaves a tear of 5.5 cm. measures lengthwise where there is no typing on top. This is made up of 3 triangular portions joined by the .2 cm. strips below typed portions. 1st triangle is 2 cm. in length with 1 cm. perpendicular from apex to base. The second is 3.2 cm. base with a perpendicular of 1 cm. and the third is 2.8 cm. by 1 cm.

31. Therefore out of the total length of 17.5 cm., 7.5 cm. is a strip uniformly of .2 cm. There are 3 triangles, in length respectively 2 cm., 3.2 cm. and 2.8 cm. with the height almost at the centre in each case 1 cm. The photostat of the document is an annexe and can be seen also. We took the measurements from the original. It is easy to see how small will be space for writing. The three triangles of which only 2 could be held to be torn by the appellant could not have contained the words of attestation and signature. The one on the extreme left is so situated that no one would write there an attestation. The three triangles are separated by 4 cm. and 3.5 cm. and it is impossible to think that the attestation was written in one triangle and the signature in another for there was not enough space to write them one above the other even if one could cramp in one line. Further with the typing having gone to .2 cm. from the bottom anyone wishing to write an attestation would ordinarily write it in the margin where plenty of space was available and that is the usual course lawyers adopt when the writing goes right down to the bottom. We are, therefore, satisfied that there was no writing on the pieces and the halting testimony of the 2 clerks should not have been accepted without corroboration. They said nothing about it when they were first examined.

32. The sum total of our observations may now be stated. The document was merely a copy of which the original could be summoned. One sheet was unduly long and was likely to protrude from the file of papers and

thus liable to get frayed. It is frayed and the paper is showing more tears today. The typing had gone to the very bottom of the paper and there was not sufficient space to write in a natural hand the attestation and to sign it. There was blank paper in the margin where the attestation could be conveniently written and signed. The document was not necessary for the decision of the case and Mr. Vir Bhan had not even attempted to prove it. It was being inspected to find out the original case of the claimant after the case had gone to arbitration and there was an award. Nothing was to be gained by tearing it or even by tearing out the attestation even if there was one. Of course it would be improper even to tear out the blank portion but no one indulges in such a silly and useless act. There were serious allegations against a judge of the Court and there was a possibility of the appellant being the target of hostility and the evidence against him was of a single clerk. There was word against word.

33. The question that arises is what are we to do? We have held above that the disciplinary committee could be asked to reconsider the matter by the Bar Council. The order of the disciplinary committee does show that although they held that the Bar Council had acted without jurisdiction, they went on to express their satisfaction with what they had already done. The re-examination was not made objectively but with the intention of reaffirming their decision by every argument for it. No attempt was made to find whether the circumstances were such that the appellant could be said to have proved satisfactorily the contrary of what was held or had created sufficient doubt in the matter. The earlier findings were affirmed when there was no need to do so as the petition for review was held incompetent.

34. At the hearing before us the Bar Council of India appeared and supported the case of the advocate. Mr. Natesan said that in the opinion of the Bar Council, it would be proper for this Court to go into the matter. Previously the Bar Council had probably supported the case against the appellant. The stand of the Bar Council in the case before us was this:

"The Disciplinary Committee of the Bar Council while finding that it has

no jurisdiction to review the matter in view of the prior appeal to this Court, has gone also into the merits of the case, examined it elaborately with reference to the materials stated to be new matter and has come to the same conclusion. The question that now arises is whether the Supreme Court can review the matter itself in this appeal when the Disciplinary Committee had no jurisdiction, and set aside the order made by the Disciplinary Committee on the merits. It may be a different thing if this Court now reviews the order in the light of the materials placed before the Court after the production of the original document stated to have been torn which ex facie shows that it could not have been deliberate or wanton."

35. Another body of lawyers, namely, the Bar Association of the Supreme Court sought permission to intervene and were heard. Mr. A. S. R. Chari on behalf of the Association strongly supported the advocate's case. Thus we have the entire Bar of the country and the entire Bar of this Court unanimously asking this Court to go into the matter.

36. It appears to us, therefore, that the Bar Council of India does not wish to oppose the review by us of our order and indeed they invite us to grant relief to the appellant. Ordinarily we would have been unwilling to grant a review after this Court had declined to do so on an earlier occasion. But the circumstances are different. Our view of the matter is also that the charge of deliberately and wantonly mutilating an important document in a judicial file has not been as clearly made out as one would wish. This Court on earlier occasions, taking the facts from the order of the disciplinary committees, declined to interfere as no question of law was involved. It decided the appeal summarily without issuing notice or sending for the record. There is force in the contention that an advocate is entitled to a full appeal on facts and law under Sec. 38 of the Advocates Act. Since the disciplinary jurisdiction of the High Court has been taken away a right of appeal to this Court has been substituted. This Court must in all cases go into the matter to satisfy itself that justice has been done by the disciplinary committee or committees.

37. We find some unusual circumstances facing us. The entire Bar of India are of the opinion that the case was not as satisfactorily proved as one should be and we are also of the same opinion. All processes of the Court are intended to secure justice and one such process is the power of review. No doubt frivolous reviews are to be discouraged and technical rules have been devised to prevent persons from reopening decided cases. But as the disciplinary committee themselves observed there should not be too much technicality where professional honour is involved and if there is a manifest wrong done, it is never too late to undo the wrong. This Court possesses under the Constitution a special power of review and further may pass any order to do full and effective justice. This Court is moved to take action and the Bar Council of India and the Bar Association of the Supreme Court are unanimous that the appellant deserves to have the order against him disbarring him from practice set aside.

38. Looking at the matter for ourselves we find that the document said to be mutilated was not needed for the case. In any event it was only a carbon copy and not an original. No part of the typed portion was damaged except very slightly. The tear in two places equal to a third of a small postage stamp are the subject of the charge. In our opinion there was most probably no writing there as there was hardly any space available and the whole of the margin was available to write the attestation of 'true copy'. The clerks did not speak of any writing at first and now too in a very halting manner. No steps were taken to match the alleged pieces with the tears and the pieces have not been preserved. Thus there is the word of Amrik Singh against that of the appellant. There was a background of hostility which the appellant had created by his aggressive action in other cases. Whether he handled the paper roughly and a piece came off which he threw down without noticing it or the paper gave way and a piece fell (as it did when we handled it) it is not possible to say with definiteness. We find it difficult to believe that this mutilation, without any rhyme or reason, was done with a sinister motive. This is the unanimous

view of the entire Bar of India speaking through Counsel.

39. Our duty is clear. We could have paused to consider the law applicable to reviews in such matters but we do not think we should ascertain it in this case. This matter is one of the ethics of the profession which the law has entrusted to the Bar Council of India. It is their opinion of a case which must receive due weight. The Bar Council thinks that the decision against the appellant is unsustainable. We see no reason to differ from them. We accordingly grant review in this case and set aside the order disbaring the appellant from practice which had been passed against him. There shall be no order about costs.

Appeal allowed.

**AIR 1971 SUPREME COURT 116
(V 58 C 27)**

(From: Central Board of Excise and Customs, New Delhi)*

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

Becker Gray & Company (1930) Ltd., and others, Appellants v. The Union of India and another, Respondents.

M/s. Bunge & Co. Ltd., Intervener.

Civil Appeals Nos. 1178 to 1180 of 1967, D/- 23-1-1970.

(A) Foreign Exchange Regulation Act (1947), Sec. 12 (1) — Payment for exported goods — Filing of declaration as to valuation — Under-valuation in declaration does not amount to contravention of restrictions imposed by Section 12 (1). AIR 1970 SC 1597, Followed. (Para 3)

(B) Foreign Exchange Regulation Act (1947), Ss. 27, 23, 23A — Incorrect declaration by party in contravention of Rules framed under S. 27 or Forms prescribed under Rules — S. 23A cannot be invoked for levying penalty under Sec. 167 (8) of Sea Customs Act — Such declaration may be penalised under Section 23 — Appeals Nos. 47 to 50 of 1967, D/- 13-3-1967 (Central

(* Appeals Nos. 47 to 50 of 1967, D/- 13-3-1967, — Central Board of Excise and Customs, New Delhi.)

IN/IN/B1/70/RGC/B

Board of Excise and Customs, (New Delhi). Reversed. (Para 4)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 1597 (V 57) =

1969-1 SCC 91, Union of India
v. Rai Bahadur Sriram Durga
Prasad (P) Ltd. 3

M/s. N. A. Palkhiwala and P. P. Ginwala, Sr. Advocates, (M/s. D. N. Mukherjee, R. S. Kumar and A. Choudhury, Advocates, with them), for Appellants; Mr. N. S. Bindra, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents; Mr. M. C. Chagla, Sr. Advocate, (Mr. D. N. Gupta, Advocate, with him), for Intervener.

The following Judgment of the Court was delivered by

BHARGAVA, J.—The appellants in these appeals were exporters of Jute Carpet Backing Cloth and, in connection with some exports by them between the period January 1957 to January 1963, penalties have been imposed on them under Sec. 167 (8) of the Sea Customs Act for contravention of Section 12 (1) of the Foreign Exchange Regulation Act No. 7 of 1947 (hereinafter referred to as "the Act") in view of the provisions of Section 23A of the Act and Section 19 of the Sea Customs Act by the Adjudicating Officer. Their appeals to the Central Board of Excise and Customs (hereinafter referred to as "the Board") were dismissed, though the amounts of penalties imposed were reduced. The order of the Board dismissing the appeals has been challenged in these appeals before us by special leave.

2. The Board based its decision for upholding the penalties on the finding that the declarations given in purported compliance with Sec. 12 (1) of the Act were defective in two respects. One defect found was that, in the declarations, the invoice value of the goods was shown at a figure lower than the real sale value. The second defect found was that, in the declarations, it was stated that the invoice value declared was the full export value of the goods and was the same as that contracted with the buyer whereas, in fact, the goods had not been sold to the buyer and were being exported on consignment basis, so that the correct declarations should have been that the declarations contained a fair valuation of the goods which were unsold. The declarations were given

in Form G. R. I. prescribed by the Rules framed under Section 27 of the Act. On behalf of the appellants, the argument advanced was that these defects in the declarations did not amount to contravention of the restrictions imposed by Sec. 12 (1) of the Act, so that the imposition of these penalties was not justified.

3. So far as the question of under-valuation of the exported goods in the declarations or the documents accompanying the declarations is concerned, reliance was placed on the decision of this Court in *Union of India v. M/s. Rai Bahadur Shreeram Durga Prasad (P) Ltd.*, 1969-1 SCC 91 = (AIR 1970 SC 1597), where this Court held that under-valuation in a declaration under Sec. 12 (1) of the Act does not amount to contravention of the restrictions imposed by that provision. That decision is fully applicable to the present cases before us on this point and, in view of that decision, the imposition of the penalties, on the basis that the under-valuation of the goods amounted to contravention of Sec. 12 (1), is unjustified. We may add that we see no justification for granting the request of Mr. Bindra, learned counsel for the respondents, that that decision should be reconsidered by a larger Bench.

4. Mr. Bindra, however, urged that, in these cases, there was the distinctive feature that the Board also found that the declarations were further incorrect inasmuch as the goods were declared to have been sold, while they were being exported on consignment basis as unsold goods, and it was further stated in the declarations that the full export value of the goods is the value shown instead of stating that it was the fair valuation of unsold goods. The finding recorded by the Board, no doubt, shows that the declarations required to be made under the Rules in Form G.R.I. contained incorrect information; but that incorrect information related to points on which Sec. 12 (1) does not require a declaration. A declaration, which is in contravention of the Rules or the Forms prescribed under the Rules, may be penalised under Section 23 of the Act, but such contravention will not attract the provisions of the Sea Customs Act. Under Sec. 23A of the Act, only a breach of restrictions imposed by Sec. 12 (1) of the Act is to

be deemed in contravention of restrictions imposed by Sec. 19 of the Sea Customs Act. An incorrect declaration in contravention of the Rules made under Sec. 27 of the Act is not to be deemed a contravention of any restriction imposed by Sec. 19 of the Sea Customs Act. It is, therefore, quite clear that, in these cases, the imposition of the penalties under Section 167 (8) of the Sea Customs Act was totally unjustified. Consequently, these appeals are allowed with costs, and the orders of the Adjudicating Officer, and the Board imposing the penalties under Sec. 167 (8) of the Sea Customs Act are set aside. Penalties, if recovered, shall be refunded.

Appeals allowed.

AIR 1971 SUPREME COURT 117
(V 58 C 28)

(From: Gujarat)*

J. C. SHAH AND K. S. HEGDE, JJ.

M. D. Shukla and others, Appellants
v. The State of Gujarat and others,
Respondents.

Civil Appeal No. 458 of 1969, D/-
6-2-1970.

(A) States Reorganisation Act (1956), Ss. 115 (7), Proviso and 116 — Bombay Reorganisation Act (1960), Ss. 81 (6) Proviso and 82 — Effect of — Public servant allotted to another State — Conditions of service applicable immediately before 1-11-1956 cannot be affected to his disadvantage by rules made by State except with approval of Central Government.

The provisions of Ss. 115 and 116 of the States Reorganisation Act and those of Sections 81 and 82 of the Bombay Reorganisation Act are substantially the same. Section 116 provides for the continuance of officers in equivalent posts and under the proviso to Section 115 (7) a guarantee is given that the conditions of service applicable immediately before the appointed day in the case of any person who is allotted to another State cannot be varied to his disadvantage except with the previous approval of the Central Government. This protection could not be removed by the rules

(* Spl. Civil Appln. No. 1499 of 1966,
D/- 1-7-1968 — Guj.)

IN/IN/B23/70/KSB/P

made by the State subsequent to November 1, 1956, unless the previous approval of the Central Government was obtained thereto. (Paras 4, 8, 11)

(B) Civil Services — Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules (1957) — Absorption — Meaning of — Gujarat State Government's Order, D/- 19-8-1966 — Held amounted to absorption of ministerial secretariat staff of former States of Saurashtra and Kutch into Gujarat State secretariat staff — Order cannot be challenged as violative of R. 138, Bombay Civil Services Classification and Recruitment Rules, 1957. Spl. Civ. Appln. 1499 of 1966, D/- 1-7-1968 (Guj), Reversed.

The appellants who were holding permanent posts in the ministerial service of the Secretariat of the former Saurashtra and Kutch States were allotted to Bombay under the States Reorganisation Act and subsequently to State of Gujarat under the Bombay Reorganisation Act 1960. These officers who were serving in the district at their option were transferred to the Secretariat of the Gujarat State. By an order dated 19-8-1966 the State Government regularised their appointments in Secretariat designating the departments in which they were posted, posts to which appointed and the dates from which they were appointed. On a writ petition filed by the officers who were already in ministerial service, the High Court declared the Order D/- 19-8-1966 as invalid. On appeal to Supreme Court:

Held (i) that the order dated 19-8-1966 amounted to absorption within the meaning of that term in the Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules 1957. In the absence of determination of equivalent posts under the orders of the Central Government, the State of Gujarat was competent, as a matter of provisional arrangement to absorb the former Saurashtra and Kutch States personnel in the ministerial establishment of the Gujarat State Secretariat. (Paras 12, 13, 15)

(ii) that Rule 138 could not take away the statutory right vested in the personnel of the former Saurashtra and Kutch States under the States Reorganisation Act, 1956. Since the arrangement which was made by the Government of the State of Gujarat must be regarded as provisional and to enure so

long as the Central Government did not make a final decision, it was not open to the officers of the Secretariat to challenge the validity of that order. Spl. Civ. Appln. 1499 of 1966, D/- 1-7-1968 (Guj) Reversed. (Para 18)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 850 (V 55)=

1968-2 SCR 136, Union of India

v. P. K. Roy

10

(1965) AIR 1965 SC 136 (V 52)=

1964-7 SCR 549, N. Raghavendra

Rao v. Dy. Commr. South Kanara, Mangalore

9

Mr. M. C. Chagla, Sr. Advocate (M/s. S. K. Dholakia, Vineet Kumar and J. R. Nanavati, Advocates with him) for Appellants; Mr. S. T. Desai, Sr. Advocate (M/s. B. D. Sharma and S. P. Nayar, Advocates, with him) for Respondent No. 1; Mr. S. S. Shukla, Advocate, for Respondents Nos. 2 to 148.

The following Judgment of the Court was delivered by

SHAH, J.— Certain officers in the ministerial branch of the Secretariat Service of the State of Gujarat moved a petition in the High Court of Gujarat for an order directing the State Government to treat its order dated August 19, 1966 as "illegal, void and of no effect" and to forbear from enforcing its order treating the persons whose names were specified in the annexure to the order as servants of the "Secretariat cadre." The High Court of Gujarat granted the petition and declared the order dated August 19, 1966, invalid. With certificate granted by the High Court this appeal has been filed.

2. Prior to November 1, 1956, the appellants were holding permanent posts in the ministerial service of the Secretariats of the Part B State of Saurashtra and the Part C State of Kutch. By virtue of Section 8 of the States Reorganization Act 37 of 1956 the new State of Bombay, which included the territories of the States of Saurashtra and Kutch, was formed. S. 115 of the States Reorganisation Act made provisions relating to services other than All-India Services. By sub-section (1) of Section 115 it was enacted; inter alia, that every person who immediately before the appointed day was serving in connection with the affairs of any of the existing States specified therein shall, as from that day, be deemed to have been allotted to serve in connection with the affairs

of the successor State to that existing State. By the proviso to sub-section (7) it was provided that conditions of service applicable immediately before the appointed day to the case of any person allotted to another State shall not be varied to his disadvantage except with the previous approval of the Central Government. Section 116 provided for the continuance of officers in the same posts. By Section 117 power was conferred upon the Central Government to give directions to any State Government that may appear to be necessary for the purpose of giving effect to the provisions of Sections 114, 115 and 116 of the Act.

3. Under the States Reorganisation Act, 1956, the appellants were allotted service in connection with the affairs of the new State of Bombay. In exercise of the powers under Article 309 of the Constitution, the Government of Bombay sanctioned certain rules called "The Allocated Government Servants' (Absorption, Seniority, Pay and Allowances) Rules, 1957". Those rules governed the servants who were allotted to the State of Bombay on reorganisation. A large majority of the members of the ministerial branch of the Secretariats of the States of Saurashtra and Kutch were, it appears, unwilling to be posted in the Secretariat of the new State of Bombay. They were accordingly posted in the districts of the former States of Saurashtra and Kutch.

4. Under Act 11 of 1960 called "The Bombay Reorganisation Act" the States of Gujarat and Maharashtra were carved out of the territory of the new State of Bombay. Under Section 81 provisions relating to services other than All-India Services were made and by Section 82 provisions as to the continuance of officers in the same posts was made. By Section 83 power was given to the Central Government to give directions to the States. Those provisions were substantially the same as the provisions of Sections 115, 116 and 117 of the States Reorganisation Act, 1956. The appellants were allotted service in connection with the affairs of the State of Gujarat under S. 81 of the Bombay Reorganisation Act.

5. The newly constituted State of Gujarat finding a dearth of experienced officers in the Secretariat transferred the appellants at divers times between the years 1961, 1962 and 1963 to

the Secretariat of the State of Gujarat and assigned them duties in connection with the Secretariat Service. Orders were issued from time to time fixing their scales of pay and seniority. Apparently the Public Service Commission raised some objections about an attempted integration between the officers who were originally serving in the Secretariat Service, and those who were posted from the districts. Ultimately on August 19, 1966, the State Government issued the order to the following effect:

"The question of regularising the appointment to various posts in the Secretariat Department on and after 1st May 1960 of the drafted persons was under the consideration of Government for some time. Government is now pleased to direct in consultation with the Gujarat Public Service Commission that the persons shown in the accompanying statement should be treated to have been regularly appointed in the posts shown against their names in column-4 of the statement with effect from the date shown in column-5 in the Departments mentioned in column-3 of the statement.

2. As regards fixation of their pay and seniority orders have already been issued in Government Resolution General Administration Department No. SCT 1161-F, dated 25th April, 1961 and Government Resolution General Administration Department No. SCT-1162-KH, dated 14th March 1964. The Departments are requested to fix their pay and seniority accordingly."

Appended to the order was a list of 90 persons designating the departments in which they were posted, posts to which appointed and the dates from which they were appointed.

6. The officers of the Secretariat who before the date of the order constituted the ministerial service then filed the petition out of which this appeal arises challenging the validity of the order of the Government. The petition was founded on three grounds: (1) that the order violated Rule 138 of the Recruitment Rules framed by the Government of Bombay in 1957; (2) that the order violated the proviso to Clause (6) of Section 81 in that it altered the conditions of service of the applicants; and (3) that it violated the provisions of the Allocated Government Servants' (Absorption, Seniority, Pay and Allowances) Rules, 1957.

7. Counsel for the applicants conceded before the High Court that the transfer of the former Saurashtra and Kutch States Secretariat personnel to the Gujarat Secretariat per se was not open to objection. The High Court did not consider whether the Saurashtra and Kutch States Secretariat personnel had "any rights flowing on account of absorption and integration of service under the States Reorganisation Act, 1956 or the Allocated Government Servants' Rules, 1957". But the High Court held that since the impugned order purported to amalgamate the former Saurashtra and Kutch States personnel with the Gujarat Secretariat Service contrary to the terms of R. 138 of the Recruitment Rules, and the Government had no authority to vary the method of recruitment provided by the statutory Rule 138 of the Recruitment Rules which was mandatory, the orders of transfer to the Secretariat which were not made in the process of integration could not operate as absorption under the Allocated Government Servants (Absorption, Seniority, Pay and Allowances) Rules, 1957. The High Court also observed that when the ministerial service employees of the former Saurashtra and Kutch States Secretariats were absorbed in the districts, integration of the services was complete and any transfer thereafter to the Secretariat could not and did not amount to absorption in equivalent posts.

8. It is necessary first to examine the scheme of Sections 115 & 116 of the States Reorganization Act 1956. Section 115 was intended to provide for the conditions of service of employees who immediately before November 1, 1956 were serving in connection with the affairs of a State and were allotted to serve in connection with the affairs of another State. Power to fix the conditions of service was reserved exclusively to the Central Government. For that purpose the Central Government was authorised to establish one or more Advisory Committees to advise the Government on the division and integration of the services in the new States and for ensuring fair and equitable treatment to all persons affected by the provisions of Section 115 and for proper consideration of any representation made by those persons. By the proviso to sub-section (7) of S. 115 a guarantee was given to every allotted

public servant that his conditions of service shall not be varied to his disadvantage except with the previous approval of the Central Government. Section 116 provided for the continuance of officers in equivalent posts.

9. This Court in *N. Raghavendra Rao v. Dy. Commr. South Kanara Mangalore*, (1964) 7 SCR 549 = (AIR 1965 SC 136) held that the effect of sub-section (7) of Section 115 is to preserve the power of the State to make rules under Article 309 of the Constitution, but the proviso imposes a limitation on the exercise of that power; the limitation is that the State cannot vary the conditions of service applicable immediately before November 1, 1956 to the disadvantage of persons mentioned in sub-sections (1) and (2) of Section 115. In the view of the Court the broad purpose underlying the proviso to Section 115 (7) of the Act was to ensure that the conditions of service shall not be changed except with the prior approval of the Central Government, that is, before embarking on varying the conditions of service, the State Governments should obtain the concurrence of the Central Government.

10. In *Union of India v. P. K. Roy* (1968) 2 SCR 186 = (AIR 1968 SC 850) this Court held that it is the duty of the Central Government to integrate the services, but the State may be asked to prepare a provisional gradation list provided the Central Government maintains its control over it.

11. It is clear that the conditions of service applicable immediately before the appointed day in the case of any person who is allotted to another State cannot be varied to his disadvantage except with the previous approval of the Central Government. This protection could not be removed by the rules made by the State subsequent to November 1, 1956, unless the previous approval of the Central Government was obtained thereto.

12. It is true that the ministerial service personnel in the States of Saurashtra and Kutch, after they were allotted to the State of Bombay were posted and assigned duties in various districts in Saurashtra and Kutch. But in the absence of evidence to show that the previous approval of the Central Government was obtained, their right to be absorbed in equivalent

posts in the new State of Bombay and later in the State of Gujarat was not thereby affected. It appears that there has not been any equivalence established between the posts in the Secretariats of the States of Saurashtra and Kutch and the posts in the new State of Bombay and later in the State of Gujarat to which the members of the ministerial service of the Secretariats of former Saurashtra and Kutch States were allotted. The mere fact that they were posted and continued to render service in the Districts will not, in our judgment, affect the right of the personnel to be absorbed in the equivalent posts in the Secretariat and on terms not disadvantageous to those they were already entitled except with the previous approval of the Central Government.

13. It was conceded, and rightly, that the State has the authority to transfer, subject to the Constitution and the rules made under Article 309, any public servant to render service which by his training and aptitude he was competent to do. Transfer of the personnel from the States of Saurashtra and Kutch to the Secretariat in the State of Gujarat and assignment of duties performable by the ministerial staff in the Secretariat cannot be challenged, and that because they were posted between 1956 and 1960 in the Districts they will not be deprived of their statutory right under Section 115 (7) proviso. Posting in the districts was and must remain purely provisional, until final integration is made by the Central Government. It is common ground that no such final integration had been made by the Central Government.

14. Two grounds appealed to the High Court in deciding the case against the appellants: (1) that the appellants were transferred to the Secretariat of the State of Gujarat, but they were not absorbed in the ministerial service of the Secretariat of the State of Gujarat. In the view of the High Court there was nearly (sic) "regularisation" of the appointment of those persons for the purpose of performing service in the Secretariat; and (2) that the order dated August 19, 1966 was contrary to the Recruitment Rules, 1957.

15. If it be granted that the State was competent to transfer and did transfer the appellants to perform

service in connection with the affairs of the State in the Secretariat, it is difficult to hold that when the State "regularised" the service of the appellants in the Secretariat with the consent of the Public Service Commission there was no absorption under the Absorption Rules. It is true that the expression "absorption" has not been used in the order, but that will not justify an inference that there was no intention to absorb the former Saurashtra and Kutch States personnel in the Secretariat. In the absence of determination of equivalent posts under the orders of the Central Government, the State of Gujarat was competent, as a matter of provisional arrangement to absorb the former Saurashtra and Kutch States personnel in the ministerial establishment of the Gujarat State Secretariat. In terms the order says that the persons named therein "should be treated to have been regularly appointed in the posts shown against their names in column-4 of the statement" appended to the order. That, in our judgment amounted to absorption.

16. Original Rule 138 of the Bombay Civil Services Classification and Recruitment Rules, 1939, was deleted, and the following rule was substituted on May 22, 1957. The relevant part of the rule reads:

"138. The ministerial staff in the Secretariat and attached offices is divided into two Divisions.

(a) Upper; and (b) Lower.

(i) Superintendents: Appointments shall be made by promotion from among Senior Assistants.

(ii) Senior Assistants: Appointments shall be made by promotion from among Junior Assistants.

(iii) Junior Assistants: Appointments shall be made either:—

(a) by nomination on the results of a competitive examination held by the Bombay Public Service Commission, or

(b) by promotion from among members of the Lower Division.

Provided that not more than one out of every four vacancies in the posts of Junior Assistants shall ordinarily be filled by promotion.

(2) To be eligible for appointment by nomination a candidate must:—

(i) hold a degree in Arts, Law Science, Agriculture or Commerce of

a recognised University or possess an equivalent qualification;

(ii) have attained the age of 18 years; and

(iii) not have attained the age of 30 years in the case of members of the Lower Division appointed on the recommendation of the commission and who have graduated while in service and in any other case 24 years on the first day of the month immediately following month in which the posts are advertised by the Commission.

B. Lower Division

(b) Clerks, clerk-typists, typists: Appointments shall be made by nomination on the results of a competitive examination held by the Commission.

Provided that suitable members of Class IV services who while in that service, have passed the Secondary School Certificate Examination or an examination recognised by Government as equivalent to that examination, shall be eligible for appointment to the posts of clerks by promotion.

(2) To be eligible for appointment by nomination, a candidate must:—

(i) have passed the secondary school certificate examination or an examination recognised by Government as equivalent to that examination:

(ii) have attained the age of 18 years, and

(iii) not have attained the age of 23 years on the first day of the month immediately following the month in which the posts are advertised by the Commission.

A candidate for the post of clerk-typist or typist must, also be able to type neatly accurately at a minimum speed of 40 words per minute.

17. The High Court held that recruitment to the ministerial staff in the Secretariat could only be by nomination or by promotion from among members of the Lower Division, nomination being on the result of a competitive examination held by the Public Service Commission and promotion being from the subordinate staff. In view of this rule, according to the High Court, it was not open to the State Government to adopt any other method of recruitment of the members of the ministerial staff.

18. Counsel for the appellants contended that Rule 138 only dealt with the existing servants and did not pre-

vent any additional members from being amalgamated in the ministerial staff in the Secretariat. He also contended that the recruitment did not amount to admission of an officer for the first time in the service. It is unnecessary for the purpose of this appeal to consider these arguments. Assuming that Rule 138 requires the State to follow a certain method for recruitment to the ministerial service, that rule made under Article 309 of the Constitution cannot take away the statutory right vested in the personnel of the former Saurashtra and Kutch States which they acquired under the States Reorganisation Act, 1956, to hold posts in the new State which were equivalent and on terms which were not, unless the previous approval of the Central Government was obtained, disadvantageous. Since the arrangement which is made by the Government of the State of Gujarat must be regarded as provisional and to endure so long as the Central Government does not make a final decision, it is not open to the officers of the Secretariat to challenge the authority of the Government of Gujarat either to transfer officers from the Districts and to post and assign them duties in the Secretariat or to fix their pay and seniority among the officers in the Secretariat performing ministerial duties.

19. The appeal must therefore be allowed and the order passed by the High Court must be set aside. The petition filed by the respondents Nos. 2 to 148 will stand dismissed. There will be no order as to costs throughout.

Appeal allowed.

AIR 1971 SUPREME COURT 122 (V 58 C 29)

(From: Jammu and Kashmir)
I. D. DUA, J.

Latif Hussain, Petitioner v. The State of Jammu & Kashmir, Respondent.

Writ Petn. No. 126 of 1970, D/- 7-7-1970.

Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), S. 3 (3) — Order of detention to be approved by the Government with-

IN/IN/D523/70/MLD/M

in 20 days — Provision does not depend for its operation on arrest and detention of person ordered to be detained — Order of confirmation by Government made before arrest and detention of person — Detention is not illegal. (Para 4)

The following Judgment of the Court was delivered by

DUA, J.— Latif Hussain Malik, petitioner, forwarded his application dated March 10, 1970 from Central Jail, Jammu seeking his production in this Court for filing an application for a writ of habeas corpus. According to him, he was arrested on September 21, 1969. This application was treated as an application for writ of habeas corpus and on April 9, 1970 a rule nisi was issued.

2. According to the return the petitioner was detained on November 21, 1969 pursuant to an order dated November 6, 1969 with a view to preventing him from acting in a manner prejudicial to the security of the State. He was informed that it was against public interest to disclose to him the grounds of his detention. The State Government confirmed the order of detention on November 11, 1969.

3. The only contention raised on his behalf is that the order of confirmation by the Government was made before the petitioner's arrest and detention and that this rendered his custody illegal.

4. I am unable to sustain this contention. The order of detention was made by the District Magistrate on November 6, 1969. Under Sec. 3 (3) of the Jammu and Kashmir Preventive Detention Act this order had to be approved by the Government within 20 days. This provision does not depend for its operation on the arrest and detention of the person ordered to be detained. Merely because the petitioner could only be arrested on November 21, 1969 did not extend the period within which the order of detention made by the District Magistrate was required by the statute to be approved by the Government in order to extend the life of the order beyond 20 days. The order of detention is not illegal and the petitioner's detention is in full accord with the procedure established by law.

5. This petition accordingly fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 123
(V 58 C 30)

(From Madras: AIR 1965 Mad 164)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The Tirunelveli Motor Bus Service Co., Appellant v. The Commissioner of Income Tax, Madras, Respondent.

Civil Appeal No. 1775 of 1969, D/-11-8-1970.

Income-tax Act (1922), Sec. 10 (2-A)
— Amount representing bonus payable shown in 1950-51 on debit side — Amount remained unpaid for some years — In accounting year 1957-58 part of amount paid to employees in full settlement and balance credited to profit and loss accounts — Credit treated as income accruing in the year 1957-58 and assessed to tax — Record containing no indication that any allowance or deduction in respect of bonus was made in the assessment year 1950-51 nor was there any proof that assessee had obtained any benefit relating thereto in assessment year 1957-58 — Amount is not assessable under Sec. 10 (2A). AIR 1965 Mad 164, Reversed. (Para 2)

The following Judgment of the Court was delivered by

GROVER, J.—This is an appeal by certificate from a judgment of the Madras High Court answering the following question which had been referred to it under Section 66 (1) of the Indian Income-tax Act, 1922, hereinafter called the "Act" in the affirmative and against the assessee.

"Whether on the facts and in the circumstances of the case, the sum of Rs. 54,479 is assessable in the year 1957-58 under the provisions of Section 10 (2A) of the Income-tax Act of 1922?"

The assessee is a private limited company. It runs a fleet of buses. For the assessment year 1950-51 the assessee returned an income of Rupees 14,555/-. The Income-tax Officer required the assessee to furnish various particulars and documents under Sec-

IN/IN/D952/70/GKC/B

tion 22 (4) of the Act. These were not furnished. Apart from committing a default under S. 22 (4) it committed a default under Sec. 23 (2). The Income-tax Officer made an assessment under Sec. 23 (4) estimating the assessee's income at Rs. 1,80,000/-. On appeal to the Appellate Assistant Commissioner it was reduced to Rs. 1,30,000/-.

2. In the accounts relating to the assessment year 1950-51 the assessee had claimed a sum of Rs. 4,09,786/- as establishment charges which included a sum of Rs. 71,949/- representing the annual bonus payable to the employees. This amount had actually not been paid but had been shown on the debit side. The assessee ran into financial difficulties and the bonus remained unpaid for some years. In the accounting year relevant to the assessment year 1957-58 with which we are now concerned a sum of Rs. 17,470/- was paid to the employees as bonus in full settlement and the balance of Rs. 54,479/- was credited to the profit and loss account. The Income-tax Officer treated the credit of Rs. 54,479 so made as income accruing in the year of account. The Appellate Tribunal while dealing with the appeal observed:

"Regarding the second contention, in the return made by the assessee for 1950-51, the assessee claimed bonus to employees and thereafter arrived at the business income at Rs. 14,555. The assessment, however, was completed under Section 23 (4) having as a guide the earlier year's assessment or a total income of about Rs. 130,000/-. No doubt in the assessment of 1949-50, there was a bonus claim too. From this feature alone, it is difficult to conclude that the Income-tax Officer had scrutinised the computation and had considered the bonus too in his estimate. Actually, in the manner the estimate has been made, it would appear that the book position had been given the go-by. Unless the department is able to identify any particular item of expense as having been already allowed as a deduction in an earlier assessment conclusively Sec. 10 (2A) is not available for recoupment. This contention too is accordingly accepted."

The High Court did not agree with the above view of the Tribunal although it appears that it did not disagree with

the conclusion of the Tribunal that the record did not contain any indication that the Income tax Officer had made any allowance in respect of bonus for which provision had been made while making the assessment for the assessment year 1950-51. On that finding of the Tribunal it could hardly be regarded as established that either any allowance or deduction had been granted in respect of a trading liability of the assessment year 1950-51 or it had been proved that the assessee had obtained any benefit relating to such trading liability in the assessment year 1957-58 which would attract the provisions of S. 10 (2A) of the Act. That provision only applies when an allowance for deduction has been made in the assessment of any year in respect of any loss, expenditure or trading liability incurred by the assessee and subsequently during any previous year the assessee receives any amount in respect of such loss or expenditure or has obtained some benefit in respect of such trading liability by way of remission or cessation thereof in which event the amount received by him has to be deemed to be profits and gains. On the finding of the Tribunal the condition of Sec. 10 (2A) could not be said to have been satisfied and the addition of Rs. 54,479 made by the Income-tax Officer in the assessment for the year 1957-58 was not justified. It is apparent that the question whether an allowance had been granted or a deduction made in respect of a trading liability had to be decided by referring to the order relating to the assessment year 1950-51 and it could not be determined by drawing inferences from what was done in respect of the assessment of an earlier year.

3. In our judgment the finding of fact of the Appellate Tribunal did not warrant the answer returned by the High Court which is hereby discharged. The answer would thus be in the negative and in favour of the assessee. The appeal is accordingly allowed with costs.

Appeal allowed.

AIR 1971 SUPREME COURT 125
(V 58 C 31)

(From: Allahabad)
K. S. HEGDE AND
I. D. DUA, JJ.

Subedar, Appellant v. The State of U. P., Respondent.

Criminal Appeal No. 164 of 1967,
D/14-8-1970.

Constitution of India, Article 136 — Criminal appeal on special leave — Appreciation of evidence — Case depending on circumstantial evidence — Lower Courts holding accused guilty — Conclusions arrived at ignoring the principle that evidence must necessarily point only to the guilt of accused excluding any reasonable possibility of his innocence — Supreme Court can interfere with conclusion and proceed to review and reappraise evidence — Held on facts that there was no suspicion against accused and that he was involved as an after-thought and hence conviction set aside — Judgment appealed from Allahabad High Court, Reversed. AIR 1952 SC 343, Referred. (Para 8)

Cases Referred: Chronological Paras
(1952) AIR 1952 SC 343 (V 39) =
1952 SCR 1091 = 1953 Cri LJ
129, Hanumant v. State of
M. P. 8.

The following Judgment of the Court was delivered by

DUA, J.—Subedar, appellant, has come up on appeal by special leave from his conviction under Section 396 read with Sec. 109, I. P. C. and sentence of life imprisonment imposed by the temporary Civil and Sessions Judge, Hardoi and affirmed on appeal by the Allahabad High Court according to which the appellant's case is covered by the second and third clauses of Sec. 107, I. P. C. read with Explanation 2.

2. Seven persons, including the appellant, were tried, five under S. 396, I. P. C. and Subedar, appellant, and Tota under Sec. 396 read with Section 109, I. P. C. The trial court convicted six and acquitted one. The appeal of the convicted persons to the High Court failed. In this Court only Subedar has appealed.

3. According to the courts below Subedar and Tota were not amongst

the dacoits. They are, however, stated to have assembled at the time of the dacoity which was committed on the night between the 21st and 22nd March, 1963. Subedar, it is not disputed, is a first cousin of the victims of the dacoity (Gajodhar and Chhotey Lal) and is a resident of village Zafarpur where the dacoity was committed. Gajodhar, it may be stated, was killed during the course of the dacoity. The circumstances on which the prosecution relied against Subedar in the High Court are:

(1) bitter enmity between Gajodhar and Chhotey Lal and Subedar and Tota who are fast friends on the other; (sic)

(2) the nature of the incident suggests that the primary object of the culprits was to commit the murder of Gajodhar and Chhotey Lal and though the culprits did not succeed in killing Chhotey Lal his property was looted as an incidental venture;

(3) on the evening preceding the night of dacoity, Subedar and Tota were seen in a grove south of the village within less than a mile from Zafarpur in the company of five or six persons including appellant, Gajju son of Chheda, armed with kantas, bhallas and lathis. On the night following the dacoity was committed at the house of Gajodhar and Chhotey Lal when Gajodhar was killed and Chhotey Lal seriously injured and in the commission of that offence Gajju son of Chheda participated;

(4) Subedar, who was inimical towards Gajodhar and Chhotey Lal tried to show false sympathy for them by raising an alarm at the time of dacoity;

(5) on the following morning Subedar lodged first information report by way of Peshabandi in order to put the police on wrong track.

4. None of these circumstances is, in our view, established on the record; nor can they be considered either singly or collectively to be sufficiently cogent to bring home to the appellant abetment of the offence under Section 397, I. P. C. beyond the possibility of a reasonable doubt. According to Chhotey Lal undoubtedly there was a dispute in regard to property between him and the appellant who is his first cousin and indeed court litigation was pending between them. But it seems

to be an exaggeration to say that there was bitter enmity between the parties. In support of the second circumstance also we are unable to find any evidence on the record. The inference seems to be conjectural, not supported by the material on the record on any rational basis. The charge under Section 396, I. P. C. also postulates murder in the course of the commission of dacoity and does not quite support the High Court's view. In any event it does not implicate the appellant. After dealing with the last two circumstances we will turn to the third. Subedar, it is conceded, actually lodged the first information report (Exhibit Ka 7) on the morning of 22nd March. It was a written report covering nearly three printed pages. Now, merely because there was some dispute or litigation pending in courts between the parties it does not follow that the report was lodged by the appellant with the object of misleading the police or in order to forestall suspicion against him. From the contents of the report it is not possible to draw this inference. There is nothing misleading in it and certainly nothing indicative of a design to put the police on a wrong track. In fact its detailed nature suggests that it must have emanated from the persons who had taken full account of the loss and had even evaluated the articles stolen. The dacoity and murder it may be recalled was committed on the night between 21st and 22nd March. The written information was given by Subedar on the morning of the 22nd at 6-15 A. M. at the police station about 7 miles away. In these circumstances the suggestion of Peshabandi (to forestall suspicion) by the appellant seems to be wholly insupportable. Chhotey Lal, who appeared as P. W. 2, admitted in his cross-examination that Subedar, accused, had gone to the police station to lodge a report regarding the occurrence in question. Though he denied that he had sent Subedar to lodge the report he was constrained to admit that the following day at 9 or 10 O'clock the Sub-Inspector had also told him that Subedar had gone to the police station to lodge the report. He also admitted that when the Sub-Inspector informed him about Subedar having gone to lodge the report on his behalf he did not tell the Sub-Inspector

that Subedar was inimical to him and his report should, therefore, be shown to him for scrutiny. The detailed nature of the report, the contents of which have not been shown to be incorrect, were presumably given to the appellant by Chhotey Lal. These circumstances support rather than negative the theory that Chhotey Lal had sent Subedar for lodging the report. There is, however, positive evidence in the statement of Dammar (P. W. 5) that Chhotey Lal had sent the appellant to lodge a report. Dammar (P. W. 5) had also accompanied Subedar along with Lila Pradhan and the chowkidar. We see no reason for disbelieving the testimony of P. W. 5. P. W. 17 Chaudhri Ishrat Hussain, Sub-Inspector, has stated that Subedar was arrested by him on the 15th April, 1963. The statement of Babu Ram (P. W. 7) and Khanna (P. W. 8), the two witnesses on whose evidence the appellant is convicted were recorded by him on the 28th March, 1963. It is, however, not known as to what they had stated during the investigation. A day earlier on 27th March, 1963 P. W. 17 had actually framed a charge-sheet against Jitta and Gajjoo son of Eupan Pasi. On the 9th April, 1963 an application by Chhotey Lal was received by P. W. 17 in which suspicion was cast on Subedar and Tota. Prior to 9th April, according to this witness, he had no proof of these two persons having participated in the dacoity though he admits that he had already recorded Chhotey Lal's statement before 9th April. In fact Sub-Inspector Deoray (P. W. 15) had recorded Chhotey Lal's statement as early as March 22, 1963 and it was from P. W. 15 that P. W. 17 took over the investigation. P. W. 15 does not say that Chhotey Lal or anyone else suspected the appellant. The foregoing discussion strongly indicates that the implication of Subedar, appellant, was an after-thought. Circumstances Nos. 4 and 5 have thus no basis and appear to be purely conjectural.

5. We may now appropriately refer to the statements of the two witnesses whose sole testimony appears to be the basis of the appellant's conviction. The third circumstance is founded on their evidence. Babu Ram (P. W. 7) whose statement was recorded in court on the 28th March, 1964 has deposed that about a year earlier he was

returning to his village from the Consolidation Office at Thomharwa in the evening when the sun was about to set. Khanna and Bashir were with him. When they reached near the big grove lying to the south of village Daulatpur, he saw five or six persons in the grove. Out of them he knew only Tota and Subedar. Others were not known to him. They were armed with ballam, Kanta and lathis. On the same night a dacoity was committed at the residence of Gajodhar and he was killed by the dacoits. Khanna (P. W. 8) has deposed in similar terms. The contradictions elicited in their cross-examination would show that their statement on the question of the presence of the appellant in the grove cannot be safely relied upon. According to Babu Ram who had on the day in question gone from Katghara (which was also the village of Khanna, P. W. 8) to the Consolidation Office in village Thomharwa along with Khanna and Bashir, they had made merely oral request in regard to their grievance without submitting any application. Khanna (P. W. 8) has, on the other hand, stated that Bashir and Babu Ram met him only on his way back home. He professes to have submitted his application but expresses ignorance about Babu Ram and Bashir having done so because they had not met him in the Consolidation Office. This contradiction on the facts and circumstances of this case is very material and casts a serious doubt on the veracity of their version in regard to the circumstances in which they profess to have seen the appellant near the grove. In their cross-examination a suggestion was also thrown that Subedar had appeared as a defence witness in a case against one Jailal Chammar, in which case these two witnesses had appeared for the prosecution. This suggestion was apparently intended to indicate the motive on the part of these two witnesses to falsely implicate the appellant. The evidence of these two witnesses seems to us to be too infirm to carry conviction to their deposition that they saw the appellant as alleged. It is indeed somewhat surprising how their evidence was accepted by the courts below, without appropriate scrutiny, in holding the presence of the appellant in the grove. But even assuming that the appellant was seen

by them as alleged, that by itself is not sufficient to connect him with the offence charged. It cannot be said that from this it follows as a necessary and the only rational or reasonable inference that the appellant was an abettor of the dacoity and murder. On a practical approach the reasonable possibility of his innocence cannot be ruled out. The Courts below have erroneously ignored this vital aspect.

6. At this stage we may refer to some evidence which was recorded in the High Court on appeal. It appears that on behalf of the present appellant and Tota it was complained in the High Court by their counsel that the circumstance that these two accused persons had been seen with the culprits who committed dacoity in question was not clearly put to them under Sec. 342, Criminal P. C. by the trial court, and that they were misled in their defence because the trial court had questioned them in a manner which suggested that they had been charged with having actually committed dacoity along with the other culprits. The High Court, therefore, summoned Subedar and Tota who were on bail. This order was passed on 11th August, 1966. Subedar was accordingly examined by the High Court on the 24th August and was confronted with the statements of Babu Ram and Khanna (P. W.s. 7 and 8). The appellant denied that he was ever in the grove as stated by these witnesses and stated that he had enmity with them and added that they were police witnesses. Subedar also expressed a desire to produce witnesses in his defence. Lila Pradhan was in the circumstances examined by the High Court as D. W. 4. It may be recalled that according to Dammar, Lila Pradhan was also one of the persons who had gone to lodge the report with him and Subedar. Lila Pradhan deposed in his examination-in-chief in the High Court that Chhotey Lal had asked Subedar to go and lodge a report in the police station about the dacoity in question. Subedar also raised an alarm at the time of the dacoity. This witness, after his cross-examination by the counsel for the State, was examined by the High Court at some length. He was village Pradhan for six years. His statement seems to be frank and straightforward. From the evidence on the record we are also inclined to

think that the appellant must have been included in the original list of prosecution witnesses. This view finds support from the statement of sub-Inspector, Deorary, (P. W. 15) who had recorded the statements of Chhotey Lal and Dammar and of other witnesses on the day following the decoity. P. W. 17 seems to us to have wrongly denied this fact.

7. Apart from the material which we have just discussed there is no other relevant material to which our attention has been invited or which we have come across on this record relevant to the case against Subedar. From this it is crystal clear that there was no real suspicion against Subedar and that it was in April that he was involved as an after-thought presumably because of some other ulterior consideration. Both the trial Court and the High Court seem to us to have completely gone wrong in convicting Subedar.

8. The respondent's counsel strongly contended that this Court should not interfere on special leave appeal under Article 136 with the conclusions of the two Courts below holding the appellant guilty. We do not agree with this submission. This Court undoubtedly does not normally proceed to review and reappraise for itself the evidence in criminal cases when hearing appeals under Article 136. But when the judgment under appeal has resulted in grave miscarriage of justice by some misapprehension or mistake in the reading of evidence or by ignoring material evidence then it is not only empowered but is expected to interfere to promote the cause of justice. Article 136 is worded in very wide terms and the power conferred by it is not hedged in by any technical hurdles. This overriding and exceptional power has been vested in this Court to be exercised sparingly and only in furtherance of the cause of justice. In the present case which depends only on circumstantial evidence, the Courts below have completely ignored the warning given by this Court in *Hanumant v. The State of Madhya Pradesh*, 1952 SCR 1091 = (AIR 1952 SC 343) against the danger of conjectures and suspicions taking the place of proof. The caution was reiterated thus:

"It is well to remember that in cases where the evidence is of a circumstan-

tial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused." (pp. 1097-8)

Of course, the evidence on basic or primary facts has to be approached in the ordinary practical way but the conclusions in the case of circumstantial evidence must necessarily point only to the guilt of the accused excluding any reasonable possibility of his innocence. We are not satisfied that the evidence against the appellant in this case satisfies this test. The appeal accordingly succeeds. The order of the Court below as against the appellant is set aside and the appellant acquitted.

Appeal allowed.

AIR 1971 SUPREME COURT 128
(V 58 C 32)

(From: Madhya Pradesh)

S. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Ram Chandra Rai, Appellant v.
State of Madhya Pradesh and others,
Respondents.

Civil Appeal No. 429 of 1970, D/-
12-8-1970.

Constitution of India, Article 226 —
Petition for writ of mandamus directing excise department not to recover licence fee for period for which no liquor was supplied — Dismissal in limine on ground that contractual remedies were open — Dismissal is improper — Rights and obligations arising under a licence issued under statute cannot, without further investigation, be said to be purely contractual— Judgment of Madhya Pradesh High Court, Reversed. (Para 1)

IN/IN/D960/70/GKC/B

The following Judgment of the Court was delivered by

SHAH, J.—The appellant who is a licensee of a liquor shop applied to the High Court of Madhya Pradesh for a writ of mandamus directing the excise department of the State not to recover license fee for those days in respect of which liquor was not supplied to the appellant. The High Court summarily rejected the petition observing that the supply of liquor to the appellant was under a contract to the Government and "if the Government had committed a breach of the contract the remedy is elsewhere". It cannot, without further investigation, be said that the rights and obligations arising under a licence issued under a statutory authority are purely contractual. In our judgment the High Court was in error in summarily rejecting the petition.

2. We set aside the order of the High Court and direct that the High Court do issue Rule to the State and decide the case on the merits.

3. In this Court the appellant has filed copies of certain correspondence relating to the payment of compensation in respect of those days on which liquor was not supplied. It appears from a perusal of that correspondence that the State had not adopted the attitude that they will insist upon recovering or retaining the licence fee notwithstanding that they had not supplied the liquor to the liquor shopkeepers.

4. The appeal is allowed. There will be no order as to costs.

Appeal allowed.

AIR 1971 SUPREME COURT 129
(V 58 C 33)

(From: Allahabad — Lucknow Bench)
J. C. SHAH AND A. N. GROVER, JJ.

Balwant Singh and others, Appellants v. Mool Chand and others, Respondents.

Civil Appeal No. 1581 (N) of 1969, D/- 19-8-1970.

Constitution of India, Articles 226 and 136 — Interim relief — High Court can pass ex parte orders granting immediate relief to petitioner —

IN/IN/D973/70/GKC/B

1971 S. C./9 I G—9

Single Judge passing order adversely affecting rights of non-petitioners without giving notice to them — Order not granting any relief to petitioners — Order held to have caused grave injustice to non-petitioners justifying interference by Supreme Court even though the order was interlocutory and was passed by a Single Judge — Judgment of Allahabad High Court (Lucknow Bench), D/- 2-6-1969, Reversed. (Paras 4 and 6)

The following Judgment of the Court was delivered by

GROVER, J. :— This appeal is directed against an order of a learned single judge of the Allahabad High Court (Lucknow Bench). The facts speak for themselves and the appeal must succeed.

2. The Saharanpur-Delhi route is an inter-State route the major portion of which lies in the State of Uttar Pradesh. In exercise of the powers conferred by Section 47 (3) of the Motor Vehicles Act, 1939, hereinafter called the "Act", the Transport Authority fixed the strength of operators who could ply stage carriages on the aforesaid route at 100. The appellants, who are 15 in number, were among those operators to whom permits had been issued in December 1957 and they were plying their vehicles since that date. They were initially granted permits for a period of three years but their permits were renewed subsequently at successive intervals. In October 1959 a notification was issued by the State of Uttar Pradesh under Section 68-D (3) of the Act declaring the Delhi-Saharanpur route as a notified route to the total exclusion of all private operators including the appellants. The notification further provided that the U. P. Government Roadways would have a monopoly of plying buses on the said route. Although 100 operators were affected by the said notification only 50 out of them including the appellants challenged the validity of the said notification by means of writ petitions in the Allahabad High Court. These petitions were allowed in October 1961 and the High Court directed the State of Uttar Pradesh not to enforce the scheme against the 50 writ petitioners. The State Government was, however, free to enforce the scheme against the remaining operators who had not pre-

ferred writ petitions. The result, therefore, was that the operators who had succeeded in the writ petitions, including the appellants, and the U. P. Government Roadways jointly operated the vehicles on the Delhi-Saharanpur route.

3. In May 1968 the Regional Transport Authority rejected the applications of the appellants for renewal of the permits. The applications of the present respondents Nos. 3 and 4 were rejected on the ground that the route was a notified route and no permit could be granted to them. These respondents had applied for fresh permits being granted to them. The appellants and respondents 3 and 4 preferred appeals to the State Transport Appellate Tribunal. The appellants succeeded before the Tribunal and their permits were renewed upto April 28, 1972. The appeals of respondents Nos. 3 and 4 were dismissed. In May 1969 respondents Nos. 1 to 4 filed a writ petition in the High Court challenging the decision of the Appellate Tribunal. Apart from other respondents the appellants were also joined as respondents in the writ petition. The writ petition was admitted by the Division Bench sitting at Lucknow on May 14, 1969 and the following order was made, "Admit, issue notice." The stay petition which had also been filed was directed to be put up for orders on the next day. On May 15, 1969 the Bench made the following order:

"Mr. Fanthome, the learned counsel for the petitioners, and Mr. Umesh Chandra, the learned Standing Counsel, have jointly suggested that the hearing of the writ petition itself be concluded at a very early date. They have jointly suggested that the writ petition be heard on 4th of August, 1969.

Office shall show this case in the list of that date.

Learned counsel for the parties have also suggested that in the meantime the Government may put more buses on the route in question in order to meet the shortage caused by the exit of respondents Nos. 3 to 17 consequent to the order of this Court".

On May 19, 1969 appellant No. 9 who was a respondent in the writ petition before the High Court filed appearance through an advocate. Similarly on May 21, 1969, appellant No. 1 filed his

appearance. The High Court closed for the vacation on May 23, 1969. It appears that respondent No. 1 and the other respondents filed a petition before the Vacation Judge which came up for hearing on June 2, 1969 and he made an order which must be set out in extenso:—

"This is an application of Moolchand and others stating that in compliance with the order passed by a Bench of this Court on 15-5-1969 on their application (C. M. An. No. 763 (W) of 1969) the Secretary to the Regional Transport Authority has not restrained respondents Nos. 3 to 17 from plying their stage carriage buses on the Saharanpur to Delhi route on the pretext that the order of the Bench dated 15-5-1969 was vague. The Chief Standing Counsel is present and has no objection to the order dated 15-5-1969, which was passed by a Bench of which I was also a member, being clarified today. It may be recalled that in the writ petition in which C. M. An. 763 (W) of 1969 was filed by Mool Chand and others, the present applicants had challenged the renewal of the permits in favour of respondents Nos. 3 to 17 as illegal. The order which was passed by the Bench on 15-5-1969 in C. M. An. No. 763 (W) of 1969, is therefore clarified and it is made clear that respondents Nos. 3 to 17 are restrained from plying their stage carriage buses on the Saharanpur to Delhi route. It is further clarified that Roadways may ply buses on the route in question in order to meet the shortage caused by the above restrain order which has been passed against operation of the stage carriage buses of respondents Nos. 3 to 17."

4. It was suggested before the Division Bench on May 15, 1969 by counsel for the writ petitioners and the learned Standing Counsel that the Government might put more buses on the route in order to meet the shortage which would be caused by the "exit of the respondents 3 to 17 consequent to the order of this Court". It is not at all comprehensible to which order this had reference and how it was assumed that respondents 3 to 17 in the writ petition were to be prohibited from plying their buses as they had succeeded before the Appellate Tribunal and their permits had been renewed upto April 28, 1972. So long as the order of the Tribunal stood and

was not set aside by the High Court there was no question of their so called exit from the field of operators on the Delhi-Saharanpur route unless the High Court made a proper order after hearing them. Before the Vacation Judge it was sought to be represented that the Secretary to the Regional Transport Authority had not restrained respondents 3 to 17 in the petition from plying their stage carriage buses on the pretext that the order of the Bench dated May 15, 1969 was vague. The Vacation Judge proceeded to clarify the order by saying that respondents 3 to 17 before him (the present appellants) would be restrained from plying their stage carriage buses and that the U. P. Government Roadways could ply their buses in order to meet the shortage caused thereby. The result of this order was that without having any notice or opportunity to present their case the appellants were debarred from plying their stage carriage buses and the Government Roadways which had not filed any writ petition and had not asked for any relief from the High Court were enabled to ply their buses in place of the appellants. Neither the Division Bench nor the Vacation Judge thought of issuing a notice to the appellants to show cause in the matter. Even though the orders were made at the interim stage and in miscellaneous proceedings the rules of natural justice could not have been simply ignored in the manner in which it was done merely because the Standing Counsel, who was representing the State or the U. P. Government Roadways, gave his consent or joined in the suggestion made on behalf of the petitioners that in place of the appellants the U. P. Government Roadways be permitted to ply their buses on the route in question. There can be no manner of doubt that the High Court could pass an ex parte stay order to give immediate relief to the writ petitioners but in the present case the order which was made afforded no relief to them but was meant for stopping the plying of buses by the appellants and enabling the U. P. Government Roadways to ply buses instead. If the High Court considered it necessary in the circumstances of the case to make such an order the only proper and just course to follow was to hear the appellants and then proceed to make the order.

5. We are further unable to find any justification or reason for the order which was made on June 2, 1969 by the Vacation Judge which clearly modifies and varies the order made on May 15, 1969 by the Division Bench. The Division Bench never restrained the appellants from plying their stage carriage buses during the pendency of the writ petition. If it was intended that the appellants should be so restrained the learned Judges would have made an order in clearer terms.

6. We are fully alive to the course which could have been followed by the appellants of moving the High Court to vacate the impugned order. It is equally true that this court is very reluctant to interfere in interlocutory orders but the present case is of such a nature that we are satisfied that there has been a grave miscarriage of justice. We would, therefore allow the appeal and set aside the order of the Vacation Judge made on June 2, 1969. The appellants shall be entitled to their costs in this court.

Appeal allowed.

AIR 1971 SUPREME COURT 131
(V 58 C 34)

(From: Delhi)

J. M. SHELAT AND
C. A. VAIDIALINGAM, JJ.

Dr. Raghu Nath, Appellant v. Competent Officer, Delhi and others, Respondents.

Civil Appeal No. 36 of 1967, D/- 20-8-1970.

Evacuee Interest (Separation) Act (1951), S. 10 and Rule 11B of the Rules made under the Act — Mortgagee becoming evacuee and his interest vesting in Custodian — Leases and allotments by Custodian — Payment of mortgage debt by mortgagor — Competent Officer can accept payment but cannot give vacant possession to mortgagor — He can give only symbolical possession to him — (Administration of Evacuee Property (Central) Rules (1950), R. 14) — (Civil P. C. (1908), S. 35).

The result of the relevant provisions of the Administration of Evacuee Property Act and the Evacuee Interest (Separation) Act and the rules made

IN/IN/D974/70/DHZ/M

under these Acts is that though the Competent Officer must accept the mortgage amount when tendered by a mortgagor and the mortgage debt thereupon would be satisfied, he cannot exercise the power to redeem the mortgaged property and order the Custodian to deliver up its vacant possession to the mortgagor in the absence of any agreement between the mortgagor and the Custodian, and that in exercising his jurisdiction under Sec. 10 the Competent Officer cannot direct the Custodian to cancel or vary the terms of the leases or allotments made or granted by the latter firstly because he has no such power under Sec. 10 or any other provision of the Separation Act, and secondly, because such an order would amount to compelling the Custodian to act in a manner contrary to the provisions of Rule 14 of Administration of Evacuee Property (Central) Rules (1950). The only thing which the Competent Officer can do is to accept the mortgage amount whereupon interest would cease to run. In the absence of agreement the mortgagor-claimant cannot demand from the Competent Officer that the latter should accept the mortgage amount tendered by him and direct simultaneous delivery of possession of the mortgaged property. The power to redeem the mortgaged property being subject to Rule 11B(b), the only thing that the Competent Officer can at the most do is to order symbolical possession. If after the Competent Officer has ordered sale of the property and satisfaction of the mortgage debt from the sale proceeds thereof, the mortgagor has paid up full mortgage amount and the Competent Officer has accepted the same under Sec. 10 Proviso and has paid the amount to the Custodian, the order for sale cannot stand and has to be set aside. As the mortgage stands discharged the Competent Officer is bound to direct symbolical possession though not vacant possession of the property to the mortgagor. AIR 1960 All 626 & 1969-3 SCC 79; Relied on. (Paras 9, 10, 12)

The order for costs of the appeal would ordinarily follow the result, but in view of the fact that the Competent Officer was entitled to pass the order of sale in the circumstances then prevailing it is fair and equitable, though this order is set aside, that the parties

should bear their own costs.

(Para 13)

Cases Referred: Chronological Paras

(1969) Civil Appeals Nos. 2416 and 2417 of 1966, D/- 26-9-1969 = 1969-3 SCC 79, All India Film Corpn. Ltd. v. Raja Gyan Nath.	12
(1960) AIR 1960 All 626 (V 47) = 1960 All LJ 492, Ek Nawaz Khan v. Competent Officer	11

The following Judgment of the Court was delivered by

SHELAT, J.—In 1933 the appellant built a bungalow situate at 27, Curzon Road, New Delhi on a plot acquired by him under a permanent lease from the Secretary of State for India. In 1943 he mortgaged the said property with possession in favour of one K. B. Bunyad Hussain but obtained a lease thereof at the same time from the mortgagee and continued to reside therein as a tenant. In November 1949, the mortgagee left for Pakistan whereupon the Custodian of Evacuee Property under the Administration of Evacuee Property Act, 1950 (hereinafter referred to as the Administration Act) declared him to be an evacuee and his interest in the said property as the mortgagee as evacuee property. The appellant alleged that sometime in November 1949 the Custodian forcibly dispossessed him and either allotted or let out, or allowed the said premises to be occupied by certain persons. In 1954, the appellant made an application to the Competent Officer under the Evacuee Interest (Separation) Act, 1951 (hereinafter referred to as the Separation Act) for separating his interest as the mortgagor and tenant in the said property. In those proceedings a sum of Rs. 1,45,735/- was ultimately held to be due as the mortgage debt under the said mortgage. The appellant claimed that he was entitled to obtain vacant possession of the said property against payment by him of the mortgage debt. The claim was rejected on the ground that there was no agreement between the appellant and the Custodian for getting the vacant possession and also on the ground that the Competent Officer, under the Separation Act, had no power to direct the Custodian to hand over to the appellant vacant possession. From that time onwards the appellant made diverse applica-

tions to the Competent Officer and the Appellate Officer under the Separation Act for obtaining vacant possession against payment of the mortgage debt. In one such application made in 1958 he alleged that a compromise had been arrived at between him and the Custodian under which he would pay the mortgage debt and the Custodian thereupon would simultaneously hand over to him vacant possession. By his order dated March 23, 1959, the Appellate Officer, however, held that no such compromise had been entered into by the Custodian and that the correspondence between the appellant and that authority merely indicated that what was agreed to was that upon the appellant lodging certain verified claims an open portion shown as A, B, C and D in the plan of the property would be handed over to him. On this finding the Appellate Officer dismissed the appellant's application as he had neither paid the mortgage money nor put in the verified claims as suggested in the said correspondence and confirmed the order of the Competent Officer under which the property had been ordered to be sold in the absence of any agreement with the Custodian or the payment of the mortgage debt.

2. The appellant then filed a writ petition in the High Court of Punjab (in the Circuit Bench at Delhi) for quashing the said order of sale and for a direction to the Competent Officer to hand over vacant possession against payment by him of the mortgage debt. A learned Single Judge dismissed the petition holding that the Competent Officer had no jurisdiction to order such vacant possession against the Custodian or against the tenants or allottees inducted on the property by the Custodian. The Letters Patent appeal against that judgment and order was also dismissed. The appellant then filed the present appeal after obtaining special leave from this Court.

3. It is not disputed that until the time when the Competent Officer passed his order for sale of the property and the Appellate Officer confirmed it the appellant had not paid the mortgage amount, nor was there any agreement between him and the Custodian whereunder the latter would

hand over vacant possession of the property against payment of the mortgage debt. However it is conceded by counsel for respondents 1 and 3 that the appellant has since then paid the entire mortgage debt and the Competent Officer has under Sec. 10 of the Separation Act accepted that amount. Two questions on these facts, therefore, arise for determination; (1) whether the order for sale passed by the Competent Officer and confirmed by the Appellate Officer was rightly passed although the appellant had repeatedly offered to pay the mortgage debt on condition, however, that he would be given vacant possession at the same time, and (2) assuming that the Competent Officer had no power to direct the Custodian to hand over vacant possession, what was the effect of the repayment of the mortgage debt by the appellant since then and the acceptance thereof by the Competent Officer.

4. The rights in the property in question which vested in the Custodian were those of the mortgagee on his being declared an evacuee and his rights as such mortgagee in the property in question as evacuee property. Under the Transfer of Property Act, 1882 the interest which the Custodian could claim was the interest in the property transferred to the mortgagee for securing repayment of the money advanced by him. Since the mortgage was usufructuary, the mortgagee, and after his having been declared an evacuee, the Custodian, could claim and retain possession till the mortgage debt was paid and the mortgage was discharged. If the property is let out in the meantime, the mortgagee and those claiming his interest therein are entitled to receive the rents and profits accruing from the property in lieu of interest or towards part payment of the mortgage debt. Under Sec. 60 of that Act, the mortgagor has a right at any time after the principal amount has become due to require the mortgagee on payment or tender of the mortgage debt (a) to deliver to him the mortgage deed and all other documents relating to the mortgaged property which are in the mortgagee's possession or power, (b) to deliver possession where the mortgagee is in possession of the

mortgaged property and (c) to retransfer the mortgaged property to him or to such third person as he may direct at his cost. Under Sec. 76, the mortgagee in possession has to manage the property as a person of ordinary prudence would manage it if it were his own. Under Sec. 83, the mortgagor, provided his right of redemption is not barred, may deposit in the court where he might have instituted a suit for redemption to the account of the mortgagee the mortgage debt then due. The court thereupon has to issue a notice to the mortgagee and on the mortgagee stating the amount due to him and his willingness to accept the money so deposited in full discharge of the mortgage debt, pay the amount to the mortgagee on his depositing the mortgage deed and all other documents relating to the mortgaged property. Where the mortgagee is in possession of the property, the court before paying the amount has to ask him to deliver possession thereof to the mortgagor. When the mortgagor has tendered or deposited in court the mortgage debt together with interest thereon and has done all that is to be done by him to enable the mortgagee to take such amount out of court, and a notice, as aforesaid, has been served on the mortgagee under S. 83 interest ceases to run. If the mortgagee thereafter refuses to accept the amount so deposited or to deliver the mortgage deed and other documents or possession of the property where it is in his possession, the remedy of the mortgagor is to file a suit for redemption. The position, therefore, is that upon the mortgage being paid off, the mortgagor is entitled to have the property restored to him free from the mortgagee's security. The repayment of the debt would be made against delivery of possession and of the mortgage deed and other documents, and these have to be simultaneous transactions. A tender of the mortgage deed or a deposit thereof in court conditional upon the mortgagee then and there delivering possession or executing reconveyance, if required, and handing over the deeds would be a good tender so that if it were to be refused interest would cease running. It follows that a mortgagee is not permitted to deal with the property in such a way that upon discharge of the debt the property cannot be restored. (see Fisher

and Lightwood's Law of Mortgage (8th Ed.) p. 482).

5. Is the position of a mortgagor any the different than under the Transfer of Property Act by reason of the evacuee property legislation? In other words, could not the appellant have tendered to the Competent Officer the mortgage amount due by him on condition that he should be given physical and not merely symbolical possession of the mortgaged property.

6. Upon the mortgagee being declared an evacuee and his interest as such mortgagee in the premises in question an evacuee property, his interest in the mortgaged property vested under Sec. 8 of the Administration Act in the Custodian from the date of the notice issued under Sec. 7 of the Act. Under Sec. 8 (4) any person in possession of the mortgaged property would be deemed thenceforth to be holding the property on behalf of the Custodian and would be bound on demand by him to surrender possession to him. The Act having under Sec. 4 an overriding effect on any other law for the time being in force or any instrument having effect by virtue of any such Act, the Custodian, under the powers conferred on him by Section 10, could take all such measures he might consider necessary for securing, administering, preserving and managing any evacuee property including transferring "in any manner whatsoever" the evacuee property "notwithstanding to the contrary contained in any law or agreement relating thereto." Under Section 12, the Custodian is empowered, notwithstanding anything contained in any other law for the time being in force, to cancel any allotment, terminate any lease or amend the terms of such lease or agreement under which any evacuee property is held or occupied by a person whether such allotment, lease or agreement was granted or entered into before or after the commencement of the Act. Under sub-sec. (3), he is authorised to eject such person and take possession, if such person fails to surrender possession on demand made by him in the manner provided by Sec. 9, i. e., by even using such force as would be necessary for taking possession. It is conceded by the respondents that under these powers the Custodian had taken over possession of the mortgaged property and the property has since

then been in possession of persons who were either allotted portions of it or who were inducted therein as tenants by the Custodian. It is also conceded that the Custodian has refused, notwithstanding demands made by the appellant, to evict these persons from the property and hand over vacant possession to the appellant even on the appellant tendering the mortgage amount. This was presumably done by reason of the fact that though Section 12 empowers him to cancel an allotment or a tenancy made or created by him, Rule 14 (2) of the Administration of Evacuee Property (Central) Rules, 1950 lays down that in the case of a lease or an allotment granted by the Custodian he may evict a person on a ground justifying eviction of a tenant under a law relating to the Rent Control or for any violation of the conditions of the lease or allotment. From the provisions dealing with the vesting of the evacuee property, the powers of the Custodian, appeals and revisions from his order and the overriding nature of the provisions of the Act it is clear that the Administration Act is a self-contained code.

7. In 1951, Parliament passed the Evacuee Interest (Separation) Act, LXIV of 1951 (hereinafter referred to as the Separation Act). The Statement of Objects and Reasons shows that it was passed on account of the difficulty of administering evacuee properties in which there were both evacuee and non-evacuee interests and to solve the hardship felt by non-evacuees, who by reason of such properties being in possession of the Custodian, were unable to obtain satisfaction of their claims in view of the prohibitive provisions of the Administration Act and in particular its Section 17. The Act, as its long title declares, was passed for the separation of interests of evacuees from those of non-evacuee persons in composite properties. Sections 4 and 5 of the Act provide for the appointment of Competent Officers and their jurisdiction. Section 7 provides for submission of claims by a person claiming interest in a composite property. Clause (e) of sub-sec. (2) requires that where a claim is made by a mortgagor the total amount due on the mortgage debt and the particulars necessary to determine the same should be set out in such a

claim. Section 8 provides for an inquiry to be made by the Competent Officer and provides that the order to be made by him shall contain, amongst other things, the amount due to the evacuee in a case where the claim is made by a mortgagor. Sub-sec. (2) of Sec. 8, however, provides that where the Custodian has determined that the property in question or any interest therein is evacuee property, such determination is binding on the competent officer. The proviso to that sub-section lays down that nothing contained in sub-sec. (2) shall debar the competent officer from determining the mortgage debt in respect of such property or any interest therein or from separating the interest of the evacuee from that of the claimant under Sec. 10. Section 10 provides that notwithstanding anything to the contrary in any law or contract or any decree or order of the civil court or other authority, the competent officer may, subject to any rules that may be made in this behalf, take all such measures as he may consider necessary for the purpose of separating the interest of the evacuee from those of the claimant in any composite property and in particular may:

"(b) in the case of any claim of a mortgagor or a mortgagee,—

(i) pay to the Custodian or the claimant the amount payable under the mortgage debt and redeem the mortgaged property; or

(ii) sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof; or

(iii) partition the property between the mortgagor and the mortgagee having regard to the share to which the mortgagee would be entitled in lieu of his claim;"

Clause (c) empowers him to adopt a combination of all or some of these measures. The proviso to the section provides that in any case where the claimant is a mortgagor and tenders the amount due, the competent officer shall accept the same in full satisfaction of the mortgage debt. The competent officer, by virtue of the proviso, is thus under an obligation, where the claimant is a mortgagor and tenders the mortgage amount due, to accept such amount in full satisfaction of the mortgage debt and thereupon interest on the mortgage amount would cease to run. Under clause (b), he is also

empowered in such a case to redeem the mortgaged property.

8. The argument was that where the mortgage amount is tendered by the mortgagor and the competent officer accepts it in satisfaction of the debt due under the mortgage, the mortgage debt is satisfied, interest thereon ceases to run and the mortgage is discharged. Consequently, there would be no question of the competent officer adopting any of the measures provided in sub-clauses (ii) and (iii) of clause (b) of the section, that is to say, there could be no occasion for him either to sell the property for satisfaction of the mortgage debt or to partition the property between the mortgagor and the mortgagee, as, on satisfaction of the mortgage debt the mortgage is discharged and the mortgagee's interest in the mortgaged property ceases or comes to an end. The only measure which in that event he can adopt would be that under clause (b) (i), i. e., to pay to the Custodian the mortgage debt and redeem the mortgaged property. It was said that that being the position under Sec. 10, the appellant was entitled to tender the mortgage amount in satisfaction of the debt due under the mortgage on condition that the mortgage should be redeemed and possession of the property given to him. The Competent Officer in the proceedings before him under Section 7 was bound to accept the mortgage amount and redeem the mortgaged property. The argument would be valid if Section 10 had been untrammelled and the powers given therein to the Competent Officer were not made subject to the Rules which may be made under the Act. The Legislature, it seems had a purpose in making the powers contained in Sec. 10 and their exercise by the Competent Officer subject to the rules. It must have been aware of (i) that the Administration Act is, as aforesaid, a self-contained code; (ii) that the Custodian appointed thereunder is not an authority subject to the power or control of the Competent Officer and (iii) that the Administration Act, by Sections 10 and 12 thereof, confers several powers on the Custodian including the power to transfer the property vested in him. He can, therefore, create a lease or grant allotment and thus induct on the property tenants or allottees.

Under Sec. 12 of that Act the Custodian has been empowered to cancel or terminate a lease or allotment. But no such power is conferred on the Competent Officer either under Sec. 10 or under any other section of the Separation Act, nor have the powers of the Custodian been made subject to the powers of the Competent Officer or his orders. On the other hand, it would appear from a reading of the provisions of the Separation Act that the object of enacting it was to enable non-evacuees to have their interests separated in composite properties and to grant power to the Competent Officer to achieve that object. But we do not find anywhere in either of the two Acts any provision by which the Custodian is made subject to the power or control of the Competent Officer or enabling the Competent Officer to pass any order which would curtail or otherwise affect the powers of the Custodian. It would seem that the two Acts have different objects and schemes and the authorities established under them are independent of each other. The powers conferred on the Competent Officer had, therefore, to be so provided that they could be exercised in harmony and consistently with the provisions of the Administration Act and the duties and functions of the Custodian thereunder. It was for that reason that the Legislature laid down in Section 10 of the Separation Act that the powers conferred thereunder on the Competent Officer were to be subject to the rules made under that Act. Had it not been so, there would have resulted a conflict in the exercise of the respective powers given to the Custodian and the Competent Officer by the two Acts, and consequently, a failure in the smooth working out of the provisions of the two Acts.

9. Rule 11B of the Rules made under the Separation Act provides that a Competent Officer "having regard to the provisions of the proviso to Sec. 10 of the Act" shall, for the purpose of separating the evacuee interest from other interests in a composite property, adopt any of the measures in the order of preference set out therein. Clause (b) of that rule provides that in the case of a claim by a mortgagor or a mortgagee (i) where both the Custodian and claimant agree, the Competent Officer can exercise

the powers conferred on him under sub-clause (i) or sub-clause (ii) of clause (b) of Section 10 of the Act, and (ii) where there is no such agreement, he can sell the mortgaged property for satisfaction of the mortgage debt and distribute the sale proceeds thereof. The effect of this rule read in conjunction with Section 10 of the Act, however harsh it may apparently seem to be, is that though the Competent Officer has to accept the mortgage amount tendered by a mortgagor and thus discharge the mortgage debt and interest thereupon ceases to run on the principal amount and though he can adopt any one of the measures set out in Sec. 10, including redemption of the mortgage, he cannot order such redemption and direct the Custodian to deliver vacant possession of the property in the absence of an agreement between the Custodian and the mortgagor-claimant. It follows that in the absence of such agreement the mortgagor-claimant cannot demand from the Competent Officer that the latter should accept the mortgage amount tendered by him and direct simultaneous delivery of possession of the mortgaged property. The power to redeem the mortgaged property being subject to R. 11B (b), the only thing that the Competent Officer can at the most do is to order symbolical possession, but he cannot direct the Custodian to give vacant possession. The reason is clear, for, such an order would in effect be an order directing the Custodian to cancel the leases or allotments granted by him and eject the tenants or allottees from the property. Such an order would at once be in conflict with R. 14 of the Administration of Evacuee Property (Central) Rules, 1950. That rule provides that while exercising his power under Section 12 of that Act, namely, the power to cancel or vary the terms of a lease or allotment, the Custodian, in the case of a lease or allotment granted by him, can evict a person only on any of the grounds justifying eviction of a tenant under any rent control law for the time being in force in the State concerned or for any violation of the conditions of the lease or the allotment. Cl. 4 of that rule further lays down that before cancelling or varying the terms of the lease or before evicting any leases the Custodian must serve a show

cause notice on such lessee and afford him a reasonable opportunity of being heard. If the custodian is satisfied on hearing the concerned lessee that he is not liable to eviction under a rent control Act in force in the State where the property is situate or has not contravened any of the provisions of the lease, he cannot cancel the lease nor can he evict the lessee except only as provided by clause 5 of that rule on the ground that such eviction is necessary or expedient for the preservation or proper administration or management of such property or for carrying out any other object of the Act. He, therefore, cannot evict a tenant or an allottee on the ground that it is necessary to do so for the separation of an interest of a non-evacuee mortgagor as that would not be one of the purposes of the Administration Act.

10. The result which emerges from the discussion of the relevant provisions of the two Acts and the rules thereunder made is (1) that though the Competent Officer must accept the mortgage amount when tendered by a mortgagor and the mortgage debt thereupon would be satisfied, he cannot exercise the power to redeem the mortgaged property and order the Custodian to deliver up its vacant possession to the mortgagor in the absence of any agreement between the mortgagor and the Custodian, and (2) that in exercising his jurisdiction under Sec. 10 the Competent Officer cannot direct the Custodian to cancel or vary the terms of the leases or allotments made or granted by him, firstly because he has no such power under Sec. 10 or any other provision of the Separation Act, and secondly, because such an order would amount to compelling the Custodian to act in a manner contrary to the provisions of the aforesaid Rule 14. The exercise of the power to redeem being subject to the rules, it would not be competent for the Competent Officer, by reason of Rule 11B (b), to order delivery of possession by the Custodian in the absence of an agreement between him and the mortgagor-claimant.

11. In view of this position, the appellant could not have insisted that he would tender or pay the mortgage debt only against delivery of vacant possession of the property in the absence of any agreement between him

and the Custodian. The only thing which the Competent Officer could do in the circumstances was to accept the mortgage amount whereupon interest would cease to run. It is not in dispute that the appellant, insisting as he was all throughout upon being given vacant and not merely symbolical possession, did not actually tender or make payment of the mortgage debt. The mortgage debt, therefore, remained outstanding. The mortgage also stood intact, and therefore, the only measure which the Competent Officer could adopt and which in fact he adopted was to order sale of the property and satisfy the mortgage debt from the sale proceeds thereof. The order which he passed and which was confirmed by the Appellate Officer was in the circumstances then prevailing validly and competently made. The appellant's grievance against it, therefore could not be sustained. (Cf. in this connection the position of an auction purchaser as decided in *Ek Nawaz Khan v. The Competent Officer*, AIR 1960 All 626).

12. But it is conceded that since the passing of the said order the appellant has paid up the full mortgage amount and the Competent Officer has, as he was bound to do under Section 10, proviso, accepted that amount. Presumably that amount has been paid by him to the Custodian. Therefore, the mortgage debt is no longer outstanding. Though this event has happened after the impugned order was passed, we must in fairness take notice of the fact that the mortgage debt is no longer outstanding and the mortgaged property is now free from the mortgagee's security, and therefore, from the interest vested in the Custodian. It is true that the Competent Officer, as already stated, can adopt any of the three measures set out in Sec. 10 (b) of the Separation Act or adopt a combination of all or some of them, but as emerging from the discussion above, he cannot redeem the property and order delivery of vacant possession in the absence of an agreement between the Custodian and the appellant. That is quite clear. But the order of sale passed by him and confirmed by the Appellate Officer also cannot stand, firstly, because the mortgage debt now stands satisfied, and secondly because he can order sale only for satisfaction of the

mortgage debt and for distribution of the sale proceeds thereof between the mortgagor and the mortgagee. There being now no question of the satisfaction of the mortgage debt since it now stands satisfied and the property being now freed from the mortgagee's security, the order for sale cannot stand and cannot be allowed to stand. At the same time the Competent Officer cannot order the Custodian to deliver vacant possession although the appellant has paid the mortgage amount and the Competent Officer has accepted it in satisfaction of the mortgage debt. In view of Ss. 10 and 12 of the Administration Act, the powers and duties of the Custodian thereunder and under the rules made under that Act, the provisions of Sec. 10 of the Separation Act and Rule 11B of the rules made thereunder, the only thing that could be offered and given to the appellant was symbolical possession of the property. Such a result, no doubt, would be inconvenient, and may even appear to be harsh and unfair as the appellant would be driven to file proceedings for eviction of tenants and allottees now in possession of the property. (See *All India Film Corporation Ltd. v. Raja Gyan Nath*, Civil Appeals Nos. 2416 and 2417 of 1966, D/- 26-9-1969 (SC)).

13. In view of the payment of the mortgage amount by the appellant and the acceptance of it by the Competent Officer, the order directing sale has now become untenable and has, therefore, to be set aside. The mortgage stands discharged and the Competent Officer is bound to direct symbolical possession of the mortgaged property to the appellant. To this extent the appeal succeeds. The order for costs of the appeal would ordinarily follow the result, but in view of the fact that the Competent Officer was entitled to pass the order of sale in the circumstances then prevailing it is fair and equitable, though this order is set aside, that the parties should bear their own costs.

Appeal partly allowed.

AIR 1971 SUPREME COURT 139
(V 58 C 35)

(From: Gujarat)*

K. S. HEGDE AND A. N. GROVE, JJ.

The Union of India and others, Appellants v. Mohanlal Ishwar Dass Panchal and another, Respondents.

Civil Appeal No. 557 of 1966, D/- 31-8-1970.

Administration of Evacuee Property Act (1950), Section 2 (f) (as it stood before Amending Act 11 of 1953) — Custodian of Evacuee Property holding 51 per cent or more shares of a company — Property of that company becomes evacuee property. Spl. C. A. No. 1055 of 1965 (Guj). Reversed.

If the Custodian of Evacuee Property holds 51 per cent or more of the shares of any company then the property of that company becomes an evacuee property. The shares of the company which had already vested in the Custodian under the law as stood before 1953 are not diverted by the Amending Act of 1953 as the amendment was not given retrospective effect. (Paras 8, 9)

Where 51 per cent shares of a company "A" were held by another company "B" which was declared evacuee in 1951 as its all shareholders had become evacuee, the property of the company "A" also becomes evacuee property. Spl. C. A. No. 1055 of 1965 (Guj), Reversed. (Para 11)

The following Judgment of the Court was delivered by

HEGDE, J.:— This appeal by certificate arises from the judgment of a Division Bench of the Gujarat High Court in Spl. Civil Appln. No. 1055 of 1965 on its file.

2. The 1st respondent herein is the Chairman of the Board of Directors of Kathiawar Industries Ltd. The Custodian of Evacuee properties sought to proceed against that company under Section 10 (2) (ii) of the Administration of Evacuee Property Act, 1950 (to be hereinafter referred to as the 'Act'). The 1st respondent challenged those proceedings before the High Court of Gujarat by means of a petition under Article 226 of the Constitution. The High Court has

(*Spl. Civil Appln. No. 1055 of 1965 — Guj.)

allowed that petition and quashed the impugned proceedings. Hence this appeal.

3. The issued capital of Kathiawar Industries Ltd., is Rs. 5 lacs. The total number of shares subscribed, preferential as well as ordinary are 1,21,961. One of the shareholders of that company is a company by name Bhawani Investment Company Ltd. That company held 12,100 shares. The case of the appellants is that all the shareholders of Bhawani Investment Co. Ltd., had become evacuees and therefore the Bhawani Investment Co. Ltd. has become an evacuee property. The 1st respondent denied the fact that all the shareholders of Bhawani Investment Co. Ltd., had become evacuees. That issue had not been gone into by the High Court. The High Court has assumed for the purpose of this case that all the shareholders of Bhawani Investment Co. Ltd., had become evacuees but it opined that that fact cannot make the Bhawani Investment Co. Ltd., an evacuee property. It observed that an incorporated company has a personality of its own different from that of its shareholders and that personality does not disappear with the transfer of the shares of its shareholders.

4. The appellants sought to take over the management of Kathiawar Industries Ltd., on the ground that more than 51 per cent of the shares of that company had vested in the Custodian of Evacuee Property. Admittedly if the property of the Bhawani Investment Co. Ltd., is held not to be an evacuee property then all the shares of that company cannot automatically vest in the Custodian. Only the shares of the evacuee shareholders can vest in him. The 1st respondent has challenged the right of the Custodian to claim to take over the management of Kathiawar Industries Ltd., on various grounds. The High Court has not adjudicated upon most of those grounds because it was of the opinion that its decision as regards the shares of Bhawani Investment Co. Ltd., coupled with the decision of that High Court in another proceeding as regards another block of shares is sufficient to take the case out of the purview of Section 10 (2) (ii) of the Act. Hence all that we have to consider in this appeal is whether the High Court

was right in holding that even if all the shareholders of Bhawani Investment Co. Ltd., had become evacuees, the property of that company cannot be held to have vested in the Custodian. For the purpose of this appeal, we shall proceed on the basis that all the shareholders of Bhawani Investment Co. Ltd., had become evacuees at the relevant time and on that basis proceed to examine whether the property of that company had vested in the Custodian of Evacuee Property.

5. The case for the appellants is that all the shareholders of the Bhawani Investment Co. Ltd., had become evacuee prior to July 19, 1951. This is clear from a notice issued by the Assistant Custodian to the Bhawani Investment Co. Ltd., on July 19, 1951. That is also the view taken by the Custodian General. Whether this assumption on the part of those authorities is correct or not is a matter that has to be decided by the High Court. The High Court has not decided that question. Therefore we shall assume for the purpose of this appeal that all of them had become evacuees sometime prior to July 19, 1951.

6. Section 2 (f) of the Act as originally enacted defined "evacuee property" thus:

" "evacuee property" means any property of any evacuee (whether held by him as owner or as trustee or as a beneficiary or as a tenant or in any other capacity, and includes any property which has been obtained by any person from an evacuee after the 14th day of August, 1947, by any mode of transfer which is not effective by reason of the provision contained in Section 40) but does not include—

(i) any ornament and any wearing apparel, cooking vessels, or other house-hold effect in the immediate possession of an evacuee;

(ii) any property belonging to joint stock company the registered office of which was situated before the 15th day of August, 1947 in any place now forming part of Pakistan and continues to be so situated after the said date."

7. That section was amended by S. 2 (1-A) of the amending Act of 1951. Section 2 of the amending Act reads:

"In clause (f) of Section 2 of the Administration of Evacuee Property Act, 1950 (hereinafter referred to as

the said Act), after sub-clause (1), the following sub-clause shall be inserted and shall be deemed always to have been inserted namely:—

(1-A) belonging to a joint stock company of which not less than fifty-one per cent of the shares are held by evacuees, notwithstanding that the registered office of such company is situated in any part of the territories to which this Act extends or"

8. In view of this clause if the Custodian of Evacuee Property held 51 per cent or more of the shares of any company then the property of that company became an evacuee property. This definition was given retrospective effect. In view of this provision the property of Bhawani Investment Co. Ltd. must be held to have become evacuee property.

9. By Act 11 of 1953, the Act was further amended. That amending Act also amended clause 2 (f) and the definition of the "evacuee property" was substantially altered. The new definition does not take in the contents of Section 2 (f) (1-A) referred to earlier. The provisions of the amending Act 1953 were not given retrospective effect. Therefore it follows that the shares of the company which had already vested in the Custodian under the law as it stood before 1953 were not divested. The 1953 Act incorporated an additional clause in Section 10 (2) of the Act. After Section 10 (2) (i), a new clause 10 (2) (ii) was added. That clause reads:

"In any case where the evacuee property which has vested in the Custodian consists of fifty one per cent, or more of the shares in a company, the Custodian may take charge of the management of the whole affairs of the company and exercise, in addition to any of the powers vested in him under this Act, all or any of the powers of the directors of the company, notwithstanding that the registered office of such company is situated in any part of the territories to which this Act extends, and notwithstanding anything to the contrary contained in this Act or the Indian Companies Act, 1913 (VII of 1913) or in the articles of association of the company:

Provided that the Custodian shall not take charge of such management of the Company except with the previous approval of the Central Government."

10. It may be noted that this clause was not given retrospective effect.

11. The learned Judges of the High Court while deciding the case under appeal did not advert to the definition of the "Evacuee property" after the same was amended in 1951 which definition as seen earlier was in force till the Act was further amended in 1953. Evidently their attention was not invited to that definition. In view of that definition, if the contention of the appellants that all or even a substantial portion of the shareholders of the Bhawani Investment Co. Ltd., had become evacuees before 1953 is correct then the property of that company must be held to have become an evacuee property. In that view, it is unnecessary to consider the broader question whether under law a limited company can be an evacuee. In this case we are not concerned with the "evacuees", we are only concerned with "evacuee property".

12. For the reasons mentioned above we allow this appeal, set aside the judgment of the High Court and remit the case to that Court for deciding the other questions arising for decision. The costs of this appeal shall be costs in the cause.

Appeal allowed.

AIR 1971 SUPREME COURT 141
(V 58 C 36)

(From: Rajasthan)

K. S. HEGDE AND A. N. GROVER, JJ.

M/s. Davecos Garments Factory and another, Appellants v. State of Rajasthan, Respondent.

Civil Appeal No. 1082 (N) of 1970, D/- 31-8-1970.

Constitution of India, Article 299 (1) — Agreement between Government and private party — Government officer signing the agreement with his official designation without however stating that agreement was executed "on behalf of Governor" — Agreement sufficient to establish that officer was authorised to execute it — Held, there was sufficient compliance with requirements of Article 299 (1). AIR 1963 SC 1685, Foll. (Para 6)

IN/IN/E97/70/RGC/B

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 1685 (V 50) =

(1964) 3 SCR 164, Union of India v. A. L. Rallia Ram 5

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal from a judgment of the Rajasthan High Court in which the sole question for determination is whether the agreements which were executed between the appellant and the respondent fulfil the requirements of Article 299 of the Constitution.

2. In a suit filed by the respondent against the appellant for recovery of Rs. 86,000 as damages for breach of contract on the basis of agreements which were executed by the Inspector-General of Police Rajasthan a preliminary issue was framed to the following effect:

"Whether the agreements are not in accordance with Art. 299 of the Constitution of India and hence the suit is not maintainable?"

The trial court held that the agreements complied with the provisions of the aforesaid Article. Its decision was upheld by the High Court where the matter was taken on the revisional side.

3. Para. 1 of the main agreement which was executed on March 22, 1960 was as follows:

"An agreement made on 22nd day of March, 1960 between Messrs. Daveco's Garments, Jaipur (hereinafter called the approved Contractor which expression shall, where the context so admits, be deemed to include his heirs, successors, executors and administrators) of the one part and the Governor of the State of Rajasthan (hereinafter called the Government which expression shall, where the context so admits be deemed to include his successors in office and assigns) of the other part." In Clause 4 (1) it was clearly provided that the payment was to be made by the Government through the Inspector-General of Police, Rajasthan, at the rate set forth in the schedule. In clause 3 (a) the Government agreed that if the contractor duly fabricated the contracted articles and complied with the terms and conditions of the contract the Government, through the Inspector General of Police, would pay to the contractor the amount payable for each and every consignment.

The concluding portion of the agreement was as follows:

"In witness whereof the parties hereto have set their hand on 22nd day of March, 1960.

Signature of the
approved contractor.

Accepted.

Witness: 1.

Witness: 2

Sd.

I. G. of Police,

Rajasthan, Jaipur."

4. Article 299 (1) of the Constitution provides that all contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such person and in such manner as he may direct or authorise. It is common ground that the agreement Annexure B was expressed to be made by the Governor of the State of Rajasthan who was to be called the "Government" in its other clauses and that the Inspector General of Police had been duly authorised to execute the same on his behalf. The sole objection taken was to the form of execution inasmuch as it was not stated in so many words that the Inspector General of Police had signed the agreement on behalf of the Governor. This gave rise to the contention which was pressed in the courts below and before us that all the requirements of Art. 299 of the Constitution were not satisfied.

5. The present appeal stands concluded by the judgment of this court in *Union of India v. A. L. Rallia Ram*, (1964) 3 SCR 164 = (AIR 1963 SC 1685), in which it was held that the letter of acceptance of the tender signed by the Chief Director of Purchases fulfilled all the requirements of Section 175 (3) of the Government of India Act, 1935. That section employed the same language as is to be found in Art. 299 (1) of the Constitution. The Chief Director of Purchases had subscribed his signature in his official designation and had not stated in the description that the contract was

executed on behalf of the Governor-General but the court found that on a fair reading of the contents of the letter in the light of the obligations undertaken thereunder it would be reasonable to hold that the contract was executed on behalf of the Governor-General. It was added that no rule made by the Governor-General had been placed before the court showing that in executing a contract for the sale of "war disposal goods" the officer authorised in that behalf must describe himself as signing on behalf of the Governor-General of India. There can be no manner of doubt that in the present case on a reading of Annexure B and in particular clauses 1 and 4, the agreement was expressed to be made by the Governor and was also executed on his behalf.

6. The learned Additional District Judge and the High Court referred to Rule 255 of the General Finance and Account Rules which deal with the purchase of stores for use in the public service but it was rightly held that they did not govern the execution of contracts for the fabrication of garments. In the absence of any properly framed rule requiring the specific mention of the words "on behalf of the Governor" at the place where the authority authorised by the Governor to enter into the contract has to append his signature it is not possible to hold that the agreements in the present case did not fully comply with the requirement of Art. 299 (1) of the Constitution. The appeal fails and it is dismissed with costs.

7. It is unfortunate that the suit has remained stayed on account of the pendency of the proceedings arising out of the interlocutory order disposing of the preliminary issue. It is hoped that the trial court will now proceed to dispose of the suit expeditiously.

Appeal dismissed.

AIR 1971 SUPREME COURT 143.**(V 58 C 37)****(From Kerala)*****J. C. SHAH AND****V. BHARGAVA, JJ.**

State Bank of Travancore, Appellant v. Elias Elias and others, Respondents.

Civil Appeal No. 1720 of 1968, D/- 4-9-1970.

(A) Banking Regulation Act (1949), Sec. 45 (5) (i) — Guarantee under — Nature — Merger of Banks — Rank and status of employee of transferor Bank must be maintained.

The guarantee under clause (i) of Sec. 45 (5) of the Act does not cover merely the remuneration: it covers the terms and conditions of service as well. It would be a gross denial of the guarantee if the employee is not given the rank and status which he had in the transferor bank. It is not open to the transferee bank to "fit" an employee of the transferor bank performing the duties of a clerk into a subordinate cadre manned by employees performing duties which are not clerical, but of peons, watchmen, sweepers and the like. On the ground of lack of experience and qualifications a person cannot be deprived of his rank and status in the transferee bank. Clause (ii) to the first proviso of Sec. 45 (5) (i) does not authorise the transferee bank to "fit" an employee in the transferee bank into a post with rank and status lower than the rank and status enjoyed by the employee in the transferor bank.

(Paras 9, 10)

Where a person was working as a Civil Agent in transferor Bank and he was given the status of a clerk in that Bank, on merger of that Bank the transferee Bank could not fix him in the cadre of "subordinate staff" on ground that he lacked in educational qualifications and experience. He was entitled to be fixed in the "clerical cadre" in view of the guarantee given under Sec. 45 (5) (i). Even though the employee was assured the remuneration which he was drawing, classification of his post in the subordinate cadre affected the terms and conditions of his service. Writ Appeal

*(Writ Appeal No. 64 of 1966, D/- 2-11-1967 — Ker.)

IN/IN/E103/70/DVT/B

No. 64 of 1966, D/- 2-11-1967 (Ker), Affirmed. (Paras 10, 11)

(B) Banking Regulation Act (1949), S. 45 (5) (i) Second Proviso — Reserve Bank of India determining status of employee of transferor Bank — Not a final order within meaning of Second Proviso.

The decision of the Reserve Bank that the qualifications and experience of any of the employees of the transferor bank are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee bank, is declared by the Act to be final. But finality is not attached to any other matter decided by the Reserve Bank. Where the Reserve Bank of India purported to determine the rank and status of an employee of the transferor Bank and observed that his status corresponded with subordinate staff and not with clerical status, such decision cannot be deemed as final within second proviso to Sec. 45 (5) (i). Writ Appeal No. 64 of 1966, D/- 2-11-1967 (Ker), Affirmed.

(Para 8)

Mr. M. C. Chagla, Senior Advocate, (Mr. P. C. Bhartari, Advocate and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. K. Jayarama, Advocate (for No. 1) and Mr. Niren De, Attorney-General, for India, (Mr. I. N. Shroff, Advocate, with him), (for No. 2), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.—K. E. Elias—first respondent herein—was an employee of the Orient Central Bank Ltd. He was posted to do duty as a 'Civil Agent'. The Orient Central Bank Ltd. was amalgamated with the Kottayam Bank Ltd. The amalgamated bank was named the Kottayam Orient Bank Ltd. — hereinafter called 'the K. O. Bank'. The services of Elias were transferred to the K. O. Bank. Elias continued to perform the duties of a 'Civil Agent' of that Bank and certain specific duties relating to court cases were assigned to him by the K. O. Bank. The K. O. Bank issued a circular sanctioning the salary and allowances payable to all its subordinate staff under three heads — Assistants, Clerks and Peons. The salary and allowances paid to the clerks were Rs. 46-2-50-

3-80 EB-4-100 plus dearness allowance Rs. 20/. No separate scale was fixed for "Civil Agents" and it is common ground that Elias was given the salary and allowances payable to Clerks.

2. Pursuant to a scheme of amalgamation prepared by the Reserve Bank under S. 45 (4) (d) (ii) of the Banking Regulation Act 10 of 1949, the K. O. Bank was amalgamated with the State Bank of Travancore — hereinafter called the "State Bank". Under that scheme, Elias was admitted as an employee of the State Bank and he was allotted the duties of a "Civil Agent". To fix the remuneration and the terms and conditions of the employees under the State Bank, the Board of Directors constituted a Committee to assess the qualifications of all its employees. Pursuant to a report received from the Committee, the State Bank directed that the "Civil Agents" be treated as "subordinate staff" and that their remuneration be refixed. The "subordinate staff" consisted of peons, watchmen, sweepers and employees with similar duties. Their scale of remuneration was Rs. 28—2—86—1—96—EB—1—101. The scale of remuneration of the clerical staff was Rs. 112—307.

3. Elias submitted a representation to the Deputy General Manager that in absorbing him in the subordinate staff he was denied the statutory guarantee of remuneration and terms and conditions of service. This representation was rejected by the Deputy General Manager by letter dated October 19, 1963, and Elias was informed that "having regard to his educational qualifications and experience it had been decided by the State Bank to place him in the subordinate cadre." Elias made a representation to the General Manager which was rejected on December 11, 1963 and he was informed that the Bank was unable to grant his request for absorption into the "clerical cadre".

4. Elias then moved a petition in the High Court of Kerala for a writ of certiorari or other appropriate writ quashing the orders dated October 19, 1963 and December 11, 1963, fixing his rank in the cadre of subordinate staff. A Single Judge of the High Court dismissed the petition. He observed that since there was no post of a "civil Agent" in the State Bank, that Bank was competent to place Elias in

the subordinate cadre. The learned Judge also observed that, having regard to the educational qualifications and experience Elias was properly placed in the "subordinate cadre", and no ground was made out to quash the fixation of the rank and status based on an assessment of his qualifications and experience.

5. Elias appealed to a Division Bench of the High Court. During the pendency of the appeal, the State Bank applied for taking on record the decision dated September 15, 1967, of the Reserve Bank of India, holding that the State Bank was justified in not giving Elias the status of a clerk, and in placing him in the residual classification of "subordinate staff". This document was admitted on the record. The Court in allowing the appeal observed that on a consideration of the relevant circumstances, Elias was entitled to the rank and status of a clerk under the State Bank, and the order of the Reserve Bank being in violation of the statutory provisions contained in the Banking Regulation Act, 1949, the orders dated October 13, 1963 and December 11, 1963 were liable to be set aside. This appeal has been filed with special leave granted by this Court.

6. Two contentions were urged by the State Bank in support of the appeal:

(1) that the decision of the Reserve Bank dated September 15, 1967, was final by virtue of Section 45 (5) (i) read with proviso (ii) of the Banking Regulation Act X of 1949 and could not be ignored by the Court; and

(2) that the State Bank having assured to Elias the remuneration which he was drawing, a mere classification of his post in the subordinate cadre did not affect the terms and conditions of his service under the State Bank.

7. Section 45 of the Banking Regulation Act, 1949, by sub-s. (4) authorises the Reserve Bank in certain eventualities to prepare a scheme for reconstruction of a banking company or for amalgamation of the banking company with any other banking institution. By sub-s. (5), insofar as it is relevant, it is provided:

"The scheme aforesaid may contain provisions for all or any of the following matters, namely:—

x x x x x x

"(i) the continuance of the services of all the employees of the banking company (except such of them as not being workmen within the meaning of the Industrial Disputes Act, 1947, are specifically mentioned in the scheme) in the banking company itself on its reconstruction, or, as the case may be, in the transferee bank at the same remuneration and on the same terms and conditions of service, which they were getting or, as the case may be, by which they were being governed, immediately before the date of the order of moratorium:

Provided that the scheme shall contain a provision that—

(i) x x x x x x

(ii) the transferee bank shall pay or grant not later than the expiry of the aforesaid period of three years, to the said employees the same remuneration and the same terms and conditions of service as are applicable to the other employees of corresponding rank or status of the transferee bank subject to the qualifications and experience of the said employees being the same as or equivalent to those of such other employees of the transferee bank:

Provided further that if in any case under clause (ii) of the first proviso any doubt or difference arises as to whether the qualifications and experience of any of the said employees are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the transferee bank, the doubt or difference shall be referred to the Reserve Bank whose decision thereon shall be final;"

In exercise of the authority under sub-sections (4) and (5) of Section 45 of the Banking Regulation Act, 1949, the Reserve Bank prepared a scheme under which employees under the K.O. Bank were transferred to the employment of the State Bank. The terms of Cl. (ii) of the first proviso to sub-section (5) of Section 45 were expressly included in the scheme.

8. The decision of the Reserve Bank that the qualifications and experience of any of the employees of the transferor bank are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status of the trans-

feree bank is declared by the Act to be final. But finality is not attached to any other matter decided by the Reserve Bank. The Reserve Bank by its decision dated Sept. 15, 1967, purported to determine that the rank and status of the Civil Agents working in the K. O. Bank corresponded with the rank and status of the subordinate cadre under the State Bank. That decision is not declared final under the Act. The Reserve Bank of India observed that "the Civil Agent has nothing to do with the office work in the Bank just as in the case of clerks and other employees and his work is essentially different from the work of the ordinary staff in the bank". The Bank then proceeded to observe that:

"In fitting an employee of the transferor bank into the transferee bank, the rank and status of the employee as also the nature of the duties performed by the employee in the transferor bank have to be ascertained. The mere fact that the employee in transferor bank bore a particular designation either as a clerk or otherwise does not conclude the issue and that does not necessarily follow that he should, in the transferee bank, be placed in a post having the same designation: x x x On examining the position the Reserve Bank of India is of opinion that the duties which the employee was discharging in the transferor bank do not relate to the duties which a clerk has to do in the office."

In the view of the Bank the duties performed by the Civil Agent were "essentially different from those of a clerk and called for a much lower degree of qualifications, skill and competence than those which a clerk normally brings to bear on his work", and since the subordinate cadre of the State Bank in which Elias was fitted was "in effect a residual classification" there was no change and the Bank was justified in placing him in that classification. It was also observed that there was "no change in the work" allotted to Elias nor was he expected to do the work of a chaprasi or a peon and that his emoluments were better than those in the transferor bank. The fact that prior to the fitment in the transferee bank, in terms of the provisions of paragraph 15 of the Scheme, Elias was

addressed as a civil clerk did not confer on him the status of a clerk in the transferee bank. These observations relate to matters which could not be referred to the Reserve Bank and the decision of the Reserve Bank thereon is not made final under the second proviso to sub-section (5) (i) of S. 45 of the Act. Only the question whether the qualifications and experience of any of the employees of the transferor bank are the same as or equivalent to the qualifications and experience of the other employees of corresponding rank or status under Clause (ii) of the first proviso is intended to be referred to the Reserve Bank. In that view the first argument advanced on behalf of the appellant must be rejected.

9. It is said that Elias "had studied only upto 5th Form". But that is not decisive of the corresponding rank or status in which "he could be fitted" in the State Bank. Elias was employed in the K. O. Bank as a Civil Agent. The duties of a Civil Agent were clerical and not menial. In the K. O. Bank no separate scale was prescribed for the post of a Civil Agent. The salary paid to Elias was that of a Clerk and his duties were those of a Clerk. In the State Bank, Elias was also performing the duties of a Civil Agent and there was no separate classification of the office of a Civil Agent. The subordinate cadre consisted of peons, watchmen and sweepers and of employees performing similar duties and a Civil Agent performing duties which were clerical in nature could not appropriately be placed in that classification. The decision of the Reserve Bank that the subordinate cadre was a residual cadre, is, in our judgment, not supported by any evidence. It was conceded before the High Court that Elias satisfied "three conditions as to the rank, status and qualifications" of a Clerk in the State Bank. It was only urged that he had not the requisite experience. Under Clause (ii) of the first proviso to Section 45 (5) (i) the transferee bank has to grant the same remuneration and the same terms and conditions of service as are applicable to employees of corresponding rank or status of the transferee bank subject to the qualifications and experience of the said employees being the same as or equivalent to those of such other employees of the transferee bank. The guarantee

under Clause (i) of Section 45 (5) of the Act does not cover merely the remuneration; it covers the terms and conditions of service as well. It would be a gross denial of the guarantee if the employee is not given the rank and status which he had in the transferor bank. It is in our judgment, not open to the transferee bank to "fit" an employee of the transferor bank performing the duties of a clerk into a subordinate cadre manned by employees performing duties which are not clerical, but of peons, watchmen, sweepers and the like.

10. The Banking Regulation Act, 1949, guarantees the same terms and conditions of service, and the transferee bank is entitled to "fit" the employees of the transferor bank into the corresponding rank or status. In doing so it has to take into account the qualifications and experience of the employees of the transferor bank. But in "fitting" an employee into the transferee bank, the rank and status enjoyed by an employee in the transferor bank cannot be ignored. A person performing certain duties in the transferor bank when admitted into the service of the transferee bank may be so "fitted" in a cadre which is equivalent in status and rank with the status and rank of the employees in the transferee bank, but in grading him into the cadre of equivalent status and rank experience and qualifications must be taken into account. On the ground of lack of experience and qualifications a person cannot be deprived of his rank and status in the transferee bank. Clause (ii) to the first proviso of Section 45 (5) (i) does not, in our judgment, authorise the transferee bank to "fit" an employee in the transferee bank into a post with rank and status lower than the rank and status enjoyed by the employee in the transferor bank. To accept the contention raised on behalf of the State Bank is in effect to defeat the guarantee relating to the terms and conditions of service under Clause (i) of Section 45 (5) and the first proviso thereto.

11. In our judgment the High Court was right in holding that the orders passed by the State Bank "fitting" Elias into a subordinate cadre infringed the guarantee under Section 45 (5) (i) of the Banking Regulation Act, 1949.

12. The appeal fails and is dismissed with costs in favour of Elias.

Appeal dismissed.

AIR 1971 SUPREME COURT 147
(V 58 C 38)

(From Madras: ILR (1966) 2 Mad 357)
J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

Estate of late Rangalal Jajodia, Appellant v. The Commissioner of Income-tax, Madras, Respondent.

Civil Appeals Nos. 2332 to 2335 and 2336 to 2339 of 1966, D/- 19-11-1977).

Income-tax Act (1922), S. 34 (3) Second Proviso and S. 24B (3) — Income-tax returns filed by one R — Assessment completed after his death, describing the assessee as estate of R by heirs and legal representatives of R — Fresh assessments ordered in accordance with provisions of S. 24B — Held Sections 34 (3) Second Proviso and 24B (3) applied to the facts of the case. ILR (1966) 2 Mad 357, Reversed.

One R filed income-tax returns for the years 1942-43 and 1943-44. On the receipt of the returns the Income-tax officer issued the statutory notices under Ss. 22 (4) and 23 (2) but before the assessments could be made, R died. The assessment was completed describing the assessee as the estate of deceased R by legal heirs and representatives, his son S by first wife, wife A and her children. In appeal by S who contended that he was not legal representative of R under the latter's will, the assessment was set aside on the ground that no notice was issued to A and fresh assessment was directed to be made on the executors of R in accordance with Section 24B. Fresh assessment was made on the estate of deceased R by executors A and another in 1954, more than four years after the end of assessment years 1942-43; 1943-44 respectively:

Held (1) that A was an assessee in the income-tax proceedings, but the proceedings were not in compliance with the Act by reason of the failure of giving the requisite notice of assessment and the requisite notice of de-

mand to A. The expression 'any person' in Section 34 (3) Second Proviso must be confined to a person intimately connected with the assessments of the year under appeal.

In the present case as the finding was that the assessment was made on A but no notice was given to her, and the necessary direction was therefore given that notice should be given to her and A was heard and the assessment was made, she was not merely intimately connected with the assessment, but she was in fact an assessee. Therefore the Second Proviso to section 34 (3) applied. The High Court was in error in holding that the assessment proceedings were barred by limitation. AIR 1963 SC 1356 distinguished. Finding in AIR 1965 SC 342 that income belonged to the year 1948-49 held was not a finding necessary for the disposal of an appeal in respect of the year of assessment in question. ILR (1966) 2 Mad 357, Reversed. (Paras 14, 15, 16)

(2) Section 24B (3) which deals with the case of a person dying after having furnished a return applied to the present case. (Para 17)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 342 (V 52) =
1964-52 ITR 335, Income-tax Officer, Sitapur v. Murlidhar Bhagwandas 14, 15
(1963) AIR 1963 SC 1356 (V 50) =
(1963) 49 ITR 1, S. C. Prashar v. Vasantsen Dwarkadas 15

Mr. A. K. Sen, Senior Advocate (Mr. T. A. Ramachandran, Advocate with him), for Appellant in C. As. Nos. 2332 to 2335 of 1966 and for Respondent in C. As. Nos. 2336 to 2339 of 1966; Mr. S. Mitra, Senior Advocate (Mr. G. C. Sharma, Advocate and Mr. B. D. Sharma, Advocate for Mr. R. N. Sachthey, Advocate, with him) for Respondent in C. As. Nos. 2332 to 2335 of 1966 and for Appellant in C. As. Nos. 2336 to 2339 of 1966.

The following Judgment of the Court was delivered by

RAY, J.: These appeals are by certificate against the judgment dated 16 August, 1965 of the High Court of Madras on a reference under S. 66 (1) of the Indian Income-tax Act, 1922 (hereinafter referred to as the Act).

2. Seven questions were referred to the High Court. The reference involved first the construction of the second proviso to sub-section (3) of section 34 of the Act, and, secondly, the applicability of section 24B (3) of the Act to the assessments made on the executor to the estate of late Rangalal Jajodia.

3. In order to appreciate the scope of the reference, it is necessary to refer to the facts which gave rise to the questions. Rangalal Jajodia (hereinafter referred to as the deceased) filed income-tax returns for the years 1942-43 and 1943-44 as well as his excess profits tax returns for the corresponding chargeable accounting periods ending 31 December, 1941 and 31 December, 1942 before the Income-tax Officer, Excess Profits Tax Officer, Madras, Special South Circle. On receipt of the returns, the officer issued the requisite statutory notices to the assessee for production of accounts and also other evidence in support of the returns under Sections 22 (4) and 23 (2) of the Act and under the corresponding provisions of section 30 of the Excess Profits Tax Act, 1940. Rangalal Jajodia complied with the aforesaid notice. But before the assessments to the income-tax and excess profits tax could be made Rangalal Jajodia died on 11 January, 1946.

4. Rangalal Jajodia was survived by Shankar Lal Jajodia son by a pre-deceased wife, Aruna Devi, the second wife and children by the second wife. Rangalal Jajodia had made a will on 16 April, 1945 whereby Aruna Devi and one Ram Kumar Bhuwalka were executrix and executor respectively. Shankar Lal Jajodia was disinherited under the will. Shankarlal Jajodia however performed the funeral obsequies for the deceased. The Revenue on the basis of that information issued notice to Shankarlal Jajodia asking him to show cause why the assessment of the deceased should not be made on him as the legal representative. Shankarlal Jajodia objected to the course stating that he was not the legal representative and that his step-mother Aruna Devi and Ram Kumar Bhuwalka as the executrix and executor respectively were the proper persons on whom proceedings were to be taken. The Revenue called for a copy of the will which however was not

produced. The assessment was completed on 28 February, 1947 on the materials describing the assessee as "the estate of late Shri Rangalal Jajodia by legal heirs and representatives, Shri Shankarlal Jajodia, son of Rangalal Jajodia, Srimati Aruna Devi, wife of Rangalal Jajodia and her children".

5. The assessment orders were served on Shankarlal Jajodia who appealed to the Appellate Assistant Commissioner contending that he was not the legal representative. At the hearing of the appeals on 30 April, 1952 Shankarlal Jajodia produced a copy of the will. The Appellate Assistant Commissioner set aside the assessment and directed the Revenue Officer to make a fresh assessment on the executors in accordance with section 24B of the Act. Pursuant to the direction of the Appellate Assistant Commissioner the Revenue Officer informed the executors and Ram Kumar Bhuwalka of his proposal to make assessment on them as the legal representatives of Rangalal Jajodia. Ram Kumar Bhuwalka who had refused to act as an executor intimated the fact to the Revenue Officer. Aruna Devi the executrix accepted the notice but requested the Revenue Officer to furnish her with copies of the returns, notes of examination and correspondence between the deceased and the Revenue to enable her to make representations. The Revenue Officer however took the view that under section 24B of the Act it was not necessary to go through all the formalities once again and that the assessments were required to be done only for the purpose of inviting objections, if any, to the locus standi of Aruna Devi as the legal representative of the deceased. On the said view the Revenue Officer completed the income-tax and excess profits tax assessments on the estate of late Rangalal Jajodia by executors Mrs. Aruna Devi and another. The assessments were made on 29 October, 1952 more than four years after the end of assessment years 1942-43 and 1943-44 respectively.

6. The executrix Aruna Devi appealed against the assessments contending before the Appellate Assistant Commissioner that the assessments were barred by limitation and that the previous Appellate Assistant Commissioner's direction to make assessments on her was invalid. It was

also contended that reasonable opportunities were not given to Aruna Devi before the assessments were made. The Appellate Assistant Commissioner on 16 April, 1955 held that the assessments were validly made on a valid direction by the previous Appellate Assistant Commissioner. He however set aside the assessments directing the Revenue Officer to complete them after giving the executrix a fresh opportunity to object to the assessment. Aruna Devi appealed to the Appellate Tribunal. The Tribunal rejected the appeals on the ground that the assessments had been set aside by the Appellate Assistant Commissioner with the direction to give sufficient opportunities to her. On a reference taken by Aruna Devi to the High Court, the High Court held that the Tribunal ought to have properly disposed of the appeals on all the contentions raised therein. Pursuant to the order of the High Court the Tribunal heard the appeals on merits on 9 June, 1961 and held that the re-assessment made by the Revenue Officer on Aruna Devi, the executrix was valid and that the assessments were saved from the bar of limitation by the second proviso to Section 34 (3) of the Act. The Tribunal also held that the assessments were validly made under Section 24B (3) of the Act.

7. The High Court on reference under Section 66 (1) of the Act held that the second proviso to Section 34(3) applied to save re-assessment from the bar of limitation but that in the present appeals, the first assessments which were made on Shankarlal Jajodia were set aside on appeal because these were not made on the real legal representatives of the deceased and therefore no direction or finding could be made by the Revenue Authority in any such appeal as would remove the bar of limitation on the re-assessment later made on the executor who was to be regarded as an entirely different assessee. The High Court also held that the direction or finding given by the Appellate Assistant Commissioner for making the assessment on the executors was unnecessary for the disposal of the appeals filed by Shankarlal Jajodia and therefore the direction and the findings were outside the scope of the second proviso to section 34 (3) of the Act.

8. As to section 24B sub-clause (3) of the Act, the High Court held that the section applied to the assessments in the present appeals but the High Court negatived the contention of the Revenue that the assessments made on the executrix were made in proper compliance with the procedure prescribed under section 24B (3) of the Act. The High Court held that it was a condition precedent to the validity of assessment to be made on the legal representatives that the procedure prescribed for making the assessment on the deceased assessee was to be repeated as regards the assessment on the legal representative irrespective of the fact that such procedure was followed during the lifetime of the deceased.

9. The relevant provisions of S. 34 (3) of the Act necessary for the purpose of the present appeals are the second proviso to the said sub-section. The said second proviso is as follows:

"Provided further that nothing contained in this section limiting the time within which any action may be taken or any order, assessment or re-assessment may be made, shall apply to a re-assessment made under S. 27 or to an assessment or re-assessment made on the assessee or any person in consequence of or to give effect to any finding or direction contained in an order under section 31, section 33, section 33A, S. 33B, section 66 or section 66A".

10. Counsel for the Revenue in C. As. Nos. 2336-2339 of 1966 contended that the second proviso saved the assessment from the bar of limitation by reason of an order of assessment having been made in consequence of a finding or direction given by the Appellate Assistant Commissioner and secondly that Aruna Devi was a person intimately connected with the assessment and that in fact the assessment was made on her, but the assessment was set aside because no notice was given to her. Counsel for the appellant Aruna Devi in C. As. Nos. 2332-2335 of 1966 on the other contended first that Aruna Devi was not an assessee and therefore the benefit of the second proviso to S. 34 (3) of the Act would not avail. Secondly, it was said that Aruna Devi was not intimately connected with the assessment and was not an assessee, because there

was no proceeding in law under the Act against Aruna Devi and therefore she was not an assessee.

11. An assessee is defined in S. 2 (2) of the Act meaning a person by whom income-tax or any other sum of money is payable under this Act, and includes every person in respect of whom any proceeding under the Act has been taken for the assessment of his income or of the loss sustained by him or of the amount of refund due to him. It was said on behalf of the appellant Aruna Devi that the estate cannot be an assessee and in order to make the legal representative an assessee a proceeding must be taken against the executor under the Act. It was also said that in the final assessment Aruna Devi was assessed as an executrix but no proceeding for assessment was taken against Aruna Devi as an executrix. Emphasis was placed on the fact that the proceeding was against the estate which was unknown to law and even if the proceeding against the estate could be held to be a valid proceeding Aruna Devi was never given any notice and therefore no proceeding was taken against her.

12. The assessment order shows the name of the assessee as the estate of late Shri Rangalal Jajodia by legal heirs and representatives Shri Shankarlal Jajodia son of Shri Rangalal Jajodia, Smt. Aruna Devi wife of Rangalal Jajodia and her children. Rangalal Jajodia had filed the return. He died before the assessment was completed. The assessment was made on Aruna Devi as legal representative. She was described as legal representative but not as an executrix. The liability under the Act in case of death of a person is of the executor, administrator or legal representative to be liable to pay out of the estate of the deceased person to the extent to which the estate is capable of meeting the charge the tax assessed as payable by such person or any tax which would have been paid by him under the Act if he had not died. The Revenue in the assessment proceedings described the estate of Rangalal Jajodia by the legal heirs and representatives. It cannot be denied that an executor is also a legal representative.

13. What happened in the present assessment proceedings was that the

proceedings were commenced during the lifetime of Rangalal Jajodia by reason of the returns being filed by and notices under sections 22 (3) and 23 (2) of the Act having been served on Rangalal Jajodia during his lifetime. The assessment order contains intrinsic evidence to that effect as also of repeated intimation having been given to Shankarlal Jajodia after the death of Rangalal Jajodia. No reply having been received from Shankarlal Jajodia, the assessment was completed under section 24B of the Act through the legal heirs and representatives including Aruna Devi. The Appellate Assistant Commissioner on an appeal preferred by Shankarlal Jajodia set aside the assessment because no notice was given to Aruna Devi though the assessment proceeding was against her as a legal representative. The lack of a notice does not amount to the Revenue Authority having had no jurisdiction to assess but that the assessment was defective by reason of notice not having been given to her. An assessment proceeding does not cease to be a proceeding under the Act merely by reason of want of notice. It will be a proceeding liable to be challenged and corrected. Similarly, if there is a mistake as to name or there is a misdescription of the name, the proceeding will be liable to be challenged and corrected by giving notice to the assessee subject to such just exceptions as an assessee can take under law. The direction given by the Appellate Assistant Commissioner was to make fresh assessment on Aruna Devi in accordance with the provisions of the Act.

14. Counsel for Aruna Devi relied on the decision of this Court in Income-tax Officer, Sitapur v. Murlidhar Bhagwandas, (1964) 52 ITR 335 = (AIR 1965 SC 342) in support of the proposition that no finding was necessary in the present case because Aruna Devi was not an assessee and was a different person. We find that Aruna Devi was an assessee in the income-tax proceedings, but the proceedings were not in compliance with the Act by reason of the failure of giving the requisite notice of assessment and the requisite notice of demand. In Murlidhar's case, (1964) 52 ITR 335 = (AIR 1965 SC 342) (supra) the assessee appealed against an assessment order and the Appellate Assistant Commissioner held that the income

was received in the previous accounting year and directed that the amount should be deleted from the assessment year 1949-50 and included in the assessment year 1948-49. Pursuant to that direction the Income-tax Officer initiated re-assessment proceedings in respect of the year 1948-49 and served a notice on 5 December, 1957. The question was whether the second proviso applied and saved the notice in respect of the year 1948-49. It was held that the jurisdiction of the Appellate Assistant Commissioner under section 31 of the 1922 Act was strictly confined to the assessment order of the particular year under appeal and the assessment or re-assessment made in consequence of or to give effect to any finding or direction contained in an order under S. 31, section 33A, section 33B, section 66 or section 66A must necessarily relate to the assessment of the year under appeal. The expression 'finding and direction' in the second proviso to section 34 (3) was held to be a finding necessary for giving relief in respect of the assessment in question and that a direction which the appellate or the revisional authority was empowered to give under the sections mentioned in that proviso. The finding in Murlidhar's case, (1964) 52 ITR 335 = (AIR 1965 SC 342) (supra) that the income belonged to the year 1948-49 was not a finding necessary for the disposal of an appeal in respect of the year of assessment in question.

15. Counsel for Aruna Devi contended that the expression 'any person' occurring in the second proviso to section 34 (3) of the Act could not be referable to a stranger and that Aruna Devi was a stranger. In support of that proposition reliance was placed on the decision of this Court in S. C. Prashar v. Vasantsen Dwarkadas, (1963) 49 ITR 1 = (AIR 1963 SC 1356). The facts of that case are entirely different and are of no assistance for the reason that in the present appeals Aruna Devi was impleaded as a party to the assessment proceedings as a legal representative of Rangalal Jajodia. The words 'any person' were construed in Murlidhar's case, (1964) 52 ITR 335 = (AIR 1965 SC 342) (supra) to be confined to a person intimately connected with the assessment year under appeal. It was said in that case that modification or setting aside of assess-

ment made on a firm, joint Hindu family, association of persons, for a particular year may affect the assessment for the said year on a partner or partners of the firm, member or members of the Hindu undivided family or the individual, as the case may be. In such cases though the latter are not eo nomine parties to the appeal, their assessments depend upon the assessments on the former. The said instances are only illustrative. It is not necessary to pursue the matter further. We would, therefore, hold that the expression 'any person' in the setting in which it appears must be confined to a person intimately connected in the aforesaid sense with the assessments of the year under appeal. In the present appeals the finding was that the assessment was made on Aruna Devi but no notice was given to her. The necessary direction was therefore given that notice should be given to her. Aruna Devi was heard and the assessment was made. She was not merely intimately connected with the assessment. She was in fact an assessee. Therefore the second proviso to Section 34(3) applied.

16. We are therefore of opinion that the second proviso to Section 34(3) of the Act applies to the present appeals because first the proceedings against Rangalal Jajodia commenced on filing of returns before the income-tax authorities; secondly, the assessment proceedings continued after the death of Rangalal Jajodia against the legal representatives Shankarlal Jajodia and Aruna Devi; thirdly, the assessment proceedings on being set aside and not cancelled pursuant to the appeal filed by Shankarlal Jajodia on the ground that notice was not given to Aruna Devi were continued, and, fourthly, the setting aside of the assessment was only on the ground that notice was not given to Aruna Devi and therefore the finding and direction was vital to the assessment proceedings. The High Court was in error in holding that the assessment proceedings were barred by limitation.

17. The other question is as to the applicability of section 24B of the Act. Counsel on behalf of Aruna Devi repeated the contentions advanced in the High Court that section 24B does not cover the entire field of procedure to be followed in assessing the income

of the deceased person. The High Court held that section 24B of the Act applied but Aruna Devi should have been given opportunities to object to the assessment by repeating the entire procedure of section 24B of the Act as during the lifetime of the deceased. Counsel for the Revenue did not impeach the conclusion of the High Court that in relation to Aruna Devi the provisions of section 24B of the Act were to be followed de novo. We are of opinion that the High Court correctly held that section 24B of the Act applies to the present case. The third sub-section of section 24B deals with a case of a person dying after having furnished a return. Further, in the present case the Income-tax Officer had reason to believe the return to be incorrect or incomplete, and he called upon Rangalal to furnish evidence. The Act further confers power on the Revenue officer to make the assessment and determine the tax payable by the deceased on the basis of the assessment and for that purpose to issue appropriate notice which would have had to be served upon the deceased had he survived and in that behalf to require from the executor, administrator or other legal representative of the deceased person any accounts, documents or other evidence which he might under the provisions of sections 22 and 23 require from the deceased person. These provisions adequately answer the contention of the appellant Aruna Devi.

18. For these reasons we hold that the High Court was in error in holding that the second proviso to section 34 (3) of the Act did not save the assessments and therefore we set aside the judgment of the High Court and allow the appeals of the Revenue in C. As. Nos. 2336-2339 of 1966.

19. As for appeals C. As. 2332-2335 of 1966 we uphold the conclusion of the High Court and dismiss the appeals. Each party will bear and pay its own costs in all these appeals.

Appeals in C. As. Nos. 2336-2339 of 1966 allowed; Appeals in C. As. Nos. 2332-2335 of 1966 dismissed.

AIR 1971 SUPREME COURT 152 (V 58 C 39)

(From Mysore: AIR 1969 Mys 23)

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER and A. N. RAY, JJ.

In Civil Appeals Nos. 179 to 235 of 1969:

The State of Mysore and others, Appellants v. M/s. D. Cawasji & Co. and others, Respondents.

In Civil Appeals Nos. 130 to 133 of 1970:

The State of Mysore, Appellants v. M. Govindappa and others, Respondents.

Civil Appeals Nos. 179 to 235 of 1969 and 130 to 133 of 1970, D/- 18-11-1970.

Mysore Excise Act (5 of 1901), S. 18 — Mysore Elementary Education Act (6 of 1941), S. 9 and Schedule (as amended in 1955) — Levy of education cess on excise revenue — "Shop rent" paid by excise contractor is not excise revenue.

A payment for the exclusive privilege of selling toddy from certain shops is called "shop rent". The licensee pays what he considers to be equivalent to the value of the right and it has no relation to the production or manufacture of toddy and such "shop rent" is not excise duty within the meaning of Entry 51 List 2 of Sch. 7 of Constitution. "Shop rent" therefore is not excise revenue within the meaning of the Schedule to the Mysore Act (1941) and no education cess can be levied thereon. AIR 1967 SC 1512, Foll. (Para 9)

The education cess is not levied as an independent cess but is levied as a cess on all items of land revenue, forest revenue and excise revenue and therefore the question whether it falls under entry 62 of List II Sch. 7 left open. (Para 11)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1512 (V 54) =

1967-1 SCR 548, Guruswami and Co. v. State of Mysore (Shinde Bros. v. Dy. Commr. Raichur)

(1962) AIR 1962 SC 1281 (V 49) =
1962 Supp 3 SCR 436, R. C.

Jall v. Union of India
(1958) AIR 1958 SC 468 (V 45) =
1958 SCR 1422, M. P. V. Sun-

dararamier and Co. v. State
of Andhra Pradesh

8

Mr. M. C. Chagla, Sr. Advocate (M/s. R. Gopalakrishnan and S. P. Nayar, Advocates, with him), for Appellants (In all the Appeals); Mr. M. C. Setalvad, Sr. Advocate (M/s. B. Datta and P. N. Tewari, Advocates, and M/s. J. B. Dadachanji and Co., Advocates, with him) (for No. 1) (In C. As Nos. 179, 180, 183, 193 and 194 of 1969) Mr. M. K. Nambyar, Sr. Advocate, (M/s. K. N. Bhatt, S. Shivaswamy and K. L. Hathi, Advocates, with him) (In C. As. Nos. 181, 182, 203, 209 to 213 and 223 to 226 of 1969); M/s. S. Shivaswamy, K. N. Bhatt and K. L. Hathi, Advocates, (In C. A. No. 195 of 1969); M/s. R. V. Pillai and P. Kesava Pillai, Advocates (in C. As. Nos. 186 to 188 and 198 to 202 of 1969); Mrs. Shyamla Pappu, M/s. J. Ramamurthy and Vineet Kumar, Advocates (In C. As. Nos. 214 to 220 of 1969) and Mr. M. Veerappa, Advocate (In C. As. Nos. 130 and 133 of 1970), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.— Under the Mysore Excise Act, 1901, the Government of the State was authorised to grant exclusive privilege of selling by retail Indian made liquor on such conditions and for such period as the Government deemed fit, and to levy duty on manufacture and sale of alcoholic liquor. In exercise of that power the Government of Mysore framed rules regulating sale of "excise privileges". In the Note to Rule 23 in respect of toddy, "tree-tax", "tree-rent" and "shop-rent" were chargeable at the rate of 9 pies per rupee.

2. Under the Act the exclusive privilege of retail vending of toddy in different areas was sold by auction. Every licensee had to secure toddy by tapping toddy-yielding trees either in Government groves assigned to his shops or trees of private ownership. The licensee was required to pay to the State "tree-tax" at the prescribed rates for the number of trees tapped by him. When he tapped trees belonging to the Government he had to pay, in addition, "tree-rent" to the State. Consideration paid by the licensee to the State for the exclusive privilege of retail vending of toddy, or Arrack or beer was popularly known

as "shop-rent". In the notifications inviting bids or tenders for the exclusive privilege of retail vending of toddy, arrack, and beer it was stipulated that education cess shall be paid in accordance with Condition 23 of the General Conditions applicable to all excise licences.

3. Originally the Government used to charge "shop-rent", "tree-tax" and "tree-rent" separately. But in 1907 a notification was issued abolishing separate levies of "tree-tax" and "tree-rent". The Mysore Revenue Manual (1938 Edn.) Vol. I, at page 334 read as follows:—

"Formerly, the local cess was being levied on the following items:—

(i) x x x
(ii) Toddy — both date and bagani.

(iii) x x x
But in the marginal note dated G. O. (F. I. 9243-54 S. R. 145-06-1 dated 16th June, 1907), the following directions have been given:—

(a) The separate levy of local cess on tree-tax is abolished and the cess at present levied merged in the main item, the rates of tree-tax on the various kinds of trees being as follows:—

x x x
(b) Levy of a local cess on toddy shop rental is also abolished;

(c) The cess on tree-rent is merged in the main item itself.

N. B.:— 1/17th of the tree-tax, the shop rental and tree-rent collected should be credited to Local Funds, in lieu of the one-anna cess formerly levied on these items.

(Vide also Article 41 — Mysore Accounts Code Vol. I.)"

After the merger of a part of the Bellary District pursuant to the settling up of the State of Andhra in 1953 the Mysore Excise Act, 1901 was extended to the Bellary Area so merged in 1955.

4. The Mysore Excise Act, 1901, was repealed and replaced by the Mysore Excise Act, 1965. But no substantial alteration was made in the scheme of levy of excise revenue under the new Act.

5. Under the Mysore Elementary Education Act, 1941 an education cess was levied as a percentage inter alia of excise revenue. The Mysore Elementary Education Act, 1941, was

not extended to the Bellary Area and the excise contractors in that area were not liable to pay education cess. The Mysore Elementary Education Act, 1941, was replaced by the Mysore Compulsory Education Act, 1961. By Section 25 of that Act Chapters VI and VII of the 1941 Act were repealed and the rest of the 1941 Act continued to remain in force in the old Mysore Area. Accordingly S. 9 of the 1941 Act which occurred in Chapter III under which education cess was levied remained in operation. Section 9 (1) of the Mysore Elementary Education Act, 1941, as amended by the Elementary Education (Amendment) Act, 1944 read as follows:—

"The Government may for carrying out the purpose of this Act, levy throughout or in any part of Mysore, an education cess on any or all of such items of State revenue or of tax levied under any Act, or rule constituting Local Bodies in Mysore and at such rates as are specified in the Schedule to this Act."

After the Mysore Elementary Education (Amendment) Act, 1955, the relevant provision of the Schedule read as follows:—

Items on which cess may be levied.	Maximum rate of levy.
All items of land revenue, forest revenue, and excise revenue on which education cess is now being levied.	9 pies in the rupee.

The Government of Mysore levied the "education cess" from excise contractors in the old Mysore Area of the New State of Mysore. From time to time cash amounts were collected by the Government of Mysore.

6. A large number of excise contractors moved petitions under Article 226 of the Constitution before the High Court of Mysore challenging the levy of "education cess" on "shop-rent" in respect of toddy, arrack and beer and on "tree-tax" and "tree-rent". They claimed a declaration that they were not liable to pay the "education cess" and an injunction restraining the State from levying and collecting the education

cess and also for an order refunding the amount already collected.

7. It appears that even after the notification of 1907 merging the "tree-tax" and "tree-rent" with the "shop-rent" was issued, the State was in fact collecting the education cess from the excise contractors. In the view of the High Court under the Schedule as amended by the Mysore Elementary Education (Amendment) Act, 1955, liability to pay education cess arose in respect of all items of excise revenue on which education cess was being levied and since no education cess was being lawfully levied in the year 1955 and for a long time before that year, the liability to pay education cess did not arise. They held that the expression "now being levied" used in the Schedule as amended meant "now being lawfully levied". By virtue of Article 265 of the Constitution no tax could, they observed, be levied or collected except by authority of law: if there was no authority of law, collection of the education cess under the amended Schedule could not authorise collection of the education cess. The High Court observed that the Schedule to the Education Act was amended after the commencement of the Constitution and it was reasonable to impute to the State Legislature not merely knowledge of, but also anxiety to comply with Article 265 of the Constitution, and that was clear from the fact that neither the original Education Act nor the Amending Act of 1955 contained any provisions for validating any levy or collection made without the authority of law. Accordingly the High Court held that the State was incompetent to levy the education cess because it did not fall within the charging provision. After expressing that opinion the High Court proceeded to interpret the Schedule and held that the Education Act does not impose the charge of education cess on Arrack shop-rent, toddy "shop-rent" and beer shop-rent, "tree-tax" and "tree-rent" and that "shop-rent" is not a duty of excise and hence education cess cannot be levied on Arrack "shop-rent," toddy "shop-rent" or beer "shop-rent". The High Court also held that the excise contractors may question the validity of the levy of education cess on "shop-rent," "tree-tax" and

"tree-rent," even if they had agreed to pay education cess on those items. The High Court declared the levy of education cess on toddy, Arrack and beer "shop-rent," "tree-tax" and "tree-rent" as invalid. The State of Mysore has appealed to this Court with certificate granted by the High Court.

8. Mr. Chagla contended that under List II, Entry 8 the State Legislature is competent to legislate for levy of cess in respect of "intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors". Legislative power normally includes all incidental and subsidiary powers, but the power to tax is neither incidental nor subsidiary to the power to legislate on a matter or topic: *M. P. V. Sundararamier and Co. v. State of Andhra Pradesh*, 1958 SCR 1422 = (AIR 1958 SC 468). Entries in the Lists I and II in Schedule VII dealing with certain specific topics do not grant power to levy tax on transactions relating to those topics. Power to tax must be derived from a specific taxing entry. Tax could therefore not be levied on intoxicating liquors relying upon Entry 8, List II.

Entry 51, List II authorises the State Legislature to legislate for — "Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:—

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics;

but x x x

The taxing power in respect of alcoholic liquors for human consumption is therefore circumscribed: it may only be levied as excise duty, that is a duty levied on the manufacture and production of alcoholic liquors: *R. C. Jall v. Union of India*, (1962) Supp 3 SCR 436 = (AIR 1962 SC 1281).

9. Mr. Chagla for the State urged that the High Court was in error in holding that "shop-rent" was not excise revenue. But this question is concluded by a judgment of this Court. In *M/s. Guruswamy & Co. v. State of Mysore*, 1967-1 SCR 548 =

(AIR 1967 SC 1512) this Court held that the Mysore State Legislature was incompetent to levy health-cess on the items of the State excise revenue. The Court further held that the levy of health-cess could only be made if it be shown that the duty had been levied on goods which had been produced or manufactured, the taxable event being production or manufacture of goods. The Court observed that the essential characteristics of an excise duty was uniformity of incidence, and that the duty must be closely related to production or manufacture of goods. It did not matter if the levy was made not at the moment of production or manufacture but at a later stage. If a duty had been levied on an excisable article, but the duty was collected from a retailer it did not necessarily cease to be an excise duty. If a levy was made for the privilege of selling an excisable article and the excisable article had already borne the duty and the duty had been paid, there must be clear terms in the charging section to indicate that what was being levied for the purpose of the privilege of sale was in fact a duty of excise. The Court further held that a payment for the exclusive privilege of selling toddy from certain shops was called shop-rent. The licensee paid what he considered to be equivalent to the value of the right and it had no relation to the production or manufacture of toddy, and that the "shop-rent" was not excise duty within the meaning of Entry 51 of List II of the Constitution. We are bound by this judgment. "Shop-rent" is accordingly not excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act, 1941 and no education cess could be levied on "shop-rent".

10. Mr. Chagla however contended that in any event the State is entitled to levy "tree-tax" and "tree-rent" at the rates prescribed. It is unnecessary for the purpose of this case to determine whether "tree-tax" and "tree-rent" are excise revenue within the meaning of the Schedule to the Mysore Elementary Education Act. Granting that "tree-tax" and "tree-rent" are excise revenues, those imposts ceased to be levied separately after the year 1907: they merged

in "shop-rent" and a fixed percentage was regarded as local cess and diverted to the Local Bodies. If under the order of 1955 and before that date education cess on "tree-tax" and "tree-rent" was not being levied lawfully, liability to pay "tree-tax" and "tree-rent" could not be enforced by the State against the excise contractors.

11. Mr. Chagla also urged that even if education cess on "shop-rent" is not within the competence of the State Legislature under Entry 51, List II, it is still a tax on "luxuries" within the meaning of Entry 62 of List II, and a cess may be levied thereon. The argument is, in our judgment, misconceived. Education cess is not levied as an independent cess: it is levied as a cess on all items of land revenue, forest revenue and excise revenue. The "shop-rent" collected under the terms of the auction not being land revenue, forest revenue or excise revenue, the question whether education cess could be levied by the State Legislature under Entry 62 of List II does not fall to be determined before us. Counsel also urged that under the terms of the auction the excise contractors had agreed to pay education cess. But the liability to pay cess is statutory: if the statute does not effectuate the levy, no liability may arise for payment of the cess merely from the conditions of the auction.

12. Counsel for the State informed us that since the judgment of the High Court the Schedule has been amended by the State Legislature, but he did not very properly ask us to determine the question whether under the amended Schedule the cess is leviable. We express no opinion on the question whether the State is competent to levy the cess after amendment of the Schedule to the Mysore Elementary Education Act, 1941. It will be open to the State to agitate the question if hereafter the education cess is sought to be levied under the authority of the amended Schedule.

13. The appeals therefore fail and are dismissed with costs. There will be one hearing fee.

Appeals dismissed.

**AIR 1971 SUPREME COURT 156
(V 58 C 40)**

(From: Calcutta)*

J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

State of West Bengal and others,
Appellants v. Bata Krishna Barman,
Respondent.

Civil Appeal No. 120 of 1967, D/-
17-11-1970.

(A) Civil Services — Government Servants' Conduct Rules (1926), Rules 20 and 23 — Disciplinary proceedings against sub-Inspector on certain charges involving breach of Rules 20 and 23 — Suspension pending enquiry with 4th basic pay as subsistence allowance — Charges not proved at enquiry — Only conclusion arrived at was 'he was politically connected' — Order by disciplinary authority asking him to resume duty from date of order with a warning administered as a disciplinary penalty held was without any basis and could not be sustained — (Constitution of India, Article 311).

The respondent, a Sub-Inspector, in the Department of Food of W. B. Government was placed under suspension pending disciplinary enquiry against him on certain charges involving breach of Rules 20 and 23 of the Government Servants' Conduct Rules, 1926, and it was ordered that he would be paid 25 per cent of his basic pay for the period of suspension. The main charge on which the other three charges were based was that he had published a pamphlet without obtaining the prior sanction of the Government as required by Rule 20. After the conclusion of the enquiry, the order passed by the disciplinary authority did not contain any finding on the specified charges levelled against the respondent, but the order provided that the period of suspension will be treated as on duty and he would be paid for that period at the rate admissible under the rules as a disciplinary measure. He was directed to resume his duty from the date of order with a warning that he should not take part in any political activities in future. On a writ petition filed by the respondent challenging

*(A.F.O.O. No. 59 of 1957, D/- 19-9-1963 — Cal.)

KN/KN/F488/70/KSB/M

the order, the affidavit filed by the disciplinary authority made it clear that there was not enough data at the enquiry to hold the respondent guilty of any of the four charges but that the only conclusion it could arrive at was that the respondent was politically connected.

Held, that as the respondent could not be held guilty of having violated Rule 20 or Rule 23, the order of suspension with payment of 25 per cent of his basic pay and the warning administered to him, all as disciplinary measures, could not be allowed to stand. (Paras 6, 9, 10)

(B) Civil Services — Government Servants' Conduct Rules (1926), Rules 20 and 23 — Validity — Whether Rule 20 (1) or Rule 23 (1) violates fundamental right of freedom of speech and expression guaranteed by Article 19 (1) (a) and (b) of Constitution and are not saved by Article 19 (2) — (Quaere) — Expression of opinion by Letters Patent Bench of Calcutta High Court in A. F. O. O. No. 69 of 1957, D/- 19-9-1963 (Cal) was merely academic and not necessary for decision of case as Rules 20 and 23 were not attracted. AIR 1955 Cal 76, Ref. (Constitution of India, Article 19 (1) (a) and (b) and (2)).

(Paras 11, 12, 14)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 812 (V 50) =

1963 Supp (1) SCR 789, O. K.

Ghosh v. E. X. Joseph 11

(1962) AIR 1962 SC 1166 (V 49) =

1962 Supp. (3) SCR 369, Kameshwar Prasad v. State of Bihar 11

(1955) AIR 1955 Cal 76 (V 42) =

58 Cal WN 1026, Krishna Chandra Chatterjee v. Chief Supdt. Central Telegraph Office, Calcutta 11, 13

M/s. S. P. Mitra, G. S. Chatterjee and Sukumar Basu, Advocates, for Appellants.

The Judgment of the Court was delivered by

SHELAT, J.:— This appeal founded on a certificate, is against the judgment and order passed by the Letters Patent Bench of the High Court of Calcutta which, setting aside the judgment and order of a learned Single Judge, allowed the writ petition filed by the respondent and issued a mandamus directing the appellant-State not to enforce its orders issued

under Rule 20 (1) and Rule 23 (1) (i) of the Government Servants' Conduct Rules, 1926.

2. The respondent was appointed in June 1945 as a sub-inspector under the Director General (Transportation and Storage) of the Civil Supplies Department of West Bengal Government. In December 1951, he was attached to the movement section under the Directorate of Transportation in the Department of Food. He was placed under suspension by an order dated December 21, 1951. That order provided that he would be paid 25 per cent of his basic pay during the period of suspension. On January 19/21, 1952 he was served with a charge-sheet containing four charges: (1) that he published a certain pamphlet without obtaining the previous sanction required by Rule 20 of the said Rules, (2) that the said pamphlet contained criticism of the Government capable of embarrassing the relations between the Government and the public, thus violating Rule 20 (1) (a), (3) that the pamphlet showed that he was taking active part in politics in breach of R. 23 and (4) that the said publication constituted propaganda in connection with general elections and therefore, was in breach of Rule 23 and the standing orders of the Government in that regard. The rules on which the charges were thus founded were Rules 20 (1) (a) and (2), and Rule 23 (1) (i) of the said Rules. Though the charges mentioned standing orders of the Government, it was conceded in the High Court that there were no such standing orders.

3. The explanation of the respondent was that he had neither printed nor published the said pamphlet, that a pamphlet of the kind mentioned in the charge-sheet was printed by one M. K. Mukhopadhyaya and that his name (the respondent's) was printed therein as its publisher without his knowledge or consent. As regards the rest of the charges, he denied them all. Since they flowed from the first charge, and that charge depended upon his having published the said pamphlet, those charges, according to him, were not sustainable in view of his not having been responsible for its publication.

4. After a departmental enquiry, the Directorate of Transporta-

tion passed an order dated June 7, 1952 allowing the respondent to resume duty with effect from the date when the order would be served upon him. The order, however, provided that:

"For his period of suspension at the rate admissible under the rules, as a disciplinary measure.

The period of his suspension will be treated as on duty."

Along with this order, and as was conceded in the High Court, as part of it, a warning also was administered to the respondent drawing his attention to Rule 23 and directing him not to take part in any political activities in future.

5. It may be noticed that the order did not contain any finding on the four charges served on the respondent or any one of them. It did not also state that the respondent had published the said pamphlet or that in consequence of his having published it, he was responsible for embarrassing the Government in its relations with the public or any section thereof, or that the publication by him constituted his participating actively in politics, or that because of such alleged publication by him he was guilty of carrying on propaganda in connection with any general elections, or that he was, therefore, guilty of breach of Rules 20 and 23 of the said rules.

6. As appearing from the counter-affidavit, filed by the Director (Transportation), no such finding was possible as none of the said charges was brought home to the respondent. Indeed, the Director, in the said affidavit, could only say that the documentary and oral evidence adduced in the said enquiry showed; (a) that the petitioner was the secretary of the Arya Samaj at whose instance the said pamphlet had been printed and the respondent's name was printed as its publisher, (b) that it was admitted by the respondent that the books and pamphlets of the Arya Samaj were printed at the Satyanarain Press and (c) that the respondent had actively been participating in politics. He conceded that the only conclusion he could come to was that "the petitioner (i.e., the respondent) was politically connected although it was difficult to establish the same

from the available records and as a disciplinary measure the petitioner was granted a subsistence allowance during the period of his suspension and warned not to take part in any political activities." It is clear from this concession that it was not possible for the Director to hold, on the available data before him, the respondent guilty of any of the four charges preferred against him. A fortiori, he could not be held guilty of having violated Rule 20 or Rule 23. That being so, it is impossible to understand how the order of suspension, the payment to the respondent of only 25 per cent of his basic pay and the warning administered to him, all as disciplinary measures, i.e., as penalties, could possibly be passed.

7. Rule 20 (1) prohibits a Government servant from making any statement of fact or opinion in a document published under his own name or in any public utterances delivered by him which is capable of embarrassing: (a) the relations between the Government and the people of India, or any section thereof, or (b) the relations between His Majesty's Government or the Governor-General in Council and any foreign country or the ruler of any State in India. Sub-rule (2) provides that a Government servant, who intends to publish any document under his name or to deliver any public utterance containing statements in respect of which any doubt as to the application of the restrictions under sub-rule (1) may arise, shall submit to the Government a copy or draft of the document which he intends to publish or of the utterance which he intends to deliver and shall not publish the document or deliver such utterance save with the sanction of the Government. R. 23 (1) (i) provides that subject to the provisions of R. 22 or of any general or special order of the local Government no Government servant shall take part in, subscribe in aid of or assist in any way any political movement in India or relating to Indian affairs. The explanation to that rule lays down that the expression "political movement" includes any movement or activity tending, directly or indirectly, to excite disaffection against, or to embarrass the Government as by law established or to promote feelings of hatred or

enmity between different classes of His Majesty's subjects or to disturb the public faith.

8. Assuming for the time being the validity of Rules 20 and 23, Rule 20 could not be invoked against the respondent for the simple reason that there was no finding, as the counter-affidavit filed by the Director shows, that the respondent was responsible for the publication of the said pamphlet. It is true, as the counter-affidavit stated, that the respondent was the secretary of the Arya Samaj at whose instance the said pamphlet had been printed and the respondent's name was published therein as its publisher. But the respondent's case all throughout was that his name was mentioned in the said pamphlet as its publisher without his knowledge or consent. There was no finding that the respondent's case was untrue. In the absence of such a finding and holding the respondent responsible for the publication of the said pamphlet, the charge of violating Rule 20 against him was clearly unsustainable. Further, there was no finding that the said pamphlet contained any statement of fact or opinion which was capable of embarrassing the relations between the Government and the people of India or any section thereof, or the relations between the Government on the one hand and any foreign country or the ruler of any State in India as required by Rule 20 (1).

9. The position in regard to Rule 23 was even less sustainable. None of the four charges preferred against him alleged that he had taken part in or subscribed in aid of or assisted in any way any political movement in India or relating to Indian affairs. There was no finding, nor was there any allegation in the Director's said counter-affidavit that the Arya Samaj, of which the respondent was the secretary, was a political movement in which the respondent had taken part or had rendered any assistance. There being no such charge or finding, the respondent obviously could not be held guilty of any breach of Rule 23. As already stated, the only conclusion arrived at by the Director, if it could at all be characterised as a conclusion, was that the respondent was "politically connected". Such a statement was not a conclu-

sion because the Director did not specify with what movement or party or organisation the respondent was politically connected. The only connection referred to was with the Arya Samaj which was not found or named by the Director as a political movement or a political organisation. The statement, therefore, was not only vague but was a mere speculation on the part of the Director, since it was not based on any evidence and as the Director himself confessed in his counter-affidavit "it was difficult to establish the same from the available records". Such a finding was, therefore, no finding based on any evidence, and could not be depended upon and made the basis for any disciplinary penalty.

10. There was, therefore, no question of either R. 20 or R. 23 being enforced against the respondent. The order imposing the penalty of withholding 3/4th of the basic pay and directing to pay to the respondent only 1/4th thereof and the warning issued to him both as and by way of penalties was without any basis and was therefore bad. The Letters Patent Bench of the High Court, therefore, was right in allowing the respondent's writ petition and setting aside the order even on the assumption that the said two rules were valid.

11. The aforesaid conclusion of the Letters Patent Bench really concluded the matter and the respondent's writ petition had to be allowed. But the learned Single Judge, as also the learned Judges forming the Letters Patent Bench, went into the question of the validity of the said rules. That, in our view, was not necessary for the purposes of the case. It is true that the learned Single Judge went into the question of the validity of the said rules as it was contended before him that the said rules placed unreasonable restrictions on the respondent's freedom of speech and expression guaranteed by Art. 19 (1) (a) and (b), and were not saved by cl. (2) of that article. Reliance was placed before him on an earlier decision of Sinha, J. in *Krishna C. Chatterjee v. Chief Supdt. Central Telegraph Office Calcutta*, AIR 1955 Cal 76 where the words in R. 20 (1), namely, "capable of embarrassing" were held to be vague and the freedom of speech and

expression having been made therein subject to "the arbitrary subjective satisfaction" of a few persons in authority. In the opinion of the learned Single Judge, the word "embarrassing" could not be regarded as vague or uncertain, as expressions such as "tending to embarrass the administration of justice" and "calculated to prejudice the fair trial of a case" were well known judicial expressions used in cases of contempt of court, and therefore, R. 20 (1), according to him, could not be held to be vague or uncertain. On merits, he found that the impugned order itself showed that the Director had not wholly condoned "the misconduct" of the respondent and that on the other hand, he had been administered a warning not to take part in politics in future. Therefore, the grant of 25 p.c. of his pay only during the suspension period was justified. In this view he dismissed the respondent's writ petition. The Letters Patent Bench disagreed with the reasoning of the learned Single Judge and thought that the decisions of this Court in *Kameshwar Prasad v. State of Bihar* 1962 Supp (3) SCR 369 = (AIR 1962 SC 1166) and *O. K. Ghosh v. E. X. Joseph*, 1963 Supp (1) SCR 789 = (AIR 1963 SC 812) in relation to R. 4 (A) of the Bihar Government Servants' Conduct Rules, 1956 and R. 4 (A) and 4 (B) of the Central Civil Services (Conduct) Rules, 1955, applied against R. 23 (1) (i) of the rules in question, and held that that rule violated Art. 19 (1) (a) and (b) and was not protected by cl. (2) of that Article, and consequently, held that rule to be invalid.

12. We are of the opinion that in view of the clear statements made by the Director in his counter-affidavit the respondent could not be held responsible for the publication of the said pamphlet. As aforesaid, there was not and could not be such a finding, and therefore, R. 20 could not be invoked against him. Similarly, since even according to the Director, the respondent was connected only with the Arya Samaj, in the absence of any finding that the Arya Samaj was either a political movement or a political organisation, R. 23 also could not be invoked against him. That being the position, the impugned order passed as a disciplinary measure against

him was not sustainable under either of the said two rules and had, therefore, to be quashed. In this view the Letters Patent Bench could have concluded the appeal before it without going into the question as to the validity of the said two rules.

13. It is true that the learned Single Judge had cast doubt on the correctness of the decision of Sinha, J. on R. 20 of the said Rules in the case of *Krishna C. Chatterjee*, AIR 1955 Cal 76. But he had not based his decision in the present case on any finding that the respondent had published the said pamphlet and was therefore guilty of breach of R. 20. Consequently, R. 20 could not be applied by him against the respondent in the absence of any finding by the Director that the respondent had published the said pamphlet. It was, therefore, not necessary for the Letters Patent Bench to go into the question of the validity of R. 20. Regarding R. 23, that rule was not the subject matter in the case of *Krishna C. Chatterjee*, AIR 1955 Cal 76. For the reasons already set out above, R. 23 also could not be pressed into service against the respondent. The learned Single Judge, no doubt, upheld the impugned order but that was on an assumption by him that the respondent was guilty of misconduct, i.e., misconduct of being politically connected. But that assumption was unjustified as there was no such charge against the respondent nor was any finding that he was connected or associated with any political organisation or party. On this ground alone the judgment of the learned Single Judge was liable to be reversed. Thus it was not necessary for the Letters Patent Bench to decide the question of validity of either R. 20 or R. 23 and that question was only academic.

14. In these circumstances, we ourselves do not feel called upon to go into the question of the validity of the said two rules on which, we feel, much can be said by both the sides. It may be that the view taken by the Letters Patent Bench will bind the State Government whenever it seeks to take action against any one of its servants in future. But the correctness of the view taken by the Bench in this case can be challenged in future by the Government, if it considers it neces-

sary, in a more suitable case. So far as the present case is concerned the controversy is altogether academic as on merits neither of the two rules could be invoked against the respondent.

15. For the reasons stated above, we are in agreement with the Letters Patent Bench of the High Court that the impugned order could not be sustained on merits and the writ petition of the respondent was rightly allowed.

16. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 161

(V 58 C 41)

(From: Madras)*

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

Khajamian Wakf Estates etc. Appellants v. The State of Madras etc. Respondents.

Civil Appeals Nos. 2480 to 2509, 2543 to 2546, 2547 to 2553, 2559, 2575, 2576 & 2602 of 1966, 214 to 217, 672 to 674, 1053, 1054, 1055, 1062, 1063, 1457 and 1458 of 1967, and 162, 672, 67E and 1000 of 1968, D/- 18-11-1970.

(A) Constitution of India, Art. 31A—Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre. — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963) Pre. — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act, (30 of 1963), Pre. — Constitutionality — Acts cannot be challenged on ground of violation of Arts. 14, 19 and 31 of Constitution.

The Acts are completely protected by Art. 31A from challenge on the ground that they violate Arts. 14, 19 and 31 of the Constitution. (Para 4)

The Acts are laws providing for the acquisition by the State "estate" as contemplated by Art. 31-A. They seek to abolish all intermediate holders and to establish direct relationship between the Government and the occu-

pants of the concerned lands. These legislations were undertaken as a part of agrarian reform. Hence the provisions relating to acquisition or the extinguishment of the rights of the intermediate holders fall within Art. 31-A. AIR 1969 SC 453, Followed.

(Para 6)

The question whether as a result of Madras Act 40 of 1956, certain Inams have ceased to be Inams, is immaterial as they are "estate" within the meaning of Art. 31-A because they fall either under sub-clauses (I) or (II) or (III) of Clause (a) of Art. 31-A (2) and therefore the provisions of the Acts cannot be challenged on the ground that they infringe Arts. 14, 19 and 31.

(Para 7)

It may be that for some of the properties included in the Inam no compensation is provided, but, it cannot be said that no compensation is provided for the acquisition of the Inam as a whole in view of S. 18 of Act 26 of 1963 which provides that compensation shall be determined for each Inam as a whole and not separately for each of the interests in the Inams.

(Para 8)

(B) Constitution of India, Art. 246 — Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre. — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963), Pre. — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act (30 of 1963), Pre. — Validity — Acts are not invalid on ground that provisions in the Acts reducing liability of tenants in payment of arrears of rent are beyond legislative competence of the State Legislature.

The Acts are not invalid on ground that the provisions in the Acts reducing the liability of the tenants in the matter of payment of the arrears of rent, whether decreed or not are beyond the legislative competence of the State legislature. (Para 10)

The arrears contemplated by the Acts are either arrears of rent or debts due from agriculturists. If they are treated as arrears of rent then the State legislature had power to legislate in respect of the same under Entry 18 of List II of the VIIth Schedule. If they are considered as debts due from the agriculturists then the State legislature had competence to

*Writ Petns. Nos. 1542 of 1965, D/- 24-6-1966 and 20-7-1966 — Mad.

legislate in respect of the same under Entry 30 of the same list.

(Para 10)

(C) Constitution of India, Arts. 31 (2) and 31-A — Madras Inams Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre. — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963), Pre. — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act (30 of 1963), Pre. — Validity — Acts do not violate Art. 31 (2) merely because in regard to Inams belonging to religious and charitable institutions Acts provided payment of compensation to them every year as Tasdik and not in lump sum — Moreover, the provision is protected by Art. 31A. (Para 11)

(D) Constitution of India, Arts. 31 and 26 — Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act (26 of 1963), Pre. — Madras Lease-Holds (Abolition and Conversion Into Ryotwari) Act (27 of 1963) Pre. — Madras Minor Inams (Abolition and Conversion Into Ryotwari) Act (30 of 1963) Pre. — Validity — Acts are not invalid on ground that they provide for acquisition of properties belonging to religious denomination.

The Legislature by providing in the Acts for acquisition of properties belonging to religious denominations has not violated Art. 26 of the Constitution. (Para 12)

The provisions in Art. 26 (c) and (d) do not take away the right of the State to acquire property belonging to religious denominations. Those denominations can own, acquire properties and administer them in accordance with law. That does not mean that the property owned by them cannot be acquired. Article 26 does not interfere with the right of the State to acquire property. (Para 12)

(E) Constitution of India, Art. 31A Second Proviso—Acquisition in breach of second Proviso to Art. 31A will be invalid to that extent. (Para 13) Cases Referred: Chronological Paras (1969) AIR 1969 SC 453 (V 56)=

(1969) 3 SCR 1, B. Shankara

Rao v. State of Mysore 6

M/s. V. Vedantachari, K. C. Rajappa, S. Balakrishnan and Dr. N. M. Ghatate, Advocates, for Appellants (In Civil Appeals Nos. 2480 to 2482, 2484 to 2509, 2575 and 2576 of 1966); M/s. V. Vedantachari and S. Balakri-

shnan, Advocates, for Appellants (In Civil Appeals Nos. 2543, 2544 and 2546 of 1966); Mr. S. Balakrishnan and Dr. N. M. Ghatate, Advocates, for Appellant (In Civil Appeal No. 2546 of 1966); Mr. S. V. Gupte, Sr. Advocate, (Mr. K. Jayaram, Advocate, with him), for Appellants (In Civil Appeals Nos. 2547 to 2553 and 2559 of 1966); M/s. K. Parasuram, K. R. Chaudhuri and K. Rajendra Chaudhuri, Advocates, for Appellants (In Civil Appeals Nos. 2602 of 1966, 214 to 217 and 1055 of 1967); M/s. M. S. K. Sastri, S. Gopalan and M. S. Narasimhan, Advocates, for Appellants (In Civil Appeals Nos. 672 to 674 of 1967); Mr. M. S. Narasimhan, Advocate, for Appellants (In Civil Appeals Nos. 1053 and 1054 of 1967); Mr. A. V. V. Nair, Advocate, for Appellants (In Civil Appeals Nos. 1062 and 1063 of 1967); M/s. V. Vendantachari, A. T. M. Sampath and E. C. Agrawala, Advocates, for Appellants (In Civil Appeals Nos. 1457 and 1458 of 1967); Mr. P. C. Bhartari, Advocate, and M/s. J. B. Dadachanji and Co., Advocates, for Appellant (In Civil Appeal No. 162 of 1968); Mr. K. Jayaram, Advocate for Mr. R. Thiagarajan, Advocate, for Appellants (In Civil Appeals Nos. 672, 673 and 1000 of 1968 and 2483 of 1966); Mr. S. Mohan Kumaramangalam, Sr. Advocate, (Mr. A. V. Rangam, Advocate, with him), for Respondent-State of Madras (In all the Appeals); M/s. R. Kunchitapadam, Vineet Kumar and K. Jayaram Advocates, for Respondent No. 2 (In Civil Appeal No. 2484 of 1966); Mr. M. K. Ramamurthi, Sr. Advocate, (M/s. J. Ramamurthy and Vineet Kumar, Advocates, with him) for Respondent No. 2 (In Civil Appeals Nos. 2488 to 2490 of 1966).

The Judgment of the Court was delivered by

HEGDE, J.: In this batch of appeals, the validity of the Madras Inam Estates (Abolition and Conversion Into Ryotwari) Act, 1963 (Madras Act 26 of 1963); the Madras Lease-Holds (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act 27 of 1963) and the Madras Minor Inams (Abolition and Conversion into Ryotwari) Act 1963. (Madras Act 30 of 1963) is challenged on the ground that the material provisions in those Acts are violative of Arts. 14, 19 (1) (f) and 31 of the Constitution. The provisions in

these Acts reducing the tenants' liability to pay the arrears of rent are also challenged on the ground that the legislature had no competence to enact those provisions. A few other minor contentions are also raised in these appeals to which reference will be made in the course of the judgment. All these contentions had been unsuccessfully urged before the High Court. Dealing with the allegation of infringement of Arts. 14, 19 and 31, the High Court in addition to holding that there has been no infringement of those Articles has further held that the challenge to the validity of these Acts on the basis of those Articles is precluded in view of Art. 31-A. Dealing with the contention relating to the reduction of rent the High Court came to the conclusion that the legislature had power to enact the impugned provisions. The High Court also has given reasons for rejecting the other contentions advanced before it. Aggrieved by the decision of the High Court these appeals have been brought by special leave.

2. The impugned statutes deal with agrarian reforms. They purport to deal with Inam lands. It is pointless to go to the origin of Inams or about their early history. Suffice it to say that the Urdu word "Inam" means a gift. The Inams grants were made by the Rulers for various purposes. Some of them were granted to institutions and some to individuals. Broadly speaking there were three types of Inams. The first type consisted of the grant of the melwaram right alone. The second category consisted of the grant of both the melwaram as well as the kudivaram right. In addition to these two Inams, there were what are known as Minor Inams. Sometime prior to 1862, the Government took up the question of enfranchising the Inams. The Inams Commissioner went into the rights of various persons claiming to be Inamcars. Thereafter the Madras Enfranchised Inams Act, 1862 (Madras Act IV of 1862) was passed for declaring and confirming the title of the Inamcars. Section 2 of that Act provided that the title deeds issued by the Inams Commissioner or an authenticated extract from the register of the Commissioner or Collector shall be deemed sufficient proof of the enfranchisement of land

previously held on Inam tenure. By Madras Inams (Assessment) Act, 1956 (Madras Act 40 of 1956), full assessment was levied on all Inam lands except melwaram Inams granted on service tenure, without affecting in any way the rights as between the Inamdar and other persons, if any, in possession or enjoyment of the Inam land.

3. Where the Inam comprised the entire village, the same was treated as an "estate" in the Madras Proprietary Estates' Village Service Act, 1894 (Madras Act 2 of 1894) and the Madras Hereditary Village Offices Act, 1895 (Madras Act 3 of 1895) as well as in Madras Estates Land Act, 1908 (Madras Act 1 of 1908). Madras Estates Land Act, 1908 recognised the ryots' permanent tenure. That Act secured a permanent right of occupancy to every ryot who at the commencement, was in possession of "ryoti" land or who was subsequently admitted to the possession of such land. Then came the Madras Estates Land (Third Amendment) Act, 1936 (Madras Act 18 of 1936). That Act amplified the definition of the "estate" in the Madras Estates Land Act, 1908, so as to bring within its scope all Inam villages, of which the grant was made, confirmed or recognised by the Government. It also provided that when a question arises whether any land was the landholder's private land or not, the land should be presumed not to be Inamdar's private land until the contrary was proved. In 1937, the Madras Government appointed the Prakasam Committee to enquire into and report the conditions which prevailed in the Zamindari and other proprietary areas in the State. That committee submitted its report together with a draft bill on the lines of its recommendations, but no action was taken on that report as the Congress Ministry which appointed it resigned. Then we come to the Madras Estates (Abolition and Conversion Into Ryotwari) Act, 1948 (Madras Act 26 of 1948). This Act applies to all estates i.e. Zamindari and under-tenure estates and all Inam villages in which the grant consisted of melwaram alone. That Act as its preamble says is an Act to provide for the repeal of the permanent settlements, the acquisition of the rights of landholders in perma-

nently settled and certain other estates in the Province of Madras and the introduction of the ryotwari settlement in such estates. To complete the agrarian reform initiated by this Act, the impugned Acts appear to have been enacted. The Preamble to Madras Act 26 of 1963 says that it is an Act to provide for the acquisition of all rights of landholders in Inam estates in the State of Madras and the introduction of the ryotwari settlement in such estates. That Act follows by and large the provisions in Act 26 of 1948. In Act 26 of 1963 Inams estates are divided into two categories namely (1) existing Inam estate and (2) a new Inam estate. The existing Inam estate refers to the estate consisting of the whole village and the new Inam estate means a part village Inam estate of Pudukkottai Inam estate. The "New Inam estate" was not an estate known to law earlier. It is merely a name given to part village Inam estate or a Pudukkottai Inam estate for drafting convenience. Act 27 of 1963 is an Act to provide for the termination of the leases of certain lease-holds granted by the Government, the acquisition of the rights of the lessees in such lease-holds, and the introduction of the ryotwari settlement in such leaseholds. Act 30 of 1963 is an Act to provide for the acquisition of the rights of the Inamdars in minor Inams and the introduction of the ryotwari settlement in such Inams.

4. We do not think it necessary to go into the contention that one or more provisions of the impugned Acts are violative of Arts. 14, 19 and 31, as in our opinion these Acts are completely protected by Art. 31-A of the Constitution which says that:

"Notwithstanding anything contained in article 13, no law providing for—

(a) the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights. . . shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14, article 19 or article 31."

5. The expression "estate" is defined in sub-art. (2) of Art. 31-A. That definition includes not merely Inams but also land held under ryotwari settlement as well as land held

or let for the purpose of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pastures or site or buildings and other structures occupied by the cultivators of land, agriculturists and village artisans.

6. The impugned Acts are laws providing for the acquisition by the State "estate" as contemplated by Art. 31-A. They seek to abolish all intermediate holders and to establish direct relationship between the Government and the occupants of the concerned lands. These legislations were undertaken as a part of agrarian reform. Hence the provisions relating to acquisition or the extinguishment of the rights of the intermediate holders fall within the protective wings of Art. 31-A — see *B. Shankara Rao v. State of Mysore*, (1969) 3 SCR 1 = (AIR 1969 SC 453).

7. It is next contended on behalf of the appellants that the lands on which full assessment was levied under Act 40 of 1956 ceased to be inams and therefore provisions of the Madras Act 26 of 1963 cannot be applied to the same. We have not thought it necessary to go into the question whether as a result of Madras Act 40 of 1956, certain Inams have ceased to be Inams, as in our opinion, whether they continued to be Inams or not they are still "estate" within the meaning of Art. 31-A because they fall either under sub-clauses (I) or (II) or (III) of Clause (a) of Art. 31-A (2) and that being so the provisions of the impugned Acts cannot be challenged on the ground that they infringe Arts. 14, 19 and 31. The contention that as the State purported to abolish Inams and not other intermediaries the law cannot be held to be valid if the intermediaries sought to be removed are not Inamdars is an untenable one. If the impugned legislation can be traced to a valid legislative power, the fact that the legislature wrongly described some of the intermediaries sought to be removed does not make the law invalid. From the above observations, it should not be understood that we have come to the conclusion that the intermediaries concerned were not Inamdars. We have not gone into that question. From the provisions of the impugned Acts, it is quite clear that the intention of

the legislature was to abolish all intermediaries including the owners of those "estates" that were subjected to full assessment by Act 40 of 1956.

8. It was next urged that Article 31-A does not protect a legislation where no compensation whatsoever has been provided for taking the "estates". We do not think we need go into that question. This contention bears only on the provisions of the Madras Act 26 of 1963. Section 18 of that Act provides that compensation shall be determined for each Inam as a whole and not separately for each of the interests in the Inams. The validity of this section was not challenged before us. All that was urged was that for some of the properties included in the Inam, no compensation was provided. Even if we assume this contention to be correct, it cannot be said that no compensation was provided for the acquisition of the Inam as a whole. Hence Art. 31-A bars the plea that there was contravention of Art. 31 (2) in making the acquisition in question. One of the contentions taken on behalf of the appellants is that the impugned Acts to the extent they purport to acquire mining lands are outside the purview of Art. 31-A. It is not known whether the lands in which mining operations are going on were let or held as "estates". There is also no evidence to show that the owners of those lands are entitled to the mines. Hence it is not possible to uphold the contention that lands concerned in some of the appeals have been acquired without paying compensation.

9. In order to avoid the bar of Art. 31-A, a curious plea was put forward. It was urged that when the concerned bills were submitted to the President for his assent as required by the first proviso to Art. 31-A, the President was not made aware of the implications of the bills. This contention is a wholly untenable one. There is no material before us from which we could conclude that the President or his advisers were unaware of the implications of those bills. We must proceed on the basis that the President had given his assent to those bills after duly considering the implication of the provisions contained therein.

10. It was next urged that the provisions in the impugned Acts reduc-

ing the liability of the tenants in the matter of payment of the arrears of rent, whether decreed or not were beyond the legislative competence of the State legislature. This contention is again untenable. Those arrears are either arrears of rent or debts due from agriculturists. If they are treated as arrears of rent then the State legislature had legislative power to legislate in respect of the same under Entry 18 of List II of the VIIth Schedule. If they are considered as debts due from the agriculturists then the State legislature had competence to legislate in respect of the same under Entry 30 of the same list.

11. In regard to the Inams belonging to the religious and charitable institutions, the impugned Acts do not provide for payment of compensation in a lump sum but on the other hand provision is made to pay them a portion of the compensation every year as Tasdik. This is only a mode of payment of the compensation. That mode was evidently adopted in the interest of the concerned institutions. We are unable to agree that the method adopted is violative of Art. 31 (2). At any rate that provision is protected by Art. 31-A.

12. It was next urged that by acquiring the properties belonging to religious denominations, the legislature violated Art. 26 (c) and (d) which provide that religious denominations shall have the right to own and acquire movable and immovable property and administer such property in accordance with law. These provisions do not take away the right of the State to acquire property belonging to religious denominations. Those denominations can own, acquire properties and administer them in accordance with law. That does not mean that the property owned by them cannot be acquired. As a result of acquisition they cease to own that property. Thereafter their right to administer that property ceases because it is no longer their property. Article 26 does not interfere with the right of the State to acquire property.

13. Mr. S. V. Gupte appearing for some of the appellants urged that the impugned Act contravenes the second proviso to Art. 31-A. From the material before us it is not possi-

ble to hold that any property under the personal cultivation of any of the appellants had been acquired. Further there is no material to show what ceiling is? Hence it is not possible for us to examine the correctness of that contention. If in any particular case, the second proviso to Art. 31-A has been breached, then to that extent, the acquisition will become invalid.

14. It was urged by Mr. Sastri appearing for some of the appellants that the impugned Acts do not acquire the lands concerned in some of the appeals. This contention was not gone into by the High Court. Dealing with that contention, the High Court in its judgment observed:

"But the applicability of the impugned Acts to the Inams in question cannot be conveniently investigated in the present writ proceedings. The question will have to be determined with reference to the terms of the grant, the extent of the grant has to be ascertained by reference to the relevant materials. Section 5 of Madras Act XXXI of 1963 (XXX of 1963?) makes special provision for determination of the question whether any non-ryotwari area is or is not an 'existing Inam Estate' or 'part village Inam Estate' or a minor Inam or whole Inam village in Pudukkottai. It is stated at the bar that in most of the cases now before us the parties have applied under the provisions of the said Act for determination of the character of the Inams respectively held by them. It is needless to point out that the Tribunal constituted under the Act will be entitled to decide that a particular property is neither an 'existing Inam estate' nor a part village Inam estate nor a whole Inam village in Puddukkottai and completely out of the coverage of Acts XXVI and XXX of 1963. We also make it clear that the disposal of these writ petitions now does not preclude the Inamdars from agitating the question that a particular property is not an Inam at all and does not fall under any of the aforesaid four categories or falls under one or other of the categories as may be urged for the Inamdars."

15. We agree with the High Court that the contention in question can be more appropriately gone into in the manner suggested by the High Court.

16. In the result these appeals fail and they are dismissed. But under the circumstances, we make no order as to costs in these appeals.

Appeals dismissed.

AIR 1971 SUPREME COURT 166
(V 58 C 42)

(From: Calcutta)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

The Megna Mills Co., Ltd., (In both the Appeals); Appellant v. Ashoka Marketing Ltd., (In both the appeals), Respondent.

Civil Appeals Nos. 2012 and 2013 of 1966, D/- 6-11-1970.

Forward Contracts (Regulation) Act (1952), Sections 15 and 11 — East India Jute and Hessain Exchange Ltd., Bye-laws, Bye-laws 1 (b), 15 and 17 — Bye-law 1 (b) is mandatory — Non-compliance thereof invalidates contract.

Bye-law 1 (b) of Chapter V is mandatory when read with bye-laws 15 and 17. The bye-law requires details in the form in Appendix II to be completed in all cases. Condition No. 2 cannot be regarded as inconsequential because it must be stipulated in the contract as to how many working days' notice has to be given by the buyers to place the contracted goods along side "export vessel in the port of Calcutta". Literal compliance with the prescribed form may not be essential but if the contract does not contain all the terms and conditions set out in the form the contract will be void under the provisions of the Act and the bye-laws. AIR 1933 PC 55, Followed; Matters Nos. 26 and 27 of 1966, D/- 4-4-1966 (Cal), Affirmed.

(Paras 7, 8)

Cases Referred: Chronological Paras
(1933) AIR 1933 PC 55 (V 20) =
60 Ind App 63, Radhakisson
Gopikisson v. Balmukund Ram-
chandra 8

A. K. Sen, Sr. Advocate, (M/s. O. P. Khaitan and D. N. Gupta, Advocates, with him) (In C. A. No. 2012 of 1966) and M/s. O. P. Khaitan and D. N. Gupta, Advocates (in C. A. No. 2013 of

*(Matters Nos. 26 and 27 of 1966 D/- 4-4-1966 — Cal.)

KN/KN/F326/70/MVJ/B

1966), for Appellant; Mr. S. T. Desai, Sr. Advocate, (M/s. H. K. Puri and K. K. Jain Advocates with him) (in C. A. No. 2012 of 1966) and M/s. H. K. Puri and K. K. Jain, Advocates (in C. A. No. 2013 of 1966), for Respondent.

The Judgment of the Court was delivered by

GROVER, J.:— These two appeals by special leave are from a judgment of the Calcutta High Court holding that the disputes between the parties could not be referred to arbitration.

(Cont. on Col. 2)

"We have today bought from you the following goods:

Description	: Jute Carpet Backing cloth bound on card-board cores 152" wide.
Weight	: 9 oz. on 36".
Warp Ends	: Per Inch 15.
Weft Ends	: Per Inch 13.
Oil contents	: Upto 2%.
Quantity	: 5,000 Rolls, each roll having continuous length of 300 yards approximately
Rate	: Rs. 4,000/- per ton.
Delivery	: 500 Rolls monthly; March 63 to December 1963.

All other terms and conditions of the East India and Hessain Exchange standard contract will be applicable to this contract. Please sign your acceptance on the duplicate copy of this letter."

3. The appellant from time to time delivered certain Rolls of Jute Carpet Backing cloth under the aforesaid contract, the price of which was paid by the respondent. As regards the balance number of Rolls deliverable under the contract the appellant purchased back and the respondent resold the balance quantities of goods by a contract dated December 9, 1963 which transaction was embodied in a letter of the appellant to the respondent dated December 9, 1963 and which was countersigned by the respondent. According to the appellant it was agreed or understood between the parties that deliveries under the two contracts of December 21, 1962 and December 9, 1963 would be set off against each other. As regards 1,000 Rolls deliverable for the months of August and September 1963 under

2. It is necessary to state the facts only in Civil Appeal No. 2012/66. The appellant was and still is a member of the East India Jute and Hessain Exchange Limited, hereinafter called the "Exchange", which is the only association recognised under the provisions of the Forward Contracts (Regulation) Act, 1952, hereinafter called the "Act". The respondent is not a member of the said association. On December 21, 1962 transaction was entered into between the parties by means of a letter written by the respondent to the appellant. This letter was in the following terms:

the contract dated December 21, 1962 the appellant is stated to have received from the respondent difference in the price of goods but in respect of the balance of 1500 Rolls the respondent did not pay the difference. The appellant demanded the difference payable by the respondent under the said contracts. Disputes and differences having arisen between the parties in the matter the appellant referred its claim to the arbitration of Bengal Chamber of Commerce and Industry. This was purported to have been done on the footing that the contracts provided that all terms and conditions thereof would be governed by the bye-laws of the exchange for trading in transferable specific delivery contracts. The standard contract forms and the rules and bye-laws of the Exchange, inter alia, provided for arbitration of the Bengal Chamber of Commerce and Industry. When the Chamber proceeded with the arbitration pursuant to the reference the respondent filed a petition before the Calcutta High Court on February 19,

1966 under Section 33 of the Indian Arbitration Act, 1940. It was prayed that the extent and validity of the arbitration agreement contained in the contracts be determined and it be declared that there was no valid arbitration agreement between the parties in respect of the contracts dated Dec. 21, 1962 and December 9, 1963. The main point raised in the respondent's petition was that the contracts were not in accordance with the provisions of the Act or the bye-laws of the Exchange and were not in the forms prescribed and were, therefore, void and illegal. This petition was heard by A. N. Sen, J., who allowed the petition and held that the contracts were illegal and there was no valid arbitration agreement between the parties.

4. The Act provides for regulation of certain matters relating to forward contracts, the prohibition of options in goods and for matters connected therewith including the setting up of a Forward Markets Commission, recognition of association for the purpose of the Act, for issuing notifications for regulating or prohibiting forward contracts and option in goods etc. Section 11 empowers a recognised association to make bye-laws for the regulation and control of forward contracts subject to previous approval of the Central Government. Sub-section (3) of Section 11 is as follows:—

(3) "The bye-laws under this section may—

(a) specify the bye-laws the contravention of any of which shall make a contract entered into otherwise than in accordance with the bye-laws void under sub-section (2) of Section 15;

(aa) specify the bye-laws the contravention of any of which shall make a forward contract entered into otherwise than in accordance with the bye-laws illegal under sub-section (3-A) of Section 15.

(b)"
Under Section 15 (1) the Central Government may by notification declare the circumstances in which the forward contracts in notified goods would be void and illegal. Sub-section (2) of Section 15 provides that any forward contract in goods entered into in pursuance of sub-section (1) which is in contravention of any of the

bye-laws specified in this behalf under clause (a) of sub-section (3) of Section 11 shall be void. Sub-section (3-A) makes any forward contract in goods entered into in pursuance of sub-section (1) which at the date of the contract is in contravention of any of the bye-laws specified in this behalf under clause (aa) of sub-section (3) of Section 11 illegal.

5. By means of a notification dated March 29, 1958, the Central Government declared as follows:—

"In exercise of the powers conferred by sub-section (1) of Section 15 of the Forward Contracts (Regulation) Act, 1952 (74 of 1952) the Central Government hereby declares that the said section shall apply to jute goods (hessian cloth made of jute or bags of such hessian cloth and sacking cloth) in the City of Calcutta."

Pursuant to the provisions of Section 11 of the Act the Exchange made bye-laws for trading in transferable specific delivery contracts in jute goods. These bye-laws and the forms of the contract prescribed are contained in Working Manual Volume III. Chapter V of the Bye-laws contains the general trading provisions. According to bye-law 1 (b) all Transferable Specific Delivery Contracts shall be in writing in the prescribed forms (Appendix II for jute goods and Appendix IV for raw jute). Clause (g) of the aforesaid bye-law (1) laid down that all transferable specific delivery contracts shall be subject to the provisions of the bye-laws. Bye-laws 15 and 17 may be reproduced:

"15 "No member shall enter into a transferable specific delivery contract in raw jute and/or jute goods otherwise than on the terms and conditions prescribed under these Bye-laws."

17 "Any transferable specific delivery contract entered into in raw jute and/or jute goods which at the date of the contract is in contravention of the provisions of any of the Bye-laws 1 (c), 13, 14, 15 and 16 of Chapter V shall be illegal under the provisions of Section 15 (3-A) of the Forward Contracts (Regulation) Act, 1952."

6. The main controversy has centered on the question whether the contracts out of which the disputes arose were in the form set out in Appendix II in the Working Manual. It was maintained by the appellant

that although the contracts out of which the disputes arose did not strictly conform to the prescribed form but they were substantially in the same terms as were contained in the form. As only substantial compliance was necessary the appellant could not be denied the benefit of bye-laws contained in Chapter X of the Working Manual relating to arbitration. Bye-law I of that Chapter provides that arbitration of any claims and disputes whether admitted or not arising out of or in relation to all transferable specific delivery contracts in raw jute and/or jute goods between members or between members and non-members under the provisions of the bye-laws shall be referred to the Tribunal of Arbitration either of the Bengal Chamber of Commerce and Industry or of the Indian Chamber of Commerce, Calcutta, as is agreed in the contract in accordance with the rules framed by the said Chamber for the purpose of arbitration by its tribunal from time to time provided where in a T. S. D. contract the name of the Tribunal of Arbitration of either of the aforesaid two Chambers is omitted, such reference shall be made to the Tribunal of Arbitration of the Bengal Chamber of Commerce and Industry. The case of the respondent, however, was that the contracts were not in the form contained in Appendix II in the Working Manual which was the prescribed form under the bye-laws and therefore the bye-laws including the one relating to arbitration in Chapter X could not be made applicable for the purpose of referring the disputes to the Tribunal of Arbitration which, in the present case, was the Bengal Chamber of Commerce and Industry, Calcutta. The High Court came to the conclusion that the contracts in question violated bye-laws 1 (b) and 15 in Chapter V of the Working Manual. The contravention of these bye-laws rendered the contracts illegal under the provisions of bye-law 17 of the same Chapter. The learned Judge noticed in particular the absence of any term in the contracts similar to clause (2) in the prescribed form in Appendix II which is as follows:

"Buyers to give clear working days notice to place goods along-side."

Now in the contracts no such term appeared that the buyers would give clear notice to place goods along-side, of the number of working days specified. It has been contended before us on behalf of the appellant that the mere absence of this condition or term in the contract was not sufficient to take them outside the prescribed form which had only to be substantially complied with and it was not necessary that blanks in each and every condition in the form should have been filled up. It has further been urged that bye-law 1 (b) of Chapter V could not be regarded as mandatory requiring the details in the form in Appendix II to be completed in all cases. Even with reference to condition (2) in the prescribed form it has been submitted that if the number of days was not specified a reasonable time should have been read into that condition. In other words the buyers were to give notice to place goods along-side within a reasonable time.

7. In our opinion, the High Court was right in holding that the contracts in question were not in the prescribed form and thus they did not comply with the requirement of bye-law 1 (b) of Chapter V. There can be no manner of doubt that that bye-law is mandatory when read with bye-laws 15 and 17. It must be remembered that under bye-law 15 no member shall enter into any transferable specific delivery contract otherwise than on terms and conditions prescribed under the bye-laws and under bye-law 17 if there is a contravention, inter alia, of bye-law 15 the contract shall be rendered illegal by virtue of the provisions contained in Section 15 (3-A) of the Act. Section 11 (3) (aa) specifically empowers the Exchange to make bye-laws the contravention of any of which shall make a forward contract entered into otherwise than in accordance with such bye-laws illegal. If, therefore, the contracts in question did not comply with the requirement of bye-law 1 (b) of Chapter V they would be rendered illegal and void.

8. It is true that in the letters evidencing the contracts it was mentioned "all other terms and conditions of the East India and Hessian Exchange standard contract will be ap-

plicable", which may be taken to import conditions 1 to 7 given in the penultimate column of the prescribed form. There would still be non-compliance with condition No. 2 reproduced before. Even if it was not necessary to use the same language the number of clear working days had to be specified which was not done in the contracts in dispute. Condition No. 2 cannot be regarded as inconsequential because it must be stipulated how many working days notice has to be given by the buyers to place goods along-side "export vessel in the Port of Calcutta". Literal compliance with the prescribed form may not be essential but if the contract does not contain all the terms and conditions set out in the form the contract will be void under the provisions set out before; (See the ratio of the decision in *Radhakisson Gopikisson v. Balmukand Ramchandra*, 60 Ind App 63 = (AIR 1933 PC 55).)

9. For the reasons given above the appeals must fail and they are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 170
(V 58 C 43)

(From Calcutta: AIR 1965 Cal 478)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Additional Collector of Customs, Calcutta and another, Appellants v. M/s. Best & Co. Respondent.

Civil Appeal No. 2003 of 1966, D/- 23-10-1970.

Imports and Exports (Control) Act (1947), S. 5 (as amended by Act 4 of 1960) — Breach of conditions of licence — No order confiscating goods can be made — (Sea Customs Act (1878), Section 167 (8)).

Contravention of any condition of a licence granted under any order is liable to be punished under S. 5 as amended. But on the terms of S. 5 as amended, the right to impose penalty for contravention of any condition of a licence may be exercised under the Sea Customs Act, 1878, and not under the Imports and Exports (Control) Act, 1947. For breach of any condition of a licence, it is open to the

authorities to direct prosecution, but no order confiscating goods and imposing penalty in lieu thereof can be made. The order of confiscation can only be made under S. 167 cl. 8 of the Sea Customs Act, 1878. The provisions of the Sea Customs Act, 1878, cannot be invoked to punish the breach of a condition of a licence granted under the Imports and Exports (Control) Act, 1947. (Paras 9, 10, 11)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 110 (V 56) =

(1969) 1 SCR 65, Boothalinga Agencies v. V. T. C. Poriaswami Nadar 9

(1962) AIR 1962 SC 1893 (V 49) =

(1963) 3 SCR 338, East India Commercial Co. Ltd. Calcutta v. The Collector of Customs, Calcutta 8

M/s. Ram Panjvani and S. P. Nayar, Advocates, for Appellants.

The following Judgment of the Court was delivered by

SHAH, J.: On March 31, 1959, the Ministry of Commerce and Industry, Government of India, granted to the respondents a licence permitting them to import from West Germany certain machinery described therein of the maximum C. I. F. value of Rs. 45,000/-. Condition No. 1 of the licence provided that:

"The x x application is accepted and import licence is hereby granted having quantity and value as the limiting factors and is not valid for clearance if the actual value of any item exceeds the C.I.F. value indicated in the licence by more than 5%". The respondents submitted a bill of entry dated July 1, 1960, disclosing the C.I.F. value of the consignment as Rs. 45,179-92 inclusive of landing charges, and cleared the consignment after paying duty assessed by the Customs authorities on the real value of the goods as disclosed in the bill of entry.

2. On June 20, 1961 the Customs authorities issued a notice requiring the respondents to show cause why penal action should not be taken against them under S. 167 (8) of the Sea Customs Act, 1878, as being persons concerned in the unauthorised importation of the goods. This notice was amended by notice dated September 21, 1961, whereby the respondents were charged with having com-

mitted offences under S. 167 (8) read with S. 3 (2) of the Imports and Exports (Control) Act, 1947, for illegally importing the machinery. The respondents claimed that no breach of the conditions of the licence was committed. The Additional Collector of Customs, Calcutta, by order dated March 17, 1962, directed confiscation of the machinery under S. 167 (8) of the Sea Customs Act read with S. 3 (2) of the Imports and Exports (Control) Act, 1947, and permitted the respondents to pay a fine of Rs. 20,000/- in lieu of confiscation. A personal penalty of Rs. 25,000/- was also imposed on the respondents.

3. The respondents then moved a petition before the High Court of Calcutta under Art. 226 of the Constitution praying for a writ quashing the adjudication order dated March 17, 1962. A Single Judge of the Calcutta (Contd. on Col. 2)

High Court dismissed the petition, but in appeal under the Letters Patent the High Court reversed the decision and issued a writ of certiorari quashing the order dated March 17, 1962. The Additional Collector of Customs, Calcutta, has appealed to this Court with certificate granted by the High Court.

4. The only question which falls to be determined is whether for breach of a condition of the licence penalty may be imposed under S. 5 of the Imports and Exports (Control) Act, 1947, read with the Sea Customs Act, 1878.

5. The relevant statutory provisions may first be noticed. Under Section 167 of the Sea Customs Act, 1878, the offences mentioned in the first column of the Schedule are punishable to the extent mentioned in the third column of the same with reference to such offences respectively:

Offences.	Section of this Act to which offence has reference.	Penalties.
8. If any goods, the importation or exportation of which is for the time being prohibited or restricted by or under Chapter IV of this Act, be imported into or exported from India contrary to such prohibition or restriction; or	18 & 19	such goods shall be liable to be confiscated; and any person concerned in any such offence, shall be liable to a penalty not exceeding three times the value of the goods, or not exceeding one thousand rupees.

Chapter IV of the Sea Customs Act, 1878, contains three sections: Ss. 13, 19 & 19A. By Section 18 an absolute prohibition is imposed in respect of importation of goods by land or by sea specified therein. Section 19 provides that the Central Government may from time to time, by notification in the Official Gazette prohibit or restrict the bringing or taking by sea or by land goods of any specified description into or out of India across any customs frontier as defined by the Central Government.

6. The Central Legislature enacted the Imports and Exports (Control) Act, 1947, with the object of authorising prohibition and control on imports and exports. By Section 3 of that Act it was provided:

"(1) The Central Government may by order published in the Official Gazette, make provisions for prohibiting, restricting or otherwise controlling in all cases or in specified classes of cases, and subject to such exceptions

if any, as may be made by or under the order:—

(a) the import, export, carriage coastwise or shipment as ships, stores of goods of any specified description;

(b) the bringing into any port or place in India or goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried.

(2) All goods to which any order under sub-section (1) applies shall be deemed to be goods of which the import or export has been prohibited under Section 19 of the Sea Customs Act, 1878, and all the provisions of that Act shall have effect accordingly, except that Section 183 thereof shall have effect as if for the word "shall" therein the word "may" were substituted.

(3) x x x x

Section 5 of the Imports and Exports (Control) Act, 1947, as originally enacted, provided:

"If any person contravenes any order made or deemed to have been made under this Act, he shall, without prejudice to any confiscation or penalty to which he may be liable under the provisions of the Sea Customs Act, 1878, as applied by sub-section (2) of section 3, be punishable with imprisonment for a term which may extend to one year, or with fine, or with both."

7. In exercise of the power conferred by Sections 3 and 4-A of the Imports and Exports (Control) Act, 1947, the Central Government issued the Imports (Control) Order, 1955. Clause 3 of the Imports (Control) Order prevented importation of any goods of the description specified in Sch. I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Sch. II. By sub-cl. (2) of cl. 3 it was provided that if in any case, it was found that the goods imported under a licence did not conform to the description given in the licence or were shipped prior to the date of issue of the licence under which they were claimed to have been imported, then, without prejudice to any action that may be taken against the licensee under the Sea Customs Act, 1878, in respect of the said importation, the licence may be treated as having been utilised for importing the said goods. By cl. 5 certain conditions could be imposed by the Licensing Authority issuing a licence.

8. It may be recalled that one of the conditions of the licence issued to the respondents was that the value of any item shall not exceed the C.I.F. value indicated in the licence by more than 5%. It was the case of the Customs authorities that the real value of the machinery imported exceeded the declared value, and on that account the respondents had infringed the conditions of the licence. In *East India Commercial Company Ltd., Calcutta v. Collector of Customs, Calcutta*, 1963-3 SCR 338 = (AIR 1962 SC 1893) this Court held that S. 167 cl. 8 of the Sea Customs Act, 1878, read with S. 3 (2) of the Imports and Exports (Control) Act, 1947, authorised the imposition of penalty, if goods

were imported in contravention of any order under the Imports and Exports (Control) Act, 1947; but the section did not, expressly or by implication, authorise confiscation of goods imported under a valid licence on the ground that a condition of the licence not imposed by the order was infringed.

9. This view was reiterated by this Court in *Boothalinga Agencies v. V. T. C. Poriaswami Nadar*, (1969) 1 SCR 65 = (AIR 1969 SC 110). These cases were decided on the interpretation of S. 5 of the Imports and Exports (Control) Act, 1947, as it stood before it was amended by Act 4 of 1960. By the Imports and Exports (Control) Amendment Act 4 of 1960, in S. 5, after the words "any order made or deemed to have been made under this Act", the words "or any condition of a licence granted under any such order" were inserted. Contravention of any condition of a licence granted under any order was therefore liable to be punished under S. 5 as amended.

10. In the present case the Customs authorities did not direct prosecution for contravention of any condition of a licence: they directed confiscation of the machinery and imposed penalty in lieu thereof. But on the terms of S. 5 as amended, the right to impose penalty for contravention of any condition of a licence may be exercised under the Sea Customs Act, 1878, and not under the Imports and Exports (Control) Act, 1947. For breach of any condition of a licence it is open to the authorities to direct prosecution, but no order confiscating goods and imposing penalty in lieu thereof could be made. The order of confiscation could only be made under S. 167 cl. 8 of the Sea Customs Act 1878: in terms cl. 8 of S. 167 provides for confiscation of the goods importation or exportation of which is for the time being prohibited or restricted by or under Ch. IV of the Sea Customs Act, 1878. The notification of which the contravention is said to have been made, is not issued under S. 19 of the Sea Customs Act, but under the Imports and Exports (Control) Act, 1947. It has not been urged before us, and rightly, that penalty of confiscation is incurred under the provisions of the Sea Customs Act, 1878, for breach of the conditions of the licence.

11. In our judgment, the High Court was right in holding that the scope of power under the Sea Customs Act was not enlarged by the amendment to S. 5 of the Imports and Exports (Control) Act, and there is nothing in the amended S. 5 of the Imports and Exports (Control) Act which warrants the view that the provisions of the Sea Customs Act, 1878, may be invoked to punish the breach of a condition of a licence granted under the Imports and Exports (Control) Act, 1947.

12. The appeal fails and is dismissed. There will be no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 173 (V 58 C 44)

(From Assam: AIR 1967 Assam 13)
J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

The State of Assam and another, Appellants v. Daksha Prasad Deka and others, Respondents.

Civil Appeal No. 2265 of 1966, D/- 23-10-1970.

Constitution of India, Art. 311 (2) — Date of compulsory retirement must be determined on basis of service record — Deprivation of guarantee under Art. 311 (2) — Plea of — When open. AIR 1967 Assam 13, Reversed.

The date of compulsory retirement under Fundamental Rules, R. 56 (a) must be determined on the basis of the service record and not on what the Government servant claims to be his date of birth unless the service record is first corrected consistently with appropriate procedure. Until the record is so corrected, employee cannot claim that he had been deprived of the guarantee under Art. 311 (2) by having been compulsorily retired on attaining age of superannuation as determined on basis of entry of his date of birth in the service record.

(Para 4)

Where the application for rectification of service record as filed by Government servant concerned was itself not entertainable by reason of having been filed within three years prior to his date of actual superannuation

as entered in service record in view of S.R. 8 Note and such Government servant was compulsorily retired on such date of his actual superannuation without giving him opportunity to prove his true age as claimed by him the guarantee of Art. 311 (2) could not be claimed to have been infringed. AIR 1967 SC 1269, Distinguished; AIR 1967 Assam 13 Reversed.

(Paras 3, 5, 7)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 1269 (V 54)=

(1967) 2 SCR 625, State of Orissa v. Dr. (Miss) Binapani Dei

7

Mr. Naunit Lal, Advocate, for Appellants; Mr. R. Gopalakrishnan, Advocate, for Respondent No. 1.

The Judgment of the Court was delivered by

SHAH, J.: Daksha Prasad Deka—hereinafter called 'the respondent'—was appointed Assistant Sub-Inspector of Police with effect from January 17, 1929. On a representation made by the respondent the date of his birth was entered in the service record as July 1, 1910. Under F.R. 56 (a) the respondent was liable to be compulsorily retired on July 1, 1965. In 1955 the respondent applied that the date of birth entered in his service record, be shown as August 1, 1911. That application was rejected. The respondent again applied in 1963 for correction of his date of birth. The application was rejected and by order dated June 26, 1965, the respondent was informed that he will stand superannuated on June 30, 1965. His representation made to the Government of Assam against that order was unsuccessful.

2. The respondent then applied to the High Court of Assam praying for a writ in the nature of mandamus requiring the State of Assam to forbear from giving effect to the order dated June 26, 1965. The High Court quashed the order dated June 26, 1965, and directed the State of Assam to give an opportunity to the respondent to show cause against the order directing compulsory retirement and an opportunity to prove his true date of birth. Against that order, this appeal is preferred with special leave.

3. In the opinion of the High Court if the true date of birth of the respondent was August 1, 1911, the order compulsorily retiring the res-

pondent on June 30, 1965, without giving him an opportunity to prove his true age, infringed the guarantee of Art. 311 (2) of the Constitution. In our judgment, the High Court was wrong in holding that there was any infringement of Art. 311 (2) of the Constitution.

4. In the service record of the respondent his date of birth was recorded as July 1, 1910 and under F. R. 56 (a) the respondent was liable to be compulsorily retired on the date on which he attained the age of 55 years. The date of compulsory retirement under F. R. 56 (a) must in our judgment, be determined on the basis of the service record, and not on what the respondent claimed to be his date of birth, unless the service record is first corrected consistent with the appropriate procedure. A public servant may dispute the date of birth as entered in the service record, and may apply for correction of the record. But until the record is corrected, he cannot claim that he has been deprived of the guarantee under Art. 311 (2) of the Constitution by being compulsorily retired on attaining the age of superannuation on the footing of the date of birth entered in the service record.

5. It is true that the State authorities did not give to the respondent an opportunity to support his case that he was born on August 1, 1911, and that the service record was erroneous. But in view of S. R. 8 Note, which governed the employment of the respondent an application for correction of the service record could not be entertained if it was made within three years before the date of "actual superannuation". S. R. 8 Note provides:

"No alteration in the date of birth of a Government servant should be allowed except in very rare cases where a manifest mistake has been made. Such mistakes should be rectified at the earliest opportunity in the course of—(1) periodical reattestation of the entries in the first page of service book, and (2) preparation of the annual detailed statement of a permanent establishment (Financial Rule Form No. II) in which is noted the date of incumbent's birth. In no case the request for change in the date of birth of a Government servant made on a date within three years of the date

of his actual superannuation should be entertained."

Validity of the Rule is not challenged by the respondent. We are unable to agree with the view of the High Court that the date of "actual superannuation" within the meaning of S. R. 8 Note is the date of superannuation computed with reference to the claim made by the public servant, and not with reference to the date as entered in the service record. If such an interpretation be accepted, S. R. 8 Note would prove in a majority of cases of no practical utility. It is intended by S. R. 8 Note that any error in the service record shall be rectified at the earliest opportunity and in no case should an application for rectification be entertained within three years of the "date of actual superannuation" i.e. the date of superannuation according to the service record.

6. Again, if the contention of the respondent were correct, on the date on which he entered service he was a minor. If on a representation that he had attained the age of majority on the date on which he entered service, it would not be open for him after being admitted to the service, to contend that under the appropriate service rules he could not have been admitted to the service, but for the misrepresentation made by him.

7. Counsel for the respondent relied upon the judgment of this Court in *State of Orissa v. Dr. (Miss) Binapani Dei*, (1967) 2 SCR 625 = (AIR 1967 SC 1269) in support of the contention that a public servant must be given an opportunity to prove his true date of birth before he is superannuated, and any order passed without such opportunity is illegal. In our judgment *Dr. (Miss) Binapani's case*, (1967) 2 SCR 625 = (AIR 1967 SC 1269) enunciates no such proposition. In that case in the service record of a public servant, April 10, 1910 was entered as the date of her birth. An enquiry was held and the public servant was required to show cause why her date of birth should not be accepted as April 4, 1907. Thereafter the Government of Orissa determined her date of birth as April 16, 1907, and declared that she should be deemed to have been superannuated on April 16, 1962. This

order was challenged by the public servant in a petition to the High Court of Orissa. The High Court held that the order of the State Government amounted to compulsory retirement before she attained the age of superannuation and was contrary to the rules governing her service conditions and amounted to removal within the meaning of Art. 311 of the Constitution, and since she was not given a reasonable opportunity of showing cause against the action proposed to be taken in regard to her, the order was invalid. This Court confirmed the order passed by the High Court of Orissa. It was observed by this Court that even an administrative order which involved civil consequences must be made consistently with the rules of natural justice. The person concerned must be informed of the case of the State and the evidence in support thereof and must be given a fair opportunity to meet the case before an adverse decision is taken. The public servant according to the service record could not be superannuated before April 10, 1965. But by an enquiry which was not held in a manner consistent with the rules of natural justice an order was made altering the date of birth as entered in the service record, and declaring that she was born in 1907. That was plainly an order passed to the prejudice of the public servant without giving an opportunity to meet the case of the State. In the present case, however, the State did not seek to modify the service record; it was the respondent who sought modification of the service record and claimed that he be declared superannuated only on the basis of the rectification prayed for by him. It is true that ordinarily when an application is made for rectification of age by a public servant concerned, the State should give the applicant proper opportunity to prove his case and should give due consideration to the evidence brought before it. But in the present case, since the application for rectification was made within three years of the date of actual superannuation, according to S. R. 8 Note the application could not be entertained. The principle of Dr. (Miss) Binapani's case,

(1967) 2 SCR 625 = (AIR 1967 SC 1269) has no application to this case.

8. The appeal is allowed and the order passed by the High Court is set aside. The petition filed by the respondent shall stand dismissed. There will be no order as to costs throughout.

Appeal allowed.

AIR 1971 SUPREME COURT 175
(V 58 C 45)

(From: Orissa)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

D. D. Suri, Appellant v. A. K. Barren and others, Respondents.

Civil Appeal No. 679 of 1970, D/- 22-10-1970.

Constitution of India, Article 226 — Writ petition — Serious allegations of improper motive and mala fides by a senior member of Indian Administrative Service against other senior officers and State Government — Dismissal of petition in limine not justified. O. J. C. No. 82 of 1968, D/- 16-4-1968 (Orissa), Reversed.

Where serious allegations including those of improper motive and mala fides have been made, in the writ petition, by a senior member of the Indian Administrative Service against other senior officers and the State Government, the High Court is not justified in dismissing the petition in limine by just writing the word 'dismissed', even without calling for affidavits in reply to the allegations contained in the petition. In such circumstances the High Court ought to call upon the opposite parties to make a return and then consider whether allegations have been proved or not. If it is found that the petitioner has made reckless allegations which are not founded on facts it would be in the fitness of things to take suitable action against him. But if on the other hand it is found that there is substance in his allegations there is no reason why the High Court should not grant him the necessary relief if a proper case is made out for doing so. It is quite

*(O. J. C. No. 82 of 1968, D/- 16-4-1968 — Orissa)

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possible that in a given case the proper course for a writ petitioner should be to seek relief by way of a suit if there are several disputed questions of fact but all these matters can be decided only if the petition is admitted and it is heard after the return has been filed by the opposite parties. C. A. No. 64 of 1970, D/- 21-8-1970 (SC) and C. A. No. 36 of 1963 D/- 16-9-1963 (SC), Relied on; O. J. C. No. 82 of 1968, D/- 16-4-1968 (Orissa), Reversed. (Para 6)

Cases Referred: Chronological Paras

(1970) Civil Appeal No. 64 of 1970, D/- 21-8-1970 (SC), *Gian Chand v. State of Haryana* 6
(1963) Civil Appeal No. 36 of 1963, D/- 16-9-1963 (SC), *Ram Saran Dass v. State of Punjab* 6

Mr. A. S. R. Chari, Sr. Advocate, (Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji and Co., with him), for Appellant; M/s. Santosh Chatterjee and R. N. Sachthey, Advocate, for Respondent No. 3.

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal by special leave from an order of the Orissa High Court dismissing the writ petition filed by the appellant under Article 226 of the Constitution in limine.

2. According to the appellant he joined the Indian Administrative Service on August 7, 1950. He was assigned to the Orissa State. In 1952 while he was serving as an Additional District Magistrate, Cuttack, he had to issue search warrants against some of the top leaders including Biju Patnaik and Hare Krishna Mehtab on an application filed before him by the Special Police Establishment, Delhi. The orders issued by him were challenged in the High Court but were upheld. This says the appellant, was the beginning of hostility towards him among those who wielded power in Orissa State. In 1952 he was transferred on deputation to the Government of India and was posted at Delhi. In 1955 the appellant was confirmed in the Indian Administrative Service senior scale and continued to serve on deputation with the Central Government. In 1961 the question of sending the appellant back to Orissa arose because he had already put in

9 years' service on deputation. As the appellant was apprehensive of the danger involved in his going back to Orissa because of hostility of the State Government and the statements made by some politicians as also by the then Chief Secretary he made a representation to the then Home Minister Shri Lal Bahadur Shastri bringing to his notice various facts and circumstances which showed that he was likely to be in serious trouble if he went to Orissa. He was granted a personal interview by the Home Minister and the orders for his reversion to Orissa were cancelled. He was appointed Salt Commissioner of India with headquarters at Jaipur and was concurrently posted as Managing Director Hindustan Salts Ltd. In 1961 owing to certain allegations made by some unknown persons the Special Police Establishment Delhi started an investigation against the appellant. In August 1964 a charge sheet was served upon him in which it was stated that he was in possession of assets which were disproportionate to his known sources of income. The appellant gave the necessary explanation. After an inquiry had been held by Shri P. M. Naik I. C. S. the appellant was exonerated of all charges on February 19, 1965 by the Central Government on the report made by Shri Naik. The appellant was sent back to Orissa in April 1965 and on December 19, 1966 he was appointed Commissioner Land Reforms.

3. Learned counsel for the appellant has placed before us a chronology of events subsequent to December 1966. Inter alia, it has been stated that in April 1967 the appellant wrote to the State Government complaining about interference in his work by Ramanathan, Member of the Board of Revenue Orissa. In the middle of 1967 the appellant was asked to make a report on the Transport Department. In his report he brought out certain matters against Ramanathan. In August 1967 the Chief Secretary put up a notice to the Chief Minister to constitute a committee to review the work of the appellant. One of the members of that Committee was Ramanathan. In September 1967 the appellant made two representations against the personnel of the committee, in particular, with regard to the

appointment of Ramanathan as a member of that Committee.

4. In para 3 of the petition it was alleged that the appellant was subjected to a series of illegal and capricious acts committed by opposite parties particularly A. K. Barren, Chief Secretary to the Government of Orissa and S. K. Ghosh, Director of Vigilance in that State. These orders, according to the appellant, were actuated by "deepest malice and manifest mala fides". In para 4 it was alleged that on November 27, 1967 the appellant's residence was surrounded by a force of about 50 police personnel and his house was searched for two days by K. C. Patnaik, Deputy Superintendent of Police on the basis of the warrant of search purported to have been issued by D. P. Sharma, Additional District Magistrate for an alleged offence under Section 5 (2) of the Prevention of Corruption Act read with Section 5 (1) (d) (e) and Section 3 (a) of that Act. In para 5 it was alleged that on November 28, 1967 while the search was being conducted the appellant was served with an order of A. K. Barren, Chief Secretary, suspending the appellant under Rule 7 (3) of the All India Services (Discipline and Appeal) Rules 1955 with effect from the date of the service of the order. During the period of suspension the appellant was not allowed to leave Cuttack except with the prior permission of the Chief Secretary. In Para 6 of the petition it was stated that although the order purported to have been issued under the abovementioned Rule which contemplated suspension pending disciplinary proceedings there were no proceedings which were in fact pending and therefore the order was altogether illegal. In the writ petition in other paragraphs it was alleged that on December 7, 1967 the Additional District Magistrate, Sambalpur, issued a search warrant on the application of Patnaik D. S. P. for the search of the locker which had been leased out by the appellant and his wife jointly in the Delhi Safe Deposit Janpath New Delhi. During the search of the appellant's residence at Cuttack as well as the locker at Delhi the personal jewellery of the appellant's wife was even seized and such articles and papers as had no connec-

tion whatsoever with the subject-matter of the allegations were taken into possession. In para 28 quite a serious allegation was made against Ghosh, the Director of Vigilance. It was said that he had with the connivance of A. K. Barren posted a number of policemen in plain clothes to watch the appellant's movements and he was subjected to a lot of harassment and humiliation. Even the letters sent by the appellant for posting were snatched from his servant and his in-coming mail was tampered with.

5. It is unnecessary to set out the other facts alleged but we may extract the following portion from para 30 of the petition (Annexure 2) of the appellant:

"The petitioner submits that all the illegal orders relating to investigation by the Vigilance Police, searches of the petitioner's residence at Cuttack and his Locker at New Delhi, his suspension, the restraint on his movement, and the withdrawal of all facilities and entitlements of the petitioner were passed on or at the instance of opposite party No. 1 and with the active connivance and abetment of opposite party No. 2 both of whom have been maliciously hostile to the petitioner for a long time and have acted in collusion with the sole purpose of subjecting him to incalculable harm, harassment and mental torture for satisfaction of personal grudge."

6. We are wholly unable to understand how in the presence of all the allegations which had been made in the petition including those of mala fides by a senior member of the Indian Administrative Service against other senior Officers and the State Government the High Court was justified in dismissing the petition in limine by just writing the word "dismissed". The High Court did not even call for affidavits in reply to the allegations contained in the petition. This Court has repeatedly laid down (see *Gianchand v. State of Haryana*, Civil Appeal No. 64 of 1970, D/- 21-8-1970 (SC) following *Ram Saran Dass v. State of Punjab*, Civil Appeal No. 36 of 1963, D/- 16-9-1963 (SC)) that in such circumstances the High Court ought to call upon the respondents to make a return and then consider whether allegations have been proved

or not. If it is found that the appellant has made reckless allegations which are not founded on facts it would be in the fitness of things to take suitable action against him. But if on the other hand it is found that there is substance in his allegations there is no reason why the High Court should not grant him the necessary relief if a proper case is made out for doing so. It is quite possible that in a given case the proper course for a writ petitioner should be to seek relief by way of a suit if there are several disputed questions of fact but all these matters can be decided only if the petition is admitted and it is heard after the return has been filed by the respondents.

7. The appeal is, therefore, allowed and the matter is remanded to the High Court for admitting the writ petition and disposing it of in accordance with law. Costs shall abide the event.

Appeal allowed.

AIR 1971 SUPREME COURT 178
(V 58 C 46)

M. HIDAYATULLAH C. J., J. M. SHELAT, V. BHARGAVA,
G. K. MITTER, C. A. VAIDIALINGAM, A. N. RAY AND
I. D. DUA, JJ.

Raj Narain, Petitioner v. Superintendent, Central Jail, New Delhi and another, Respondents.

Writ Petn. No. 330 of 1970, D/- 1/11-9-1970.

Criminal P. C. (1898), S. 344—Under-trial prisoner — Order of remand by Magistrate — Rule nisi by Supreme Court — Extension of remand by Magistrate — Presence of prisoner before Magistrate not necessary. (1867) 2 Weir 409 and AIR 1948 Mad 100, Overruled.

Per majority (Shelat and Vaidialingam JJ. Contra.) Prisoners, who are under-trial, are brought before the Supreme Court on rule nisi and are kept in custody of the Supreme Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from custody of the Supreme Court by his order and he

is only required to intimate to the jail authorities, the prisoner and the Supreme Court that the original remand has been extended while adjourning the case. This is sufficient compliance with the requirements of the law in such special circumstances. The object of production of the prisoner before the Magistrate is more than answered by his production before the Supreme Court because the prisoner has the protection of his interest transferred from the Magistrate to the Supreme Court. There is nothing in the law which required the personal presence of the prisoner before the Magistrate because that is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrate to have the prisoner produced before him, when he recommit him to further custody, a Magistrate can act only as the circumstances permit. AIR 1953 SC 277, Distinguished. (1867) 2 Weir 409 and AIR 1948 Mad 100, Overruled.

(Paras 7, 8, 9)

Cases Referred: Chronological Paras

- (1969) W. P. No. 171 of 1969, D/- 25-9-1969 (SC), Tlangdingliana v. State of Assam 25
(1967) 1967 Delhi L. T. 126, Ram Rishi Anal v. Delhi Administration, Delhi 37
(1953) AIR 1953 SC 277 (V 40) = 1953 SCR 652 = 1953 Cri LJ 1113, Ram Narayan Singh v. State of Delhi 6, 35, 37
(1948) AIR 1948 Mad 100 (V 35) = 49 Cri LJ 41 = ILR (1948) Mad 279, In re Venkataraman 5, 34
(1867) 1867 Pun Re (Cr) 72, Crown v. Shera 33
(1867) 2 Weir 409 5, 31
Mr. D. P. Singh, Advocate of M/s. Ramamurthi and Co., for Petitioner.

ORDER (1-9-1970) — By majority, we hold that the custody of Mr. Raj Narain is valid and that he is not entitled to release on his fresh petition. We shall give our reasons later. Judgment of Hidayatullah C. J. and Bhargava, Mitter, Ray and Dua JJ. was delivered by

HIDAYATULLAH, C. J. (11-9-1970): Mr. Raj Narain M. P. was arrested on August 20, 1970 under Ss. 107/117, Criminal Procedure Code, and was remanded to jail custody under warrant issued by the City Magistrate, Luck-

now. A petition for a writ of habeas corpus for his release is pending in this Court, and under our orders, August 22, 1970, he has been transferred to Tihar Central Jail Delhi. His original remand, as ordered by the City Magistrate, was till August 28, 1970.

2. On August 28, 1970, we were informed at 4 P.M. that his remand would expire at midnight of the 28th August 1970 and that the Superintendent, Central Jail, Delhi would not be able to detain Mr. Raj Narain thereafter. The following intimation from the Superintendent was received in this connection by the Registry:

"Sub: Production of Shri Raj Narain, M. P. in the Supreme Court. Writ Petition No. 315 of 1970.

Sir,

I have the honour to state, that Shri Raj Narain, M. P. was received in this jail on transfer from District Jail, Lucknow, for production in Supreme Court in connection with his Writ Petition in the nature of Habeas Corpus. He was produced in the Court on 25th, 26th and 27th August, 1970. Now it has been ordered by the Supreme Court dated 27-8-70 that he is not to be produced in the Court and that he may be kept in Delhi. Orders of the Court are reproduced below:

"Shri Raj Narain's petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may however be kept in Delhi."

2. Judicial remand of Shri Raj Narain has been granted upto 28-8-70 by the City Magistrate and Magistrate 1st Class, Lucknow, vide enclosure copy of the order dated 21-8-70. In other words his judicial remand expires today. You are, therefore, requested kindly to intimate whether Shri Raj Narain is to be kept in Delhi Jail after 28-8-70 as per your orders or his further judicial remand is to be taken from the said Court.

Clarification sought may kindly be given today per bearer.

Yours faithfully."

The Court, thereupon, made the following order:

"It has been represented to us by the Superintendent of Jail that Mr. Raj Narain's remand expires at midnight and that as he has been ordered to be kept in Delhi, it would be necessary for us to say in whose custody

and under whose orders he has to be detained. A similar situation had arisen in the case of Mr. Madhu Limaye when his remand expired and he became a free man, because we could not keep him under our orders in detention beyond the period originally fixed by the Magistrate. The same situation has arisen now and we can only make this order that he shall be remanded back to the custody to which he belongs and that he may be taken to U. P. if so desired, to be produced before us on the next date of hearing to be fixed in this case. If the fresh remand order is not received by the Superintendent of the Jail by midnight, the petitioner shall not be detained as directed by this Court, and he shall be set at liberty at midnight."

3. The same day a wireless message was received by the Superintendent, Tihar Central Jail from the District Magistrate Lucknow. It stated:

"Habeas Corpus Petition No. 315/70 Date 28-3-70. Shri Raj Narain M. P. remanded to further jail custody upto September 1st (1-9-70) under orders of C. M. Lucknow dated 28-8-70. Note in the Jail Warrant and inform him." The following day the message was corrected to read September tenth instead of September first. The City Magistrate Lucknow also telegraphed to the Superintendent, Tihar Central Jail the following message:

".....Reference Habeas Corpus Petition No. 315/70 dated August 28, 1970 Tiem (sic) P. M. Shri Raj Narain M. P. remanded to further jail custody upto September Ten Nineteen Seventy. Note in the jail warrant and inform him." Simultaneously this Court was informed by District Magistrate that remand of Mr. Raj Narain M. P. was extended to September 10, 1970 by the City Magistrate.

4. Mr. Rajnarain made an application in the nature of a habeas corpus petition stating that the remand orders were communicated to him on the morning of the 29th and therefore his detention after midnight of 28th was illegal and unsupported by any order of remand. Further, that in any case, as he was remanded behind his back, his remand is illegal and he is entitled to be released. The question is whether the custody of Mr. Raj Narain became illegal at midnight of August 28, 1970. In our opinion it did not.

5. Mr. Raj Narain's counsel relied upon the case reported in *In re Venkataraman*, 49 Cri LJ 41 = (AIR 1948 Mad 100), where it was held that an illegality was committed by a Magistrate in remanding a prisoner without having him before him and asking him whether he wished anybody to represent him and giving him an opportunity of showing cause why he should not be further remanded. The ruling restates, what was said in an old case reported in *Anonymous*, (1867) 2 Weir 409, where it was ruled that just as commitment required the presence of a prisoner, so did recommitment. The earlier case contains no discussion and is opinion stated on a reference by the Magistrate.

6. In *Ram Narain Singh v. State of Delhi*, 1953 SCR 652 = (AIR 1953 SC 277), it was ruled that an adjournment required an order in writing and so did an order of remand. The case dealt with an adjournment under Section 344 of the Code of Criminal Procedure and as there was nothing to show that the Magistrate had made an order remanding the prisoner to custody, the detention was held to have become illegal. In that case the last order by the Magistrate adjourning the case, was made on 9th March, 1953 but there was no order of remand. The only order was an endorsement on the warrant "Remanded to Judicial (sic) till 11th March 1953". This warrant was not produced earlier and there was nothing on the Court's record to show an order of remand. All that the Court had done was to adjourn the case. This Court refused to take notice of the warrant, produced after the Court rose for the day because it was not produced earlier and there was no order on the Court's record, showing a remand. The detenus were, therefore, set at liberty.

7. The facts here are different from the case cited. Mr. Raj Narain did not want bail or seek to appear by counsel. He complained of nothing except his detention which he described as illegal for the technical reason that he was not produced before the Magistrate. If he wanted bail he could have asked us as he was in our custody. There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrates before granting remands at the

instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit. Where the prisoner's custody is transferred to a superior Court such as this the Magistrate can only adjourn the case at the same time extending the period of remand. It is for this Court to see that the custody by it continues under proper orders and if this Court is satisfied that the prisoner is in proper custody under a proper order of remand, the prisoner will not be released. This Court does not order detention and cannot extend the remand. Its custody is conterminous with the remand ordered by the Magistrate. If the Magistrate extends the period of remand and communicates the order to the person having the immediate custody of the prisoner with intimation to this Court and the prisoner, nothing more is expected of him. The object of production of the prisoner before the Magistrate is more than answered by his production before this Court because the prisoner has the protection of his interest transferred from the Magistrate to this Court.

8. There is no reason why we should order the release of Mr. Raj Narain when we are satisfied that he is held on a proper remand by a Magistrate and there are no circumstances justifying release by us. To expect the Magistrate to do more under Sec. 344 of the Code in such circumstances is to expect an impossibility from him and the law does not contemplate an impossibility. Indeed, similarly courts trying cases may find it necessary to order a remand in the absence of an accused, e.g. when an accused is so seriously ill that the trial has to be adjourned and he cannot be brought to court and in such case the order made without production of accused in court will not be invalid.

9. Prisoners, who are under trial, are brought before this Court on rule nisi and are kept in custody of this Court. This is a transferred custody on behalf of the Magistrate. The Magistrate cannot recall the prisoner from our custody by his order and he is only required to intimate to the jail authorities, the prisoner and this Court that the original remand has

been extended while adjourning the case. This is sufficient compliance with the requirements of the law in such special circumstances.

10. It was for these reasons that we held the present custody of Mr. Raj Narain pending the decision of his main petition to be proper and rejected the application for his instant release.

The Judgment of Shelat and Vaidialingam JJ. was delivered by

VAIDIALINGAM, J.—11. We regret our inability to agree with the order just pronounced by the learned Chief Justice with regard to the validity of the remand order dated August 28, 1970, in question. We now proceed to give our reasons for such disagreement.

12. In this petition for Habeas Corpus the petitioner prays for immediate release on the ground that the remand order dated August 28, 1970, passed by the City Magistrate, Lucknow is invalid and that his detention after the midnight of the 28th August, 1970, is illegal. He further attacks his detention on the ground that it is contrary to the directions given by this Court on August 28, 1970, in Writ Petition No. 315 of 1970.

13. The circumstances leading to the filing of the present petition may be briefly stated thus: The petitioner has already filed a writ petition No. 315 of 1970 for Habeas Corpus challenging his arrest on August 20, 1970 and his detention in the District Jail, Lucknow. He raised various grounds against the legality of his arrest and detention and prayed for being released forthwith. He also prayed for striking down certain sections of the Criminal Procedure Code as violative of the Constitution. The City Magistrate, Lucknow in his counter-affidavit has stated that he had issued the warrant for the arrest of the petitioner under Sections 107 and 112, Criminal P. C. and that when the petitioner was produced before him on August 20, 1970 at 9 A. M. he orally explained to the petitioner the contents of the notice under Sec. 112, Criminal P. C., a copy of which had already been served on him; and that the petitioner filed a lengthy reply thereto. It is further stated by the City Magistrate that as the petitioner did not make any application for being released on

bail during pendency of the inquiry, he was remanded to jail. The City Magistrate has also maintained that the proceedings initiated against the petitioner are legal and valid and the provisions of the Criminal Procedure Code challenged by the petitioner are also valid. The contentions raised by the parties in this writ petition are pending adjudication by this Court. But it may be stated that the order of remand passed on August 20, 1970 was effective till August 28, 1970.

14. In Writ Petition No. 315 of 1970, the petitioner impleaded the State of U. P., the District Magistrate, Lucknow, the Superintendent of District Jail, Lucknow and the Union of India as respondents. On August 21, 1970 when the said writ petition came up for preliminary hearing, this Court directed "issue of rule nisi returnable on August 25, 1970" and further ordered that the petitioner was to be produced before the Court on that day. The petitioner accordingly was transferred from the District Jail, Lucknow, to the Central Jail, New Delhi, for being produced before this Court. He was produced in this Court on the 25th, 26th and 27th August, 1970. On August 27, 1970, this Court passed the following order:

"Shri Raj Narain's petition is not to be listed tomorrow and he is not to be produced in Court tomorrow. He may, however, be kept in Delhi."

15. Though the State of Uttar Pradesh appeared before us through Counsel on August 27, 1970, when the above order was passed, it was not brought to our notice that the remand order passed by the City Magistrate, Lucknow, on August 20, 1970 was expiring by midnight of August 28, 1970 nor were any directions in that connection sought for from this Court at that time. It was only on August 28, 1970 at 4 P. M. when the Court was about to rise for the day that a letter of the Superintendent, Central Jail, New Delhi of the same date, received by the Assistant Registrar of this Court, seeking directions regarding detention of the petitioner, was brought to our notice. That letter has been set out by the learned Chief Justice in his order. It is clear from that letter that the judicial remand of the petitioner ordered by the City Magistrate, Lucknow would expire on that day and orders were solicited

whether the petitioner is to be detained further under orders of this Court or whether his further judicial remand is to be taken from the City Magistrate, Lucknow.

16. When a person under detention has come with a grievance that his detention is illegal and invalid and seeks a writ of Habeas Corpus and is produced before this Court, the prisoner comes directly under the custody of this Court. But no orders would be passed by this Court which would have the effect of detaining a prisoner beyond the period of detention already ordered and which order is complained of. In an appropriate case, during the operation of the detention order under challenge, this Court may release the prisoner on bail or otherwise either with or without conditions pending adjudication of his grievance by this Court.

17. On the letter of August 28, 1970, of the Superintendent, Central Jail, New Delhi, this Court made an order on the same day which has been set out in full in the order of the learned Chief Justice. From that order the following points emerge:

(i) Mr. Raj Narain was remanded to the custody to which he belongs namely, the U. P. authorities;

(ii) The U. P. authorities were at liberty to take the petitioner to Lucknow pending fixation of the further date for the hearing of his writ petition.

(iii) If the Superintendent of the Central Jail, New Delhi, does not receive the fresh order of remand by midnight of August 28, 1970, the petitioner should not be detained as directed by this Court and that he should be set at liberty at midnight.

18. At this stage it may be stated that if the respondents in Writ Petition No. 315 of 1970, who were represented by counsel, had brought to our notice on August 27, 1970 (when this Writ Petition was adjourned to a later date) that the remand order of the City Magistrate was expiring on August 28, 1970 and had sought directions, this Court would have, on that date itself, passed an order similar to the one which was actually passed in the evening of August 28, 1970. In that case the respondents would have

had ample opportunity to take the petitioner to Lucknow, for producing him before the City Magistrate for a further order of remand, if he considered it necessary.

19. However, the position is that the petitioner was not taken to Lucknow nor produced before the City Magistrate. Instead, he was kept in the Central Jail, New Delhi. The City Magistrate, Lucknow, passed two orders, viz., one on August 28, 1970 and another on August 29, 1970. Both the orders have been quoted in the order of the learned Chief Justice. By the first order, which is stated to have been communicated by wireless message, the petitioner was remanded to further jail custody upto September 1, 1970. By the second order which was communicated by telegram, he was remanded to further jail custody upto September 10, 1970.

20. The petitioner has in the present writ petition prayed for the issue of a writ of Habeas Corpus directing his release on the ground that his further detention is illegal. He has attacked his detention after midnight of August 28, 1970 as illegal and contrary to the directions given by this Court. He has stated that no orders of remand were communicated to him before midnight of August 28, 1970 and that the two remand orders are quite inconsistent with each other. The more serious ground of challenge in respect of the remand orders is that they are illegal as they have been passed by the City Magistrate, without his being produced before the City Magistrate and behind his back.

21. On August 31, 1970, this Court issued a notice to the Superintendent, Central Jail, New Delhi, to produce before the Court on September 1, 1970, the warrants under which "Mr. Raj Narain is presently detained." On September 1, 1970, on behalf of the jail authorities, the wireless message received on August 28, 1970 and the telegram of August 29, 1970 were brought to our notice.

22. As we were inclined to hold that the remand orders had not been passed according to law and in consequence the further detention of the petitioner was illegal, this Court passed on the same day the following order:

"By majority, we hold that the custody of Mr. Raj Narain is valid and

that he is not entitled to release on his fresh petition. We shall give our reasons later."

23. The petitioner's grievance that the two orders passed by the City Magistrate on 28th and 29th August, 1970 are inconsistent, has considerable force. It is strange that a remand order extending the petitioner's custody upto September 1 1970, was followed within hours by another order extending it to a still further period upto September 10, 1970. There is nothing to show why this became necessary. Prima facie, it looks as if the Magistrate had not judicially applied his mind on the question of how long the petitioner's custody should be extended. Prima facie, it would also show that the Magistrate was passing an order of remand in a mechanical manner without even considering the period for which his remand orders are to have effect. This certainly shows non-application of judicial mind even where the personal liberty of a citizen is involved.

24. But we are not prepared to rest our decision on the above circumstance alone. The petitioner has further stated in his petition that he received intimation only in the morning of August 29, 1970 about the order of remand passed by the City Magistrate, Lucknow. If the City Magistrate was in law entitled to pass an order of remand on August 28, 1970, without the person detained being produced before him, the mere fact that it was made known to the petitioner in the morning of August 29, 1970 may not make the order of detention invalid. But we are upholding the contention of the petitioner that the City Magistrate had no power to pass an order of remand without the person in detention being produced before him, and as such the order passed on August 28, 1970 is illegal, irrespective of the time as to when it was made known to the petitioner.

25. Now coming to the question of the legality of the order passed by the Magistrate remanding the petitioner in detention, without his being produced before him, it is necessary to refer to certain provisions of the Criminal Procedure Code. Such a question came up before this Court in *Tlangdingliana v. State of Assam*, W. P. No. 171 of 1969, D/- 25-9-1969

(SC), but was not decided as it was not necessary in that case to do so.

26. The Criminal Procedure Code contemplates the period for which a person can be detained in custody prior to the commencement of an inquiry or trial and that is broadly divided into two stages. The first stage is the maximum period of 24 hours. (See S. 61, Criminal P. C.) For this period the police have the power to detain a person during investigation. Under Art. 22 (2) of the Constitution, however, every person who is arrested and detained in custody shall be produced before the nearest Magistrate within a period of 24 hours of such arrest excluding the time mentioned therein and no such person shall be detained in custody beyond the said period without the authority of the Magistrate. If the investigation cannot be completed within 24 hours, the person arrested and detained in custody must be forwarded to the nearest Magistrate as provided under Section 167 (1), Criminal P. C. Under Sec. 167 (2) when an accused person is so forwarded, the Magistrate, whether he has or has no jurisdiction to try the accused, may authorise the detention of the accused in such custody as he thinks fit for a term not exceeding 15 days in the whole. This is the second stage of detention for 15 days. If the Magistrate to whom the accused has been forwarded has not jurisdiction to try the case or commit it for trial, and if he considers further detention unnecessary, that Magistrate has to forward the accused to the Magistrate having such jurisdiction. Under Section 167 (3) the Magistrate authorising detention in the custody of the police is bound to record his reasons for so doing.

27. But the fact to be noted in Section 167 (2) is, that the accused who is suspected or alleged to have committed an offence and who has to be tried by a court has to be forwarded to the nearest Magistrate whether he has jurisdiction to try the case or not. For the purpose of enabling the police to complete the investigation, the Magistrate before whom the accused is so produced has got power to authorise the detention of the accused for the maximum period mentioned therein. If the aforesaid Magistrate considers further detention unnecessary, the accused has to be forwarded to

the Magistrate having jurisdiction. Before both the Magistrates referred to in this sub-section, production of the accused is essential. And this is the position in respect of a person against whom the commission of an offence is alleged.

28. It may happen that the 15 days detention ordered under Section 167 (2) is not found sufficient for completing the investigation. It could not have been contemplated by the Legislature that under such circumstances the arrested person must be released. Therefore it must have made provisions for continuing the arrested person's detention after 15 days in suitable cases and there is no provision permitting further remand barring that contained in Sec. 344, Criminal P. C. We have already referred to the fact that the City Magistrate has in his counter-affidavit in Writ Petition No. 315 of 1970 stated that the petitioner did not offer any bail during the pendency of the inquiry in which case Sec. 344 squarely applies. Section 170, Criminal P. C. also refers to the accused under custody being forwarded to a Magistrate empowered to take cognizance of the offence upon a police report. This section also insists upon the production of the accused before the Magistrate.

29. A remand under Section 344, Criminal P. C. is to be distinguished from a remand under Section 167 (2), Criminal P. C. Section 344 is more general than Section 167 (2). But Section 344 itself contains the limitations for passing an order of remand under that provision. Sec. 344 gives power to the Court to postpone or adjourn the inquiry or trial under the circumstances and in the manner indicated therein. The first proviso to Sec. 344 states that no Magistrate shall remand an accused person to custody under that section for a term exceeding 15 days at a time. The accused is entitled to participate in the inquiry or trial and he will be present before the court concerned and it is in his presence that the order of remand under the first proviso will be made by the Court or Magistrate concerned. The accused being present at the inquiry or trial before a Magistrate or court, in our opinion, it is implicit in Sec. 344 that the order of remand under the first proviso has to be made in his presence.

30. The matter can be considered from another aspect. We have already stated that even in respect of an accused who is alleged to have committed an offence and with reference to which offence investigation is being conducted by the police, the production of the accused before the Magistrates mentioned in Section 167 (2), Criminal P. C. is absolutely essential for the purpose of the police obtaining the necessary orders for detaining the accused, beyond the period of 24 hours referred to in Sec. 61, Criminal P. C. Under Sec. 344, Criminal P. C., which deals with inquiry or trial in respect of an offence alleged to have been committed by an accused, the remand order under the proviso is to be passed in the presence of the accused. In this case even according to the averments made by the City Magistrate in his counter-affidavit in Writ Petition No. 315 of 1970, the petitioner had been arrested on the basis of a warrant issued by him under Sections 107 and 112, Criminal P. C. and that the petitioner did not offer to be released on bail pending the inquiry. A reading of Sec. 107, Criminal P. C. will clearly show that the inquiry referred to by the City Magistrate with reference to the petitioner is not in respect of an offence alleged to have been committed already, but is only for the purpose of deciding whether action is to be taken for prevention of the offence referred to therein. When an accused who is alleged to have committed a crime has to be produced before the Magistrate when an order of remand is passed under Section 344, Criminal P. C., in our opinion, it stands to reason that a person who has not committed any offence but is only sought to be proceeded against under Chapter VIII, Criminal P. C. but is proposed to be detained, must be before the court at the time when the latter passes an order of remand under S. 344, Criminal P. C.

31. We will now refer to the case law on this aspect. In 1867-2 Weirs 409, the Madras High Court had to answer a reference made by a Magistrate whether a person has to be placed before a Magistrate on each occasion of fresh remand being given. The names of the parties are not given in the Report. In High Court proceeding dated June 10, 1867 it is stated as follows:

"The High Court observe that to remand is to re-commit to custody and that a Magisterial commitment requiring the presence of the prisoner, the recommitment of the prisoner also requires that presence."

32. This decision was given under Section 344 of the Criminal Procedure Code as it then stood.

33. In *Crown v. Shera*, 1867 Pun Re (Cr) 72, it was held that it was illegal to remand a person on the application of the police, when the prisoner is not produced in Court.

34. In ILR (1948) Mad 279 = (AIR 1948 Mad 100), a Division Bench of the Madras High Court had to consider the legality of a remand order passed by the Magistrate under Sections 167 and 344, Criminal P. C. without the prisoners having been produced before him. In dealing with this question the High Court observes at page 281 (of ILR Mad) = (at p. 100 of AIR), as follows:

".....it does seem certain that an illegality was committed by the Magistrate in issuing an order of remand without having the prisoners produced before him and asking them whether they wished anybody to represent their cause and giving them an opportunity of showing cause why they should not be further remanded. We trust that the Sub-Magistrate issued this order through oversight and because as he later said, the prisoners were at Trichinopoly and he did not have much notice that a request for a further remand would be made. However that may be, we agree with the learned Counsel for the petitioners that an illegality involving a breach of the provisions of the Criminal Procedure Code was committed; and we trust that our order will serve as a warning to the Magistrate not to repeat this illegality."

35. In 1953 SCR 652 = (AIR 1953 SC 277), this Court had to deal with the validity of the detention of an accused. Even at the outset we may state that in that decision, this Court was dealing with a case, where no order of the Magistrate remanding the accused to custody was placed before this Court. Therefore, on facts that case stands on a different footing, but the principle laid down by that decision, in our opinion, is apposite. At page 654 (of SCR) = (at p. 278 of AIR), this Court observes as follows:

"This Court has often reiterated before that those who feel called upon to deprive other persons of their personal liberty in the discharge of what they conceive to be their duty, must strictly and scrupulously observe the forms and rules of the law."

36. It will be noted that this Court has emphasised that when the personal liberty of a person is sought to be restricted or curtailed, rules of the law as well as the forms must be scrupulously observed.

37. More recently the Delhi High Court in the decision reported in *Ram Rishi Anal v. Delhi Administration*, Delhi, 1967 Delhi LT 126, had to deal with the legality of an order of remand passed by the Magistrates without the accused being produced before them. There were certain other illegalities pointed out in that judgment. The learned Chief Justice has held in that decision that passing of remand order behind the back of an accused, is illegal. In the judgment of the Delhi High Court there is no reference to the decisions cited by us earlier except the decision of this Court in 1953 SCR 652 = (AIR 1953 SC 277).

38. From the decision of this Court, referred to above, it is clear that the authorities seeking to curtail the liberty of a subject must strictly and scrupulously observe the forms and rules of the law. The various provisions of the Criminal Procedure Code, referred to by us, as also the decisions quoted above lead to the conclusion that the accused must be present before the Magistrate or Court when an order of remand is passed. In fact the decisions quoted by us clearly lay down that an order of remand passed without the accused being produced, is illegal. We are in agreement with those decisions.

39. It stands to reason that an order of remand will have to be passed in the presence of the accused. Otherwise the position will be that a Magistrate or Court will be passing orders of remand mechanically without having heard the accused for a considerably long time. If the accused is before the Magistrate when a remand order is being passed, he can make representations that no remand order should be passed and also oppose any move for a further remand. For instance, he may rely upon the inordinate delay that is being caused by the prosecu-

tion in the matter and he can attempt to satisfy the Court that no further remand should be allowed. Again it may be that an accused, on a former occasion may have declined to execute a bond for getting himself released; but on a later occasion when a further remand is being considered, the accused may have reconsidered the position and may be willing to execute bond in which case a remand order will be totally unnecessary. The fact that the person concerned does not desire to be released on bail or that he can make written representations to the Magistrate are, in our opinion, beside the point. For instance, in cases where a person is sought to be proceeded against under Chapter VIII of the Criminal Procedure Code, it would be opened to him to represent that circumstances have materially changed and a further remand has become unnecessary. Such an opportunity to make a representation is denied to a person concerned by his not being produced before the Magistrate. As the Magistrate has to apply his judicial mind, he himself can take note of all relevant circumstances when the person detained is produced before him and decide whether a further remand is necessary. All these opportunities will be denied to an accused person if he is not produced before the Magistrate or the Court when orders of remand are being passed.

40. It is no answer that the petitioner was brought to New Delhi under the orders of this Court and hence the City Magistrate had to pass the remand order at Lucknow. We have already mentioned that no representation was made nor any directions asked on August 27, 1970, on behalf of the respondents when Writ Petition No. 315 of 1970 was adjourned. Under orders of August 28, 1970, this Court released the petitioner from its custody and restored him to the original custody and even permitted him to be taken to Lucknow, pending fixation of a fresh date of hearing of his case. The Uttar Pradesh authorities concerned did not avail themselves of the opportunity to take him back to Lucknow for being produced before the Magistrate concerned. On the other hand, they were content to have an order of remand of the prisoner in New Delhi passed by the Magistrate sitting in Lucknow. Such

an order, as we have held, is illegal and hence the detention of the petitioner on the authority of such an illegal order of remand is also illegal. Such a situation has been brought about by the Uttar Pradesh authorities for which they have to thank themselves.

41. In the result we hold that the orders of remand dated 28th and 29th August, 1970 passed by the City Magistrate, Lucknow, are illegal. We further hold that the detention of the petitioner in the Central Jail, New Delhi, after the midnight of August 28, 1970 on the authority of the illegal orders of remand is also illegal. In consequence the petitioner should be set at liberty forthwith. The writ petition is allowed.

Petition dismissed.

**AIR 1971 SUPREME COURT 186
(V 58 C 47)**

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

**A. Lakshmanrao, Petitioner v.
Judicial Magistrate, First Class, Parvatipuram and others, Respondents.**

Writ Petn. No. 513 of 1970. D/-
24-11-1970.

(A) Criminal P. C. (1898), Section 344 — Order of remand — Court can pass it even if accused is not present in Court.

As a matter of law personal presence of an accused person before a Magistrate is not a necessary requirement for the purpose of his remand under Section 344, Cr. P. C., at the instance of the police, though as a rule of caution it is highly desirable that the accused should be personally produced before the Magistrate so that he may, if he so chooses, make a representation against his remand and for his release on bail. AIR 1971 SC 178, Foll.

(Para 7)

(B) Constitution of India, Article 14 — Criminal P.C. (1898), Section 344 (1-A) — Constitutionality — Section is immune from challenge on ground that it clothes Court with unfettered, arbitrary and unguided power.

Section 344 (1-A) does not clothe the Court with an unfettered, arbitrary and unguided power. (Para 9)

LN/LN/F721/70/GKC/P

Apart from the fact that it is only when either from the absence of a witness or some other reasonable cause the Court considers it either to be necessary or advisable to postpone the commencement of the inquiry or trial or adjourn the hearing of the case that the order of remand can be made, the Court is also required to record the order in writing giving the reasons why it thinks fit that the case should be postponed or adjourned. It is further open to the Court to impose terms and to fix the period which cannot exceed 15 days at one time. This discretion being vested in a Court of law has to be exercised judicially on well-recognised principles and is immune from challenge on the ground of arbitrariness or want of guidelines. If the discretion is exercised in an arbitrary or unjudicial manner remedy by way of resort to the higher Courts is always open to the aggrieved party.

(Para 9)

(C) Criminal P.C. (1898), Section 344 — Section applies even to a case which is at stage of investigation and collection of evidence.

The fact that Section 344 occurs in Chapter 24 which contains general provisions as to inquiries and trial does not justify a construction that it is inapplicable to a case which is at the stage of investigation and collection of evidence only. This is clear from sub-section (1-A). Under sub-section (1-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The explanation makes it clear beyond doubt that reasonable cause as mentioned in sub-section (1-A) includes the likelihood of obtaining further evidence during investigation by securing a remand.

(Para 10)

(D) Criminal P. C. (1898), Section 344 (1-A) Expl. — Scope Explanation merely serves to explain scope of expression "reasonable cause" occurring in sub-section (1-A).

(Para 11)

(E) Constitution of India, Article 14 — Criminal P. C. (1898), Section 344 — Constitutionality — Power of Court to remand accused — Power, although discretionary, discretion is judicial one — Absence of express, precise standard for determination of

question as to when order of remand is to be passed does not render section unconstitutional.

(Para 12)

(F) Constitution of India, Articles 32 and 226 — Habeas Corpus — Detention pursuant to order of remand under Section 344 is not open to challenge in habeas corpus proceedings.

(Para 12)

Cases Referred: Chronological Paras

(1971) AIR 1971 SC 178 (V 58) =

W. P. No. 330 of 1970, D/-

11-9-1970, Raj Narain v.

Supdt. Central Jail, N. Delhi

7, 13

Mr. P. Ram Reddy, Sr. Advocate, (Mr. P. P. Rao, Advocate, with him) for Respondents.

The following Judgment of the Court was delivered by

DUA, J.:— The petitioner, A. Lakshmanarao, an Advocate practising at Narasipatnam in the district of Visakhapatnam in the State of Andhra Pradesh has applied under Article 32 of the Constitution for a writ of habeas corpus on the following averments:

2. The petitioner, while going home from the Court, was arrested on 17th July, 1970 at about 12.30 in the afternoon. He was not shown any warrant at the time of his arrest. He was produced before a Judicial Magistrate, First Class, on 18th July and remanded to judicial custody under Section 167 (2), Criminal P. C. for 15 days. At the time of remand he was informed by the Magistrate that he was accused of offences under Sections 120-B, 121-A, 122 read with 302 and 395, I. P. C. in Crime No. 3 of 1970 (known as Parvatipuram Naxalite Conspiracy Case). The crime had been registered in January, 1970 in which more than 148 persons were sought to be proceeded against. The names of only 148 accused persons were specifically mentioned. The petitioner and one Dr. C. Ramadass were not specifically named. They were apparently included in the expression "others". On 30th March, 1970 a report was filed by the Investigating Officer describing it as a preliminary charge-sheet in which it was stated that the investigation in the case had not been completed and several accused persons had yet to be traced. This report, according to the averments, does not fall under Section 173 (1), Criminal P. C. Even in

this preliminary charge-sheet the names of the petitioner and Dr. Ramadass were not included. On 1st August when the period of the petitioner's first remand expired, again no charge-sheet was separately filed against him and Dr. C. Ramadass. The prosecution, however, sought extension of the period of remand. When the petitioner objected to further remand a second preliminary charge-sheet was presented to the Court on that very day specifically including the petitioner's name. His remand was thereupon extended upto 6th August and thereafter upto 20th August. On 20th August he was not produced in the Court because of want of escort and the order of remand was made in his absence. He has expressed ignorance about the period of this remand.

3. The present petition dated 22nd August, 1970 was forwarded to this Court through the Superintendent, Central Jail, Rajahmundry (Andhra Pradesh.). The petitioner challenges the remand orders from the 1st August onwards and claims that his detention is illegal and that he is entitled to be set at liberty. The remand order dated 20th August, 1970 which was made in his absence because he could not be produced before the Court on the ground of lack of escort is challenged on the further ground that the law does not permit remand orders without the actual production of the accused before the Court.

4. According to the petitioner who himself argued his case, Section 344 (1-A), Criminal P. C. does not contain any guidelines for the Court in the matter of remand orders and he added that this section is otherwise too inapplicable to the investigation stage of criminal cases. When his attention was drawn to the explanation to Section 344, according to which the likelihood of further evidence being obtained by the remand in cases of suspicion against an accused person, raised by the evidence already obtained, he contended that the explanation could not as a matter of law serve to extend the scope of the substantive provision contained in sub-section (1-A). On this premise the petitioner questioned the vires of Section 344 (1-A) and (2) and the explanation.

5. In the counter affidavit sworn by the Judicial Magistrate in

whose Court the case against the petitioner is pending, while referring to the proceedings held on 1st August, 1970, it is affirmed that the petitioner and Dr. C. Ramadass were produced in Court and it was submitted by them that since their names had not been shown in the preliminary charge-sheet the Court had no power to extend the period of remand. On that very day the prosecution filed a second preliminary charge-sheet in which the petitioner and Dr. C. Ramadass were shown as accused Nos. 149 and 150 suspected of having committed offences under Sections 120-B, 121-A, 122 read with 302 and 395, I. P. C. The Court thereupon passed an order of remand in respect of both of them. A bail application filed on behalf of the petitioner and Dr. C. Ramadass was thereafter argued by the petitioner and the matter was adjourned to 6th August, 1970 for orders when that application was disposed of.

6. On behalf of the other respondents a lengthy affidavit has been sworn by S. Veerananarayanareddi, Deputy Superintendent of Police, Crime Branch, C. I. D. Government of Andhra Pradesh, Hyderabad. It is affirmed in this affidavit that the petitioner is an active Naxalite and along with others is accused of charges under Sections 120-B read with Sections 302, 395, 397, 399, 364, 365, 368, and 386, I. P. C. in P. R. C. No. 3/70 pending in the Court of the Judicial First Class Magistrate, Parvatipuram Taluk. A separate complaint under Sections 121-A and 120-B read with 121, 122, 123, and 124-A, I. P. C. is also stated to have been filed against the aforesaid persons including the petitioner in the same Court in P. R. C. 8 of 1970. These two cases are known as Parvatipuram Naxalite Conspiracy cases and relate to 46 murders, 82 dacoities, 99 attacks on police and 15 abductions committed by the accused persons in Andhra Pradesh. The accused persons are also alleged to have committed several offences of the types just mentioned in the Agency Tracts of Orissa bordering Andhra Pradesh. The Government of Andhra Pradesh had on account of the gravity of the situation declared certain areas affected by the Naxalite menace in Srikakulam and Warangal Districts as disturbed areas under Section 3 of the

Andhra Pradesh Suppression of Disturbances Act, 1948. In the affidavit certain incidents have been traced from 1964 and it is affirmed that as a result of various political developments certain volunteers were recruited from various parts of Andhra Pradesh and the petitioner helped them in creating revolutionary bases in the agency tracts of Visakhapatnam District. There is also reference to one of the accused persons having become an approver and another having made a confessional statement. After stating various facts discovered during investigation it is affirmed that the investigation of this case is limited not only to the State of Andhra Pradesh but it extends to several States where Naxalite movement has spread, including West Bengal and Orissa, and as many as 900 witnesses have already been examined during the course of investigation, which has taken nearly nine months. Sanction of the State Government has also been obtained for the prosecution of the petitioner and the other accused persons under Section 196, Criminal P. C. On 12th October, 1970 the investigation was completed and a final charge-sheet filed in the Court of the Judicial Magistrate in P. R. C. No. 3 of 1970. The separate complaint against the petitioner and other accused persons mentioned earlier was also filed in the Court of the Judicial Magistrate under Sections 121-A, 120-B read with 121, 123 and 124-A, I. P. C. on the same day. It is admitted that the preliminary charge-sheet is not covered by Section 173(1), Criminal P. C. But it is averred that it is only a report pending further investigation seeking extension of remand under Section 344, Criminal P. C. The long period of investigation has been ascribed to the fact that there was an organised attempt on the part of the accused and their followers to thwart the efforts of the authorities in bringing the accused to book. It is admitted that the petitioner is lodged in Central Jail, Rajahmundry and that on 20th August, 1970 he could not be produced before the Court for lack of escort. The remand is also admitted to have been extended by the Magistrate, respondent No. 1 from time to time on 3rd and 17th September, and 1st October, 1970. The Court, it is pleaded, is empowered to

pass an order of remand even in the absence of the accused under Section 344, Criminal P. C. unlike the remand order under Section 167, Criminal P. C. Incidentally, in this counter-affidavit there is a reference to the prejudicial activities in which the petitioner has been indulging in connection with Naxalite movement. The initial non-inclusion of his name in the array of accused persons has been explained on the ground that sufficient corroboration of the approver's testimony incriminating the petitioner was not forthcoming at that stage.

7. In so far as the question of legality of the remand order dated 20th August, 1970 without producing the petitioner before a Magistrate is concerned, the point is concluded by a recent judgment of this Court in the case of Raj Narain v. Supdt. Central Jail, New Delhi, W. P. No. 330 of 1970, D/- 11-9-1970 since reported in the notes portion of (1970) 2: Part 9 SCC 32 = (AIR 1971 SC 178). In that case this Court by majority expressed the view that as a matter of law personal presence of an accused person before a Magistrate is not a necessary requirement for the purpose of his remand under S. 344, Cri. P. C. at the instance of the police, though as a rule of caution it is highly desirable that the accused should be personally produced before the Magistrate so that he may, if he so chooses, make a representation against his remand and for his release on bail. The Court on the review of the decided cases observed:—

"There is nothing in the law which required his personal presence before the Magistrate because that is a rule of caution for Magistrates before granting remands at the instance of the police. However, even if it be desirable for the Magistrates to have the prisoner produced before them, when they recommit him to further custody, a Magistrate can act only as the circumstances permit."

8. The order of remand dated 20th August, 1970 was in the circumstances not contrary to law so as to render the petitioner's custody illegal justifying his release by this Court on habeas corpus. It is unnecessary to point out that it was and still is open to the petitioner to apply for his release on bail to the appropriate Court in accordance with law there being no ille-

gal obstacle in his way in this respect..

9. The challenge to the constitutional validity of Section 344 (1-A), Criminal P. C. is also in our opinion misconceived. Section 344 reads:

"(1) In every inquiry or trial, the proceedings shall be held as expeditiously as possible and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded.

(1-A) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn, any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefor, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody:

Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time:

Provided further that when witnesses are in attendance, no adjournment or postponement shall be granted, without examining them, except for special reasons to be recorded in writing.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.— If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand."

Sub-section (1-A) was originally numbered as sub-section (1). The present sub-section (1) of Section 344 was added by the Amending Act 26 of 1955 when the original sub-section (1) was re-numbered as sub-section (1-A). The impugned sub-section vests in the Court seized of a criminal case power to postpone the commencement of or adjourn any inquiry or trial before

him by order in writing stating the reasons therefor from time to time on such terms as the Court thinks fit and for such time as it considers reasonable. When the case is so postponed or adjourned the Court may also by a warrant remand the accused, if in custody. This judicial power to postpone or adjourn the proceedings is to be exercised only if from the absence of witnesses or any other reasonable cause the Court considers it necessary or advisable to do so. Reasonable cause for remand according to the explanation to this section covers a case where sufficient evidence is obtained to raise a suspicion about the complicity of an accused person in the offence and it appears likely that more evidence may be obtained by remand. The Court has in the exercise of its judicial discretion in granting or declining postponement or adjournment of the case and in ordering remand of the accused, to keep in view all the relevant facts and circumstances of the case. The petitioner strongly contended that this section clothes the Court with an unfettered, arbitrary and unguided power. A plain reading of the section shows the untenability of the submission. Apart from the fact that it is only when either from the absence of a witness or some other reasonable cause the Court considers it either to be necessary or advisable to postpone the commencement of the inquiry or trial or adjourn the hearing of the case that the order can be made, the Court is also required to record the order in writing giving the reasons why it thinks fit that the case should be postponed or adjourned. It is further open to the Court to impose terms and to fix the period which cannot exceed 15 days at one time. This discretion being vested in a Court of law has to be exercised judicially on well-recognized principles and is in our view immune from challenge on the ground of arbitrariness or want of guidelines. In our opinion, therefore, not only are the guidelines clearly contained in the statute but the discretion being judicial is required to be exercised on general principles guided by rules of reason and justice on the facts of each case, and not in any arbitrary or fanciful manner. It may also be remembered that if the discretion is exercised in an arbitrary or

unjudicial manner remedy by way of resort to the higher Courts is always open to the aggrieved party.

10. The second limb of the challenge is based on the contention that Section 344 falls in Chapter 24, Criminal P. C. which contains general provisions as to inquiries and trials. According to this submission this section cannot apply to a case which is at the stage of investigation and collection of evidence only. This argument appears to us to be negatived by the express language both of sub-section (1-A) and the explanation. Under sub-section (1-A) the commencement of the inquiry or trial can also be postponed. This clearly seems to refer to the stage prior to the commencement of the inquiry. The explanation makes it clear beyond doubt that reasonable cause as mentioned in sub-s. (1A) includes the likelihood of obtaining further evidence during investigation by securing a remand. The language of S. 344 is unambiguous and clear and the fact that this section occurs in Chapter 24 which contains general provisions as to inquiries and trials does not justify a strained construction. Indeed, postponement of an inquiry also seems to be within the contemplation of the general provisions as to inquiries and trials. So this challenge also fails.

11. The suggestion that the explanation could not extend the substantive provisions of sub-s. (1A) has merely to be stated to be rejected because the explanation merely serves to explain the scope of the expression "reasonable cause."

12. The last submission that there is in any event no guideline for making a remand order and, therefore, the power to remand an accused person under Section 344 is ultra vires being arbitrary and unguided is wholly unacceptable. When a case is postponed or adjourned and the accused is in custody the court has to exercise its judicial discretion whether or not to continue him in custody by making a remand order. The court is neither bound to make an order of remand nor is it bound to release the accused person. The period of remand is in no case to exceed 15 days at a time. The discretion to make a suitable order is to be exercised judicially keeping in view all the facts and cir-

cumstances of the case including the nature of the charge, the gravity of the alleged offence, the area of investigation, the antecedents of the accused and all other relevant factors which may appropriately help the court in determining whether to keep the accused in custody or to release him on bail. The court has to ensure the presence of the accused and a just, fair and smooth inquiry and trial of the offence charged. The order of remand is thus subject to judicial discretion and the order is also subject to review by the superior courts in accordance with law. The power conferred being judicial the absence of an express, precise standard for determination of the question would not render the section unconstitutional. Detention pursuant to an order of remand which appropriately falls within the terms of S. 344 is accordingly not open to challenge in habeas corpus.

13. After we had reserved orders the petitioner forwarded to this Court through jail supplementary affidavit containing written arguments. We have gone through the affidavit but we do not find any new point requiring discussion. It only discloses a further attempt to reopen the majority decision of this Court in Raj Narain's case, W.P. No. 330 of 1970, D/- 11-9-1970 (reported in AIR 1971 SC 178) (supra) by relying on the minority judgment and by submitting that Section 344 (1-A), Criminal P. C. offends Art. 19 (1) (d) of the Constitution. All that we need say at this stage is that the majority view is binding on us.

14. This petition accordingly fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 191 (V 58 C 48)

(From Mysore: 1969 Lab I C 730)

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

The State of Mysore (In all the Appeals), Appellant v. H. Papanna Gowda and another, Respondents.

Civil Appeals Nos. 1868 to 1882 of 1969, D/- 24-11-1970.

LN/LN/F720/70/YPB/T

Education — Mysore University of Agricultural Sciences Act (22 of 1963), Section 7 (5) — Validity — Section is unconstitutional — (Constitution of India, Article 311).

Section 7 (5) which authorises the issuance of notification whereby the Government servants are to cease to hold the civil posts which they held under the State of Mysore at the time when notification is issued is unconstitutional, the reason being that it amounts to removal from a civil post under the State in contravention of the provisions of Art. 311. 1969 Lab. I. C. 730 (Mys), Affirmed, AIR 1960 Punj 284, Dist. (Paras 7, 8)

Cases Referred: Chronological Paras (1960) AIR 1960 Punj 284 (V 47) =

ILR (1960) Punj 781, Amulya Kumar Talukdar v. Union of India

Mr. Jagadish Swarup, Solicitor General of India (M/s. S. S. Javli and S. P. Nayar, Advocates with him), for Appellant (In all the Appeals); M/s. M. Rama Jois and R. B. Datar, Advocates, for Respondent No. 1 (In C. As. Nos. 1868 to 1871 and 1874 to 1881 of 1969).

The following Judgment of the Court was delivered by

MITTER, J.: The State of Mysore has come up in appeal from a common judgment of the High Court at Bangalore disposing of a number of writ petitions and holding void the compulsory transfer of the respondents herein to the Agricultural University under the provisions of the University of Agricultural Sciences Act, 1963.

2. As the same question arises in all these appeals it will be sufficient to state the facts in Civil Appeal No. 1868 of 1969 in which one H. Papanna Gowda is the respondent. The said respondent was appointed on January 7, 1959 as an agricultural demonstrator in the Mysore Civil Service. His appointment was as a 'local candidate' which under the Mysore Civil Service Rules means a person appointed not in accordance with the rules of recruitment. His services were however regularised when he was selected by the Public Service Commission for appointment to that post on August 27 1959. By an order dated April 4, 1964 he was transferred and posted as a Chemical Assistant of the Sugarcane Research Station Mandya, in the de-

partment of agriculture. When he was thus employed, a law made by the State Legislature called the University of Agricultural Sciences Act, 1963 (hereinafter referred to as the 'Act') came into force on April 24, 1964. Before the High Court the respondents to these appeals challenged the vires of S. 7 (5) of the Act and a notification issued thereunder.

3. The preamble to the Act shows that it was an Act to establish and incorporate a University for the development of agriculture, animal husbandry and allied sciences in the State of Mysore. Under S. 3 (2) the University was to be a body corporate having perpetual succession and a common seal. The powers given under S. 6 of the Act enabled it inter alia to create administrative, ministerial and other posts and to appoint persons to such posts. Under Section 7 (1) subject to the conditions therein mentioned several agricultural and veterinary colleges were disaffiliated from the Karnatak University or the University of Mysore and were to be maintained by the new University as constituent colleges. The control and management of these colleges were to stand transferred to the Agricultural University and all its properties and assets and liabilities and obligations of the State Government in relation thereto were to stand transferred to, vest in, or devolve upon the said university. Under sub-section (4) of Section 7 the control and management of such research and educational institutions of the Department of Agriculture, the Department of Animal Husbandry and the Department of Fisheries of the State Government were, as and from such date as the State Government might by order specify, to be transferred to the University and thereupon all the properties and assets and liabilities and obligations of the State Government in relation to such institutions were to stand transferred to, vest in, or devolve upon the University. Omitting the proviso which is not relevant for our purpose, sub-section (5) provided.

"Every person employed in any of the colleges specified in sub-section (1) or in any of the institutions referred to in sub-section (4) immediately before the appointed day or the date specified in the order under sub-section (4),

as the case may be, shall, as from the appointed day or the specified date, become an employee of the University on such terms and conditions as may be determined by the State Government in consultation with the Board."

4. The Board has been defined in Section 2 clause (3) as the Board of Regents of the University.

5. By notification dated September 29, 1965 the control and management of a large number of research and educational institutions were transferred to the University with effect from October 1, 1965. The Agricultural Research Institute, Mandya where the respondent was working was one such institution. Not liking the change which his future prospects were likely to undergo as a result of the notification, the respondent presented a writ petition seeking a declaration that sub-sections (4) and (5) of Section 7 of the Act were invalid and for a further declaration that he continued to be a civil servant under the State Government. To put in brief the argument on this head was that he had been removed from a civil post under the State in contravention of the provisions of Article 311.

6. A further argument was put up that the respondent had been subjected to hostile discrimination inasmuch as person who had been appointed in the same manner as himself and later in point of time than himself had been retained in the service of the State thereby infringing Articles 14 and 16 of the Constitution.

7. It is not necessary to deal with the second point as the appellant, in our opinion, must fail on the first. There can be no dispute — as indeed the learned Solicitor-General was constrained to admit — that the respondent and others who had filed writ petitions in the High Court challenging the notification ceased to hold the civil posts which they held under the State of Mysore at the time when the notification was issued if it was to have full force and effect. Whether the prospects of the respondent were or were not to be prejudicially affected if he was to become an employee of the University is not in point. However the learned Solicitor-General drew our attention to paragraph 17 of the counter-affidavit to the writ petition

filed in the High Court where it was stated that the terms and conditions of transfer as agreed to by the Government and the University provided *inter alia* for the following:—

(1) Every employee of the Government on his transfer to the University shall enjoy the same pay scale.

(2) He was to be eligible for pensionary benefits in the same manner as he had while he was serving the Government.

(3) His claims for higher pay scales or higher positions under the University shall be deemed to be on a preferential basis in comparison with others, provided the qualifications and experience were equal; and

(4) Every employee of the Government on his transfer to the University was to be protected to the extent that the terms and conditions of his service under the University would not be altered to his detriment.

8. We are not here concerned with the question as to whether for all practical purposes the respondent was not to be a loser as a result of the transfer. Evidently the respondent held the view that as a civil servant of the State of Mysore the prospects of promotion to higher posts with better scales of pay were greater in the service of the State with its manifold activities in various departments. For better or for worse, the notification resulted in extinction of his status as a civil servant.

9. The learned Solicitor-General sought to rely on a judgment of the Punjab High Court in *Amulya Kumar Talukdar v. Union of India*, ILR (1960) Punj 781 = (AIR 1960 Punj 284) a case which was considered by the High Court of Mysore, in aid of his contention that the transfer of the kind effected in this case had been held to be valid by the Punjab High Court. The High Court at Bangalore went into the question rather elaborately and noted that there were many differences between the provisions of the Indian Institute of Technology (Kharagpur) Act, 1956, the Act impugned in the Punjab High Court and the Agricultural University Act of 1963. In the Punjab case the petitioner had initially been appointed by the Director, Indian Institute of Technology, Kharagpur as a peon. As a result of the Act of 1956 the Institute

declared to be one of national importance, was constituted under the Act providing inter alia that the employees who were working in the Institute before were to hold office or service thereafter upon the same terms and conditions and with the same rights and privileges as to pension, leave, gratuity, provident fund and other matters as they would have held the same on the date of commencement of the Act as if the Act had not been passed. In the case before us the Act provides by sub-section (5) of Section 7 that the terms and conditions of the Government employees immediately before the appointed day or the date specified in the notification were to be such as might be determined by the State Government in consultation with the Board. The learned Judge of the Punjab High Court on the facts of that case found it unnecessary to examine the argument whether the assent given by the President to the Indian Institute of Technology Bill had the effect of terminating the status of the petitioners as Government servants by the President as also the argument raised on their behalf that their lien had been terminated under the Fundamental Rules without their consent. The Punjab decision cannot therefore apply to the case as presented before us.

10. In the result the appeals fail and are dismissed with costs. There will be one set of hearing fee. Appeals dismissed.

AIR 1971 SUPREME COURT 194
(V 58 C 49)

(From: Gujarat)

S. M. SIKRI, K. S. HEGDE AND
I. D. DUA, JJ.

Bholanath Amritlal Purohit, Appellant v. State of Gujarat, Respondent.

Criminal Appeal No. 43 of 1967, D/- 14-8-1970.

Post Office Act (1898), Section 72 — Complaint — Meaning — Mere information to Police not sufficient as complaint — Decision of Gujarat High Court, Reversed.

The expression "complaint" in Section 72 cannot be equated to mere

information or accusation. It is a formal document indicting an officer of the postal department for a criminal offence. The purpose behind Section 72 is that officials of the postal department should not be harassed with frivolous prosecutions and that before any of the prosecutions contemplated by Section 72 is launched, the authorities mentioned in that section should have examined the appropriateness of launching a prosecution and either file a complaint themselves or authorise the filing of such a complaint. An information laid before the police or even a sanction of the concerned authority granted for a prosecution by the police would not meet the requirements of Section 72. There should be a formal complaint as contemplated by Section 4 (1) (h) of the Criminal Procedure Code. (1906) 10 Cal WN 1029 and AIR 1953 Trav-Co 537 and (1965) 2 Cri LJ 165 (Guj) and (1966) 7 Guj LR 698, Rel. on. Decision of Gujarat High Court, Reversed. (Para 8)

Cases Referred: Chronological Paras

(1966) 7 Guj LR 698 = ILR	
(1966) Guj 576, Alubhai Mujat-bhai v. State of Gujarat	10
(1965) 1965-2 Cri LJ 165 (Guj), Narotamdas Bhikhabai v. State of Gujarat	10
(1953) AIR 1953 Trav-Co 537 (V 40) = ILR (1953) Trav-Co 600, Gnanaprakasam Barnabas v. State	10
(1906) 10 Cal WN 1029, Emperor v. Rohini Kumar Sen	10

The following judgment of the Court was delivered by

HEGDE, J.:— The appellant was tried and convicted by the Judicial Magistrate 1st Class, 1st Court, Broach under Section 55 of the Indian Post Office Act, 1898 (to be hereinafter referred to as the Act) and sentenced to suffer rigorous imprisonment for one month and to pay a fine of Rs. 100/- in default to suffer rigorous imprisonment for three weeks. In appeal that conviction was affirmed by the learned Sessions Judge, Broach. In his revision petition before the High Court of Gujarat, the principal contention taken by him was that the learned Magistrate was not competent to take cognizance of the case against him as there was no complaint as required by Section 72 of the Act. The revision petition was admitted for

hearing and notice issued to the respondent but when the matter came up for hearing before Raju, J., the learned Judge rejected the revision petition with these cryptic remarks:

"Heard the learned Counsel for the petitioner. I do not wish to exercise my revisional jurisdiction in this matter."

2. Thereafter this appeal was brought after obtaining a certificate from the High Court under Article 134 (1) (c) of the Constitution.

3. The learned Counsel for the appellant, Mr. H. K. Puri challenged the conviction of the appellant on the sole ground that the appellant's trial was illegal as the case against the appellant was not proceeded on the basis of a complaint made by order of, or under authority from, the Director General or Post Master General as required by Section 72 of the Act.

4. The case against the appellant was taken cognizance of on the basis of a report by the police under Section 173 of the Criminal Procedure Code after making an enquiry under Ch. XIV (Pt. V) of that Code. It is true that the investigation of the case was launched on the basis of the information given by the postal authorities. We shall even assume that the investigation in question was made after obtaining the sanction of the concerned Post Master General as contended by the learned Counsel for the respondent.

5. Section 55 of the Act reads thus:

"Whoever, being an officer of the Post Office entrusted with the preparing or keeping of any document, fraudulently prepares the document incorrectly, or alters or secretes or destroys the document, shall be punishable with imprisonment for a term which may extend to two years, and shall also be punishable with fine".

6. In brief the accusation against the appellant is that he fraudulently prepared certain documents in the post office where he was serving as a delivery clerk.

7. Section 72 of the Act prescribes:

"No Court shall take cognizance of an offence punishable under any of

the provisions of Sections 51, 53, 54, Clauses (a) and (b), 55, 56, 58, 59, 61, 64, 65, 66 and 67 of this Act, unless upon complaint made by order of, or under authority from, the Director General or a Post Master General".

8. The question for consideration is whether there is such a "complaint" in this case? The expression "complaint" is not defined in the Act but the "complaint" contemplated under Section 55 is one that initiates a prosecution on the basis of which the accused if found guilty is punishable with imprisonment for a term which may extend to two years and also with a fine. That being so the expression "complaint" in Section 72 cannot be equated to mere information or accusation. The context in which that expression is used in Section 72 indicates that it is a formal document indicting an officer of the postal department for a criminal offence. The purpose behind Section 72 is that officials of the postal department should not be harassed with frivolous prosecutions and that before any of the prosecutions contemplated by Section 72 is launched, the authorities mentioned in that Section should have examined the appropriateness of launching a prosecution and either file a complaint themselves or authorise the filing of such a complaint. Such a requirement will not be satisfied if the concerned authorities merely ask the police to investigate into the case and take appropriate action. An information laid before the police or even a sanction granted for a prosecution by the police would not meet the requirements of Sec. 72. If the legislature contemplated that a mere information to the police by the appropriate authority is sufficient then there was no need to enact Section 72. Further if all that was required was to obtain the sanction of the concerned authority then the legislature would have enacted a provision similar to Section 197 of the Criminal P. C. The fact that the legislature did not choose to adopt either of the two courses mentioned above is a clear indication of the fact that the mandate of Section 72 is that there should be a formal complaint as contemplated by Section 4 (1) (h) of the Criminal Procedure Code which says:

"Complaint" means the allegation made orally or in writing to a Magis-

trate, with a view to his taking action under this Code, that some person whether known or unknown, has committed an offence, but it does not include the report of a police officer".

9. If we understand the word "complaint" in Section 72 of the Act as defined under Section 4 (1) (h) of the Criminal P. C., as we think we should, then there was admittedly no "complaint" against the appellant which means that the learned Magistrate was incompetent to take cognizance of the case. From that it follows that the trial of the case was an invalid one and that the appellant was convicted without the authority of law.

10. The meaning of the word "complaint" in Section 72 of the Act had come up for consideration before several High Courts. The conclusion reached by those High Courts accords with that reached by us. As far back as 1906 the meaning of the word "complaint" in Section 72 of the Act came up before a Division Bench of the Calcutta High Court in *Emperor v. Rohini Kumar Sen*, (1906) 19 Cal WN 1029. The Court held that the prosecution therein was vitiated because of the failure to comply with the requirements of Section 72 of the Act. A similar view was taken by the Travancore-Cochin High Court in *Gnanaprakasam Barnabas v. State*, ILR (1953) Trav-Co 600 = (AIR 1953 Trav-Co 537). Raju J. himself took that view in *Narotamdas Bhikhabai v. State of Gujarat*, (1965) 2 Cri LJ 165 (Guj). That decision was rendered by the learned Judge on September 2, 1963. The same view was taken by another bench of the Gujarat High Court in *Alubhai Mujabhai v. State of Gujarat*, (1966) 7 Guj LR 698. No contrary decision was brought to our notice.

11. For the reasons mentioned above we allow this appeal, set aside the conviction of the appellant and acquit him. The fine levied if it had been recovered from the appellant will be refunded to him.

Appeal allowed.

AIR 1971 SUPREME COURT 196
(V 58 C 50)

(From: Mysore)*

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Shivappa and others, Appellants
v. The State of Mysore, Respondent.

Criminal Appeal No. 87 of 1967, D/-
19-2-1970.

(A) Penal Code (1860), S. 395 —
Sentence — Offence though serious no
injury caused — Held sentence of three
years' rigorous imprisonment would
meet ends of justice. (Para 7)

(B) Evidence Act (1872), S. 114 —
Presumption whether accused were
receivers of stolen property or were
dacoits when to be drawn stated.

If there is other evidence to connect an accused with the crime of dacoity itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presumption or the other may be drawn depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. If the gap of time is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed. The reason is obvious. Disposal of the fruits of crime requires the finding of a person ready to receive them and the shortness of time, the nature of the property which is disposed of, that is to say, its quantity and its character determine whether the person who had the goods in his possession received them from another or was himself the thief or the dacoit. In some cases there may be other elements which may point to the way as to how the presumption may be drawn. They differ from case to case.

*Criminal Appeal No. 29 of 1965, D/-
24-1-1967 — Mys.)

CN/CN/B125/70/DHZ/G

The goods stolen were a large quantity of cloth taken for sale to the market. Those goods were not sold and were being taken back to the dealers by the cartmen. A large number of persons said to be 20 in number pelted stones at the cartmen and looted the property. Immediately afterwards a number of searches were made and the goods were found with various persons.

Held under the circumstances it was legitimate to raise the presumption that the persons with whom the goods were found were the dacoits themselves.

(Paras 5, 6)

Mr. A. S. R. Chari, Sr. Advocate (Mr. R. V. Pillai Advocate with him), for Appellants; Mrs. Shyamala Pappu and Mr. S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— These are 14 appellants who appeal against their conviction under section 395 of the Indian Penal Code and sentences of 5 years' rigorous imprisonment and fine of Rs. 10000/- passed on them. Originally 20 persons were tried and convicted for the same offence and received a like sentence. 14 alone have appealed to this Court. The incident which took place on July 28, 1962 was theft by dacoity of certain cotton pieces from two carts within the limits of Lingsugur Police Station at about 11.30 p.m.

2. The facts are that two traders in cloth sent their wares in carts for sale. The cartmen halted after the market was over on the way for food. Thereafter six carts left for Mudgal at about 10 p.m. When the carts reached a Nala called Heri Halla about three miles from Lingsugur at about 11-30 p.m. 20 persons are said to have approached the carts and pelted stones. It was a dark night and the assailants were not identified. It appears that four out of the six carts escaped, but two carts were looted. The police investigated the case and arrested the 20 persons who were accused in the case as being the culprits involved in this incident.

3. It is not necessary to go into rest of the case or the evidence on which the case of dacoity was established, because dacoity as such is not challenged before us. The accused were con-

victed on the sole evidence of having in their possession pieces of cloth which were later identified to belong to the traders. Searches took place between July 30, 1962 and August 17, 1962. In these searches cloth which was undoubtedly stolen at the time of the dacoity was found in their houses. The High Court and the Court below drew from this the conclusion that the appellants were themselves the dacoits, and convicted them accordingly under S. 395 of the Indian Penal Code and sentenced them to 5 years' rigorous imprisonment and fine of Rs. 100/-.

4. In this appeal, the only contention raised by Mr. A. S. R. Chari is that the presumption that they were dacoits ought not to have been drawn since the circumstances do not admit the drawing of such a presumption in the case. According to Mr. Chari, the presumption to be drawn ought to have been one under Section 411 of the Indian Penal Code or at the most under S. 412 of the Indian Penal Code but not of complicity in the crime of dacoity. He contends that the circumstances under which the one presumption or the other may be drawn under Section 114 of the Indian Evidence Act have not been stated by law and therefore it is necessary always to start with the lesser presumption and draw the higher presumption only when there is some other evidence to show the complicity of the person in the crime itself. According to him there is no other evidence in the case which points to the complicity of the 14 appellants in the crime of dacoity and therefore as they cannot be suspected to be dacoits themselves, the only presumption to be drawn is one of receivers of stolen property or as receivers of property which was stolen in a dacoity.

5. In our opinion, the law advocated by Mr. Chari is not correct. If there is other evidence to connect an accused with the crime itself, however small, the finding of the stolen property with him is a piece of evidence which connects him further with the crime. There is then no question of presumption. The evidence strengthens the other evidence already against him. It is only when the accused cannot be connected with the crime except by reason of possession of the fruits of crime that the presumption may be drawn. In what circumstances the one presump-

tion or the other may be drawn, it is not necessary to state categorically in this case. It all depends upon the circumstances under which the discovery of the fruits of crime are made with a particular accused. It has been stated on more than one occasion that if the gap of time is too large, the presumption that the accused was concerned with the crime itself gets weakened. The presumption is stronger when the discovery of the fruits of crime is made immediately after the crime is committed. The reason is obvious. Disposal of the fruits of crime requires the finding of a person ready to receive them and the shortness of time, the nature of the property which is disposed of, that is to say, its quantity and its character determine whether the person who had the goods in his possession received them from another or was himself the thief or the dacoit. In some cases there may be other elements which may point to the way as to how the presumption may be drawn. They need not be stated here for they differ from case to case. In the present case, the goods stolen were a large quantity of cloth taken for sale to the market. These goods were not sold and were being taken back to the dealers by the cartmen. A large number of persons said to be 20 in number pelted stones at the cartmen and looted the property. Immediately afterwards a number of searches were made and the goods were found with various persons who were prosecuted as offenders and they have been presumed to be involved in the dacoity itself. It may be noticed that from each person a large number of goods of the same type such as 20 choli pieces or ten pieces of cloth were found. It is impossible to think that within the short time available, these goods could have been easily disposed of to receivers of stolen property or could be placed in the custody of friends till such time as the original offenders could take them away. The time gap in some cases is as short as two days and in some others it is not more than five days. In two cases only the time gap is about 19 days. Even then we think that the time gap is too short for original offenders to have disposed of the property to these appellants or to have left the goods in their custody till such time as the original offenders could have taken them away.

6. We are, therefore, satisfied that the proper inference was drawn in this case. It must not be forgotten that the offence was committed at night by as many as 20 persons or more. The houses of 20 persons were searched and large quantities of the stolen goods were found in their houses. It is impossible to think that these 20 persons were merely receivers of stolen property from some other 20 persons who were the dacoits. It is legitimate therefore to raise the presumption in this case that the persons with whom the goods were found were the decoits themselves. This presumption has been drawn and in our opinion rightly in this case. The conviction was therefore correct in all the circumstances of the case.

7. As regards the sentence, the offence no doubt was serious. But no injury beyond one appears to have been caused. Therefore we think that a sentence of three years' rigorous imprisonment will meet the ends of justice in this case. The sentence is reduced to three years' rigorous imprisonment. The sentence of fine will stand. The appeal is allowed to this extent.

Appeal partly allowed.

AIR 1971 SUPREME COURT 198 (V 58 C 51)

(From Punjab: ILR (1964) 1 Punj 607)
J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

Writ Petns. Nos. 116 and 190 to 214 of 1968.

Saheb Ram etc., Petitioners v. Financial Commissioner, Chandigarh, and others, Respondents.

Civil Appeals Nos. 2356 and 2357 of 1966 and 1508 to 1514 and 1471 of 1968.

Lachhmi Narain and others, Appellants v. The Financial Commissioner, Punjab, Chandigarh and others, Respondents.

Writ Petns. Nos. 116 and 190 to 214 of 1968 and Civil Appeals Nos. 2356 and 2357 of 1966, and 1508 to 1514 and 1471 of 1968, D/- 24-2-1970.

Tenancy Laws—Punjab Security of Land Tenures Act (10 of 1953), S. 18 (1) (i) — Claim of right of purchase under — Six years should have been com-

CN/IN/B147/70/DHZ/M

pleted on date of application for purchase.

In order to claim a right of purchase as against the landowner under S. 18 (1) (i), the minimum period of six years should have been completed at the time when the application for purchase by the tenant is made, and it is not necessary that he should have been a tenant of the land on April 15, 1953 when the Act came into force. Provided the other conditions are satisfied, such a tenant will be entitled to purchase the land. (1963) 65 Pun LR 652 & ILR (1967) 2 Punj & Har 120 and AIR 1970 Punj & Har 23, Distinguished. (Para 35)

Cases Referred: Chronological Paras

(1970) AIR 1970 P & H 23 (V 57) =
ILR (1969) 2 Punj & Har 680,
Mam Raj v. State of Punjab 34
(1967) ILR (1967) 2 Punj & Har
120 = 69 Pun LR 484, Amar
Singh v. State of Punjab 34
(1963) 65 Pun LR 652 = ILR
(1963) 2 Punj 808, Ganpat v.
Jagmal 34

M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co. and Miss Sona Bhatiani, Advocate, for Petitioners (in all the Petns.) and Appellants (in C. As. 1508 to 1514 of 1968); Mr. M. E. C. Agarwala, Advocate for Respondents Nos. 5 and 6 (In W. P. No. 116 of 1968) and Respondent No. 5 (In W. Ps. Nos. 191 and 209 of 1968 and C. As Nos. 1508 to 1514 and 1471 of 1968; Mr. S. V. Gupte, Senior Advocate (Mr. J. C. Talwar, Advocate, with him), for Respondents Nos. 5 and 6 (In W. Ps. Nos. 190 and 201 of 1968), Respondent No. 5 (In W. Ps. Nos. 192 to 200, 202, 203 and 210 to 213 of 1968 and Respondents Nos. 5 to 8 in W. P. No. 205 of 1968); Mr. B. R. L. Iyengar, Senior Advocate (M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co. with him), for Appellants (In C. A. 2356 of 1966 and C. A. No. 147 of 1968); Mr. N. L. Dhingra, Advocate and M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co., for Appellants (In C. A. No. 2357 of 1966); Mr. Dinkar Dutt Chaudhury, Advocate, for Respondents Nos. 2 and 3 (In C. As. Nos. 2356 and 2357 of 1966).

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— The common question that arises for consideration in all these writ petitions filed under Art. 32 and the civil appeals, on certificates granted by the High Court, is whether a tenant, in order to claim the right of purchase as against the landowner, under Section 18 (1) of the Punjab Security of Land Tenures Act, 1953 (Act X of 1953) (hereinafter referred to as the Act), should have been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, on the date when the Act came into force (April 15, 1953), or on the date when he files the application for purchase to the concerned authority under the Act. A subsidiary point also arises for consideration viz., whether the person who claims the right to purchase, should have been a tenant on the date when the Act came into force.

2. The circumstances under which these writ petitions and appeals arose, may be briefly stated.

3. We shall first take up for consideration Civil Appeal No. 2356 of 1966.

4. Respondents 2 and 3, who are the tenants under the appellant landowner, in this appeal, filed on January 10, 1961 before the Assistant Collector, I Grade, Fazilka, an application under S. 18 (1) of the Act for purchase from their landlord 19 acres and 7 kannals of land comprised in their tenancy. Their case was that they had been in continuous occupation of the land comprised in their tenancy for a minimum period of six years and, as such, they were entitled to purchase the land. Their claim was resisted by the appellant land-owner on the ground that it was only those tenants who had completed a continuous period of six years of tenancy prior to the commencement of the Act who were entitled to purchase the land under Section 18 (1) of the Act and as the applicants did not satisfy that test, the application was not maintainable. The Assistant Collector, by his order dated March 29, 1961 overruled the objection of the land-owners and held that the application filed by the tenants was maintainable as similar purchase applications had been entertained without regard to any date of completion of six years of continuous tenancy and in this view the matter was directed to be posted for further hearing. The applicants challenged this order of the Assistant Collector by an

appeal taken before the Collector, Ferozepore. The Collector, by order dated June 9, 1961 reversed the order of the Assistant Collector and held that no tenant who had not been in continuous possession for six years on the commencement of the Act could apply, under Section 18 (1) of the Act, for purchasing the property and that the six year period should have been completed at the time the Act came into force. In this view he held that the application filed by the tenants was not maintainable.

5. The tenants carried the matter in appeal before the Additional Commissioner, Jullundur Division, who, by his order dated December 14, 1962, agreed with the Collector and dismissed the appeal. The tenants went in revision before the Financial Commissioner, Revenue, Punjab, who by his order dated April 24, 1963 reversed the orders of the Collector and the Additional Commissioner. The Financial Commissioner held that the right of purchase under Section 18 (1) of the Act could be exercised by a tenant whose tenancy existed on the date of the commencement of the Act and who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years on the date of the application for the purchase of the land and the land has not been included in the reserved area of the land-owner. The Financial Commissioner further held that a tenant who, on the date of the application for purchase, owns or holds land exceeding the permissible area will not be entitled to purchase the land under his tenancy. After setting aside the orders of the Collector and the Additional Commissioner, the matters were remanded to the Assistant Collector, Fazilka, for a decision on merits.

6. The appellants-land owners filed Civil Writ No. 715 of 1963 in the High Court of Punjab to quash the orders of the Financial Commissioner, Revenue, Punjab. The tenants of certain other properties had also filed applications for purchase and their landlords had filed Civil Writ No. 716 of 1963 before the Punjab High Court. Both these Civil Writ Petitions were disposed of by common judgment of the High Court, dated October 1, 1963. After a consideration of the scheme of the Act and in particular the provisions of Section 18, the High Court held that to

have the benefit of S. 18 (1) (i), the tenants must be in continuous occupation of the land under their tenancies for a period of six years on the date of making the application for purchase under that section. Accordingly the High Court agreed with the views expressed by the Financial Commissioner on this point and left open for consideration by the Assistant Collector certain other aspects that appear to have been pressed on behalf of the tenants.

7. Civil Appeals No. 2356 of 1966 and 2357 of 1966 are directed against the orders passed in Civil Writ Petitions Nos. 715 and 716 of 1963 respectively. Similarly, a group of eight civil writ petitions had been filed by other land owners before the Punjab and Haryana High Court challenging the orders passed by the Financial Commissioner, Revenue, upholding the right of the tenants to purchase the lands concerned. Civil Appeals Nos. 1471 of 1968 and 1508 to 1514 of 1968 are directed against the orders passed by the High Court dismissing those writ petitions.

8. Certain other land-owners had contested the maintainability of applications filed by their tenants for purchase under S. 18 (1) and had made request to the concerned authorities to stay the proceedings and await the decision of this Court in Civil Appeals Nos. 2356 and 2357 of 1966. Apart from questioning the maintainability of the applications filed by the tenants and the jurisdiction of the authorities to entertain those applications, certain other contentions had also been taken by the landlords. Stay of proceedings asked for by the land-owners was declined by the authorities and finally, by the Financial Commissioner, Revenue, by his order dated February 29, 1968. Against this common order Writ Petitions Nos. 116 of 1968 and 190 to 214 of 1968 have been filed, under Art. 32. In those Writ Petitions the jurisdiction of the authorities to entertain the applications under S. 18, filed by the tenants, arises for consideration.

9. At the outset we may state that in all these matters we are giving our decision only regarding the interpretation of Section 18 of the Act with special reference to the points mentioned at the beginning of this judgment, and any other matters which may arise for consideration in these proceedings are left open to be adju-

licated upon by the appropriate authorities concerned, before whom proceedings may be pending.

10. On behalf of the land-owners, Mr. B.R.L. Iyengar, learned counsel, after a reference to the material provisions of the Act, urged that the interpretation put on Section 18 by the High Court is against the entire scheme of the statute and that such an interpretation will defeat the very object and purpose for which the Act had been passed. Counsel pointed out that the Act clearly indicated that the lands treated as surplus area were exclusively intended for being utilised for re-settlement of tenants already ejected from the land or who were liable to be ejected under Section 9 (1) (i) of the Act. He further pointed out that if the test of six years' continuous occupation, dealt with under S. 18 of the Act, is considered to be satisfied with reference to the date when the application for purchase is made by a tenant, as held by the High Court, there will be a conflict between S. 10-A and S. 18. Counsel finally urged that having regard to the scheme of the Act, continuous possession for a minimum period of 6 years under S. 18 of the Act must be such possession on the date the Act came into force viz., April 15, 1953 and tenants who did not satisfy this condition were not entitled to exercise the right of purchase under S. 18.

11. Mr. S. V. Gupte, learned counsel appearing for the tenants, on the other hand pointed out that the object of the Act was to put a ceiling on the extent of property that could be held by a tenant or a landlord and for stabilising tenancies of long duration and confer on such tenants the right of pre-emption and a right of purchase. Counsel pointed out that the Act did not snap the relationship of landlord and tenant, but, on the other hand, tried to maintain the same. There was no prohibition, he pointed out, anywhere in the Act against creation of new tenancies after April 15, 1953. He further urged that the scheme of the Act clearly indicated that apart from other rights, a right of purchase was given to a tenant who was in actual possession of the land and if the tenant satisfied the requirement of having been in continuous possession for a minimum period of six

years on the date of his filing an application for purchase, S. 18 (1) (i) would stand attracted. It was also urged that having due regard to the various provisions of the Act, there was no warrant to restrict the right of purchase under Section 18 (1) (i) only to a tenant who had been in continuous occupation of the land for a minimum period of six years on the date of the coming into force of the Act.

12. The other learned counsel, appearing in some of these matters either for the landlords or for the tenants have adopted the arguments of Mr. Iyengar and Mr. Gupte, respectively.

13. It is necessary to broadly consider the general scheme of the Act in the first instance. The Act came into force on April 15, 1953 and it was to provide for the security of land tenure and other incidental matters. The Act has been amended from time to time in 1953, 1955, 1959 and 1962. Under the Act, as originally passed, it is to be noted that there were two other sections viz., Ss. 7 and 15, which were later omitted. Even under S. 18, originally the period provided was 12 years. By the amendment Act, Punjab Act XI of 1955, the period was reduced to 6 years.

14. As Mr. Iyengar, in the course of his arguments, has referred to Sections 7 and 15, we shall just refer to the substance of those provisions. Section 7, dealing with the minimum period of tenancy, provided that no tenant on land other than the reserved area of a landowner shall be liable for ejectment before the expiry of a period of ten years from the commencement of the Act or from commencement of his tenancy, whichever is later, and this was notwithstanding anything to the contrary contained in any other law and except as provided by the Act. Section 15 is a corollary to Section 7 and it provided that when a tenant, after the expiration of the period specified in Section 7 has been allowed to hold over, his tenancy shall be deemed to have been renewed for a further period of 10 years commencing from the date of its expiration, on the same terms and conditions. The object of Mr. Iyengar relying upon these provisions was to show that the only protection intended to be given to tenants on land other than on the reserved area of a landowner

was to give a fixity for a period of 10 years and, if such tenants hold over, the tenancy was protected for a further period of 10 years. These sections, which have been subsequently deleted, do not, in our opinion, lend any support to Mr. Iyengar in the interpretation to be placed on S. 18.

15. By the Punjab Amendment Act XI of 1955, certain amendments were made in the parent Act.

16. Section 2 (5-a) defining 'Surplus Area' was introduced by this Amendment. Section 7 of the original Act was deleted. Section 10-A was introduced and the period of 12 years in Section 18 was substituted by a reduced period of 6 years. Section 16 of the original Act was substituted by new section.

17. Section 15 of the original Act was omitted by the Punjab Act XXXII of 1959.

18. One of the amendments in 1962 was the substitution of the new section 6 in the place of the old section.

19. We shall now refer to the material provisions of the Act, as it stands at present.

20. We have already mentioned that the Act was passed to provide for the security of land tenure and other incidental matters. Section 2 defines the various expressions. In particular, it is only necessary to refer to the definition of the expressions 'permissible area' 'reserved area' and 'surplus area'. 'Permissible area' under S. 2 (3), in relation to a landowner or tenant means thirty standard acres and where such thirty standard acres on being converted into ordinary acres exceed sixty acres, such sixty acres. It is not necessary to refer to the proviso. 'Reserved area', under S. 2 (4) means the area lawfully reserved under the Punjab Tenants (Security of Tenures) Act, 1950 as amended by President's Act of 1951. Section 2 (5-a) defines 'surplus area'. Broadly speaking, 'permissible area' related to the thirty standard acres which a landowner or a tenant could possess and the 'reserved area' meant the area lawfully reserved under the Act of 1950, as amended by President's Act of 1951. That will be an area which the landowner will be entitled to choose for himself from his holdings in order to enable him to have the permissible area of thirty standard acres. Generally speaking, excess

lands not covered by the reserved area not in the possession of any tenant will be the surplus area so far as a landowner is concerned.

21. Section 5 gives a right to a landowner who owns land in excess of the permissible area to reserve out of the entire land held by him in the State of Punjab any parcel or parcels not exceeding the permissible area. Section 5-A makes it obligatory on a landowner and tenant holding land in excess of the permissible area to furnish a declaration in the manner and within the period provided therein. Section 5-B (1) enables a landowner who has not exercised his right of reservation under the Act to select his permissible area and intimate the selection to the authority concerned, in the manner and within the period stated therein. Sub-s. (2) gives power to the prescribed authority in cases where a landowner fails to select his permissible area to select the parcel or parcels of land which such landowner may be entitled to retain under the Act. Any transfer of land, excepting those mentioned under S. 6, made between August 15, 1947 and February 2, 1955 will not affect the rights of tenants of such land under the Act. Section 8 safeguards the continuity of a tenancy. Section 9 provides for the conditions under which a tenant is liable to be evicted and under sub-s. (1) (i) a tenant on the area reserved under the Act or is a tenant of a small landowner can be evicted. But, under Section 9-A, a tenant liable to ejection under cl. (i) of sub-s. (1) of Section 9, cannot be dispossessed unless he is accommodated on a surplus area in accordance with the provisions of Section 10-A or otherwise on some other land by the State Government. Section 10 gives a right of restoration to a tenant who has been ejected from any land in excess of the permissible area between August 15, 1947 and April 15, 1953 provided the land is under self-cultivation and the ejection has been on grounds other than those mentioned in Section 9. Under sub-s. (4) of S. 10, in case of such restoration, the landowner or any other person in actual possession is entitled to such compensation as may be determined by the Assistant Collector from the tenant intended to be restored. Section 10-A gives power to the State Government

or any officer empowered by it in that behalf to utilise any surplus area for the resettlement of tenants ejected or to be ejected under cl. (i) of sub-s. (1) of S. 9.

22. It will seen that while providing for eviction of a tenant from a reserved area under S. 9 (1) (i), that tenant is safeguarded by S. 9-A providing that his dispossession shall not take place unless he is accommodated on a surplus area and S. 10-A provides for utilisation of surplus area for resettlement of tenants ejected or to be ejected under cl. (i) of sub-s. (1) of S. 9. These three provisions are interlinked and inter-connected. The Explanation to S. 10-A (b) makes it clear that the utilisation of any surplus area will not affect the right of a landowner to receive rent from the tenant so settled.

23. Section 12 provides for the quantum of rent payable by a tenant for the land held by him. Section 14-A provides for the procedure to be adopted by a landowner desiring to eject a tenant under the Act. Under S. 16, excepting in the case of lands acquired by the State Government or by a heir by inheritance, no transfer or disposition of lands after February 1, 1955 shall affect the rights of the tenant thereon under the Act. Section 17 gives to the tenants mentioned therein, a right of pre-emption.

24. The various provisions, referred to above, in our opinion, clearly indicate that the Act does not snap the relationship of landlords and tenants once and for all. In fact that relationship is fairly well preserved and a limited right of evicting tenants is given to the landlord and an obligation to pay rent is also cast upon the tenant. But, in respect of tenants who are evicted or are liable to be evicted under S. 9 (1) (i) of the Act, provision is made for re-settling them under S. 9-A read with Section 10-A of the Act. Such resettlement does not affect the right of the landowner to receive rent from the tenant. The provisions of S. 6 and S. 16 also indicate that excepting the particular types of transactions, referred to therein, no other, dealing with the property by the landowners will affect the rights that the tenant has under the Act. In fact these two provisions take in cases of transfer prohibited thereunder after August 15, 1947 and

also subsequent to the date of the coming into force of the Act. It will also be noted that the definition of 'surplus area' under S. 2 (5-a) and Section 10-A giving power to the State Government to utilise the surplus area for re-settlement of the tenants were both brought in by the Amendment Act of 1955 and with retrospective effect from the date of the original Act, viz., April 15, 1953.

25. We then come to the material section, Section 18, which is as follows:

"18 (1) Notwithstanding anything to the contrary contained in any law, usage or contract, a tenant of a landowner other than a small landowner —

(i) who has been in continuous occupation of the land comprised in his tenancy for a minimum period of six years, or

(ii) who has been restored to his tenancy under the provisions of this Act and whose periods of continuous occupation of the land comprised in his tenancy immediately before ejection and immediately after restoration of his tenancy together amounts to six years or more, or

(iii) who was ejected from his tenancy after the 14th day of August, 1947, and before the commencement of this Act, and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before his ejection,

shall be entitled to purchase from the land-owner the land so held by him but not included in the reserved area of the land-owner, in the case of a tenant falling within clause (i) or clause (ii) at any time, and in the case of a tenant falling within clause (iii) within a period of one year from the date of commencement of this Act:

Provided that no tenant referred to in this sub-section shall be entitled to exercise any such right in respect of the land or any portion thereof if he had sublet the land or the portion, as the case may be, to any other person during any period of his continuous occupation, unless during that period the tenant was suffering from a legal disability or physical infirmity, or, if a woman, was widow or was unmarried;

Provided further that if the land intended to be purchased is held by

another tenant who is entitled to pre-empt the sale under the next preceding section, and who is not accepted by the purchasing tenant, the tenant in actual occupation shall have the right to pre-empt the sale.

Section 18 (2) deals with the procedure to be adopted by the tenant who is desirous of purchasing land. Sub-s. (3) provides for the purchase price being three-fourths of the value of the land determined by the Assistant Collector. Under sub-s. (4) it is open to the tenant to pay the purchase price either in a lump sum or in six-monthly instalments not exceeding ten. It further provides that on the purchase price or the first instalment thereof being deposited, a tenant shall be deemed to have become the owner of the land. The other matters dealt with in Section 18 are not necessary to be gone into.

26. Under Section 18 (1) three categories of tenants have been given a right to purchase from the landowner the land so held by him, but not included in the reserved area of the land-owner and they are (i) a tenant who has been in continuous occupation of the land for a minimum period of six years; (ii) a tenant restored to his tenancy under the Act and whose period of continuous occupation of the land comprised in his tenancy immediately before ejectment and after restoration amounts to six years or more; and (iii) a tenant who was ejected from his tenancy after August 14, 1947 and before April 15, 1953 and who was in continuous occupation of the land comprised in his tenancy for a period of six years or more immediately before his ejectment.

27. Before dealing with the first category, we will refer to the tenants coming under categories (ii) and (iii). Regarding the second category, the period of occupation by a tenant both prior to and after the date of the Act are taken into account for computing the period of occupation of six years or more. It is thus clear that the occupation by him for part of the period which will be after the date of the Act is admittedly taken into account to give him a right to purchase the land. He also represents the type of tenants whose possession has been disturbed prior to the date of the Act

and who gets possession again by virtue of being restored under the Act to his tenancy and such possession is counted in his favour. For persons coming in category (ii), there is no time limit within which they should exercise the right to purchase. On the other hand S. 18 (1) clearly gives such persons a right to purchase the land at any time. Category (iii) deals with tenants who have been ejected after August 14, 1947 and before April 15, 1953, but prior to such eviction they have been in continuous occupation of the land for six years or more. Admittedly, such persons were not in possession of the land as tenants on the date when the Act came into force, i. e., on April 15, 1953. But, nevertheless, if such a person who has been evicted during the particular period above-mentioned had been at the time of his ejectment in continuous occupation of land comprised in his tenancy for a period of six years or more, he is given a right to purchase the land. That is, a person who had lost all contact with the land on the date of the Act as a tenant, and who was not in possession on the date of the coming into force of the Act, is also given a right to purchase the land provided his ejectment was after August 14, 1947 and before April 15, 1953. For a tenant coming under this category the section provides that he must exercise his right to purchase within a period of one year from the date of commencement of the Act.

28. Coming to clause (i) of S. 18 (1), that clause does not expressly state as to when the tenant referred to therein should have completed his continuous occupation of a minimum period of six years. According to the landowners, such a tenant must have completed the period of six years on April 15, 1953, whereas, according to the tenants it is enough if the period of six years had been completed on the date when an application for purchase is made. The question now is whether the scheme of the Act indicates whether the six years period should have been completed on April 15, 1953, the date when the Act came into force.

29. In our opinion, having due regard to the scheme of the Act, there is no warrant for importing any such restriction in Section 18 (1) (i) of the Act. If the intention of the Legisla-

ture was that the tenant under S 18 (1) (i) should have been in continuous occupation for a minimum period of six years on the date of the Act, it would have been specifically so provided for in the said clause.

30. There is also intrinsic evidence in S. 18 (1) (i) itself that it is not necessary for a person coming under sub-cl. (i) that he should have completed his continuous occupation of six years on the date of the Act. We have already referred to the category of tenants coming under cl. (ii) and shown that the Act recognises their possession for a period a part of which must certainly be subsequent to the commencement of the Act. Then the object of the Act, as seen from cl. (ii) is to protect even tenants who get back into possession of the land after the date of the Act, we do not see any reason why a limitation should be read in cl. (i) in respect of a tenant who is in possession of the land that he should have completed the period of six years of continuous occupation even prior to the date of the Act.

31. There is an additional reason why we cannot read any such limitation into cl. (i). Clause (iii) dealing with the third category of tenants, admittedly relates to a tenant evicted from the property even before the date of the Act and who was not in possession on the day when the Act came into force. But, nevertheless, if such tenants had been in continuous possession for six years at the time of their ejection which must be before the date of the Act, they are entitled to purchase the property, but that right must be exercised within a period of one year from the date of the commencement of the Act. If Mr. Iyengar's contention, that the tenants in category (i) should have completed the continuous period of six years on the date of the Act, is correct such tenants and tenants coming under category (iii) will be on a par in that both would have completed their period of six years before the date of the Act. Nevertheless in the case of tenants coming under category (iii), the Legislature has specifically stated that they must exercise their right of purchase within a period of one year from the date of the Act whereas in the case of tenants coming under cl. (i) they could exercise the right at any time. This itself clearly indicates that the tenants

coming under category (i) are entirely different from the tenants coming under category (iii). If both types of tenants coming under clause (i) and clause (iii) stand on the same footing the position would be that both would have completed the period of continuous occupation of six years prior to the Act and the Legislature would have provided that both should exercise the right of purchase within a period of one year. The distinction made regarding the period within which these two categories can exercise their right, clearly indicates the intention of the Legislature to the contrary. It stands to reason that the tenants coming under clauses (i) and (ii) who are in actual possession of the land have been given the option either to continue as tenants and pay rent or to exercise their right to purchase the land at any time. There is no question in their case of there being any time-lag or doubt because, being in possession no other person's right will normally be affected; whereas in the case of a tenant coming under cl. (iii), he has already gone out of the land and therefore the Legislature has specifically provided a very short period of one year from the date of the Act for exercising, if he so chooses, his right to purchase the land provided he satisfies the other conditions mentioned in the section. The Legislature did not want the position to be kept nebulous and doubtful in respect of such a person who was not in possession as a tenant on the date of the Act. While coming to a tenant who satisfies the requirements of cl. (iii) of S. 18 (1), the Legislature has taken care to see that those types of tenants are made to take a decision to purchase the land within the shortest possible time so that other peoples' rights may not be jeopardized.

32. Nor is there any warrant for the contention of Mr. Iyengar that the person who claims the right under cl. (i) should have been a tenant on April 15, 1953. So far as we could see, there is no prohibition under the Act placing any restriction against the right of the landowner creating new tenancies after the date of the Act. In fact the second proviso to S. 9-A clearly indicates to the contrary. It deals with the contingency of tenancy coming into force after the commencement of the Act.

33. Section 18 (1) (i) gives a right to a tenant to purchase the land; and that right has to be examined when an application under Section 18 is made and cannot be denied on the ground that he was not a tenant for more than six years on April 15, 1953. There is no limitation placed under cl. (i) of Section 18 (1) that the tenant who exercises his right should be a tenant on the date of the Act or that he should have completed the period of six years on April 15, 1953 and there is no warrant for reading in Section 18 (1) (i) clauses which it does not contain. It is enough if the continuous period of six years has been completed on the date when the tenant files the application for purchase of the land.

34. We were referred to three decisions: Ganpat v. Jagmal, (1963) 65 Pun LR 652; Amar Singh v. State of Punjab, ILR (1957) 2 Punj and Har 120, and Mam Raj v. State of Punjab, ILR (1969) 2 Punj and Har 680 = (AIR 1970 Punj and Har 23). In the first decision the question was whether a transfer by a landowner in excess of the reserved area has to be ignored when the rights of a tenant under section 18 are being considered. In the second and third decisions the question was whether an order for purchase passed in favour of a tenant under Section 18 can be ignored by the Collector when exercising his functions under Section 10-A of the Act. In none of the decisions the points now decided by us came up for consideration directly and therefore it is not necessary to deal with those decisions in detail.

35. To conclude we are of opinion that in order to claim a right of purchase as against the landowner under Section 18 (1) (i) of the Act, the minimum period of six years should have been completed at the time when the application for purchase by the tenant is made, and it is not necessary that he should have been a tenant of the land on April 15, 1953. Provided the other conditions are satisfied, such a tenant will be entitled to purchase the land.

36. In the result the writ petitions and appeals are dismissed with costs—such costs to be one hearing fee.

Writ petitions and appeals dismissed.

AIR 1971 SUPREME COURT 206 (V 58 C 52)

(From Allahabad: AIR 1967 All. 135)

J. M. SHELAT AND G. K. MITTER, JJ.

Hanuman Prasad Gupta, (in all the Appeals), Appellant v. Hiralal (in all the Appeals), Respondent.

Criminal Appeals Nos. 225 to 232 of 1966, D/- 24-2-1970.

Companies Act (1956), Ss. 207, 205 and 36 — Provisions of S. 205 (5) incorporated also in Articles of company — Obligation to pay dividend arises at place of company's registered Office — Non-payment — Court at place of company's registered office has jurisdiction to try offence — (Contract Act (1872), S. 50) — AIR 1967 All 135, Reversed.

A dividend once declared is a debt payable by the company to its registered shareholders. (Para 4)

Once a dividend warrant is posted to the registered address of the shareholder, dividend is deemed to have been paid within meaning of S. 205. The section makes the failure to post within the prescribed period and not the non-receipt of the warrant by the shareholder an offence. Prima facie, both the obligation to post the dividend warrant and the failure to satisfy that obligation would occur at the place where the obligation is to be performed and that would be the registered office of the company and not the address at which the warrant is to be posted. Payment in cash or the posting of a cheque or a warrant are equivalent and the obligation to pay is discharged when either of them is done. (Paras 4, 5, 6)

Where the power to pay dividend by posting a cheque or a warrant as provided in Section 205 (5) is incorporated in the Articles of Association of the company, it constitutes a contract between a company and its members. (1915) 1 Ch 881 & 1938 Ch. 708 Ref. (Para 6)

If under a contract, a promisee prescribes the manner in which the promise is to be performed, the promisor can perform the promise in the manner so prescribed. (See S. 50 of the Contract Act.) (Para 7)

Once a mode of payment of dividend is agreed to, namely, by posting a

cheque or a warrant, the place where such posting is to be done is the place of performance and also the place of payment, as such performance in the manner agreed to is equivalent to payment and results in the discharge of the obligation. (Para 8)

The common law rule that debtor must seek the creditor has no application. (1910) 2 K. B. 509 & (1886) 3 TLR 182 Rel. on. (Para 7)

When the company posts the dividend warrant to the registered address of a shareholder, that being done at the shareholder's request, the post office becomes the agent of the shareholder, and the loss of a dividend warrant during transit thereafter is the risk of the shareholder. (Para 9)

Since the obligation to post the warrant arose at the registered office of the company, failure to discharge that obligation also arose at the registered office of the company. Therefore, the alleged offence must be held to have taken place at the place where the company's registered office is situate and not where the dividend warrant, when posted, would be received. AIR 1966 SC 1466 & (1846) 175 ER 128 & AIR 1925 Cal 613, Ref.; AIR 1967 All 135, Reversed.

(Para 11)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 1466 (V 53)=
 (1966) 59 ITR 738, Indore
 Malwa United Mills Ltd. v.
 Commr. of Income Tax 9
 (1938) 1938 Ch 708 = (1938) 3 All
 ER 214, Beattie v. Beattie Ltd. 7
 (1925) AIR 1925 Cal 613 (V 12)=
 29 Cal WN 432 = 26 Cri LJ
 725, Gunananda Dhone v. Santi
 Prokash Nanley 10
 (1915) 1915-1 Ch 881 = 84 LJ
 Ch 688, Hickman v. Kentor
 Romney Marsh Sheep Breeders'
 Association 7
 (1910) 1910-2 KB 509 = 79 LJ
 KB 924, Thairlwall v. Great
 Northern Rly. Co. 7
 (1886) 3 TLR 182, Norman v.
 Ricketts 7
 (1846) 175 ER 128 = 2 Car & K.
 309, Regina v. James Milner 10

Mr. H. R. Gokhale, Sr. Advocate
 (M/s. K. K. Jain, Bishamber Lal and
 H. K. Puri, Advocates with him), for
 Appellant, (in all the Appeals).

The following Judgment of the Court was delivered by

SHELAT, J.— All these appeals, founded on a certificate granted by the High Court of Allahabad, raise a common question as to jurisdiction. The appeals arise from complaints filed by the respondent in the Court of First Class Magistrate at Meerut under section 207 of the Companies Act, 1956 on an allegation of failure on the part of the appellant, the director-in-charge of M/s Iron Traders (Private) Ltd., to pay to him dividends on shares held by him, although the dividends were declared by the company for the respective years. The question being common, all these appeals are disposed of by a common judgment.

2. The appellant contended that the Magistrate at Meerut had no jurisdiction to try the complaints and that the Magistrate at Delhi, where the company's registered office is situate, who would have the jurisdiction. The Magistrate rejected the contention and held that as the dividend had to be paid at the registered address of the respondent, which was at Meerut, it was the Meerut Court which had the jurisdiction. The Sessions Judge, on appeal, upheld the order of the Magistrate and in revision the High Court, rejecting the appellant's contention, confirmed the view taken by the Magistrate and upheld by the Sessions Judge. The High Court in taking the aforesaid view observed:

"The object behind the statute is to ensure prompt payment of dividend to a shareholder. That payment may be made to him directly or it may be made by sending a cheque or warrant to his registered address. If a shareholder complains that he has not received payment he is entitled to proceed against the company and its Directors by filing a complaint at the place where he resides because the law demands that payment should have been made to him there."

The High Court's reasoning was clearly based on the premise that payment of dividend has to be made at the place where the shareholder resides, and therefore, it is the Magistrate within whose jurisdiction the shareholder's registered address is situate who has the jurisdiction. The contention in these appeals is that such a view is not in accord with section 207. The question is of some importance,

for, if the view taken by the High Court is correct, it would mean that directors of companies would be liable to be prosecuted at hundreds of places where the registered addresses of their shareholders are on allegations that dividends are not paid to them.

3. Section 205 deals with dividends and the manner and time of payment thereof. Sub-section (1) provides that no dividend shall be declared or paid by a company for any financial year except out of the company's profits for that year arrived at in the manner therein set out. Sub-section (3) provides that no dividend shall be payable except in cash. Sub-section 5 (b), however, empowers payment of dividend by cheque or dividend warrant sent through the post directed to the registered address of the shareholder entitled to the payment of the dividend or in the case of joint shareholders to the registered address of that one of them who is first named in the register of members or to such person or to such address as the shareholder or the joint shareholders may in writing direct. Section 206 provides that no dividend shall be paid by a company in respect of any share therein except to the registered holder of such share or to his order or to his bankers, or where a share warrant has been issued to the bearer of such warrant or to his bankers. Section 207 lays down the penalty for failure to distribute dividends declared by the company and provides that where a dividend has been declared by a company but has not been paid or a cheque or a warrant in respect thereof has not been posted within 42 days from the date of declaration to any shareholder entitled to the payment of the dividend, every director of the company, its managing agent or secretaries and treasurers shall, if he is knowingly a party to the default, be punishable with simple imprisonment for a term which may extend to 7 days and shall also be liable to fine. But the section further provides that no offence shall be deemed to have been committed within the meaning of the foregoing provision in the cases therein set out.

4. A dividend once declared is a debt payable by the company to its registered shareholders. It is clear from section 205 that although under sub-

section (3) no dividend shall be payable except in cash, sub-section (5) authorises a company to pay the dividend by a cheque or a warrant. Therefore, dividend can be said to have been paid either when it is paid in cash or when a cheque or a warrant is sent through the post directed to the registered address of the shareholder entitled to payment thereof. Indeed, Section 207 itself lays down that the offence thereunder is committed when dividend is either not paid or a cheque or a warrant in respect thereof has not been posted within the time prescribed therefor. Once, therefore, a dividend warrant is posted at the registered address of the shareholder, dividend is deemed to have been paid.

5. The section casts an obligation on the company to pay the dividend, which is declared to the shareholder entitled thereto within 42 days from its declaration. The offence under the section takes place when there is failure to pay or a cheque or a warrant therefor is not posted to the registered address of the shareholder. It will be noticed that the section makes the failure to post within the prescribed period and not the non-receipt of the warrant by the shareholder an offence. Therefore, the obligation to pay within the prescribed period is satisfied once the dividend is paid or a cheque or a warrant therefor is posted at the registered address of the shareholder. Prima facie, both the obligation to post the dividend warrant and the failure to satisfy that obligation would occur at the place where the obligation is to be performed and that would be the registered office of the company and not the address at which the warrant is to be posted.

6. But the question is since the dividend, when declared, becomes a debt payable by the company to the shareholder and the company becomes a debtor, does the common law rule that the debtor must seek out the creditor apply? There are two considerations which must not be lost sight of before that rule is applied. The first is that section 207 does not make non-receipt of the dividend warrant by the shareholder within 42 days an offence. The offence consists in the failure to post the dividend warrant within the prescribed period. The

provisions of section 205 empower payment of dividend by a cheque or a warrant and treat the posting of a cheque or a warrant as payment. Therefore, payment in cash or the posting of a cheque or a warrant are equivalent and the obligation to pay is discharged when either of them is done. The second consideration is that the power to pay dividend by posting a cheque or a warrant provided in section 205 (5) is incorporated in the Articles of Association of the company by Article 132. That article reads:

"Unless otherwise directed by the company in General Meeting any dividend may be paid by cheque or warrant sent through the post to the registered address of the member entitled or in the case of joint holders to the registered address of that one whose name stands first on the register in respect of the joint holding and every cheque so sent shall be made payable to the order of the person to whom it is sent."

7. Section 36 of the Act, which is in the same terms as section 20 of the English Companies Act, 1948, provides that subject to the provisions of the Act the Memorandum and Articles of Association, when registered, bind the company and the members thereof to the same extent as if they respectively have been signed by the company and by each member, and contained covenants on its and his part to observe all the provisions of the Memorandum and of the Articles. It is well established that the Articles of Association constitute a contract between a company and its members in respect of their ordinary rights as members. (see *Hickman v. Kent or Romney Marsh Sheep Breeder's Association*, 1915-1 Ch 881, and *Beattie v. Beattie, Ltd.*, 1938 Ch. 708). If under a contract, a promisee prescribes the manner in which the promise is to be performed, the promiser can perform the promise in the manner so prescribed. (See section 50 of the Contract Act). Thus, if A desires B, who owes him Rs. 100 to send him a note for that amount by post, the debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A. (See illustration (d) to Section 50 of the Contract Act.) In this connection the decision in *Thairlwall v. Great Northern Rly. Co.*, 1910-2 KB 509, shows how the problem is dealt with by the

English Courts. The plaintiff there, who held certain stocks of the defendant company, filed an action to recover dividend payable on those stocks. The defence was that the dividend was paid having been sent by post to the registered address of the plaintiff. The question was looked at from the point of view whether there was any agreement by or obligation on the plaintiff to accept the dividend warrant as payment. If there was any such agreement, the principle laid down in *Norman v. Bicketts*, (1886) 3 TLR 182, would apply namely, that a debtor or a creditor can agree to make and accept payment of the debt in some form other than cash and that when the creditor asks his debtor to send the amount by post, then if the debtor sends a cheque for the amount by post the risk of loss in transit falls on the creditor and the posting is equivalent to payment. Further the stock certificates had upon the back of them a clause that dividend would be payable by warrant which would be sent by post to the proprietor's registered address, or to any person duly authorised to give a receipt for the same. Section 9 of the Act of 1890, under which the defendant-company was incorporated, also provided that the terms and conditions on which the stock was issued shall be stated on the certificate thereof. In the six monthly report of accounts issued by the directors to the stock-holders there was a statement that the profits of the company had enabled the directors to declare a dividend and there was at the back of that report a notice that the dividend warrants would be payable on a certain date and would be sent by post to the stockholders on the previous day. Under section 90 of the Companies Act, 1845 it was within the power of the directors to fix the date at which and the mode in which dividends should be paid, subject of course to the control of a general meeting. The stock-holders of the company at their general meeting had declared the amount of dividend as proposed by the directors but had passed no resolution as to how payment was to be made. It was held that though no such resolution was passed by the stockholders, they had notice as to how the directors proposed to pay the dividends and as no

alteration was made in those proposals, the stockholders were held to have decided among themselves by a proper resolution that the dividend should be paid on a certain day and in the manner proposed by the directors. Such a conduct was equivalent to a request, and therefore, the stockholders became entitled to payment in that way and in that way alone. Consequently, when the dividend warrant had been sent by post the dividend was paid and the company's obligation to pay stood discharged.

8. It follows, therefore, that once a mode of payment of dividend is agreed to, namely, by posting a cheque or a warrant, the place where such posting is to be done is the place of performance and also the place of payment, as such performance in the manner agreed to is equivalent to payment and results in the discharge of the obligation.

9. It is clear from section 205 (5) that the company could pay dividend either in cash or by posting a cheque or a warrant at the registered address of the respondent. Article 132 of the Articles of Association also authorises the company to pay dividend either in cash or by posting a cheque or a warrant to the shareholder at his registered address. The effect of Article 132 is that when a dividend warrant is posted at the registered address of the shareholder that would be equivalent to payment. Once a warrant is so posted the company is deemed to have paid and discharged its obligation. As aforesaid, the Articles of Association constitute an agreement between the company and the shareholders, and the latter was entitled to the payment of dividend in the manner laid down in the Articles and in that manner alone. Article 132 thus not only authorises the company to make the payment in the manner laid down therein but amounts to a request by the shareholders to be paid in the manner so laid down. When, therefore, the company posts the dividend warrant at the registered address of a shareholder, that being done at the shareholder's request, the post office becomes the agent of the shareholder, and the loss of a dividend warrant during transit thereafter is the risk of the shareholder. In *Indore Malwa United Mills Ltd. v. Commr. of Income-Tax*, (1966) 59 ITR

738 = (AIR 1966 SC 1466) this Court, on a question arising whether on the facts there, payment was made in taxable territory, held that if by an agreement, express or implied, between the creditor and the debtor, or by a request, express or implied, by the creditor, the debtor is authorised to pay the debt by a cheque and to send the cheque to the creditor by post, the post office is the agent of the creditor to receive the cheque and the creditor receives payment as soon as the cheque is posted to him. That being the position, the place where a dividend warrant would be posted, the post office being the agent of the shareholder, is the place where the obligation to pay the debt is discharged—in the present case at Delhi where the company has its registered office. It follows that the offence under section 207 of the Act would also occur at the place where the failure to discharge that obligation arises, namely, the failure to post the dividend warrant within 42 days. The venue of the offence, therefore, would be Delhi and not Meerut, and the court competent to try the offence would be that court within whose jurisdiction the offence takes place i.e., Delhi. This should be so both in law and common sense, for, if held otherwise, the directors of companies can be prosecuted at hundreds of places on an allegation by shareholders that they have not received the warrant. That cannot be the intention of the legislature when it enacted Section 207 and made failure to pay or post a dividend warrant within 42 days from the declaration of the dividend an offence.

10. This view is also in accord with the principle laid down by Maule J. in *Ragina v. James Milner*, (1846) 175 ER 128, that the felony of not surrendering at a district court to a fiat in bankruptcy, under Stat. 5 and 6 Vict. c. 122, Section 32, is committed at the place where the district court is situate; and an indictment for the offence cannot be sustained in a different country from that in which the person was a trader or in which he committed an act of bankruptcy. On the same principle the High Court of Calcutta has also held in *Gunanand Dhone v. Santi Prokash Nanley*, 29 Cal WN 432 = (AIR 1925 Cal 613) that it is the court within the local limits of whose jurisdiction the accus-

ed is liable to render accounts and fails to do so by reason of having committed a breach of trust alleged against him that has the jurisdiction.

11. The offence under S. 207 is the failure to pay dividend or to post a cheque or a warrant for the dividend amount. Since the obligation to post the warrant arose at the registered office of the company, failure to discharge that obligation also arose at the registered office of the company. Therefore, the alleged offence must be held to have taken place at the place where the company's registered office is situate and not where the dividend warrant, when posted, would be received.

12. In that view, the High Court was in error in holding that the Magistrate at Meerut had the jurisdiction to try the said complaints. The appeals must accordingly be allowed and the High Court's orders set aside. Order accordingly.

Appeals allowed.

AIR 1971 SUPREME COURT 211
(V 58 C 53)

(From: Bombay)*

S. M. SIKRI AND V. BHARGAVA JJ.

The Union of India, Appellant v. Lonavala Borough Municipality of Lonavala and another, Respondents.

Civil Appeal No. 1641 of 1966, D/- 9-3-1970.

Municipalities — Bombay Municipal Boroughs Act (18 of 1925), S. 73 (1) Proviso 2 cl. (c) — Bombay District Municipal Act (30 of 1901), S. 59 — 'Consolidated tax' envisaged by S. 59 (1) Proviso 2, cl. (c) of Act of 1901 — Nature of — It cannot be distinguished from a tax on buildings and lands — Position under Act of 1925 is exactly the same.

The G. I. P. Railway (later the Central Railway) had land with buildings etc. situated within the limits of the Lonavala Municipality (respondent). The Municipality was governed at that time by the Bombay District Municipal Act, 3 of 1901. But no tax was levied on those buildings and lands in view of S. 135 of the Railways Act.

*(Appeal No. 26 of 1958, D/- 10-3-1965—Bom.)

In 1914, the Government of India issued a notification under S. 135 of the Railways Act, according to which the exemption granted to the G. I. P. Railway Administration in respect of house tax was taken away and that tax became payable by the G. I. P. Railway to the Lonavala Municipality. On 4th May 1916, the respondent promulgated new rules for taxation and, instead of charging separate house tax and water rate, it decided to charge a consolidated tax assessed as a rate on buildings and lands in accordance with clause (c) of the second proviso to section 59 (1) of the Act of 1901. The Railway felt that, since, under the notification of 1914, house tax only was payable by the Railway Administration, there was no justification for the respondent Municipality to charge consolidated tax from it and consequently protested against that payment. Thereafter on 26th July, 1917, the Government of India issued a fresh notification under Section 135 of the Railways Act, whereby the Railway Administration was rendered liable to pay what was described as 'tax on land and buildings'. On the issue of this notification, the respondent started charging the G. I. P. Railway this consolidated tax and this continued until some time in the year 1927 by which time the G. I. P. Railway was taken over by the Government and became a Government undertaking. In the Rules promulgated on 4th May 1916, the consolidated tax described as a general rate on buildings and lands was not chargeable on government property. Relying on this provision in the rules, an objection was raised that the charge of the tax was illegal when the Railway had become government property. Subsequently, the respondent Municipality amended its rules and promulgated fresh rules on the 6th October 1931. By this time, the respondent Municipality had been constituted into a Borough under the Bombay Municipal Boroughs Act No. 18 of 1925. Under those rules, the exemption in respect of government property to the charge of the general rate on buildings and lands, which was contained in the Rules of 1916, was deleted and all lands and buildings within the Municipal Borough became chargeable irrespective of their being owned by the Government. In pursuance of those rules of 1931, the respon-

dent started collecting the consolidated tax assessed as a rate on buildings and lands of the Railway from it. The Union of India, which had come to be the owner of Railway under the name of the Central Railway, filed a suit for refund of the entire amount which was collected by the respondent from the Railway in pursuance of the rules of 1931.

Held that, on the proper interpretation of the language used in the two Acts of 1901 and 1925 the rules, and the notification, and taking into account the circumstances under which the notification of 1917 was issued, the only conclusion that could be arrived at was that the Railway was made liable to the consolidated tax. Judgment of Bombay High Court in Appeal No. 26 of 1958, D/- 10-3-1965 (3om), Affirmed. (Para 12)

A consolidated tax assessed as a rate on buildings and lands cannot be distinguished from a tax on buildings and lands. AIR 1939 Bom 478, Rel. on; AIR 1962 All 83, Ref.; AIR 1929 Mad 746 & AIR 1963 SC 1742, Disting.

(Para 11)

Clause (c) of the second proviso to Section 59 (1) permits the imposition of a consolidated tax assessed as a rate on buildings or lands or both. The moment a tax is assessed as a rate on buildings or lands, it naturally becomes a tax on buildings and lands. The fact that it was a consolidated tax was immaterial.

(Para 7)

The power to impose the consolidated tax has been given for the purpose of substituting it for the multiple taxes which could be imposed under the clauses of S. 59 (1). The intention appears to be that, though the Municipality was empowered under S. 59 (1) to impose four different kinds of taxes, it was permitted under the clause (c) of the second proviso to simplify matters by having a single tax on buildings and lands in lieu of those multiple taxes. Such a single tax had to be assessed as a rate on buildings and lands.

(Para 7)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 1742 (V 50)=

(1964) 2 SCR 608, Patel Gordhandas Hargovindas v. Municipal Commr. Ahmedabad

12

(1962) AIR 1962 All 83 (V 49)=

1961 All LJ 976, Raza Buland

Sugar Co. Ltd. Rampur v. Municipal Board, Rampur

12

(1939) AIR 1939 Bom 478 (V 26)=

ILR (1939) Bom 701, Borough Municipality Ahmedabad v.

Ahmedabad Manufacturing and Calico Printing Co. Ltd.

11

(1929) AIR 1929 Mad 746 (V 16)=

ILR 52 Mad 779, Municipal Council, Cuddappah v. M.

& S. M. Rly. Co. Ltd.

12

Dr. L. M. Singhvi, Sr. Advocate (Mr. B. D. Sharma Advocate, with him), for Appellant; Mr. H. R. Gokhale Sr. Advocate (Dr. Y. S. Chitale and Mr. Janendra Lal Advocates, and Mr. B. R. Agarwala Advocate of M/s. Gagrati and Co. with him), for Respondent No. 1.

The Judgment of the Court was delivered by

BHARGAVA, J.:— The Union of India, as the owner of the Central Railway, instituted a suit for refund of Rs. 2,76,967 collected as tax from the Railway Administration by the respondent Municipality during the period from 1931 till the institution of the suit in November, 1954. The facts leading up to the suit are that, the G.I.P. Railway, which was a Private Company, had land situated within the limits of the respondent Municipality. On this land, stood the railway station, their Water Reservoir at Bhusi, bungalows of Officers, and certain other buildings. There were also vacant lands and some lands on which railway lines were laid out. In this area, which belonged to the G.I.P. Railway, the Railway Company itself built roads, supplied water from its Bhusi Reservoir, arranged for the lighting, and provided other services. In fact, up to the year 1916, the Railway used to supply water even to the Municipality from its Bhusi Reservoir on payment. The Municipality was governed, at that time, by the Bombay District Municipal Act No. 3 of 1901 (hereinafter referred to as "the Act of 1901") under which a tax on lands and buildings situated within the municipal limits used to be charged @4 per cent of the annual rental value, but no tax was levied on the buildings and lands of the G.I.P. Railway in view of S. 135 of the Indian Railways Act No. 9 of 1890. In the year 1914, the Government of India issued a notification under Sec-

tion 135 of the Railways Act declaring that the Administration of the G.I.P. Railway shall be liable to pay, in aid of the funds of the local authorities set out in the Schedule, the taxes specified against each of those authorities. Against the name of Lonavala Municipality, which is the respondent in this case, the tax mentioned was House-tax. Thus, the exemption granted to the Railway Administration was taken away by this notification in respect of house-tax and house-tax became payable by the G.I.P. Railway to the respondent. In 1916, the respondent constructed its own water reservoir and became independent of the Railway for water supply, but no water rate was charged from the Railway even thereafter, though water charges for actual quantities of water supplied in three of the bungalows was charged from the occupants of the bungalows. The rest of the Railway Colony continued to be supplied with water from the Railway Reservoir at Bhushi.

2. On 4th May, 1916, the respondent promulgated new rules for taxation and, instead of charging separate house-tax and water rate, it decided to charge a consolidated tax assessed as a rate on buildings and lands in accordance with clause (c) of the proviso to section 59 (1) of the Act of 1901. Thereafter, it appears that the respondent demanded this consolidated tax from the Railway in respect of the Railway lands and buildings. The Railway felt that, since, under the notification of 1914, house tax only was payable by the Railway Administration, there was no justification for the respondent to charge consolidated tax from it and, consequently, protested against this payment. Thereafter, on 26th July, 1917, the Government of India issued a fresh notification under S. 135 of the Railways Act, whereby the Railway Administration was rendered liable to pay what was described as "tax on lands and buildings". On the issue of this notification, the respondent started charging the G.I.P. Railway this consolidated tax and this continued until some time in the year 1927 by which time the G.I.P. Railway was taken over by the Government and became a Government undertaking. In the Rules promulgated on 4th May, 1916, the consolidated tax described as a gene-

ral rate on buildings and lands was not chargeable on government property. Relying on this provision in the Rules, an objection was raised that the charge of the tax was illegal when the Railway had become government property.

3. Subsequently, the respondent Municipality amended its Rules and promulgated fresh Rules on the 6th October, 1931. By this time, the respondent Municipality had been constituted into a Borough under the Bombay Municipal Boroughs Act No. 18 of 1925 (hereinafter referred to as "the Act of 1925"). These new Rules were thus promulgated under this Act of 1925. Under these Rules, the exemption in respect of government property to the charge of the general rate on buildings and lands, which was contained in the Rules of 1916, was deleted and all lands and buildings within the Municipal Borough became chargeable irrespective of their being owned by the Government. A separate clause was incorporated giving certain exemptions, but since they do not affect the case before us, they need not be mentioned. In pursuance of these Rules of 1931, the respondent started collecting the consolidated tax assessed as a rate on buildings and lands of the Railway from it.

4. In the year 1940, the Railway Administration preferred an appeal under section 110 of the Act of 1925 against one of the demand notices issued in respect of this tax on the 6th October, 1940. This appeal came up before the Sub-Divisional Magistrate, Western Division, Poona, who held that the levy of this consolidated tax was ultra vires and set aside the demand notice. On a revision by the respondent under section 111 of the Act of 1925, the District and Sessions Judge set aside the order of the Sub-Divisional Magistrate, holding that the imposition of the tax was valid. Against this decision, the Railway Administration filed a revision before the High Court of Bombay under section 115 of the Code of Civil Procedure. The High Court, on 12th February, 1945, refused to exercise its special powers under section 115, C.P.C., with the further remark that the proper remedy to be sought was by means of a suit.

5. Under these circumstances, the Union of India, which had come to be the owner of this Railway under the name of the Central Railway, filed the suit on 27th November, 1954 for refund of the entire amount which was collected by the respondent from the Railway in pursuance of the Rules of 1931. The trial Court held that the levy of this tax was void inasmuch as, under the notification issued on the 26th July, 1917, only the rate on lands and buildings was payable by the Railway Administration. The suit for the refund filed by the Union of India was, on this ground, decreed. On appeal, the High Court disagreed with the trial Court and held that even the consolidated tax was payable in view of the notification of 26th July, 1917, so that the tax had been rightly collected. The High Court, thereupon, set aside the decree of the trial Court and dismissed the suit. It is against this decree that the Union of India has come up in this appeal by certificate under Article 133 of the Constitution.

6. In order to appreciate the submissions made by counsel for parties in this appeal, it is necessary to set out the relevant provisions of section 59 of the Act of 1901 and of section 73 of the Act of 1925 which are as follows: "Section 59 of the Act of 1901:

59 (1) Subject to any general or special orders which the State Government may make in this behalf, any Municipality—

* * *

may impose, for the purposes of this Act, any of the following taxes, that is to say,

(i) a rate on buildings or lands or both, situate within the municipal district;

* * *

(vii) a general sanitary cess for the construction or maintenance, or both construction and maintenance, of public latrines, and for the removal and disposal of refuse;

(viii) a general water-rate or a special water rate or both for water supplied by the Municipality, which may be imposed in the form of a rate assessed on buildings and lands, or in any other form, including that of charges for such supply, fixed in such

mode or modes, as shall be best adapted to the varying circumstances of any class of cases or of any individual case;

(ix) a lighting tax;

* * *

Provided further that—

* * *

(c) the Municipality in lieu of imposing separately any two or more of the taxes described in clauses (i), (vii), (viii) and (ix) may impose a consolidated tax assessed as a rate on buildings or lands, or both situate within the municipal District."

"Section 73 of the Act of 1925:

73. (1) Subject to any general or special orders which the State Government may make in this behalf and to the provisions of sections 75 and 76, a municipality may impose for the purposes of this Act any of the following taxes, namely:

(i) a rate on buildings or lands or both situate within the municipal borough;

* * *

(viii) a general sanitary cess for the construction and maintenance of public latrines, and for the removal and disposal of refuse;

* * *

(x) a general water-rate or a special water-rate or both for water supplied by the municipality, which may be imposed in the form of a rate assessed on buildings and lands or in any other form, including that of charges for such supply, fixed in such mode or modes as shall be best adapted to the varying circumstances of any class of cases or of any individual case;

* * *

(xi) a lighting tax;

* * *

Provided further that—

* * *

(c) the municipality in lieu of imposing separately any two or more of the taxes described in clauses (i), (viii), (x) and (xi) may impose a consolidated tax assessed as a rate on buildings or lands or both situated within the municipal borough."

7. In the year 1914, the respondent Municipality had only levied a rate on

buildings and lands under clause (i) of S. 59 (1) of the Act of 1901. There was no question of imposing a general or special water rate as the respondent had no water works of its own and was taking water supply from the G.I.P. Railway. It was in these circumstances that the notification was issued by the Central Government dated the 13th May, 1914 making the Railway Administration liable to pay house-tax to the Municipality of Lonavala. The notification was obviously intended to make the Railway liable to pay the tax which had been imposed as a rate on buildings and lands under S. 59 (1) (i) of the Act of 1901 by the respondent. Subsequently, in the year 1916, the respondent Municipality not only arranged for water supply and imposed a general water rate, it proceeded to make rules for imposition of a consolidated tax assessed as a rate on buildings and lands under clause (c) of the second proviso to S. 59 (1) in lieu of the existing tax imposed as a rate on buildings and lands under clause (i) as well as the water rate imposed under clause (viii) of S. 59 (1). Thereafter, the Central Government issued the notification dated 26th July, 1917 under S. 135 (1) of the Railways Act making the G.I.P. Railway liable to tax on buildings and lands imposed by the Lonavala Municipality. It is to be noted that in this notification, the Government used the word "tax" and not the word "rate". The tax imposed under S. 59 (1) was described as "a rate on buildings and lands". If the intention of the Government had been that the G.I.P. Railway should be liable to that tax only, it could have used the word "rate" instead of the word "tax" in the notification. In fact, if the notification had been left untouched, the liability of the G.I.P. Railway would have continued to be in respect of the rate on buildings or lands because of the earlier notification of 1914, under which the Railway had been made liable to House-tax. The notification of 26th July, 1917 made the Railway liable to tax on buildings and lands obviously because the Government intended that the Railway should be liable to the consolidated tax under clause (c) of the second proviso to S. 59 (1). Clause (c) permits the imposition of a consolidated tax assessed as a rate on

buildings or lands or both. The moment a tax is assessed as a rate on buildings or lands, it naturally becomes a tax on buildings and lands. The fact that it was a consolidated tax was immaterial. It was this consolidated tax which was intended to be made payable by the G.I.P. Railway when the Central Government used the expression "tax on buildings and lands" in place of the earlier words "House Tax" and chose not to refer to the liability being in respect of a rate on buildings and lands. It is true that all taxes are not rates; but all rates are taxes. A rate on buildings and lands is a tax on buildings; so also any other tax assessed as a rate on buildings and lands becomes a tax on buildings and lands. We are unable to accept the submission made by counsel for the appellant that the expression "tax on buildings and lands" used in the notification of 26th July, 1917 could only refer to a rate on buildings and lands under clause (i) of Section 59 (1) and would not cover the consolidated tax referred to in clause (c) of the second proviso. It is true, as urged by him, that the tax under clause (c) of the second proviso is not identical with, and is different in nature from, the rate on buildings and lands imposed under clause (i), but that circumstance does not imply that it is not a tax on buildings and lands. The mere use of the word "consolidated" cannot make any difference to this interpretation. It is also significant that clause (c) of the second proviso does not purport to lay down that the consolidated tax will be the sum-total of the taxes described in clauses (i), (vii), (viii), and (ix). The consolidated tax envisaged by that clause is in lieu of separate imposition of any two or more of the taxes described in clauses (i), (vii), (viii) and (ix) which means that the power to impose this consolidated tax has been given for the purpose of substituting it for the multiple taxes which could be imposed under those clauses. This consolidated tax cannot, therefore, be held to be of the same nature as the taxes in all those clauses. The intention appears to be that, though the Municipality was empowered to impose four different kinds of taxes, it was permitted under clause (c) of the second proviso to simplify matters by having a single tax on buildings and lands in lieu of those

multiple taxes. Such a single tax had to be assessed as a rate on buildings and lands. This being the nature, it obviously becomes a tax on buildings and lands, so that the notification of 26th July, 1917 clearly makes the Railway liable to payment of this tax. The position under the Act of 1925 is exactly the same where also the language of clause (c) to the second proviso is identical with that contained in the Act of 1901, so that the liability imposed on the Railway by the notification of the Government dated 26th July, 1917 under S. 135 (1) of the Railways Act continued even under the Act of 1925.

8. It is also significant to note that the Rules, which were framed by the Municipality under the Act of 1901 and by the Municipal Borough later under the Act of 1925, which were promulgated on the 4th May, 1916 and the 6th October, 1931 respectively, described the tax as a general rate on buildings and lands in Rule 1. It is true that, in the heading of the Rules, the expression used was that "the Rules were for the levy of a consolidated rate on buildings and lands" but, in the main provision, the tax was described only as "a general rate on buildings and lands". A general rate on buildings and lands is obviously a tax on buildings and lands and would, therefore, be covered by the notification of the Central Government dated 26th July, 1917.

9. Apart from this interpretation which we have arrived at on the basis of the language used in the two Acts, the Rules, and the notification of the Central Government; there are two circumstances which indicate that this must be the correct construction of the notification issued by the Central Government. The first circumstance is that, when this notification was issued, the only tax which was being imposed by the Lonavala Municipality which the Central Government could have intended should become payable by the G.I.P. Railway was the consolidated tax under clause (c) of the second proviso. There was no other tax which would have been covered by this notification. In fact, the notification would be meaningless if we were to hold that this consolidated tax is not covered by the expression "tax on buildings and lands".

This notification was issued while the earlier notification of 1914 was already in existence and, if the intention was to cover only the rate mentioned in clause (i) of S. 59 (1), there was no need to issue this fresh notification as the liability of the Railway to pay that tax already existed under that notification of 1914.

10. The second circumstance that we can take notice of is the historical background in which this notification of 26th July, 1917 was issued. It appears that, after the Rules for imposition of this consolidated tax came into force in 1916, the Municipality demanded payment of this consolidated tax from the G.I.P. Railway. Thereupon, the Agent of the G.I.P. Railway Company wrote a letter to the Secretary, Railway Board, Simla on the 1st December, 1916, stating that the Company did not agree that it should pay the new consolidated tax as it comprised a house tax and a water rate. The Company had its own arrangements for the supply of water and it was obviously unfair that it should be called upon to pay any tax which includes a water rate, when no municipal water was being consumed by the Railway at Lonavala. The Secretary, Railway Board, forwarded this letter to the Secretary to the Government of Bombay, General Department, with a letter dated 12th December, 1916, enquiring whether the Agent's information was correct and, if so, whether the Bombay Government had any remarks to offer on the Agent's contentions. On 11th May, 1917, the Secretary to the Government of Bombay replied to the Secretary, Railway Board, pointing out that, originally, the Municipality proposed to levy a general water rate on all houses, in addition to the existing house tax, but, on representations from property owners of Lonavala and Khandalla, it had decided to impose a consolidated rate on buildings and lands in lieu of the house-tax and the proposed general water rate. Consequently, they were levying, in lieu of house-tax a consolidated rate, which included a general water rate, on sliding scale, on all properties situated within the municipal limits. The water rate imposed was not intended to cover expenses on any service rendered in the nature of a general tax as opposed to a service tax. In equity,

the Railway Company's property in Lonavala had no better right to exemption than the properties of private individuals who, although they did not take private pipe connections, were paying the general water rate. In the circumstances, a request was made to the Secretary, Railway Board, to move the Government of India to declare the Administration of the G.I.P. Railway liable to pay to the Lonavala Municipality the consolidated tax on buildings and lands in lieu of the house-tax in respect of the railway properties situated within the municipal limits. It was suggested that the Schedule annexed to the notification dated 13th May, 1914 may be amended accordingly. It was in pursuance of this move by the Bombay Government that the notification of 26th July, 1917 was issued by the Central Government. That the notification of 26th July, 1917 was issued in pursuance of this correspondence is clarified by the Memorandum dated 17th August, 1917, with which a copy of the new notification was forwarded by the Government of India, Railway Department (Railway Board) to the Secretary to the Government of Bombay. These circumstances in which the notification of 26th July, 1917 was issued, make it plain that the Government of India, when they used the expression "tax on buildings and lands" in the notification, intended to make the G.I.P. Railway liable to the consolidated tax which had been imposed by the Municipality under the Rules of 1916.

11. The decision of the Bombay High Court in Borough Municipality, Ahmedabad v. Ahmedabad Manufacturing and Calico Printing Co. Ltd., AIR 1939 Bom 478 on interpretation of sections 73 and 110 of the Act of 1925 also supports the view that we have taken above. The question that arose in that case was whether the right of an appeal envisaged by using the expression "in the case of a rate on buildings or lands or both" in section 110 could be availed of in respect of a general water rate imposed under clause (x) of section 73 (1) which described that tax as a general water rate imposed in the form of a rate assessed on buildings and lands. It was held that there was no distinction between a rate on buildings or lands and tax in the form of a rate assessed on buildings or lands. In the case before us,

on that analogy, a consolidated tax assessed as a rate on buildings and lands cannot be distinguished from a tax on buildings and lands.

12. Reference may also be made to a decision of the Allahabad High Court in Raza Buland Sugar Co., Ltd., Rampur v. Municipal Board, Rampur, AIR 1962 All 83 where it was held that a water rate is a tax on buildings and lands and is not, in fact, a service tax chargeable in respect of water supplied. Counsel for the appellant referred to a decision of the Madras High Court in Municipal Council, Cuddappah v. M. & S. Ry. Co. Ltd., AIR 1929 Mad 746, but that case is of no assistance as it turned on the special language which had been used in the Act and the notification which came up for consideration in that case. In fact, the expression that had to be interpreted was "property tax" and not tax on buildings and lands". We agree with learned counsel for the appellant that such assistance cannot be derived from the decision of this Court in Patel Gordhandas Hargovindas v. Municipal Commr. Ahmedabad (1964) 2 SCR 608 = (AIR 1963 SC 1742) which was relied upon by the High Court. However, as we have held above, on the proper interpretation of the language used in the two Acts, the Rules, and the notification, and taking into account the circumstances under which the notification of 1917 was issued, the only conclusion that can be arrived at is that the Railway was made liable to this consolidated tax, so that the decision of the High Court is perfectly correct.

13. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 217 (V 58 C 54)

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.

Barkat Ali, Petitioner v. The State of Jammu and Kashmir, Respondent.

Writ Petn. No. 313 of 1970, D/- 22-10-1970.

Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Section 3 (1) (b) — Detention under for purposes of deporta-

KN/KN/F122/70/KSB/T

tion — State cannot directly deport detenu but has to refer matter to Central Government for making necessary arrangements which takes some time — But delay in making such arrangements cannot affect validity of detention or make it a mala fide detention.

(Para 6)

Mr. S. K. Bisaria, Advocate amicus curiae, for Petitioner; Mr. R. N. Sachthey, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.:— This is a petition under Article 32 of the Constitution complaining that the petitioner is under illegal detention. We directed issue of rule nisi and the State Government has filed an affidavit through the Deputy Secretary to the Home Department Jammu and Kashmir Government.

2. It appears that the Government, vide its order No. ISD: 530 of 1970 dated June 25, 1970, ordered that the petitioner be detained under Section 3 (1) (b) of the Jammu and Kashmir Preventive Detention Act, 1964. Section 3 (1) (b) enables the Government to make orders to detain a person "if satisfied with respect to any person who is a foreigner within the meaning of the Foreigners Act, 1946, that with a view to regulating his continued presence in the State or with a view to making arrangements for his expulsion from the State, it is necessary so to do."

3. It is stated in the affidavit of the respondent that "the petitioner was recruited as an agent by the Pakistan Intelligence, paid several visits to the State and had planted explosives under some bridges on the National Highway with the intention to disrupt communications. He was apprehended on 29/30th November, 1959 within the State when he had come to one of his missions. During the course of investigation some more explosives had been recovered on his information. The case was registered in P/S Saddar Jammu for contravening the provisions of Indian Passport Act, the Entry Agents Ordinance, the Explosives Substances Act and Sections 224 and 332 of the R. P. C. The case was tried by the Special Judge who sentenced him to undergo eleven years rigorous imprisonment."

4. The order of detention, according to the affidavit, was read over and explained to the petitioner in Urdu and his thumb impression was taken in token of the fact that he fully understood the contents of the order. It was further stated that the case of the detenu was referred to the Advisory Board as required under Section 10 of the Jammu and Kashmir Preventive Detention Act, and the opinion of the Board was awaited.

5. The learned counsel who was appointed amicus curiae at the first hearing, said that under Section 11 (1) the Board had to report within 10 weeks from the date of detention and as it had not reported within that period the detention was illegal. It, however, appears that Section 11 of the Act had been amended by The Jammu and Kashmir Preventive Detention (Amendment) Act (J. & K. Act VIII of 1967) and for the words "ten weeks" the words "five months" were substituted.

6. The learned counsel further said that the detention was mala fide because the State had failed to make the necessary arrangements to deport the petitioner to Pakistan. It appears that the State cannot directly deport the petitioner but has to refer the matter to the Central Govt. for making necessary arrangements and this has taken some time. But we are unable to hold that this delay in making arrangements affects the validity of the detention, though we trust that arrangements will be made very soon to deport him to Pakistan.

7. In the result the petition fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 218
(V 58 C 55)

(From Patna: AIR 1965 Pat 134)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Amitava Das Gupta (In both the Appeals), Appellant v. Nath Bank Ltd., (In both the Appeals), Respondent.

Civil Appeals Nos. 1750 of 1966 and 109 of 1967, D/- 21-10-1970.

KN/KN/F121/70/LGC/B

Limitation Act (1908), Article 183 — Banking Regulation Act (1949), Section 45-B — Banking Companies (Amendment) Act (1950), Section 11 — Suit transferred to Calcutta High Court under provisions of Section 11 — Jurisdiction conferred on High Court by Banking Companies Act, held was part of its ordinary original civil jurisdiction under Article 183 and not a special jurisdiction — Hence Article 183 was applicable for execution of decree passed by High Court and execution proceeding filed within 12 years were within time. AIR 1958 Mad 418 and AIR 1962 SC 403, Followed; AIR 1965 Pat 134, Affirmed; (1888-89) 16 Ind App 156 (PC), Ref. to. (Letters Patent (Cal), Cls. 11, 12).

(Para 5)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 403 (V 49) =

(1962) Supp 1 SCR 73, Jyoti Bhushan Gupta v. Banaras Bank Ltd. 5

(1958) AIR 1958 Mad 418 (V 45) =

ILR (1958) Mad 685, P. T. Munia Servai v. Hanuman Bank Ltd., Tanjore (In Liquidation) 5

(1888-89) 16 Ind App 156 =

5 Sar 400 (PC), Navivahoo v. Turner (Official Assignee) 5

P. Chatterjee, Sr. Advocate, (M/s. A. K. Bose and R. C. Prasad, Advocates with him), for Appellant (In both the Appeals); Mr. D. N. Mukherjee, Advocate, for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

GROVER, J.:— These appeals have been brought to this Court by certificate from a judgment of the Patna High Court.

2. The facts may be stated. The respondent — Nath Bank Limited — brought a money suit against the appellant, Amitava Das Gupta, and one Benoy Kumar Sen Gupta in the Patna Courts on March 3, 1949. The Bank, however, went into liquidation as a result of a petition filed by two of its creditors in March 1950, in the Calcutta High Court. The Reserve Bank of India was appointed the official liquidator of the said Bank. The Banking Companies (Amendment) Act 1950 received the assent of the President on March 15, 1950. Under Section 11 of the said Act where any

proceeding for the winding up of a banking company or any other proceeding, whether civil or criminal, which had arisen out of or in the course of such winding up, was pending in any Court immediately before the commencement of the Act it was to stand transferred to the Court which would have had jurisdiction to entertain such proceeding if the Act had been in force on the date on which the proceeding had commenced. By virtue of Section 11 the suit which was pending in the Patna Court was transferred to the Calcutta High Court. The records were accordingly transmitted to the Calcutta High Court where the suit was renumbered as Original Trial Suit No. 122 of 1951. After trial it was decreed against the appellant and the other defendant. The decree holder then applied for execution of the decree in the Calcutta High Court and prayed for attachment of a house in Patna. A precept was sent by the Calcutta High Court to the District Judge Patna followed by the transfer of decree to the Court of the District Judge for execution under Section 46 of the Code of Civil Procedure. The execution case was placed before a Subordinate Judge before whom a number of objections were raised. Two Miscellaneous cases arose out of the objections filed under Order 21, Rule 58 and Section 151 of the Code of Civil Procedure which were dismissed. The appellant filed an application on June 3, 1959 under Section 47 of the Code that the decree sought to be executed was null and void and was incapable of execution. He filed another objection alleging that the decree-holder had suppressed certain material facts. The learned Subordinate Judge held that the decree passed by the Calcutta High Court was null and void and it was barred by limitation when the execution was taken out. The matter was taken in appeal to the High Court.

3. The High Court took the view that the registered office of Nath Bank Ltd., was situate in Calcutta and therefore the Calcutta High Court would be the Court where winding up proceeding could be started. Under Section 45-B of the Banking Companies Act, 1949, as amended by the Banking Companies (Amendment) Act,

1950, the High Court of Calcutta where the winding up proceedings were going on was competent to decide all claims of the company in liquidation. Reliance was also placed on the amendment made by the Banking Companies Act (Act 52 of 1953) which incorporated Section 45-C with regard to the jurisdiction of the High Court to dispose of the suit. The claim of Nath Bank, therefore, against the appellant and Benoy Sen. Kumar Gupta was fully within the jurisdiction of the Calcutta High Court. An argument was raised on behalf of the judgment-debtors that after transfer of the suit to the Calcutta High Court it should have issued a notice to them of such transfer so that particular objections to the plaintiff's claim could be made there. Since no notice was issued to them they were precluded from prosecuting the suit properly in the Calcutta High Court. The learned judges of the Patna High Court were, however, of the view that the burden lay upon the judgment-debtors to establish that notice of the Original Trial Suit No. 122/51 had not been issued by the Calcutta High Court to them. The order sheet of the suit had not been brought on the record and in the absence of that document, it was said, the judgment-debtors could not raise any objection on the ground of want of notice. At any rate it was not considered necessary that a fresh notice be issued when an order had been passed by the Patna Court in the presence of the judgment-debtors transmitting the records to the Calcutta High Court.

4. The next question which had been argued before the High Court was one of limitation. The point which fell for decision was whether Article 183 of the Limitation Act, 1908, was applicable. For the applicability of Article 183 it had to be decided whether the decree passed on the original side of the High Court after the suit had been transferred, as a result of the operation of the Banking Companies Act, could be regarded as a decree passed on the ordinary original side of the High Court or in its special jurisdiction. The judgment debtors maintained that the jurisdiction conferred by the Banking Companies Act on the High Court was a special jurisdiction and the High Court was not

exercising its ordinary original civil jurisdiction while disposing of the suit that had been transferred from Patna by virtue of the special provisions of the Banking Companies Act. This contention was repelled and it was held that in the present case the High Court had exercised its ordinary original jurisdiction while disposing of the suit which had been transferred to it. Consequently Article 183 of the Limitation Act applied and the execution proceedings were within time.

5. Before us two main contentions have been sought to be raised. The first relates to the question of limitation and the second to no notice having been issued by the Calcutta High Court to the judgment debtors on transfer of the suit to that Court. As regards the first point it is not disputed that if Art. 183 of the Lim. Act, 1908 was applicable the execution proceedings would not be barred by time. The period of limitation prescribed by that Article is 12 years to enforce a judgment, decree or order of any court established by Royal Charter in the exercise of its ordinary original civil jurisdiction. The original jurisdiction of the Calcutta High Court has been defined in Clauses 11 and 12 of the Letters Patent of that Court. The argument which has been raised on behalf of the appellant is that the jurisdiction which was derived under the Companies Act or the Banking Companies Act was not covered by Clause 12 of the Letters Patent. It had, therefore, to be regarded as the special jurisdiction of the High Court. Reliance has been placed on *Navivahoo v. Turner* (Official Assignee) (1888-89) 16 Ind App 156 (PC) in which it was laid down that the ordinary jurisdiction of the High Court embraces all such as exercised in the ordinary course of law and without any special step being necessary to assume it. The special step, in the present case, could be found in Section 11 of the Banking Companies (Amendment) Act 1950. An identical question came up for consideration before the Madras High Court in *P. T. Munia Servai v. The Hanuman Bank Ltd., Tanjore* (in Liquidation) ILR (1958) Mad 685 = (AIR 1958 Mad 418). Applying the test laid down by the Privy Council it was held that jurisdiction conferred on the High Court by the Bank-

ing Companies Act was part of its ordinary original jurisdiction within the meaning of Art. 183. That jurisdiction had to be exercised in the ordinary course of law without any special step being necessary to assume it. The Madras decision was referred to with approval by this Court in *Jyoti Bhushan Gupta v. The Benaras Bank Ltd.*, (1962) Supp 1 SCR 73 = (AIR 1962 SC 403). In fact that decision concludes the matter so far as the applicability of Article 183 is concerned. It must, therefore, be held that Article 183 was applicable and the execution proceedings were within time.

6. As regards the other contention about no notice or opportunity having been given to the appellant to prosecute the suit when it was transferred to the Calcutta High Court we can derive no assistance from the printed record. It was necessary to send for the original records of the Calcutta High Court relating to Original Trial Suit No. 122 of 1951 in which the money decree was granted in favour of Nath Bank Ltd. Let those records be called as expeditiously as possible and the appeal placed for further hearing before this Court as soon as the record is received.

Order accordingly.

AIR 1971 SUPREME COURT 221 (V 58 C 56)

(From: Bombay)*

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

Perspective Publications (P.) Ltd. and another, Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 159 of 1966,
D/- 19-11-1968.

(A) Contempt of Courts Act (1952),
S. 1—Contempt of Court—Scandalising the Court — Newspaper article containing scandalous allegations against High Court Judge — Article calculated to obstruct administration of justice — Illustrative case.

In 1960 a suit was filed by one Thackersey against the weekly newspaper "Blitz" and its Editor and others

claiming Rs. 3 lacs as damages for libel. The hearing began in June 1964. The delivery of the judgment commenced on January 19, 1965 and continued till February 12, 1965. After June 24, 1964, that suit was heard from day to day by Mr. Justice Tarkunde. The suit was decreed in the sum of Rs. 3 lacs. An appeal was pending before the High Court against that judgment when the impugned article was published on April 24, 1965, in a weekly periodical called "Mainstream".

Its heading was "Story of a Loan and Blitz Thackersey Libel Case". The article had been ingeniously and cleverly worded. The salient matters mentioned in that article were these: After paying a tribute to the Indian judiciary the writer said that according to the report in "Prajatantra", a Gujarati Paper, architects Khare-Tarkunde Private Limited of Nagpur, got a loan facility of Rs. 10 lacs from the Bank of India on December 7, 1964. The partners of Khare-Tarkunde included the father, two brothers and some other relations of Justice Tarkunde who awarded a decree for Rs. 3 lacs as damages against Blitz and in favour of Thackersey. It was pointed out that the date, on which Rs. 10 lacs loan facility was granted by the Bank of India, was about five and a half months after the Thackersey-Blitz libel suit had begun and just over six weeks before Justice Tarkunde began delivering his "marathon judgment" on January 19, 1965. It was then said that for Rs. 10 lacs loan facility granted to Khare-Tarkunde, the New India Assurance Co. stood guarantee and that the two Directors of the Bank of India who voted in favour of the credit of Rs. 10 lacs being granted to Khare-Tarkunde were Thackersey and Jaisinh Vithaldas (believed to be a relative of Thackersey). Next it was stated that one of the Directors of the New India Assurance Co. that stood guarantee for the loan facility was one P who was also a senior partner of the Solicitors of Thackersey in the Blitz-Thackersey Libel Case. Emphasis was laid on the fact that Khare-Tarkunde had a capital of Rs. 5 lacs only and the balance sheet of the firm on June 1964 revealed indebtedness to various financiers to the tune of Rs. 14 lacs. Thus Khare-Tarkunde was stated to be "lucky to get against all this a

*(Criminal Misc. Appln. No. 323 of 1965—D/- 24-11-1965. — Bom.)

handsome loan of Rs. 10 lacs from the Bank of India". The writer referred to the Code among college teachers and university professors of not examining papers when their own children and near relatives sit for examination and added that Justice Tarkunde himself would recognize the rightness of such a Code. Referring to the unimpeachable integrity and reputation of Judges of the Bombay High Court, the writer proceeded to say "there must not be allowed to be raised even the faintest whisper of any misgiving on that score." Paragraph 24 of the article stated: "If Sri Thackersey did not lay it bare at the time of the suit that he was one of the sponsors of a contract of which the Judge's relations were the beneficiaries, it is up to the Chief Justice of the Supreme Court and the Bombay High Court including Justice Tarkunde as also the ever vigilant members of the Bar to consider all the implications of these disclosures which have distressed a common citizen like me, so that the finest traditions of our judiciary may be preserved intact."

Held that the article read as a whole left no doubt that it exceeded the bounds of fair and reasonable criticism. (Para 9)

There was a clear imputation of impropriety, lack of integrity and oblique motives to Justice Tarkunde in the matter of deciding the Thackersey-Blitz suit which undoubtedly constituted contempt of court.

(Para 20)

(B) Contempt of Courts Act (1952), S. 1 — Proceedings for contempt for scandalizing the Court — It will not be right to say that committals for such contempt have become obsolete and that proper remedy in such a situation was for the Judge to institute action for libel. Case law referred

(Para 17)

(C) Contempt of Courts Act (1952), S. 1 — Summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(Para 17)

(D) Contempt of Courts Act (1952), S. 1 — Scandalising the Court — Right to express fair criticism of act or conduct of Judge in his judicial capacity.

It is open to anyone to express fair, reasonable and legitimate criticism of

any act or conduct of a Judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because Justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men.

(Para 17)

(E) Contempt of Courts Act (1952), S. 1—Scandalising the Court—Distinction between defamation of a judge and contempt of Court — Test.

A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court.

(Para 17)

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt.

(Para 17)

Alternatively, the test will be whether the wrong is done to the judge personally or it is done to the public. The publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

(Para 17)

(F) Contempt of Courts Act (1952), S. 1 — Scandalising the Court — Truthfulness or factual correctness not recognized as defence in law of contempt.

It may be that truthfulness or factual correctness is a good defence in an action for libel, but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognized. AIR 1952 SC 149, Expl.

(Para 18)

Cases Referred: Chronological Paras
(1968) 1968-2 WLR 1204 =

1968-2 QB 150, Reg v. Commr.

of Police of the Metropolis;

Ex parte Blackburn (No. 2)

12

(1959) AIR 1959 SC 102 (V 46) =

1959 SCR 1367 = 1959 Cri LJ

251, State of Madhya Pradesh

v. Revashankar

16

- (1954) AIR 1954 SC 10 (V 41)=
1953 SCR 1169 = 1954 Cri
LJ 238, Brahma Prakash Shar-
ma v. State of Uttar Pradesh
15, 16, 17
- (1954) AIR 1954 SC 743 (V 41)=
(1955) 1 SCR 677, Hira Lal
Dixit v. State of Uttar Pra-
desh 16
- (1953) AIR 1953 SC 75 (V 40)=
1953 SCR 215 = 1953 Cri LJ
519, In re Editor, Printer and
Publisher of The Times of
India 15
- (1952) AIR 1952 SC 149 (V 39)=
1952 SCR 425 = 1952 Cri LJ
832, Bathina Ramakrishna v.
State of Madras 15, 18
- (1952) AIR 1952 SC 369 (V 39)=
1953 SCR 1, Aswini Kumar
Ghose v. Arabinda Bose 15
- (1946) 328 US 331 = 90 Law Ed.
1295, John D. Penne Kamp &
Miami Herald Publishing Co.
v. State of Florida 14
- (1943) AIR 1943 PC 202 (V 30)=
70 Ind App 216, Debi Prasad
Sharma v. King Emperor 10
- (1936) 1936 AC 322 = 105 LJ
PC 72, Ambard v. Attorney
General for Trinidad and
Tobago 11, 15
- (1928) 44 TLR 301, Rex v. Editor
of the New Stateman 11
- (1900) 1900-2 QB 36 = 69 LJ
QB 502, The Queen v. Gray 10, 11
- (1899) 1899 AC 549 = 68 LJ PC
137, McLeod v. St. Aubyn 10, 11
- (1893) 1893 AC 138, In the matter
of a Special Reference from
the Bahama Islands 10
- (1765) Wilms 243 = 97 ER 94,
Rex v. Almon 10
- (1742) 2 Atk 469 = 26 ER 683,
In re Read and Huggonson 10
- 28 Com LR 419, Bell v. Stewart 14

Mr. S. C. Agarwala, Advocate of M/s
Ramamurthi and Co., for Appellants;
M/s. M.S.K. Sastri and S. P. Nayyar,
Advocates, for Respondent.

The Judgment of the Court was
delivered by

GROVER, J.— This is an appeal
from the judgment of the Bombay
High Court passed in exercise of ordi-
nary original civil jurisdiction by which
the appellants were found guilty of
having committed contempt of Mr.
Justice Tarkunde in his judicial capa-
city and of the Court. Appellant No.
2 D. R. Goel, who is the Editor, Printer

and Publisher of Perspective Publica-
tions (P) Ltd., — appellant No. 1, was
sentenced to simple imprisonment for
one month together with fine amount-
ing to Rs. 1,000/-, in default of pay-
ment of fine he was to undergo fur-
ther simple imprisonment for the
same period. The appellants were
also directed to pay the costs incurred
by the State. On behalf of the first
appellant it has been stated at the bar
that the appeal is not being pressed.

2. The background in which the
impugned article was published on
April 24, 1965, in a weekly periodical
called "Mainstream" which is a publi-
cation brought out by the first appel-
lant may be set out. In the year 1960
a suit was filed by one Krishnaraj
Thackersey against the weekly news-
paper "Blitz" and its Editor and others
claiming Rs. 3 lacs as damages for
libel. The hearing in that suit com-
menced on the original side of the
Bombay High Court on June 24, 1964.
The delivery of the judgment com-
menced on January 19, 1965 and con-
tinued till February 12, 1965. After
the June 24, 1964, that suit was heard
from day to day by Mr. Justice Tar-
kunde. The suit was decreed in the
sum of Rs. 3 lacs. An appeal is pend-
ing before a Division Bench of the
High Court against that judgment.

3. The impugned article is stated
to have been contributed by a person
under the name of "Scribbler" but ap-
pellant No. 2 has taken full responsi-
bility for its publication. Its heading
was "Story of a Loan and Blitz Thack-
ersey Libel Case". It is unnecessary
to reproduce the whole article which
appears verbatim in the judgment of
the High Court. The article has been
ingeniously and cleverly worded. The
salient matters mentioned in that arti-
cle are these: After paying a tribute
to the Indian judiciary the writer says
that according to the report in "Pra-
jatantra" a Gujarati paper, architects
Khare-Tarkunde Private Limited of
Nagpur, hereinafter called "Khare
Tarkunde" (which is described a Firm
in the article) got a loan facility of
Rs. 10 lacs from the Bank of India on
December 7, 1964. The partners of
Khare-Tarkunde included the father,
two brothers and some other relations
of Justice Tarkunde who awarded a
decree for Rs. 3 lacs as damages
against Blitz and in favour of Thack-
ersey. It is pointed out that the date

on which Rs. 10 lacs loan facility was granted by the Bank of India was about five and a half months after the Thackersey-Blitz libel suit had begun and just over six weeks before Justice Tarkunde began delivering his "marathon judgment" on January 19, 1965. It is then said that for Rs. 10 lacs loan facility granted to Khare-Tarkunde, the New India Assurance Co. stood guarantee and that the two Directors of the Bank of India who voted in favour of the credit of Rs. 10 lacs being granted to Khare-Tarkunde were Thackersey and Jaisinh Vithaldas (believed to be a relative of Thackersey). Next it is stated that one of the Directors of the New India Assurance that stood guarantee for the loan facility was N. K. Petigara, who was also a senior partner of M/s. Mulla and Mulla Craigie Blunt and Caroe, Solicitors of Thackersey in the Blitz-Thackersey Libel Case before Justice Tarkunde. Emphasis is laid on the fact that Khare-Tarkunde had a capital of Rs. 5 lacs only and the balance sheet of the firm of June 1964 revealed indebtedness to various financiers to the tune of Rs. 14 lacs. Thus Khare-Tarkunde is stated to be "lucky to get against all this a handsome loan of Rs. 10 lacs from the Bank of India". The writer refers to the Code among college teachers and university professors of not examining papers when their own children and near relatives sit for examination and adds that Justice Tarkunde himself will recognize the rightness of such a Code. Referring to the unimpeachable integrity and reputation of judges of the Bombay High Court, the writer proceeds to say "there must not be allowed to be raised even the faintest whisper of any misgiving on that score." Paragraph 24 deserves to be produced:—

"If Sri Krishna Thackersey did not lay it bare at the time of the suit that he was one of the sponsors of a contract of which the judge's relations were the beneficiaries, it is up to the Chief Justice of the Supreme Court and the Bombay High Court including Justice Tarkunde as also the ever vigilant members of the Bar to consider all the implications of these disclosures which have distressed a common citizen like me, so that the finest traditions of our judiciary may be preserved intact."

4. A petition was filed before the Bombay High Court by the State of Maharashtra pointing out that the aforesaid article contained scandalous allegations and was calculated to obstruct the administration of justice and constituted gross contempt of court. The article purported to state certain facts relating to the transaction between Khare-Tarkunde and the Bank which were false and there were several misstatements and suppression of facts some of which were:

(a) The article wrongly stated that the father of Mr. Justice Tarkunde was a partner in Khare-Tarkunde; and

(b) The article falsely described the transaction as a loan by the Bank to Khare-Tarkunde. In fact the said transaction was only a guarantee given by the Bank which undertook to pay to the Government any amount not exceeding Rs. 10 lacs in the event of Khare-Tarkunde being unable to perform its obligations. The Bank was secured by a further guarantee given by the New India Assurance Co. Ltd. undertaking to secure the Bank in the event of the Bank having to pay the said amount or any part thereof.

5. Appellant No. 2 who also happens to be a Director and Principal Officer of the first appellant, filed a reply raising some objections of a legal and technical nature and took up the position that the impugned article was based on a report published in "Prajatantra" from which all the facts stated in the article were incorporated. It was asserted that certain 'major facts' had been verified by the appellant and found to be true. It was admitted that upon reading the petition for taking contempt proceedings it was found by appellant No. 2 that there were certain incorrect statements in the article. It was claimed that the article had been published in a bona fide belief that whatever was stated in the article in "Prajatantra" was true. The intention was to convey to the public at large that it was incumbent on the plaintiff Thackersey and Petigara, one of the partners of Mulla & Mulla etc., his attorney to inform Justice Tarkunde that the plaintiffs had voted for a resolution of the Board of Directors of the Bank of India which, without reasonable doubt, would help Khare-Tarkunde in which Tarkunde happened to be a brother of the Judge.

6. The High Court analysed the implications of the facts stated in each paragraph of the impugned article in great detail and observed:—

"..... reading the article as a whole, taking care not to read into it anything more than its plain language implies and making every allowance for literary style and rhetorical flourish expressions which were often used in the arguments for the respondents it is impossible to avoid the conclusions that this article exceeds the bounds of fair and reasonable criticism. In so far as it suggests that there is some sort of casual connection between the granting of the loan to M/s. Khare Tarkunde Pvt. Ltd., and the judgment of Mr. Justice Tarkunde in the Blitz-Thackersey case, it clearly attempts to lower the learned judge in his judicial capacity not to mention the fact that it would also tend to shake the confidence of the lay public in the High Court and impair the due administration of justice in that Court. In so far as there is a suggestion made be it ever so faint, that Mr. Justice Tarkunde knew or must have known of the loan to his brother's firm before he delivered the judgment in the case, the article is malicious and not in good faith."

The High Court also examined the misstatements and inaccuracies in the impugned article and held that there was no foundation for suggestion that Khare-Tarkunde was an impecunious concern and therefore was "lucky" to get the handsome loan nor for the suggestion that either Thackersey and his Co-Directors in the Bank of India or Thackersey's solicitor and his Co-Directors in the New India Assurance Co. went out of their way to grant accommodation of Khare Tarkunde. The High Court found no basis for the insinuation that there was any connection between the loan and the judgment in the Blitz-Thackersey case or that Justice Tarkunde knew or might have known about any loan having been granted to his brother's firm. No attempt was made to justify these suggestions in the return or in the argument before the High Court and all that was urged was that the words used by the contemner did not give rise to the said imputations or innuendos and that the contemner was only trying to communicate to the public at large what has been stated

before. It is needless to refer to the other points raised before and decided by the High Court because none of them has been argued before us.

7. In this appeal, counsel for appellant No. 2 has made some attempt to establish that no aspersion was cast on the integrity of Justice Tarkunde in the article nor was any imputation of dishonesty made. His second contention is that proceedings for contempt for scandalising a judge have become obsolete and the proper remedy in such a situation is for the Judge to institute action for libel. Thirdly, it is said there was no evidence before the High Court that Justice Tarkunde did not know about the transaction or the dealings between the firm in which his brother was a partner and the bank of which Thackersey was a director. If, it is submitted, the allegations made in the article were truthful or had been made bona fide in the belief that they were truthful the High Court ought not to have found appellant No. 2 guilty of contempt. At any rate, according to counsel, the statements contained in the article only made out a charge of bias against the Judge and if such a charge is made it cannot be regarded as contempt.

8. On the first point our attention has been invited to the paragraphs in the article containing expression of high opinion held by the writer of the judiciary in India. It is suggested that his attempt was only to make a fair and legitimate criticism of the proceedings in the Thackersey suit against the "Blitz" weekly. It has been emphasised in the article that the damages which were awarded to the tune of Rs. 3 lakhs were almost punitive and that it was a rare phenomenon that the plaintiff (Thackersey) did not step into the witness box and also a permanent injunction had been granted preventing Blitz from printing anything based on the subject matter of litigation. The law involving freedom of press fully warranted such criticism of a judgment or of the proceedings in a suit in a court of law.

9. It is true that the writer of the article could exercise his right of fair and reasonable criticism and the matters which have been mentioned in some of the paragraphs may not justify any proceedings being taken

for contempt but the article read as a whole leaves no doubt that the conclusions of the High Court were unexceptionable. It was a skilful attempt on the part of the writer to impute dishonesty and lack of integrity to Justice Tarkunde in the matter of Thackersey Blitz suit, the imputation being indirect and mostly by innuendo that it was on account of the transaction and the dealings mentioned in the article that the suit of Thackersey was decreed in the sum of Rs. 3 lakhs which was the full amount of damages claimed by Thackersey. It may be that the article also suggests that Thackersey and his attorneys were to blame inasmuch as they did not inform the Judge about the transactions of Khare-Tarkunde with the Bank of India with which Thackersey was associated in his capacity as a director but that cannot detract from the obvious implications and insinuations made in various paragraphs of the article which immediately create a strong prejudicial impact on the mind of the reader about the lack of honesty, integrity and impartiality on the part of Justice Tarkunde in deciding the Thackersey-Blitz suit.

10. On the second point counsel for appellant No. 2 has relied a great deal on certain decisions of the Privy Council and the Australian and American courts. In the matter of a Special Reference from the Bahama Islands, 1893 AC 138, a letter was published in a colonial newspaper containing sarcastic allusions to a refusal by the Chief Justice to accept a gift of pineapples. No judgment was given by the Privy Council but their Lordships made a report to Her Majesty that the impugned letter though it might have been made subject of proceedings for libel was not, in the circumstances, calculated to obstruct or interfere with the course of justice or the due administration of law and, therefore, did not constitute contempt of court. In that case there was no question of scandalising the court nor had any imputation been made against the Chief Justice in respect of any judicial proceedings pending before him or disposed of in his court. It is the next decision of the Privy Council in *McLeod v. St. Aubyn*, 1899 AC 549 on which a great deal of argument has been built up before us

that the courts, at least in England, have stopped committing any one for contempt for publication of scandalising matter respecting the court after adjudication as well as pending a case before it. That case came by way of an appeal from an order of the Acting Chief Justice St. Aubyn of the Supreme Court of St. Vincent committing one McLeod to prison for 14 days for alleged contempt of court. It was said *inter alia* in the impugned publication that in Mr. Trifford the public had no confidence and his *locum tenens*, Mr. St. Aubyn was reducing the judicial character to the level of a clown. There were several other sarcastic and libellous remarks made about the Acting Chief Justice. While recognizing publication of scandalous matter of the court itself as a head of contempt of court as laid down by Lord Hardwicke in *re Read and Huggonson*, (1742) 2 Atk 469 (471) Lord Morris proceeded to make the oftquoted observation "committals for contempt of Court by itself have become obsolete in this country even though in small colonies consisting principally of coloured population committals might be necessary in proper cases. Only a year later Lord Russell of Killowen C. J., in *The Queen v. Gray*, (1900) 2 Q.B. 36 reaffirmed that any act done or writing published calculated to bring a court or a judge of the court in contempt, or to lower his authority was a contempt of court. The learned Chief Justice made it clear that judges and courts were alike open to criticism and if reasonable argument or expostulation was offered against any judicial act as contrary to law or the public good no court could or would treat that as contempt of court but it was to be remembered that the liberty of the press was not greater and no less than the liberty of every subject. In that case it was held that there was personal scurrilous abuse of a judge and it constituted contempt. All the three cases which have been discussed above were noticed by the Privy Council in *Debi Prasad Sharma v. King Emperor*, 70 Ind App 216 = (AIR 1943 PC 202) where contempt proceedings had been taken in respect of editorial comments published in a newspaper based on a news item that the Chief Justice of Allahabad High Court in his administrative capacity had issued a circular to judi-

cial officers enjoining on them to raise contributions to the war fund and it was suggested that he had done a thing which would lower the prestige of the court in the eyes of the public. This is what was said at p. 224 (of Ind App) = (at p. 204 of AIR).

"In (1893) A. C. 138, the test applied by the very strong Board which heard the reference was whether the words complained of were in the circumstances calculated to obstruct or interfere with the course of justice and the due administration of the law. In (1900) 2 QB 36 it was shown that the offence of scandalising the court itself was not obsolete in this country. A very scandalous attack had been made on a judge for his judicial utterances while sitting in a criminal case on circuit, and it was with the foregoing opinions on record that Lord Russell of Killowen C. J. adopting the expression of Wilmet C. J. in his opinion in *Rex v. Almon* (1765) Wilmet's Notes of Opinions 243, which is the source of much of the present law on the subject, spoke of the article complained of as calculated to lower the authority of the judge."

11. It is significant that their Lordships made distinction between a case where there had been criticism of the administrative act of a Chief Justice and an imputation on him for having done or omitted to have done something in the administration of justice. It is further noteworthy that the law laid down in 1899 AC 549 was not followed and it was emphasised that 1900-2 Q.B. 36 showed that the offence of scandalising the Court itself was not obsolete in England. In *Rex v. Editor of the New Statesman*, (1928) 44 T.L.R. 301, an article had been published in the *New Statesman* regarding the verdict by Mr. Justice Avory given in a libel action brought by the Editor of the "Morning Post" against Dr. Marie Stopes (the well-known advocate of birth control) in which it was said, *inter alia*, "the serious point in this case, however, is that an individual owning such views as those of Dr. Marie Stopes cannot apparently hope for a fair hearing in a Court presided over by Mr. Justice Avory — and there are so many Avorys". On behalf of the contemner 1899 AC 549 was sought to be pressed into service. The Lord Chief Justice in delivering the judgment of the Court said that the prin-

ciple applicable to such cases was the one stated in (1900) 2 Q. B. 36 and relied on the observations of Lord Russell at p. 40. It was observed that the article imputed unfairness and lack of impartiality to judge in the discharge of his judicial duties. The gravamen of the offence was that by lowering his authority it interfered with the performance of his judicial functions. Again in *Ambard v. Attorney General for Trinidad and Tobago*, 1936 AC 322 the law enunciated in (1900) 2 QB 36 by Lord Russell of Killowen was applied and it was said at page 335:

"But whether the authority and position of an individual judge, or the due administration of justice, is concerned no wrong is committed by any member of the public who exercise the ordinary right of criticising, in good faith, in private or public, the public act done in the seat of justice. The path of criticism is a public way; the wrong headed are permitted to err therein; provided that members of the public abstain from imputing improper motives to those taking part in the administration of justice, and are genuinely exercising a right of criticism, and not acting in malice or attempting to impair the administration of justice, they are immune. Justice is not a cloistered virtue; she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

It was, however, held that there was no evidence upon which the court could find that the alleged contemner had exceeded fair and temperate criticism and that he had acted with untruth or malice and with the direct object of bringing the administration of justice into disrepute.

12. Lord Denning M. R. in *Reg v. Commr. of Police of the Metropolis, Ex parte Blackburn* (No. 2) (1968) 2 WLR 1204 made some pertinent observations about the right of every man, in Parliament or out of it, in the Press or over the broadcast, to make fair and even outspoken comment, on matters of public interest. In the words of the Master of Rolls,

"those who comment can deal faithfully with all that is done in a Court of justice. They can say that we are mistaken, and our decisions erroneous, whether they are subject to appeal or

not. All we would ask is that those who criticise us will remember that, from the nature of our office, we cannot reply to their criticism. We cannot enter into public controversy. Still less into political controversy. We must rely on our conduct itself to be its own vindication."

In that case Mr. Quintin Hogg had written an article in "Punch" in which he had been critical of the Court of Appeal and had even made some erroneous statements. But reading of the article the salient passage of which is set out in the judgment of the Master of the Rolls makes it quite clear that there was no attempt to scandalise the Court and impute any dishonourable or dishonest motives or to suggest any lack of integrity in any particular Judge.

13. Oswald in his book on the Contempt of Court has expressed the view that it would be going a great deal too far to say that commitments for contempt of Court by scandalising the Court itself have become obsolete, and that there does not seem to be any good reason for ignoring the principles which govern the numerous early cases on the subject.

14. The American and the Australian cases viz., *Johan D. Pennekamp & the Miami Herald Publishing Co. v. State of Florida*, (1946) 328 US 331 & *Bell v. Stewart*, 28 CLR 419, to which reference has been made on behalf of appellant No. 2 can hardly be of much assistance because in this country principles have become crystallized by the decision of the High Courts and of this court in which the principles followed by English Courts have been mostly adopted.

15. We would now advert to the decisions of this court. It was held in *Bathina Ramakrishna Reddy v. State of Madras*, 1952 SCR 425 = (AIR 1952 SC 149) that the fact that the defamation of a Judge of a subordinate Court constitutes an offence under S. 499 of the Indian Penal Code did not oust the jurisdiction of the High Court to take cognizance of the act as a contempt of court. In that case in an article in a Telugu weekly it was alleged that the Stationary Sub-Magistrate of Kovvur was known to the people of the locality for harassing litigants in various ways etc. Mukherjee J., (as he then was) who delivered the judgment described the article as a scurrilous attack

on the integrity and honesty of a judicial officer. It was observed that if the allegations were false, they could not but undermine the confidence of the public in the administration of justice and bring the judiciary into disrepute. The appellant there had taken the sole responsibility regarding the publication of the article and was not in a position to substantiate by evidence any of the allegations made therein. It was held that he could not be said to have acted bona fide, "even if good faith can be held to be a defence at all in a proceeding for contempt". The decision in *re The Editor, Printer and Publisher of "The Times of India"*, 1953 SCR 215 = (AIR 1953 SC 75) and *Aswini Kumar Ghose v. Arabinda Bose*, 1953 SCR 1 = (AIR 1952 SC 369), is very apposite and may be next referred to. In a leading article in "The Times of India" on the judgment of this Court in 1953 SCR 1 = (AIR 1952 SC 369) the burden was that if in a singularly oblique and infelicitous manner the Supreme Court had by a majority decision tolled the knell of the much maligned dual system prevailing in the Calcutta and Bombay High Courts by holding that the right to practise in any High Court conferred on advocates of the Supreme Court had made the rules in force in those High Courts requiring advocates appearing on the original side to be instructed by attorneys inapplicable to them. This is what was said by Mahajan J., (as he then was) speaking for the court:

"No objection could have been taken to the article had it merely preached to the courts of law the sermon of divine detachment. But when it proceeded to attribute improper motives to the Judges, it not only transgressed the limits of fair and bona fide criticism but had a clear tendency to affect the dignity and prestige of this court. The article in question was thus a gross contempt of court. It is obvious that if an impression is created in the minds of the public that the judges in the highest court in the land act on extraneous considerations in deciding cases, the confidence of the whole community in the administration of justice is bound to be undermined and no greater mischief than that can possibly be imagined".

The Editor, Printer and Publisher of the newspaper rendered an apology which was accepted; but this court concurred in the expression of views in 1936 AC 322 a passage from which has already been extracted. The guiding principles to be followed by courts in contempt proceedings were enunciated in *Brahma Prakash Sharma v. State of Uttar Pradesh*, 1953 SCR 1169 = (AIR 1954 SC 10). The judgment again was delivered by Mukherjee J., (as he then was) and the English decisions including those of the Privy Council were discussed. It is necessary to refer only to the principles laid down for cases of the present kind i.e. scandalising the court. It has been observed that there are two primary considerations which should weigh with the court when it is called upon to exercise summary power in cases of contempt committed by "scandalising" the court itself. In the first place, the reflection on the conduct or character of a Judge in reference to the discharge of his judicial duties would not be contempt, if such reflection is made in the exercise of the right of fair and reasonable criticism which every citizen possesses in respect of public acts done in the seat of justice. Secondly when attacks or comments are made on a Judge or Judges disparaging in character and derogatory to their dignity, care should be taken to distinguish between what is a libel on a judge and what really amounts to contempt of court. If, however, the publication of the disparaging statement is calculated to interfere with the due course of justice or proper administration of law by such court, it can be punished summarily as contempt.

"It will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice, or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties. It is well established that it is not necessary to prove affirmatively that there has been an actual interference with the administration of justice by reason of such defamatory

statement; it is enough if it is likely, or tends in any way, to interfere with the proper administration of law."

In that case it was held that the contempt was of a technical nature. This was based apparently on the reason that the Members of the Bar who had passed a resolution attributing incompetency, lack of courtesy etc. and had referred to complaints against two officers, one a Judicial Magistrate and the other a Revenue Officer and had sent those complaints to the District Magistrate, Commissioner and the Chief Secretary in the State and secondly because very little publicity had been given to the statement.

16. In *re Hira Lal Dixit*, (1955) 1 SCR 677 = (AIR 1954 SC 743) the above principles were applied and reaffirmed. In that case words which had been used in a poster which was published had the necessary implication that the judges who decided in favour of the Government were rewarded by the Government with appointments to this Court. Although the case was not one of scandalizing of the court but the question that was posed was whether the offending passage was of such character and import or made in such circumstances as would tend to hinder or obstruct or interfere with the due course of administration of justice by this court and it was answered in the affirmative and the contemner was held guilty of contempt of Court. In *State of Madhya Pradesh v. Revashankar*, 1959 SCR 1367 = (AIR 1959 SC 102) an application was made under Section 528 of the Code of Criminal Procedure in certain criminal proceedings containing serious aspersions against a Magistrate, Mr. N. K. Acharya. Reliance was once again placed on *Brahma Prakash Sharma's case*, 1953 SCR 1169 = (AIR 1954 SC 10) and the principles laid therein. It was held that the aspersions which had been made amounted to something more than a mere intentional personal insult to the Magistrate; they scandalised the court itself and impaired the administration of justice and that proceedings under the contempt of court could be taken against the contemner.

17. There can be no manner of doubt that in this country the principles which should govern cases of the present kind are now fully settled by the previous decisions of this court.

We may restate the result of the discussion of the above cases on this head of contempt which is by no means exhaustive.

(1) It will not be right to say that committals for contempt scandalizing the court have become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men."

(4) A distinction must be made between a mere libel or defamation of a judge and what amounts to a contempt of the court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by his court. It is only in the latter case that it will be punishable as contempt.

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee J. (as he then was) (Brahma Prakash Sharma's case, 1953 SCR 1169 = (AIR 1954 SC 10)), the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the judge or to deter actual and prospective litigants from placing complete reliance upon the court's administration of justice or if it is likely to cause embarrassment in the mind of the judge himself in the discharge of his judicial duties.

18. As regards the third contention no attempt was made before the High Court to substantiate that the facts stated in the article were true or were founded on correct data. It may be that truthfulness or factual correctness is a good defence in an action for

libel, but in the law of contempt there are hardly any English or Indian cases in which such defence has been recognized. It is true that in the case of Bathina Ramakrishna Reddy, 1952 SCR 425 = (AIR 1952 SC 149) there was some discussion about the bona fides of the person responsible for the publication but that was apparently done to dispose of the contention which had been raised on the point. It is quite clear that the submission made was considered on the assumption that good faith can be held to be a defence in a proceeding for contempt. The words "even if good faith can be held to be a defence at all in a proceeding for contempt" show that this Court did not lay down affirmatively that good faith can be set up as a defence in contempt proceedings. At any rate, this point is merely of academic interest because no attempt was made before the High Court to establish the truthfulness of the facts stated in the article. On the other hand, it was established that some of the material allegations were altogether wrong and incorrect.

19. Lastly the submission that the statements contained in the article made out only a charge of bias against the judge and this cannot constitute contempt has to be stated to be rejected. It is a new point and was never raised before the High Court. Moreover the suggestion that the charge in the article was of legal bias which meant that Justice Tarkunde had some sort of pecuniary interest in Khare-Tarkunde which had the transactions with the bank of which Thackersey was a Director is wholly baseless. Counsel had to agree that Justice Tarkunde was neither a shareholder nor was there anything to show that he had any other interest in Khare-Tarkunde. The mere fact that his brother happens to have a holding in it cannot per se establish that Justice Tarkunde would also have some financial or pecuniary interest therein. It is not possible to accept nor has such extreme position been taken by the counsel for appellant No. 2 that there was any bar to a brother or a near relation of a judge from carrying on any business, profession or avocation. The entire argument on this point is wholly without substance.

20. The appellant No. 2 showed no contrition in the matter of publication of the impugned article. He never even tendered an unqualified apology. The High Court, in these circumstances, was fully justified in punishing him for contempt of court and in awarding the sentence which was imposed. In the impugned article there was a clear imputation of impropriety, lack of integrity and oblique motives to Justice Tarkunde in the matter of deciding the Thackersey-Blitz suit which, on the principles already stated, undoubtedly constituted contempt of court.

21. The appeal fails and is hereby dismissed.

Appeal dismissed.

**AIR 1971 SUPREME COURT 231
(V 58 C 57)**

(From Madras: AIR 1968 Mad 274)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

State of Tamil Nadu and another (in both appeals), Appellants v. M. Rayappa Gounder (in C. A. No. 2462 of 1969), R. Narayanaswami Naidu (in C. A. No. 2463 of 1969), Respondents.

Civil Appeals Nos. 2462 and 2463 of 1969, D/- 21-10-1970.

Madras Entertainments Tax (Amendment) Act (20 of 1966), S. 7 — Section does not change the law retrospectively — It attempts to validate invalid assessments — It also attempts to overrule decision of High Court — Section is invalid. AIR 1970 SC 1292 and Criminal Appeal No. 75 of 1969, D/- 10-9-1969 (SC) and AIR 1971 SC 57, Relied on. (Paras 4, 5)

Cases Referred: Chronological Paras

(1971) AIR 1971 SC 57 (V 58) =

Civil Appeals Nos. 125 to 134 of 1967, D/- 23-2-1970, Janpada Sabha, Chhindwara v. Central Provinces Ltd.

(1970) AIR 1970 SC 192 (V 57) =

Civil Appeals Nos. 2197 and 2198 of 1966, D/- 25-4-1969, Shri Prithvi Cotton Mills Ltd. v. Broach Borough Municipality

(1970) AIR 1970 SC 1292 (V 57) =
Civil Appeals Nos. 2062 to

2064, 2072 and 2251 of 1969, D/-17-4-1970, Municipal Corpn. of the City of Ahmedabad v. New Shrook Spg. and Wvg. Co., Ltd.

(1969) Criminal Appeal No. 75 of 1969, D/- 10-9-1969 (SC), Mahal Chand Sethia v. State of West Bengal

(1963) W. P. No. 513 of 1963 (Mad), R. Sundararaja Naidu v. Entertainment Tax Officer

Mr. S. Mohan Kumara Mangalam, Senior Advocate, (Mr. A. V. Rangam, Advocate with him), for Appellants (in both Appeals); Mr. N. H. Hingorani and Mrs. K. Hingorani, Advocates, for Respondents (in both Appeals).

The following Judgment of the Court was delivered by

HEGDE, J.:— In these appeals by special leave this Court is called upon to consider the true effect as well as validity of some of the provisions of the Madras Entertainments Tax (Amendment) Act, 1966 (Madras Act XX of 1966) (to be hereinafter referred to as the Act). For the purpose of pronouncing on the questions of law arising for decision, it is sufficient to refer to the facts of the case in Civil Appeal No. 2462 of 1969 as has been done by the High Court.

2. The 1st respondent in Civil Appeal No. 2462 of 1969, is the Managing Partner of the cinema theatre known as "the K. M. S. Theatre" at Mettupalayam in Coimbatore District. On November 7, 1965, the C. T. O. Erode, made surprise inspection of the theatre and found the booking clerk actually selling unauthorised tickets with a forged seal "C.T.O. Mettupalayam". The officer seized the forged seal and other connected materials alongwith the bogus tickets. Thereafter he served on the respondents notices calling upon them to show cause why the price of the tickets issued which had escaped assessment should not be brought to tax under the Madras Entertainments Tax Act, 1939 and further to levy surcharge on the payments for admission under the Madras Local Authorities Finance Act, 1961. The respondents' objection was duly considered and rejected. Thereafter the assessing authority levied entertainment tax and surcharge on the price of the tickets

which according to him had escaped assessment. The respondents moved the High Court of Madras under Article 226 of the Constitution to quash the assessment.

3. The question as to the power of the assessing authority to re-assess the receipts that had escaped assessment under the Madras Entertainments Tax Act, 1939 had come up for consideration before the High Court of Madras in W. P. No. 513 of 1963 (Mad.) R. Sundararaja Naidu v. Entertainment Tax Officer. Therein the High Court of Madras held that there was no power to re-assess under that Act. Thereafter the State legislature enacted the Act. The Act among other provisions contains S. 7, a provision relating to validation of assessment and collection of certain taxes. That section reads:

"Notwithstanding anything contained in this Act or in the principal Act or in any judgment, decree or order of any Court no assessment or re-assessment or collection of any tax due on any payment for admission to any entertainment or any cinematograph exhibition which has escaped assessment to tax, or which has been assessed at a rate lower than the rate at which it is assessable, under S. 4 or 4-A of the principal Act, made at any time after the date of the commencement of the principal Act and before the date of the publication of this Act in the Fort St. George Gazette shall be deemed to be invalid or ever to have been invalid on the ground only that such assessment or re-assessment or collection was not in accordance with law and such tax assessed or reassessed or collected or purporting to have been assessed or reassessed or collected, shall, for all purposes, be deemed to be and to have been always validly assessed or reassessed or collected; and accordingly—

(a) all acts, proceedings or things done or taken by the State Government or by any officer of the State Government or by any other authority in connection with the assessment or reassessment or collection of such tax, shall, for all purposes be deemed to be, and to have always been done or taken in accordance with law;

(b) no suit or other proceeding shall be maintained or continued in any

court against the State Government or any person or authority whatsoever for the refund of any tax so paid; and

(c) no Court shall enforce any decree or order directing the refund of any tax so paid."

4. The re-assessments with which we are concerned in these cases were made prior to the coming into force of the Act. Therefore all that we have to see is whether those re-assessments are validly protected by Section 7. The High Court of Madras allowed the writ petitions and quashed the reassessments on the ground that the power to re-assess under Section 7 (B) introduced by the Act is incomplete and not exercisable in the absence of prescription as to limitation contemplated by the section and hence S. 7 of the Act fails to validate the assessments in question. We do not propose to go into that question as in our opinion S. 7 of the Act is invalid in so far as it attempts to validate invalid assessments without removing the basis of its invalidity.

5. We have earlier seen that the Madras High Court had held that the provisions of the Madras Entertainments Tax Act, 1939 do not provide for reassessment. That decision has not been appealed against nor the correctness of that decision challenged before us. Section 7 of the Act does not change the law retrospectively. All that it provides is that notwithstanding anything contained in the Act or in the principal Act or in any judgment, decree or order of any Court, no assessment or re-assessment or collection of any tax due on any payment for admission to any entertainment or any cinematograph exhibition which has escaped assessment to tax, or which has been assessed at a rate lower than the rate at which it is assessable under S. 4 or 4-A of the principal Act made at any time after the date of the commencement of the principal Act and before the date of the publication of this Act in the Gazette shall be deemed to be invalid or ever to have been invalid on the ground only that such assessment or re-assessment or collection was not in accordance with law and such tax assessed or reassessed or collected or purporting to have been assessed or reassessed or collected shall for all purposes be deemed to be to have always been

validly assessed or re-assessed or collected. The effect of this provision is to overrule the decision of the Madras High Court and not to change the law retrospectively. What the provision says is that notwithstanding any judgment of the court, the reassessment invalidly made must be deemed to be valid. The legislature has no power to enact such a provision. A question similar to the one before us came up for consideration before this Court in *The Municipal Corporation of the City of Ahmedabad v. The New Shrock Spg. & Wvg. Co. Ltd.*, Civil Appeals Nos. 2062 to 2064, 2072 and 2251 of 1969 D/- 17-4-1970 = (AIR 1970 SC 1292). Dealing with that question this is what this Court observed:

6. "This is a strange provision. Prima facie that provision appears to command the Corporation to refuse to refund the amount illegally collected despite the orders of this Court and the High Court. The State of Gujarat was not well advised in introducing this provision. That provision attempts to make a direct inroad into the judicial powers of the State. The legislatures under our Constitution have within the prescribed limits, powers to make laws prospectively as well as retrospectively. By exercise of those powers, the legislature can remove the basis of a decision rendered by a competent court thereby rendering that decision ineffective. But no legislature in this country has power to ask the instrumentalities of the State to disobey or disregard the decision given by courts. The limits of the power of legislatures to interfere with the directions issued by courts were considered by several decisions of this Court. In *Shri Prithvi Cotton Mills Ltd. v. The Broach Borough Municipality*, Civil Appeals Nos. 2197 and 2198 of 1966 D/- 25-4-1969 = (AIR 1970 SC 132), our present Chief Justice speaking for the Constitution Bench of the Court observed:

"Before we examine Section 3 to find out whether it is effective in its purpose or not we may say a few words about validating statutes in general. When a legislature sets out to validate a tax declared by a court to be illegally collected under an ineffective or an invalid law, the cause for ineffectiveness or invalidity must be removed before validation can be

said to take place effectively. The most important condition of course, is that the legislature must possess the power to impose the tax, for, if it does not, the action must ever remain ineffective and illegal. Granted legislative competence, it is not sufficient to declare merely that the decision of the court shall not bind for that is tantamount to reversing the decision in exercise of judicial power which the legislature does not possess or exercise. A court's decision must always bind unless the conditions on which it is based are so fundamentally altered that the decision could not have been given in the altered circumstances. Ordinarily, a Court holds a tax to be invalidly imposed because the power to tax is wanting or the statute or the rules or both are invalid or do not sufficiently create the jurisdiction. Validation of a tax so declared illegal may be done only if the grounds of illegality or invalidity are capable of being removed and are in fact removed and the tax thus made legal. Sometime this is done by providing for jurisdiction where jurisdiction had not been properly invested before. Sometimes this is done by re-enacting retrospectively a valid and legal taxing provision and then by fiction making the tax already collected to stand under the re-enacted law."

6-A. In *Mahal Chand Sethia v. State of West Bengal*, Criminal Appeal No. 75 of 1969 D/- 10-9-1969 (SC) Mitter J. speaking for the Court stated the legal position in these words:

"The argument of counsel for the appellant was that although it was open to the State legislature by an Act and the Governor by an Ordinance to amend the West Bengal Criminal Law Amendment (Special Courts) Act, 1949, it was incompetent for either of them to validate an order of transfer which had already been quashed by the issue of a writ of certiorari by the High Court and the order of transfer being virtually dead, could not be resuscitated by the Governor or the Legislature and the validating measures could not touch any adjudication by the Court.

It appears to us that the High Court took the correct view and the Fourth Special Court had clearly gone wrong in its appreciation of the scope and effect of the Validating Act and

Ordinance. A legislature of a State is competent to pass any measure which is within the legislative competence under the Constitution of India. Of course, this is subject to the provisions of Part III of the Constitution. Laws can be enacted either by the Ordinance making power of a Governor or the Legislature of a State in respect of the topics covered by the entries in the appropriate List in the Seventh Schedule to the Constitution. Subject to the above limitations laws can be prospective as also retrospective in operation. A court of law can pronounce upon the validity of any law and declare the same to be null and void if it was beyond the legislative competence of the legislature or if it infringed the rights enshrined in Part III of the Constitution. Needless to add it can strike down or declare invalid any act or direction of a State Government which is not authorised by law. The position of a Legislature is however different. It cannot declare any decision of a court of law to be void or of no effect."

7. Again Shah J. (one of us in *Janpada Sabha, Chhindwara v. The Central Provinces Ltd. and State of Madhya Pradesh v. Amalgamated Coal Fields Ltd.*, Civil Appeals Nos. 125 to 134 of 1967, D/- 23-2-1970 = (AIR 1971 SC 57)) speaking for the Constitution Bench explained the legal position in these words:

"The relevant words which purported to validate the imposition, assessment and collection of cess on coal may be recalled: they are "cesses imposed, assessed or collected by the Board in pursuance of the notification/ notices specified in the Schedule shall, for all purposes, be deemed to be, and to have always been validly imposed, assessed or collected as if the enactment under which they were so issued stood amended at all material times so as to empower the Board to issue the said notification/notices. Thereby the enactments i.e. Act 4 of 1920 and the Rules, framed under the Act pursuant to which the notifications and notices were issued, must be deemed to have been amended by the Act. But the Act does not set out the amendments intended to be made in the enactments. Act 18 of 1964 is a piece of clumsy drafting. By a fiction it deems the Act of 1920 and the rules

framed thereunder to have been amended without disclosing the text or even the nature of the amendments."

Proceeding further, it was observed:

"On the words used in the Act, it is plain that the legislature attempted to overrule or set aside the decision of this Court. That in our judgment, is not open to the Legislature to do under our constitutional scheme. It is open to the Legislature within certain limits to amend the provisions of the Act retrospectively and to declare what the law shall be deemed to have been, but it is not open to the Legislature to say that a judgment of a court properly constituted and rendered in exercise of its powers in a matter brought before it shall be deemed to be ineffective and the interpretation of the law shall be otherwise than as declared by the Court."

"We are clearly of the opinion that sub-section (3) of Section 152A introduced by the Ordinance is repugnant to our Constitution."

8. The present case falls within the rule laid down by that decision. Hence it is clear that the impugned assessment cannot be sustained. In this view of the matter it is not necessary to go to the other contentions arising in the case.

9. In the result these appeals fail and they are dismissed with costs. Appeals dismissed.

AIR 1971 SUPREME COURT 234 (V 58 C 58)

(From : Allahabad)*

G. K. MITTER AND A. N. RAY, JJ.

Dr. Kulbhushan Kunwar (In both the Appeals), Appellant v. 1. Smt. Raj Kumari (in C. A. No. 2564 of 1966), 2. Kumari Mandalsa Kunwar (In C. A. No. 2589 of 1966), Respondents.

Civil Appeals Nos. 2564 and 2589 of 1966, D/- 20-10-1970.

(A) Hindu Adoptions and Maintenance Act (1956), Section 23 (2) — Claim for maintenance by wife and daughter — Quantum — Determina-

*(First Civil Appeals Nos. 5 and 6 of 1958, D/- 10-3-1965 All (LB).)

KN/KN/F117/70/SSG/T

tion — Test — Date from which maintenance claimable.

The quantum of maintenance depends upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members on a reasonable view of change or circumstances possibly required in the future, regard being, of course had to the scale and mode of living and to the age habits, wants and class of life of the parties. Section 23 (2) makes no departure from these principles as enunciated in AIR 1929 PC 128 except perhaps to a limited extent envisaged in sub-clauses (d) and (e) of Section 23 (2). (Para 17)

Where wife's claim to maintenance against husband for herself and for her daughter was first laid by a lawyer's notice of 1951 but the suit for maintenance was filed in 1954 the suit could be decreed from the date of its institution as a terminus a quo for maintenance as claimed by wife. Where a Reader in medicine and physician having private practice not in affluent circumstances but with means to support wife on reasonable scale of comfort neglected his wife since about a year after his marriage, a sum of Rs. 250 for his wife and Rs. 150 for his daughter as monthly maintenance was proper subject to limit of 25 per cent and 15 per cent of the income as determined by Income-tax authorities. (Paras 20, 21, 22)

(B) Hindu Adoptions and Maintenance Act (1956), Section 23 (2) (d) — Wife's claim for maintenance — Amount regularly received by wife @ Rs. 250/- p. m. from her father during his lifetime — Sum so received by wife from her father was not her income but was only a bounty from her father which she might or might not get — Hence it was not a fact to be taken into consideration under Section 23 (2) (d). (Para 14)

Cases Referred : Chronological Paras (1929) AIR 1929 PC 123 (V 16) =

56 Ind App 182, Mt. Ekradeshwari v. Homeshwar

17

M/s. G. N. Dikshit and B. Datta, Advocates, for Appellant (in both the appeals), Mr. C. B. Agarwala, Senior Advocate (Miss Uma Mehta, Mr. S. K.

Bagga and Mrs. S. Bagga, Advocates with him), for Respondent (in both the appeals).

The following Judgment of the Court was delivered by

MITTER, J.: These two appeals are from two judgments and decrees of the High Court of Allahabad granting maintenance to the wife and daughter of the common appellant in both the appeals.

2. Counsel for the appellant did not contest the right of the respondents to claim maintenance. His argument was directed only against the quantum fixed in both the cases on the ground that the principles laid down in Section 23 (2) of the Hindu Adoptions and Maintenance Act, 1956 had not been followed by the High Court. The Act had come into force before the date of the trial court's judgment on the 1st June 1957 and it is the common case of the parties that the Act governs the rights of the parties herein. The relevant portion of Section 23 runs as follows:

"(1) It shall be in the discretion of the court to determine whether any, and if so, what, maintenance shall be awarded under the provisions of this Act, and in doing so the court shall have due regard to the considerations set out in sub-section (2) or sub-section (3), as the case may be, as far as they are applicable.

(2) In determining the amount of maintenance, if any, to be awarded to a wife, children or aged or infirm parents under this Act, regard shall be had to—

(a) the position and status of the parties;

(b) the reasonable wants of the claimant;

(c) if the claimant is living separately, whether the claimant is justified in doing so;

(d) the value of the claimant's property and any income derived from such property, or from the claimant's own earnings or from any other source;

(e) the number of persons entitled to maintenance under this Act.

x x x

As it was contended on behalf of the appellant that practically all the provisions of the sub-clauses of sub-s. (2) were disregarded by the High Court, it is necessary to state a few facts about the married life of the appel-

lant, his income out of which maintenance is to be directed, the pecuniary conditions of himself and of his wife and whether the wife has any other income or property which had to be taken into consideration.

3. The marriage of the appellant with the respondent in the first appeal took place in May 1945 at Gujranwala now in Pakistan. The father-in-law of the appellant who was examined as a witness in the maintenance suit filed by the respondent gave evidence to the effect that he had worked as an agent of the Standard Vacuum Oil Company with agencies at Gujranwala and neighbouring districts and that his annual income at the date of the marriage of the respondent was about Rs. 40,000/- out of which he had to pay Rs. 13,000/- by way of income-tax. Further, after the partition of India he came to Dehra Dun and took up his abode at Premnagar Refugee Camp but could not engage himself actively in business on account of illness and old age but had become a partner with others in a business of ice and rice mill in which he had a Re. 0-2-6 shares; he had never seen the accounts of the business and was content to accept whatever was given to him by his partners which varied between Rs. 50/- and Rs. 200/- per month. He had to leave all his property in Pakistan and had not received any compensation in lieu thereof at the date when he was examined in court in March 1956.

4. There is some dispute about the period during which the parties in the first appeal had lived together as man and wife. According to the husband the period had come to an end in March 1946 while according to the wife it had lasted up to December 1946. Admittedly, a daughter, the respondent in the second appeal, was born out of the wedlock on August 4, 1946. The wife sent a lawyer's notice claiming maintenance on July 28, 1951 and filed a suit for the purpose adding a claim to ornaments which according to her were left with the husband. The lawyer's notice states that the news of the birth of the daughter had been conveyed to the parents by his father-in-law by registered post but the latter had refused to accept it, that the wife had been sent by the appellant to Gujranwala for the confinement in

1946 and all her stridhana jewellery, silk clothes etc., had been left behind with the appellant at Lucknow. On the basis that the appellant was receiving Rs. 560/- per month as salary from Government and was earning Rupees 800 per month by way of private practice besides income from agricultural lands, the wife's claim to maintenance was laid at the rate of half the earnings of the husband inclusive of the maintenance of the minor girl who had to be educated and brought up according to the husband's status in life.

5. The suit for maintenance was actually filed on April 27, 1954 by the wife claiming besides the value of the ornaments a decree for arrears of maintenance amounting to Rs. 21,600/- and future maintenance at the rate of Rs. 600/- per month. The claim made in the daughter's suit filed on April 5, 1955 was at the rate of Rs. 150/- per month.

6. The trial court decreed the two suits awarding maintenance to the wife at Rs. 100/- per month as from the date of the decree i.e. 1st June, 1957 and at the rate of Rs. 25/- per month for the daughter negating the claim to the value of the ornaments.

7. The High Court allowed the claim of the wife to a monthly maintenance of Rs. 250/- from the date of the institution of the suit subject to a limit i.e. that the husband would not be liable at any time to pay more than 25% of the total income as accepted by the income-tax authorities by way of maintenance. With regard to the daughter, the High Court fixed the amount of maintenance at Rs. 150/- per month subject to a similar limit as in the case of the wife, the quantum being directed not to exceed 15% of the average monthly income of the father.

8. The relevant facts as they emerge from the oral and documentary evidence adduced by the parties so far as the same have a bearing on the factors mentioned in sub-cl. (a) to (d) of Section 23 (2) besides the above may be stated briefly. We have already noted that the father of the wife was a fairly well-to-do person at the time when the marriage had taken place. There was however a serious reversal of his fortunes after the partition of the country. According to him no

talk of any dowry had taken place between the parties before the marriage of his daughter. The appellant who had qualified himself in medicine had gone to Gujranwala from Lucknow for the marriage. The appellant's mother had seen the respondent several times before the nuptials. His daughter had accompanied the appellant to Lahore immediately after the marriage but had come back from there within 10 to 15 days.

9. The respondent's evidence was that except for very brief periods from October 1945 to March 1946 she had scarcely lived with her husband who was working in a medical college at Lucknow starting on a salary of Rs. 280/- per month. Her evidence was that she was not well received in her husband's family because her mother-in-law was disappointed with the dowry brought by her.

10. From the oral and documentary evidence it appears that the husband was never anxious to have the company of the wife and her attempt to make the married life a normal one by going to Lucknow three times did not have the desired effect. The husband used to write to her but stopped doing so some two months after the birth of her daughter in August, 1946. She had written a number of letters to her husband from 1946 to 1949 without receiving any reply. On the last occasion when she had gone to the husband at Lucknow the latter was absent from home for four days and she could not find out whether he was attending his college during that time. The husband had met her at Lucknow when she went there with her daughter but made himself scarce after the first day. The husband's evidence shows clearly that he was disillusioned about the wife immediately after the marriage inasmuch as he found the wife to be a girl of little education whereas he had been given to understand that she had taken a master's degree in arts. He had however tried to reconcile himself with his lot. His statement even in examination-in-chief does not show that he was at any time anxious to receive his wife or to keep her with him. He had kept up correspondence with her till August 1946 when he received a registered letter intimating him of the birth of his daughter. For five years there-

after i.e. from the time of the partition of the country, he had no news of his wife and child. In 1951 he received the lawyer's notice. At the time of his marriage he was a resident medical officer drawing a fixed salary of Rs. 280/- p.m. with free quarters. He became a lecturer in medicine in December 1945 on a salary of Rs. 280/- with prospects of increment up to Rs. 400. In 1953 he became a Reader in medicine on a scale of Rs. 500-30-800. His salary at the time of his giving evidence in court was Rs. 620/- plus 10 per cent by way of dearness allowance. He also had some private practice which came to no more than Rs. 25,000 to Rs. 30,000/- during the entire period from 1945 to 1957. His bank balance had never crossed the limit of Rs. 2,000/-. He had no other assets except a piece of land in Ambala given by way of compensation for lands owned in Pakistan. He had purchased a car for Rs. 10,000/- and his monthly expenses for the upkeep of it including the chauffeur's pay was Rs. 70/- p.m. He had no idea of the financial status of his father-in-law.

11. A few letters which passed between the husband and the wife and exhibited in this case show that from May 1945 to October 1945 the husband was writing quite affectionate letters to the wife. There were only two short letters written on the 3rd and 4th January 1946 written in an altogether different vein. The copy of the only letter of the wife which was exhibited in this case bearing date 25th August 1948 starts off with congratulations to the husband for having received a scholarship for going to England as reported in the Tribune. She complained that the husband had forgotten her although she still loved him as usual. She mentioned that the daughter was always asking after her father. She requested the husband to look them up before going abroad. She also sent her respects to her mother-in-law.

12. It will be noted that the documentary evidence noted above was of a period prior to the litigation. The wife complained in the plaint about the strained relations between herself and her mother-in-law on the ground of insufficiency of dowry, that though she had gone to the husband and tried to persuade him to do his duty by her

it was of no avail, and that she was living upon the charity of her father. The husband pleaded in defence that the wife had gone to him in October 1945 of her own accord without any traditional invitation and had stayed with him for some time off and on up to March, 1946 adding :

"During this period the defendant (himself) was constantly under threat to his life being in danger and used to take all sorts of precautions and it became further clear on account of the incompatibility of temperament that the defendant would not be able to pull on with the plaintiff."

13. Taking all the circumstances into consideration and specially the status of the father of the respondent that he was giving her a sum of Rs. 250/- p.m. by way of pocket expenses, the Civil Judge Lucknow fixed the wife's maintenance at Rs. 100/- per month and that of the daughter at Rs. 25/- p.m. The High Court held that it was the husband who was guilty of desertion and the wife was entitled to all the amenities and comforts which would have been hers had they lived together. The High Court also found that the total income in the year 1953-54 was Rs. 10,099/- and that in 1957 he was receiving a salary of Rs. 682/- per month and that his private practice which was of the order of Rs. 250/- p.m. in 1953-54 could be reasonably expected to have gone up much higher in 1957. Accordingly it fixed up a monthly allowance to the respondent at Rs. 250/- for maintenance subject to a limit of 25% p.m. of the total income as accepted by the Income-tax authorities.

14. Before us counsel for the appellant contended that the courts below had ignored the fact that on the death of the wife's father in 1960 she had inherited half the properties left by him and that even during his lifetime she was in receipt of Rs. 250/- p.m. which should have been taken into consideration under cl. (d) of sub-s. (2) of Section 23. We cannot accept this contention. A sum of Rs. 250/- p.m. even if given to the respondent regularly was not her income but was only a bounty from her father which she might or might not continue to get. It is hardly believable that the father who according to his own evidence

was getting no more than Rs. 200/- p.m. out of the partnership business could afford to give Rs. 250/- p.m. to his daughter. It would appear this statement was false and only made with a view to strengthening a claim for the recovery of the amount from the husband. If it were true that the wife had inherited any property from her father there certainly was ample opportunity for the husband to have affirmed an affidavit to that effect during the last ten years. Such affidavit could have been used even before the High Court of Allahabad which heard the appeal in 1965.

15. With regard to sub-cl. (c) the evidence makes it quite clear that it was the husband who did not want the wife to live with him. The husband never seemed to have cared for the daughter born to him. The fact that a registered letter was sent to him after the birth of the daughter shows that there was complete estrangement between the parties even before that day. Neither in the letters written to her nor in the evidence adduced by the husband is any reason disclosed as to why he took a dislike to the wife unless it be a fact that he was disappointed in his wife and cherished a feeling that she was not possessed of culture and education of the expected standard. There does not appear to be any substance in the wife's allegation that indifference of her husband stemmed from disappointment in the dowry brought by her.

16. Counsel for the appellant also relied on sub-cl. (e) to sub-s. (2) on the ground that he had to maintain his aged mother. Unfortunately however the husband had laid no ground to such a claim in his testimony before the court. He was not the only son of his mother and it appears from the evidence given by him that his family owned some lands which were being looked after by the mother. In the absence of any express statement by the husband himself in his examination no reliance can be placed on the claim made on his behalf.

17. Reference was made on behalf of the appellant to the decision of the Judicial Committee in *Mt. Ekradeshwari v. Homeshwar*, AIR 1929 PC 128 where the Board had to deal with the case of a widow of a deceased in the junior line of the well-known

Darbhanga family in Bihar. The trial court had found in that case that the gross income of the estate was Rupees 1,50,000 per annum, but the net income was only Rs. 33,000 per annum after payment of the interest on the heavy encumbrances on the estate in respect of which litigation was pending between the estate and the Maharaja of Darbhanga. In rejecting the claim of the widow to an annual maintenance of Rs. 18,000/- and upholding the concurrent findings of the courts in India that the maintenance allowance should be fixed at Rs. 4,200/- per annum the Board approved of the observations of the subordinate Judge to the effect that the said sum would enable the lady "to live as far as may be consistently with the position of a widow in something like the same degree of comfort and with the same reasonable luxury of life as she had in her husband's lifetime". According to the Board maintenance depended,—

"upon a gathering together of all the facts of the situation, the amount of free estate, the past life of the married parties and the families, a survey of the conditions and necessities and rights of the members, on a reasonable view of change of circumstances possibly required in the future, regard being, of course, had to the scale and mode of living, and to the age, habits, wants and class of life of the parties." With respect we are in entire agreement with the above dictum and in our view sub-s. (2) of Section 23 makes no departure from the principles enunciated by the Board, except perhaps to a limited extent envisaged in sub-cl. (d) and (e) of the said sub-section.

18. It was argued before us that inasmuch as the Board allowed as quantum of maintenance 1/8th of the net income of the estate we should adopt the same rate. In our view the Board laid down no principle related to the proportion of the free income allowable by way of maintenance from the estate. It is to be borne in mind that the maintenance claim was by a widow of a Brahmin family although highly placed in life. Here we have the case of a wife who was neglected by her husband not in affluent circumstances but certainly with means to support a wife on a reasonable scale of comfort.

19. It was further argued before us that the High Court went wrong in allowing maintenance at 25% of the income of the appellant as found by the Income-tax Department in assessment proceedings under the Income-tax Act. It was contended that not only should a deduction be made of income-tax but also of house rent, electricity charges, the expenses for maintaining a car and the contribution out of salary to the provident fund of the appellant. In our view some of these deductions are not allowable for the purpose of assessment of "free income" as envisaged by the Judicial Committee. Income-tax would certainly be deductible and so would contributions to the provident fund which have to be made compulsorily. No deduction is permissible for payment of house rent or electricity charges. The expenses for maintaining the car for the purpose of appellant's practice as a physician would be deductible only so far as allowed by the income-tax authorities i.e. in case the authorities found that it was necessary for the appellant to maintain a car.

20. The question as to the date from which maintenance would be claimable was also mooted before the Judicial Committee in the above case. The High Court had turned down the widow's claim to arrears of maintenance. Examining the several decisions cited before it the Board took the view that the widow was entitled to maintenance not from the date of the decree as found by the courts below nor from the date of the suit in April 1922 but from 1st of January 1922 in view of the fact that it was towards the end of the year 1921 when the widow had made up her mind to stay on at her father's place. In this case, as already noted, the claim to maintenance was first laid by a lawyer's notice of 1951 but the suit was filed in 1954. The trial court decreed maintenance from the date of the decree in 1957 but the High Court thought fit to allow maintenance from the date of the institution of the suit. No exception can be taken to the fixing of the date of institution of the suit as the terminus a quo for the maintenance claimed by the respondent.

21. A sum of Rs. 250/- per month for the maintenance of the wife

of a person occupying the position of the appellant cannot be said to err on the liberal side. The High Court in our opinion very rightly fixed that sum making it subject to the limit of 25 per cent of the income as found by the Income-tax authorities. We have no reason to take any different view. Subject to our observation as to the determination of the income of the appellant the appeal against the wife is dismissed with costs.

22. As regards the appeal in the case of the daughter, the High Court fixed the amount of monthly maintenance at Rs. 150/- till such time as she marries but so as not to exceed 15% on the average monthly income of the father. No ground was shown as to why we should make a variation in the amount fixed in her case. We uphold the finding of the High Court in this respect. There will be one set of hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 240

(V 58 C 59)

(From: Delhi)

K. S. HEGDE AND

A. N. GROVER, JJ.

Ch. Surat Singh (dead) and others, Appellants v. Manohar Lal and others, Respondents.

Civil Appeals Nos. 610 and 611 of 1966, D/- 25-8-1970.

Civil P. C. (1908), Order 41, R. 20 — Effect of non-joinder — Appeal to Supreme Court — Failure to implead necessary party — Effect.

Where the son of the plaintiff with other persons was brought on record on the death of plaintiff during pendency of appeal before the High Court and the fact that he was represented by a Counsel was clearly shown in the certified copy of order of the High Court but he was not impleaded as a party in appeal before Supreme Court, the fact that he was so impleaded admittedly being within knowledge of appellants, and the appellants failed to show any good ground for not impleading him, the appeal was liable to be dismissed for want of necessary party to the appeal. An application filed on the date of decision to implead him as party-respondent, held

being highly belated could not be entertained. (Paras 3, 5, 6)

The following Judgment of the Court was delivered by

HEGDE, J.:— In these appeals a preliminary objection has been taken to the effect that these appeals are not maintainable as one. Lt. Col. G. S. Yadav one of the parties to these cases at an earlier stage had not been impleaded. After hearing the counsel for the parties we accept this preliminary objection and dismiss these appeals as having been not properly instituted. We shall now proceed to give our reasons in support of that conclusion.

2. We shall first take up Civil Appeal No. 610 of 1966. This appeal arises from a suit instituted by one Surat Singh and others. In that suit Surat Singh was the first plaintiff. The plaintiffs therein claimed a permanent injunction restraining the defendants from interfering with their possession of the suit premises. That suit was substantially dismissed in the trial Court. As against that decision the plaintiffs went up in appeal to the Senior Sub-Judge, Delhi. In the appellate Court the plaintiffs prayed for an amendment of the plaint. They sought to include therein a prayer seeking a mandatory injunction requiring the defendants to vacate the building. The learned appellate Judge allowed that application and remanded the suit to the trial Court for a fresh trial.

3. As against that decision defendants-respondents went up in appeal to the High Court. During the pendency of the appeal in the High Court Surat Singh died and his legal representatives including Lt. Col. Yadav, his son were brought on record. In the High Court Lt. Col. Yadav was represented by a counsel. The High Court allowed that appeal and dismissed the suit. Civil Appeal No. 610 of 1966 was brought against that decision of the High Court. In this appeal Lt. Col. Yadav has not been made a party. The only explanation offered for not making him a party is that the judgment of the High Court did not show clearly that Lt. Col. Yadav was a party to the appeal. The fact that he was impleaded as party in the appeal was undoubtedly within the knowledge of the appellants. That fact is not

denied. Further the certified copy of the order of the High Court, produced along with the appeal memo, clearly shows that Lt. Col. Yadav was represented by a counsel. The appellants have not shown any good ground for not impleading Lt. Col. Yadav as a party in the appeal. He is a necessary party to the appeal. Today an application has been filed for impleading him as a party-respondent in the appeal. It is a highly belated application. On their own showing it is clear that the appellant did not act with due diligence. We do not think that we should entertain that application. In the result Civil Appeal No. 610 of 1966 is dismissed for the reasons mentioned above.

4. Now, coming to Civil Appeal No. 611 of 1966, this appeal arises from a suit filed by the respondent No. 1 in this appeal. In the suit he prayed for a permanent injunction restraining Surat Singh and others from interfering with his possession of the suit premises. His case was that the suit premises had been leased to him and that he had paid a substantial sum as a construction loan. The trial Court accepted his plea and granted a decree in his favour. As against that Surat Singh and others went up in appeal. During the pendency of the appeal Surat Singh died. Some of the legal representatives of Surat Singh applied for being impleaded in the appeal as appellants. To that an objection was taken by respondent No. 1 herein to the effect that the estate of Surat Singh will not be fully represented unless Lt. Col. Yadav is also made a party. The contention of the opposite party was that Lt. Col. Yadav had no right in the suit premises as the same had been bequeathed by Surat Singh to some of his sons. The appellate Court framed an issue as to whether Lt. Col. Yadav was a necessary party to the appeal.

5. We were told that after some evidence was led on that issue some of the appellants herein made an application to implead Lt. Col. Yadav at the same time reserving their right to dispute Lt. Col. Yadav's right to the suit premises. That application was accepted by the first appellate Court and Lt. Col. Yadav was impleaded as a party-respondent in that appeal. Ultimately the appeal failed and it was dismissed. As against that

decision the appellants herein went up in second appeal to the High Court. In that appeal they did not implead Lt. Col. Yadav. No objection appears to have been taken by the respondents in the High Court as regards his non-impleading. The High Court dismissed that appeal on merits. Civil Appeal No. 611 of 1966 has been brought against that decision of the High Court. In this Court also Lt. Col. Yadav has not been impleaded. The only reason given for not impleading him is that the decree prepared by the High Court did not show Lt. Col. Yadav as one of the parties to the appeal. This plea has no substance. The appellants knew that Lt. Col. Yadav had been impleaded as party in the first appeal. They cannot take advantage of their own omission in the High Court. It is clear that the appellants have been callous in conducting the afore-mentioned cases.

6. This day an application has been made seeking to implead Lt. Col. Yadav as a respondent in this appeal. It is a highly belated application. We see no reason to allow the same. The contention that Lt. Col. Yadav has no interest in the suit premises cannot be gone into in his absence or in these proceedings. In the result Civil Appeal No. 611 of 1966 also fails and the same is dismissed. Parties to bear their own costs in both the appeals.

Appeals dismissed.

AIR 1971 SUPREME COURT 241 (V 58 C 60)

(From: Punjab and Haryana)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Dev Raj Anand, Appellant v. Bhagwandas and another, Respondents.

Civil Appeal No. 1202 of 1969, D/- 20-10-1970.

Representation of the People Act (1951), S. 123 — Corrupt practice — Bribery — What amounts to.

The gist of the corrupt practice of bribery lies in attempting to do something for those opposed to the

*(Election Petn. No. 6 of 1968, D/- 14-2-1967—Punjab and Haryana.)

candidate with a view to changing their votes and as a bargain for votes. AIR 1955 SC 775 & AIR 1968 SC 1191 & AIR 1968 SC 1083, Rel. on.

(Para 9)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1083 (V 55)=

(1968) 3 SCR 111, Om Prabha

Jain v. Abnash Chand

(1968) AIR 1968 SC 1191 (V 55)=

(1968) 3 SCR 102, Ghasi Ram

v. Dal Singh

(1955) AIR 1955 SC 775 (V 42)=

(1955) 2 SCR 469, S. Khader

Sheriff v. Munnuswami Goun-

der

M/s. T. R. Bhasin and J. C. Talwar, Advocates, for Appellant; Mr. H. L. Sibal, Advocate-General for the State of Punjab, (M/s. P. C. Bhartari and S. S. Khanduja, Advocates, and M/s. J. B. Dadachanji and Co., Advocates, with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal from a judgment of the Punjab & Haryana High Court dismissing a petition filed by the appellant challenging the election of respondent No. 1 Bhagwandas to the Haryana Legislative Assembly from the Ambala Cantonment constituency.

2. The last date for filing the nomination papers was April 17, 1968 in the mid-term election which was held from the aforesaid constituency. The scrutiny of nomination papers took place on April 18, 1968. The polling took place on May 14, 1968 and the result was declared on the following day. Respondent No. 1 who belonged to the Jan Sangh Party got 13,009 votes whereas the appellant, who belonged to the Congress Party, polled 11,606 votes. There were certain other candidates also but it is unnecessary to make any mention about them or about the number of votes obtained by them.

3. The election of respondent No. 1 was challenged mainly on grounds of corrupt practices of bribery, undue influence, treating of voters, free conveyance of voters to and from the polling station, publication of posters making a religious appeal to the electorate by respondent No. 1 and the filing of a false return of election expenses by him. These allegations were denied by respondent No. 1. A number of issues were fram-

ed and a good deal of evidence was led by both sides.

4. We shall deal only with the determination of the questions which have been agitated before us. The first matter which has been argued before us arises out of issue No. 1 (i). It related to the commission of the corrupt practice of bribery by respondent No. 1, approaching Sant Singh Sethi on May 8, 1968 with a view to getting his support and later paying Rs. 501/- on May 12, 1968 to Punjabi Gurdwara as detailed in para 6 of the petition. It was alleged, inter alia, that after Sant Singh Sethi had been approached for securing the support of Sikh voters and after payment of Rs. 501/- had been made on May 12, 1968 Akhand Path was held in the Gurudwara. The Bhog of the Akhand Path took place on May 12, 1968 in the presence of respondent No. 1. It was announced in the congregation by Kuldip Singh, a member of the Gurudwara Executive Committee, that the Akhand Path had been performed for the purpose of wishing success to respondent No. 1 and securing the support of Sikh voters for his election which he was contesting from the Ambala Cantonment constituency. The following portion from the petition may be reproduced in original:

"It was also announced there that he had donated a sum of Rs. 501/- for the building funds and for this Akhand Path. The appeal was made to the congregation to see that the respondent No. 1 was successful in the election. The appeal was also made to the congregation to cast their votes in favour of the respondent No. 1 and to ask their friends and relatives to vote for the respondent No. 1. After this announcement, Ardas was recited and there also mention was made in the congregation regarding the donation of Rs. 501/- for the Gurudwara building and for the Akhand Path and other prayers were made for the success of respondent No. 1. It was further said in the Ardas that Guru Maharaj may persuade the sikh voters to vote for the respondent No. 1."

5. In his written statement respondent No. 1 denied having made any donation of Rs. 501/- to the Gurudwara or of approaching Sant Singh Sethi for support of Sikh voters as alleged. All

that was admitted was that the Akhand Path was held at the instance of respondent No. 1 in the normal way the Bhog of which took place on May 12, 1968. It was denied that Kuldip Singh made any announcement of the nature alleged or that it had been made with the consent or at the request of respondent No. 1.

6. Sant Singh Sethi appeared as P. W. 61. According to him respondent No. 1 had come to him on May 8, 1968 and had requested him to help him in the election. Respondent No. 1 was advised by him to have an Akhand Path performed in the Gurdwara and contribute something for its construction. Respondent No. 1 having consented Sethi asked Giani Jaswant Singh to get Akhand Path performed. At the time of Bhog on the morning of May 12, 1968 the said Jaswant Singh, after the Ardas had been recited, announced that a donation of Rs. 501/- had been made by respondent No. 1. Jaswant Singh further said that just as Guru Teg Bahadur had assisted Makhan Shah in bringing his sinking ship ashore respondent No. 1 might be similarly helped. Kuldip Singh also addressed the audience in the same strain. Jaswant Singh who appeared as P. W. 1 was the Head Granthi of Punjabi Gurdwara. According to his deposition a sum of Rs. 501/- was paid by respondent No. 1 for the construction of the Gurdwara building at the time of the Akhand Path which was performed at his instance in the Gurdwara. He admitted that at the time of Ardas he invoked divine assistance in favour of respondent No. 1 whose plight was likened to the sinking ship of Makhan Shah which, as a result of the blessings of Guru Teg Bahadur, got safely landed on the coast. He denied that he had asked the persons at the congregation to vote for respondent No. 1.

7. The next witness was Captain Mehar Singh P. W. 2. All that he stated was that he had visited the Gurdwara on May 12, 1968 where Akhand Path had been performed at the instance of respondent No. 1. At the time of Bhog many persons were present including the office-bearers. Ardas was performed by Giani Jaswant Singh who mentioned that a sum of Rs. 501/- had been donated by respondent No. 1 and good wishes

were expressed on his behalf. Jaswant Singh had also said that just as the Guru had wished for the success of Makhan Shah similarly hope was expressed for the success of respondent No. 1 in the election. Tara Chand P. W. 4 the cashier of the Gurdwara produced the relevant documents relating to the payment of Rs. 501/-. The learned judge was of the view that on the evidence led by the parties the payment of Rs. 501/- on May 12, 1968 to the Gurdwara by respondent No. 1 had been proved. He saw no reason to disbelieve the evidence of Giani Jaswant Singh P. W. 1 nor did he express any positive opinion about P. W. 2 Captain Mehar Singh. As regards Sant Singh Sethi P. W. 61, the trend of the decision of the learned judge was against his reliability. It was also observed that he had been a supporter of the appellant and had issued a poster Exh. P. W. 29/1 containing an appeal to the Sikh community to vote for the appellant in the General Election of 1961 which had also been contested by him. The evidence led by respondent No. 1 in support of his version that he had made a donation of Rs. 51/- only was not accepted. After referring to certain decisions of this court the learned judge held that notwithstanding the donation of Rs. 501/- no bargain had been proved between respondent No. 1 and the Sikh voters and therefore no corrupt practice had been established.

8. A great deal of stress has been laid before us on the evidence of Giani Jaswant Singh P. W. 1 which, as stated before, had been believed by the learned judge. It has been pointed out that a sum of Rs. 501/- had been paid in the presence of the congregation for the construction of the Gurdwara after the Ardas had been recited when the Bhog of Akhand Path took place on the morning of May 12, 1968. Emphasis has been laid on the following part of the statement of Jaswant Singh:

"The theme of the Kirtan was that just as the Guru had helped Makhan Shah the same assistance may be rendered by the Panth to Bhagwan Dass Sehgal and prayers were offered for his success."

It has been argued on behalf of the appellant that while it may be meritorious to make a donation for charita-

ble purposes but if that is made at the time or on the eve of the election it is open to the charge that its real object was to induce the electorate to vote in favour of the particular candidate (as observed in *S. Khader Sheriff v. Munnuswami Gounder*, (1955) 2 SCR 469 = (AIR 1955 SC 775). It has also been pointed out that the word "Panth" meant, in the context, the Sikh community; thus an appeal had been made to the persons present in the congregation, who were mainly Sikh voters, to vote for respondent No. 1.

9. In our judgment the effect of the simile of the help given by the Guru to Makhan Shah must be ruled out of consideration. It found no mention in the pleadings in which the case was founded primarily on a bargain having been effected between respondent No. 1 and the Sikh voters, the payment of Rs. 501/- having been made as a part of such bargain. The evidence of Jaswant Singh was quite unequivocal on the point that he never asked the persons present at the congregation to vote for respondent No. 1 after he had announced the donation of Rs. 501/- having been made by him for the construction of the Gurdwara building. In view of the pleading the appellant is not entitled to invoke any principle other than the one contained in *Ghasi Ram v. Dal Singh*, (1968) 3 SCR 102 = (AIR 1968 SC 1191) that the gist of the corrupt practice of bribery lay in attempting to do something for those opposed to the candidate with a view to changing their votes and as a bargain for votes. This principle was further elaborated in *Om Prabha Jain v. Abnash Chand*, (1968) 3 SCR 111 at p. 116 = (AIR 1968 SC 1083 at p. 1086) where it was observed with reference to the previous case:

"It has been pointed out that a Minister in the discharge of his duties may be required to do some acts of administration including the granting of money for the uplift of certain communities and this action of the Minister is not to be construed against him unless it can be established that there was a bargain with the voters for getting assistance at the election."

We find no error in the view expressed by the learned judge that it had not been proved by satisfactory evidence

that respondent No. 1 had made the donation by way of a bargain for procuring Sikh votes.

10. The next point which has been pressed on behalf of the appellant arises out of issue No. 1 (vii) which was based on the allegation that the corrupt practice of bribery had been committed by payment of Rs. 300/- to Captain Bhagat Singh and Barkat Singh on May 12, 1968 as alleged in para 6 (j) of the petition. The allegation in the aforesaid para related to Topkhana Bazar Gurdwara and was similar to what had been alleged in respect of the Gurdwara on the Idgah Road concerning the donation of Rs. 501/-. It was stated, inter alia, that the respondent No. 1 with the object of inducing Sikh voters who visited the Topkhana Gurdwara to vote for him paid a sum of Rs. 300/- on the morning of May 12, 1968 to Captain Bhagat Singh and Barkat Singh who were the office-bearers of the Committee managing that Gurdwara. The payment had been shown in the books of the Gurdwara and had been utilised for its benefit. It was claimed that on the receipt of the amount of Rs. 300/- an appeal was actually made on May 13, 1968 to the congregation in the Gurdwara to vote for respondent No. 1. Two witnesses were examined in support of the allegation made in para 6 (j) of the petition. Kulwant Singh P. W. 29 who runs a factory for making scientific instruments stated that he used to go to the aforesaid Gurdwara in which katha was held on May 13, 1968. Respondent No. 1 came there and asked for votes. Captain Bhagat Singh, Secretary of the Managing Committee, made a speech in his favour. It was announced by Captain Bhagat Singh that respondent No. 1 had given a donation of Rs. 300/- for the Gurdwara and that the congregation should assist him in the election. This witness has not been believed by the learned judge. Although in the first instance Kulwant Singh denied that he had signed the poster Exh. P. W. 29/1 which contained an appeal to vote in favour of the appellant in the General Election of 1967 but he admitted, though in a half-hearted manner, that he was a signatory to the aforesaid poster. Bakshi Barkat Singh P. W. 64 was the Vice President of the Gur-

dwara and according to him respondent No. 1 came to him on May 12, 1968 and asked for his help in the election. Simultaneously the latter made a donation of Rs. 300/- for the Gurdwara fund for purchase of fans. It was arranged that some persons should be invited on the following day in the morning to the Gurdwara where respondent No. 1 himself addressed the gathering. It was announced that a donation of Rs. 300/- had been made by him. Captain Bhagat Singh and Bakshi Barkat Singh both laid emphasis on the services which had been rendered to the Gurdwara by respondent No. 1. This witness was also not believed by the learned judge as he was clearly interested in the appellant. There were other infirmities in his statement which were noticed and the learned judge considered that his statement did not inspire confidence. We have not been shown anything basically or inherently wrong in the appraisal of evidence by the learned judge relating to the allegation made in para 6 (j) of the petition. We would, therefore, affirm the conclusion arrived at by the High Court.

11. The next contention of the learned counsel for the appellant relates to issue No. 1 (v) which was that the returned candidate had treated the voters by serving liquor to them as detailed in para 6 of the application dated September 10, 1968 containing the additional particulars. The better particulars which were furnished were, however, incorporated in the amended petition filed on September 20, 1968. In clause (h) of para 6 of the amended petition it was stated that respondent No. 1 had offered gratification by providing liquor on an extensive scale to the voters for the purpose of securing their votes. Seven localities were mentioned where liquor was alleged to have been distributed between May 11 and 13, 1968 to voters whose names were given. Some of these persons were produced as witnesses.

12. Pursuant to a notification Exht. R. W. 2/1 the liquor vend shops in the State of Haryana from May 11 to 14, 1968 were closed presumably to stop the sale of liquor during the days of polling. The learned judge considered the evidence of Man Singh P. W. 17, Sukh Ram P. W. 18, Rup Chand

P. W. 19, Shamlal P. W. 20, Faqir Chand P. W. 21, Inder Sain Chadha P. W. 23, Kanahya Ram P. W. 24, Ghisa Ram P. W. 25, Babu Lal P. W. 26 Ram Rakha P. W. 27, Paras Ram P. W. 28 and Ram Krishan P. W. 30. The evidence produced by respondent No. 1 was also discussed. The learned judge observed that the oral evidence of witnesses was hardly of much assistance in proving an allegation of the nature under consideration. According to him the witnesses for the appellant who had given evidence about the corrupt practice of bribery for being treated to liquor could not be relied upon implicitly particularly when persons had been produced from the localities by respondent No. 1 to testify that no liquor was distributed. The following portion of the judgment deserves to be reproduced in this connection:

"The evidence in this case gives rise to a suspicion that the first respondent had distributed liquor but the failure of the petitioner to connect the liquor obtained from Faqir Chand's vend with the bottles actually distributed on 11th, 12th and 13th May, 1968, is a circumstance which goes against the allegation. The liquor vends in Haryana were closed from 11th to 14th May, 1968 and the positive evidence led on behalf of the petitioner shows, and it is indeed also stated in the petition itself, that liquor was widely distributed in the specified localities between 11th and 13th May, 1968. There is no evidence that the liquor purchased from Faqir Chand's vend had been stored anywhere for 2/3 days prior to its distribution."

The learned judge further observed that although on the material dates the liquor vends were closed yet the witnesses of the appellant had asserted that liquor was being widely distributed by respondent No. 1 during those dates. There was no evidence to show how such large quantities of liquor were procured and where they were stored prior to distribution.

13. Counsel for the appellant has pointed out that apart from Faqir Chand certain other liquor contractors had also been sought to be produced in the list of witnesses which was supplied on behalf of the appellant on October 3, 1968. The name of Ram

Murti, Excise Contractor, Lalru had been included in the list for being summoned together with his books containing entries relating to the supply of liquor to respondent No. 1 from May 4, 1968 to May 14, 1968. There was yet a third liquor contractor of the name of Om Prakash whose name was included in the list of witnesses to be summoned. The learned judge made an order on October 8, 1968 directing the summoning of Faqir Chand liquor contractor of R. A. Bazar, Ambala Cantt. As regards Om Prakash it was observed that in para 6 (h) of the petition there was no allegation of any liquor having been supplied to respondent No. 1 from the liquor shop of Om Prakash at village Mohra. His production was disallowed. Although nothing was stated about summoning of Ram Murti in the order, summons of which a copy is to be found on the record appears to have been actually sent to him. On behalf of respondent No. 1 it has been submitted that this witness was given up. At any rate there is nothing to show that the appellant made any serious attempt to produce Ram Murti as a witness. We do not find any substance in the submission on behalf of the appellant that the evidence of Om Prakash and Ram Murti had been shut out without any justification. We are satisfied that sufficient grounds have not been made out for not accepting the conclusion of the learned judge that the appellant had failed to discharge the burden of proving the issue relating to treatment of voters by means of serving liquor as alleged in the election petition.

14. The only other point which remains for disposal relates to issue Nos. 6 (a) and (b). This issue involves the publication of a poster by the Secretary of the Punjabi Gurdwara, Ambala Cantonment and it was alleged that it had been published at the instance or with the consent of respondent No. 1. It was common ground that if the poster Exht. P. W. 4/4 was published either on behalf of or with the consent of respondent No. 1 it would amount to commission of a corrupt practice of undue influence within the meaning of S. 123 (2) of the Act. It is unnecessary to state its contents because, in our opinion, the learned judge was right in not accept-

ing the evidence produced by the appellant relating to its publication at the instance or with the consent of respondent No. 1. The learned judge considered that the evidence produced by the appellant relating to the publication of the poster and its distribution was extremely unsatisfactory and he had no hesitation in rejecting it. We have not been shown any infirmity in the reasoning or conclusion of the learned judge with regard to the publication and distribution of this poster.

15. In the result the appeal fails and it is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 246
(V 58 C 61)**

(From: Mysore)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

The Nagar Rice and Flour Mills and others, Appellants v. N. Teekappa Gowda & Bros. and others, Respondents.

Civil Appeal No. 2228 of 1969, D/- 27-2-1970.

(A) Rice Milling Industry (Regulation) Act (1958), S. 8 (3) (c) — Change of location of rice mill — Sanction for change obtained after shifting — Assuming previous sanction is required before moving of machinery, competitor has no locus standi to challenge grant of permission — (Constitution of India, Arts. 19 (1) (g), & 226).

Where the owners of an existing rice mill shifted its existing location and obtained the necessary permission for change of location from the Director of Food & Civil Supplies, even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site, the competitor in the business (owner of another rice mill) can have no grievance against the grant of permission permitting the installation on a new site. The right to carry on business being a fundamental right under Art. 19 (1) (g) of the Constitution, its exercise is subject only to the restrictions imposed by

*(Writ Petn. No. 496 of 1969, D/- 26-9-1969 — Mys.)

CN/DN/B173/70/VBB/M

law in the interests of the general public under Art. 19 (6) (i).

(Para 9)

Section 8 (3) (c) providing for previous permission of Central Government to change location of Rice mill is merely regulatory; if it is not complied with, the owners may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the owners from exercising their right to carry on business, because of the default. W. P. No. 496 of 1969, D/- 26-9-1969 (Mys), Reversed.

(Para 10)

(B) Rice Milling Industry (Regulation) Act (1958), Ss. 5 (4), 8 (3) (c)—Change of location of existing rice mill — S. 5 (4) has no application in granting permission under S. 8 (3) (c).

The considerations which are prescribed by sub-s. (4) of Section 5 only apply to the grant of a permit in respect of a new rice mill or a defunct rice mill. They have no application in considering the shifting of the location of an existing rice mill. In respect of a new or defunct rice mill a permit and a licence are both required; in respect of an existing rice mill only a licence is required. The conditions prescribed by sub-section (4) of Section 5 only apply to the grant of a permit and not to a licence. By Section 8 (3) (c) it is made one of the conditions of the licence that the location of the rice mill shall not be shifted without the previous permission of the Central Government. It is true that the appropriate authority clothed with the power must consider the expediency of permitting a change of location. But there is no statutory obligation imposed upon him to take into consideration the matters prescribed by Sub-S. (4) of S. 5 in granting the permission to change the location.

(Para 11)

The appellants had been carrying on business in milling rice for more than 30 years and the mill, by reason of the proposal to submerge the site in the Sharavathi Hydro-Electric Project, had to be shifted from its location. The State allotted another piece of land to the appellants and did not acquire their machinery and permitted erection of their rice mill building on the new location. This was done with a view to cause minimum hardship to the appellants arising in consequence of the proposed construction of the

dam resulting in submergence of their land. The State also granted permission to the appellants to change the location under the Rice Milling Industry (Regulation) Act, 1958.

Held that the permission could not be said to be granted without consideration of the relevant circumstances. W. P. No. 496 of 1969, D/- 26-9-1969 (Mys) Reversed.

(Para 12)

Mr. S. V. Gupte, Sr. Advocate, (M/s. S. S. Javali, H. N. Narayan and B. Datta, Advocates, with him); for Appellants; Mr. H. R. Gokhale, Sr. Advocate, (M/s. C. R. Somasekharan, H. G. Balakrishna and P. C. Bhartari, Advocates, and M/s. J. E. Dadachanji and Co. Advocates, with him); for Respondents.

The Judgment of the Court was delivered by

SHAH, J.: This appeal is filed with special leave against the judgment of the High Court of Mysore setting aside the order dated January 20, 1969, of the Director of Food & Civil Supplies of the State of Mysore under the Rice Milling Industry (Regulation) Act 21 of 1958.

2. The appellants established a rice mill many years ago in village Madugoppa, District Shimoga, in the former Indian State of Mysore and carried on milling operations. The respondents—N. Teekappa Godwa & Bros — established in 1933 a rice mill in village Kelandur at a distance of about 1 1/4 miles from the site of the appellant's mill. A notification under the Land Acquisition Act, 1894 was issued in March 1966 for compulsory acquisition of the land and buildings on the site of the appellants' rice mill for use in the Sharavathi Hydro-Electric Project. In October 1967 an award acquiring the land and buildings was made. The award expressly recited that the appellants were entitled to remove the machinery of the rice mill.

3. The appellants in the meanwhile applied to the special Officer for Rehabilitation of the State of Mysore to allot them a suitable new site in which their rice mill may be located. The Special Tahsildar for Rehabilitation sanctioned that the rice mill building may be shifted to a site in Survey No. 233 of Mudugoppa granted to the appellants by the State of Mysore. By order dated January 20, 1960, the

Director of Food & Civil Supplies passed an order sanctioning the change in the location of the appellants' rice mill from its original site to the new site "as per the provisions contained in Section 8 (3) (c) of the Rice Milling Industry (Regulation) Act, 1958", and rejected the objection raised by the respondents.

4. The respondents then moved a petition in the High Court of Mysore for a direction quashing the order dated January 20, 1969 passed by the Director of Food & Civil Supplies on the plea that the appellants' mill was moved to a place in the vicinity of their rice mill in the Kelandur village in contravention of Sections 5 and 8 of the Rice Milling Industry (Regulation) Act, 1958, and in consequence of the removal of the appellants' mill "their business was likely to be adversely affected".

5. The High Court held that permission under Section 8 (3) (c) was a condition precedent to the shifting of the location of the rice mill, and since the appellants did not obtain the previous permission to shift the mill, the order of the Director was liable to be "struck down as ultra vires". In the view of the Court by the shifting of the appellants' rice mill the respondents' business was directly affected and they had a right to challenge the legality of the order. The High Court upheld the claim of the respondents on the sole ground that the order of the Director was made in violation of the mandatory injunction of the Rice Milling Industry (Regulation) Act 21 of 1958 and it prejudicially affected the business of the respondents as rice-millers.

6. The Parliament enacted the Rice Milling Industry (Regulation) Act 21 of 1958 to regulate rice milling. By Section 3 (a) a "defunct rice-mill" is defined as meaning "a rice-mill in existence at the commencement of this Act but in which rice-milling operations have not been carried on for a period exceeding one year prior to such commencement". By Section 3 (b) "existing rice-mill" means "a rice mill carrying on rice milling operations at the commencement of this Act, and includes a rice-mill in existence at such commencement which is not carrying on rice-milling opera-

tions but in which rice-milling operations have been carried on at any time within a period of one year prior to such commencement". By Section 3 (e) "new rice-mill" means "a rice mill other than an existing rice mill or a defunct rice mill". By S. 3 (i) "rice mill" is defined as meaning "the plant and machinery with which and the premises, including the precincts thereof in which or in any part of which, rice-milling operation is carried on." By Section 5 provision is made for grant of permits in respect of new or defunct rice mills. By sub-section (1) of Section 5 it is provided that any person or authority may make an application to the Central Government for the grant of permit for the establishment of a new rice mill, and any owner of a defunct rice mill may make a like application for the grant of a permit for re-commencing rice-milling operation in such mill. By sub-section (3) if, on receipt of any such application for the grant of a permit, the Central Government is of opinion that it is necessary so to do for ensuring adequate supply of rice, it may subject to the provisions of sub-section (4) and sub-section (5) grant the permit specifying therein the period within which the mill is to be established. Sub-section (4) provides:

"Before granting any permit under sub-section (3), the Central Government shall cause a full and complete investigation to be made in the prescribed manner in respect of the application and shall have due regard to—

(a) the number of rice mills operating in the locality;

(b) the availability of paddy in the locality;

(c) the availability of power and water supply for the rice mill in respect of which a permit is applied for;

(d) whether the rice mill in respect of which a permit is applied for will be of the huller type, sheller type or combined sheller-huller type;

(e) Whether the functioning of the rice mill in respect of which a permit is applied for would cause substantial unemployment in the locality;

(f) such other particulars as may be prescribed."

By sub-section (6) a permit granted under Section 5 is effective for the period specified therein or for such

extended period as the Central Government may think fit to allow in any case. Section 6 provides for grant of licences. Any owner of an existing rice mill or of a rice mill in respect of which a permit has been granted under Section 5 may make an application to the licensing officer for the grant of a licence for carrying on rice-milling operations in that rice mill. By sub-section (3) of Section 6 the licensing officer is obliged to grant the licence on payment of the fee and on deposit of such sum as may be prescribed as security for due performance of the conditions. By sub-section (4) a licence granted under Section 6 is valid for the period specified therein, and may be renewed from time to time for such period and on payment of such fees and on conditions as may be prescribed. Section 7 provides for revocation, suspension and amendment of licences. By Section 8 restrictions are placed on rice mills. Under sub-section (1) no person or authority shall, after the commencement of the Act, establish any new rice mill except under and in accordance with a permit granted under Section 5. By sub-section (2) no owner of a rice mill shall, after the commencement of the Act, carry on rice-milling operation except under and in accordance with a licence granted under Section 6. By sub-section (3) insofar as it is relevant it is provided:

"No owner of a rice mill,—

- (a) * * * *
- (b) * * * *

(c) shall, without the previous permission of the Central Government, change the location of the whole or any part of the rice mill in respect of which a licence has been granted under Section 6;

Section 13 provides for penalties for contravention or attempts to contravene or abetting the contravention of any of the provisions, inter alia, of Section 8. Power of the Central Government to issue a permit under Section 5 and under Section 8 (3) (c) to change the location of rice mill is delegated to the Director of Food & Civil Supplies.

7. The Director of Food & Civil Supplies sanctioned, in exercise of the power under Section 8 (3) (c)

of the Act that the location of the rice mill of the appellants may be shifted. The High Court declared the order invalid on the ground that the previous sanction had not been obtained. The Court observed that "where an officer granting a licence or passing an administrative order exceeds his powers and makes an order in violation of the provision which clothes him with that power, his order is liable to be struck down", and since Section 8 (3) (c) contemplated grant of permission for change of location before the plant and the machinery were actually shifted to a new site, the Director of Food & Civil Supplies had no power to grant permission after the machinery and plant had been shifted.

8. The rice mills for the purpose of the Act were divided into three classes: defunct rice-mills, existing rice-mills and new rice-mills. Defunct rice-mills are those which had ceased functioning for a period exceeding one year prior to the commencement of the Act; existing rice mills are those which carry on rice milling operations at the commencement of the Act or had carried on rice milling operations within one year prior to the commencement of the Act; and new rice-mills are those which are other than existing rice mills or defunct rice mills. In respect of all rice mills a licence for carrying on rice milling operations under Section 6 must be obtained. In respect of a rice mill new or defunct a permit under Section 5 has first to be obtained. No permit is required by an existing rice mill. In granting the permit the authority has to take into consideration matters which are specified in sub-section (4) of Section 5. The licensing authority must on application issue a licence to an existing rice mill or a rice mill in respect of which a permit has been granted under Section 5. For change in the location of any rice mill in respect of which a licence has been granted under Section 6, the previous permission of the Central Government is necessary under Section 8 (3) (c).

9. The Parliament has by the Rice Milling Industry (Regulation) Act, 1958, prescribed limitations that an existing rice mill shall carry on

business only after obtaining a licence and if the rice mill is to be shifted from its existing location, previous permission of the Central Government shall be obtained. Permission for shifting their rice mill was obtained by the appellants from the Director of Food & Civil Supplies. The appellants had not started rice milling operations before the sanction of the Director of Food & Civil Supplies was obtained. Even if it be assumed that the previous sanction has to be obtained from the authorities before the machinery is moved from its existing site, we fail to appreciate what grievance the respondents may raise against the grant of permission by the authority permitting the installation of machinery on a new site. The right to carry on business being a fundamental right under Art. 19 (1) (g) of the Constitution, its exercise is subject only to the restrictions imposed by law in the interests of the general public under Article 19 (6) (i).

10. Section 8 (3) (c) is merely regulatory: if it is not complied with, the appellants may probably be exposed to a penalty, but a competitor in the business cannot seek to prevent the appellants from exercising their right to carry on business, because of the default, nor can the rice-mill of the appellants be regarded as a new rice mill. Competition in the trade or business may be subject to such restrictions as are permissible and are imposed by the State by a law enacted in the interests of the general public under Article 19 (6), but a person cannot claim independently of such restriction that another person shall not carry on business or trade so as to affect his trade or business adversely. The appellants complied with the statutory requirements for carrying on rice milling operations in the building on the new site. Even assuming that no previous permission was obtained, the respondents would have no locus standi for challenging the grant of the permission, because no right vested in the respondents was infringed.

11. But Mr. Gokhale for the respondents contended that in granting the permission under Section 8 (3) (c) the authority was bound to take into account matters which govern

the issue of a permit under Section 5 (4) of the Act. Counsel submitted that sub-section (3) (c) of Section 8 was enacted with a view to ensure adequate milling facilities and to prevent unfair competition and on that account it is provided that when the location of an existing rice mill has to be shifted, the authority had to take into consideration the number of rice mills operating in the locality; the availability of power and water supply for the rice mill in respect of which a permit is applied for; whether the functioning of the rice mill in respect of which a permit is applied for would cause substantial unemployment in the locality; and such other particulars as may be prescribed. According to counsel, since the Act was intended to regulate the carrying on of business of rice mills in the country, it was implicit in Sec. 8 (3) (c) that the authority sanctioning the change of location of a rice mill shall consider whether another person was by the shifting likely to be prejudiced thereby. This, counsel says, the Director did not consider, and on that account the order is liable to be set aside because the right of the respondents is infringed. This argument was not advanced before the High Court, and, in our judgment, has no substance. The considerations which are prescribed by sub-section (4) of Section 5 only apply to the grant of a permit in respect of a new rice mill or a defunct rice mill. They have no application in considering the shifting the location of an existing rice mill. In respect of a new or defunct rice mill a permit and a licence are both required: in respect of an existing rice mill only a licence is required. The conditions prescribed by sub-section (4) of Section 5 only apply to the grant of a permit and not to a licence. By Section 3 (3) (c) it is made one of the conditions of the licence that the location of the rice mill shall not be shifted without the previous permission of the Central Government. It is true that the appropriate authority clothed with the power must consider the expediency of permitting a change of location. But there is no statutory obligation imposed upon him to take into consideration the matters prescribed by sub-section (4) of Section 5 in granting the permission to change the location.

12. The appellants had been carrying on business in milling rice for more than 30 years and the mill by reason of the proposal to submerge the site in the Sharawathi Hydro-Electric Project had to be shifted from its location. The State allotted another piece of land to the appellants and did not acquire their machinery and permitted erection of their rice mill building on the new location. This was done with a view to cause minimum hardship to the appellants arising in consequence of the proposed construction of the dam resulting in submergence of their land. The State also granted permission to the appellants to change the location under the Rice Milling Industry (Regulation) Act, 1958. The permission cannot be said to be granted without consideration of the relevant circumstances.

13. The appeal is allowed and the petition filed by the respondent N. Teekappa Gowda & Bros. is ordered to be dismissed with costs throughout in favour of the appellants.

Appeal allowed.

AIR 1971 SUPREME COURT 251
(V 58 C 62)

(From : Delhi)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Union of India (In both the Appeals) Appellant v. Allied International Products Ltd. and another, Respondents.

1. J. B. Dadachanji, 2. Peter Jefferys; 3. Industrial Development Bank of India; 4. U. P. State Industrial Corporation Ltd. and 5. Industrial Finance Corporation of India, Interveners.

Civil Appeals Nos. 1772 and 1773 of 1970, D/- 19-10-1970.

(A) Companies Act (1956), S. 73 (1), (2) and (5) — Intimation that application will be given further consideration — Application cannot be deemed refused until finally decided.

The expression "permission has not been granted" in sub-sections (1) and (2) was intended to mean "permis-

sion has been refused". It is not enacted in Section 73(1) that if the application is not granted within the time prescribed, it cannot be granted after the expiry of the prescribed period, even if the Exchange has intimated that it will give further consideration to the application. Sub-section (5) contains a clear implication to the contrary. The intendment of sub-sections (1), (2) & (5) is plain. If within four weeks from the date of the closing of the subscription list, the Stock Exchange sends no intimation either extending the time or notifying that the application though not at present granted will be given further consideration, the application is deemed to be refused. If the Stock Exchange so desires, it may intimate that the period is being extended to seven weeks. The Exchange may say nothing more within the extended period, in which case, on the expiry of the extended period the allotment becomes void. If, however, within the four weeks, or within the extended period of seven weeks, the Exchange intimates that even though the application for permission is not at present granted, the application will be given further consideration, the application is not deemed to be refused until it is finally decided. (Paras 11, 13, 14)

(B) Companies Act (1956), S. 73

(1) — More applications than one for quotation of shares may be made — One of several applications only granted — Still facility for ensuring quick conversion is available.

The expression "a recognised stock exchange" means "any recognised exchange". More applications than one for quotation of shares may therefore be made. Even if out of several Exchanges approached, one or more, but not all, have granted the application for "enlistment", the facility of ensuring quick conversion is still available. If after representing in the prospectus that an application has been made to a recognised exchange for "enlistment" or will be made within the prescribed period, the Company is unable to obtain permission for "enlistment" from any exchange, the allotment will be invalid. But if permission is secured for quotation of shares in an Exchange, the allotment will not be invalid because another exchange has

*(L.P.A. Nos. 72 and 73 of 1969, D/- 24-7-1970 — Delhi.)

not granted the permission.

(Paras 16, 17)

Mr. C. K. Daphtary, Senior Advocate, (Mr. S. P. Nayar, Advocate with him), for Appellant, (In both the Appeals); Mr. N. A. Palkhivala, Sr. Advocate, (M/s. Santosh Chatterjee, A. M. Parikh and G. S. Chatterjee, Advocates with him), for Respondent No. 1 (In both the appeals); M/s. B. N. Kirpal and Bishamber Lal, Advocates, for Respondent No. 2 (In C. A. 1772 of 1970); Mr. B. Sen, Sr. Advocate, (Mr. O. P. Khaitan, Advocate, with him), for Respondent No. 2 (In C. A. 1773 of 1970); Mr. N. A. Palkhivala, Sr. Advocate, (Miss Bhuvanesh Kumari, and Mr. Santosh Chatterjee, Advocate and Mr. J. B. Dadachanji, Advocate of M/s. J. B. Dadachanji, and Co. with him), for Intervener No. 1; M. C. Setalvad, Sr. Advocate (M/s. Santosh Chatterjee, and C. M. Oberoi, Advocates and Mr. J. B. Dadachanji, Advocate, of M/s. Dadachanji and Co. with him), for Intervener No. 2; Mr. C. K. Daphtary, Sr. Advocate (Mr. I. N. Shroff, Advocate, with him), for Intervener No. 3; M/s. A. N. Sinha and Rathin Das, Advocates, for Intervener No. 4; Mr. C. K. Daphtary, Senior Advocate, (Mr. S. K. Dholakia, Advocate, with him), for Intervener No. 5.

The Judgment of the Court was delivered by

SHAH, J.: On May 29, 1965, the Allied International Products Ltd. — hereinafter called 'the Company' issued a prospectus offering to the public for subscription 5,00,000 equity shares of Rs. 10/- each and 10,000 cumulative preference shares of Rs. 100/- each, and intimating that "applications are being made to Bombay, Calcutta and Delhi Stock Exchanges for permission to deal in for official quotations of the shares of the Company".

2. On June 3, 1965, the Company submitted applications to the Stock Exchanges at Bombay, Calcutta and Delhi (which are recognised Stock Exchanges within the meaning of Section 2 (39) of the Companies Act, 1956), for "enlisting" its shares. The subscription list of the Company was closed on June 21, 1965. On June 22, 1965, the Bombay Stock Exchange extended the time for consideration of the application till the expiry of seven weeks from the date of closing of the sub-

scription list and requested the Company to furnish certain particulars to facilitate compliance with S. 73 of the Indian Companies Act, 1956. On August 6, 1965, the Exchange informed the Company that the application was receiving further consideration and requested that certain formalities be complied with. On September 13, 1965, the Exchange informed the Company that it had considered and approved the application for "enlisting" its shares.

3. On June 9, 1965, the Calcutta Stock Exchange called upon the Company to modify certain Articles of Association, and by letter dated July 12, 1965, asked for particulars in respect of specified matters. On July 27, 1965, the Calcutta Stock Exchange granted time for compliance till the end of the seventh week from the date of the closing of the subscription list. On November 5, 1965, the Calcutta Stock Exchange rejected the application of the Company for "enlisting the shares".

4. The Delhi Stock Exchange informed the Company on July 10, 1965, that in order to facilitate compliance with the provisions of Sec. 73 of the Companies Act, 1956, "the allotment of shares should be finalised as soon as possible in consultation with the Stock Exchange". By another letter dated August 9, 1965, the Exchange informed the Company that the matter of "enlistment" of shares was under consideration, and the Company will be intimated of the decision of the Exchange as soon as it is taken. The Delhi Stock Exchange by letter dated December 4, 1965, rejected the application of the Company for "enlistment" of its shares.

5. The Company challenged the orders passed by the Calcutta and Delhi Stock Exchanges rejecting the applications for "enlistment" in separate appeals under Section 22 of the Securities Contracts (Regulation) Act 42 of 1956. The Central Government dismissed the appeals. In the orders recording the dismissal it was recited that the Exchange did not grant the permission for the shares to be "enlisted" before the expiry of four weeks from the date of closing of the subscription list as required by S. 73 (1) of the Companies Act, 1956, and that the Exchange did not notify any

extension of time for the grant of the permission within four weeks.

6. The Company then moved petitions in the High Court of Delhi for the issue of writs quashing the order passed by the Central Government in appeals under S. 22 of the Securities Contracts (Regulation) Act, and the orders of the Stock Exchanges rejecting the applications of the Company as "void, illegal and of no effect", and for orders directing the Stock Exchanges to "grant enlistment" of the shares of the Company, and further declaring Section 22 of the Securities Contracts (Regulation) Act 42 of 1956, and S. 73 of the Companies Act, 1956, ultra vires the Constitution of India.

7. Rangarajan, J. was of the opinion that grant of permission by the Bombay Stock Exchange was valid, and that allotment of shares did not become void, merely because one out of the three Exchanges alone gave the permission to enlist the Company's shares. The learned Judge quashed the order of the Central Government and directed that writs of mandamus do issue against the Calcutta and Delhi Stock Exchanges requiring them to "enlist" the shares of the Company.

8. Against the decision of Rangarajan, J., the Union of India appealed to a Division Bench of the High Court of Delhi. The two Exchanges acquiesced in the orders passed against them. The High Court confirmed the order of Rangarajan, J. With certificate granted by the High Court, the Union of India has appealed to this Court.

9. In support of these appeals, two principal contentions were urged on behalf of the Union:

(1) The permission granted by the Bombay Stock Exchange after the expiry of seven weeks violated the provisions of S. 73 (1) of the Companies Act, 1956 and was on that account invalid; and

(2) that grant of permission by one out of the three Exchanges did not protect the allotment of shares from being invalid under Section 73 (1) of the Companies Act, 1956. The two Stock Exchanges which had acquiesced in the judgment of Rangarajan, J., urged that the order granting a writ of mandamus requiring the two Exchanges to enlist the shares of the Company was without jurisdiction.

Rangarajan, J., it was said, could only direct that the applications be considered by the two Exchanges.

10. The relevant provisions of S. 73 of the Companies Act, 1956, in force at the date of the applications for permission for the shares to be dealt in the Exchange, provided:

"(1) Where a prospectus, whether issued generally or not, states that application has been made or will be made for permission for the shares or debentures offered thereby to be dealt in on a recognised stock exchange, any allotment made on an application in pursuance of the prospectus shall, whenever made, be void, if the permission has not been applied for before the tenth day after the first issue of the prospectus, or, if the permission has not been granted before the expiry of four weeks from the date of the closing of the subscription lists or such longer period not exceeding seven weeks as may, within the said four weeks be notified to the applicant for permission by or on behalf of the Stock Exchange.

(2) Where the permission has not been applied for as aforesaid, or has not been granted as aforesaid, the company shall forthwith repay without interest all moneys received from applicants in pursuance of the prospectus, and, if any such money is not repaid within eight days after the company becomes liable to repay it, the directors of the company shall be jointly and severally liable to repay that money with interest at the rate of five per cent per annum from the expiry of the eighth day:

Provided x x x x
 x x x x

(5) For the purpose of this section permission shall not be deemed to be refused, if it is intimated that the application for permission though not at present granted, will be given further consideration.

x x x x x

(7) No prospectus shall state that application has been made for permission for the shares or debentures offered thereby to be dealt in on any stock exchange, unless it is a recognised stock exchange."

11. By the Securities Contracts (Regulation) Act, machinery is set up for extending recognition to and for withdrawal of recognition to Stock Ex-

changes and for other incidental matters such as the making of rules and byelaws of the Exchanges and appeals against the orders of recognised Exchanges. By S. 22 of the Act it is provided:

"Where a recognised stock exchange acting in pursuance of any power given to it by its bye-laws, refuses to list the securities of any public company, the company shall be entitled to be furnished with the reason for such refusal, and may appeal against the decision of the recognised stock exchange to the Central Government, and the Central Government, may, after giving the stock exchange an opportunity of being heard, vary or set aside the decision of the recognised stock exchange and when it does so the stock exchange shall be bound to act in conformity with the orders of the Central Government."

Sub-section (5) of Section 73 of the Companies Act, 1956, is intended to be explanatory of sub-sections (1) & (2) of Section 73. Before that sub-section was amended by Act 31 of 1965 different phraseology was used in sub-sections (1) & (2) and in sub-section (5); the former used the expression "permission has not been granted", whereas sub-s. (5) used the expression "permission shall not be deemed to be refused". The expression "permission has not been granted" is ambiguous: it may mean "permission has been refused": it may also mean that the application for permission is under consideration and has not been disposed of. Sub-sections (1) & (2) of S. 73 were borrowed from S. 51 of the English Companies Act, 1948 with slight modifications. But the draftsman of the Indian Act, for reasons which it is difficult to appreciate, substituted the expression "permission has not been granted" for the expression "permission has been refused". In enacting sub-s. (5) of S. 73 the words used in sub-s. (5) of S. 51 of the English Act, viz. "permission shall not be deemed to be refused" were adopted. In our judgment, the expression "permission has not been granted" in sub-ss. (1) & (2) was intended in the context in which it occurs and in the light of the object of the enactment, to mean "permission has been refused".

12. A Stock Exchange fulfils a vital function in the economic deve-

lopment of a nation: its main function is to "liquify capital by enabling a person who has invested money in say a factory or a railway to convert it into cash by disposing of his share in the enterprise to some one else". Investment in joint stock companies is attractive to the public, because the value of the shares is announced day after day in the Stock Exchanges, and the shares quoted on the Exchanges are capable of almost immediate conversion into money. In modern days a company stands little chance of inducing the public to subscribe to its capital, unless its shares are quoted in an approved Stock Exchange. All public companies are anxious to obtain permission from reputed Exchanges for securing quotations of their shares and the management of a company is anxious to inform the investing public that the shares of the company will be quoted on the stock exchange. To prevent malpractices, the Parliament enacted legislation which aimed at securing control over the proper functioning of the Stock Exchanges, and also placed stringent restrictions upon the representations made by the companies in issuing prospectus inviting subscriptions. The Parliament enacted the Securities Contracts (Regulation) Act 42 of 1956, and simultaneously made provision in S. 73 of the Companies Act, 1956, for ensuring that representations made in the prospectus are carried out and fluidity of the investment by the holder of stock is ensured by procuring permission for quotation of shares in a recognized stock exchange.

13. Under sub-s. (1) of S. 73 an application for permission to secure quotation if not previously made, shall be made before the tenth day after the first issue of the prospectus, and if the application is not so made, the allotment is void. Again if the Exchange rejects the application within four weeks, or within seven weeks after extending the time, the allotment will be void, unless within that period the Exchange has informed the Company that further consideration will be given to the application. It is however not enacted in S. 73 (1) that if the application is not granted within the time prescribed, it cannot be granted after the expiry of the prescribed period, even if the Exchange has inti-

mated that it will give further consideration to the application. Sub-section (5) contains a clear implication to the contrary. If the Exchange has intimated within the period prescribed by sub-s. (1) that the application will be given further consideration, it is not to be deemed that the application is refused. The Exchange is not obliged to give any intimation relating to the consideration of the application before the last day of the prescribed period. If no intimation is given till the last date of the prescribed period no inference of refusal follows. It would then be difficult to hold that if the Exchange intimates that it is considering the application or intends to give further consideration to the application that such an inference may follow. The amendment made by Act 31 of 1965 in sub-section (5) by the substitution of the expression "permission shall not be deemed to be refused" by the expression "it shall not be deemed that permission has not been granted" also gives a clue to the legislative intention that the inference of refusal will not be made if the Exchange has intimated to the applicant that further consideration will be given to the application.

14. We are unable to hold that permission for "enlistment" of shares can be given within the initial four weeks or if time be extended within seven weeks from the date of the closing of the subscription list, and if permission be not granted by the Exchange within those seven weeks, the allotment becomes void, even if the Stock Exchange intimates that it is giving further consideration to the application. The intentment of sub-sections (1), (2) & (5) is plain. If within four weeks from the date of the closing of the subscription list, the Stock Exchange sends no intimation either extending the time or notifying that the application though not at present granted will be given further consideration, the application is deemed to be refused. If the Stock Exchange so desires it may intimate that the period is being extended to seven weeks. The Exchange may say nothing more within the extended period, in which case, on the expiry of the extended period the allotment becomes void. If, however, within the four weeks, or within the extended period of seven

weeks, the Exchange intimates that even though the application for permission is not at present granted, the application will be given further consideration, the application is not deemed to be refused until it is finally decided.

15. The application for allotment of shares and acceptance thereof constitute a contract between the Company and the applicant. Section 73 (1) of the Companies Act imposes a penalty whereby the allotment of shares becomes void on the happening of the contingency specified therein. The imposition of penalty depends upon the volition of the Exchange and when imposed operates to invalidate all contracts resulting from allotment of shares between the applicants for shares and the Company. Such a provision must be strictly construed. Unless the statute in clear terms so provides, when the Exchange intimates its desire to consider the application further, an inference that the Exchange has still rejected the application, cannot be made.

16. It is true that in the prospectus issued by the Company it was intimated that applications are being made to the Bombay, Calcutta and Delhi Stock Exchanges for permission for official quotations of the shares of the Company. It is not contended, and it cannot reasonably be contended, that only one application for permission to secure quotation of the shares in an approved Exchange may be made. The expression "a recognised stock exchange" means "any recognised exchange". More applications than one for quotation of shares may therefore be made. In the present case, three applications were submitted on June 3, 1965. Two of these applications were rejected and one was granted. We are unable to hold that unless all the applications were granted, the allotment of shares must, by virtue of sub-s. (1) of Section 73, be invalid. The object of Section 73 (1) is that the subscribers to the shares must have facility to approach an Exchange for having their holdings converted whenever they desire. Even if out of several Exchanges approached, one or more, but not all, have granted the application for "enlistment", the facility of ensuring quick conversion is still available. If after representing in

the prospectus that an application has been made to a recognised exchange for "enlistment" or will be made within the prescribed period, the Company is unable to obtain permission for "enlistment" from any exchange, the allotment will be invalid. But sub-s. (1) is not intended to mean that it will be invalid, even if permission is obtained, but not from all the Exchanges to which applications have been made.

17. Section 73 (1) is enacted with the object that the subscribers will be ensured the facility of easy convertibility of their holdings when they have subscribed to the shares on the representation in the prospectus that an application for quotation of shares has been or will be made. The allotment of shares will be invalid only when permission for enlistment is not obtained. When permission from one or more of the Exchanges is obtained, it carries out the object of the Act. It will be a mechanical interpretation wholly divorced from the true object and intent of the Act to hold that even if permission is secured for quotation of shares in an Exchange, that the allotment will be invalid because another exchange has not granted the permission. That this is the true meaning of S. 73 (1) is clear from the fact that the penalty of avoidance of allotment of shares is attracted not only where the permission applied for has not been granted, but where no application has been made within the prescribed period. If applications are made to several Exchanges, some within the period of ten days after the first issue of the prospectus, and some beyond, or that one or more applications, but not all, is or are defective, and the error is not rectified, it would be unreasonable to hold that because some of the applications made beyond the tenth day after the first issue of the prospectus, or are defective, are liable to be rejected, the applications properly made before some of the Exchanges are also ineffective and the allotment made may be invalid.

18. Counsel for the Calcutta Stock Exchange urged that where a person is induced to subscribe for shares relying upon a representation that an application is made or intended to be made for quotation of the shares

in an Exchange near his home-town, and it is found that the application is not made, or if made it is rejected by the Exchange, it would be a great hardship to the shareholder if he is bound by the allotment, even if the condition of securing quotation in the Exchange convenient to him is not carried out. But Section 73 (1) declares the entire allotment void: it does not take into consideration the right or convenience of individual shareholders. An enquiry whether a shareholder or a class of shareholders was or were induced to subscribe for shares on the representation is irrelevant in determining whether the allotment is rendered invalid for failure to secure compliance with a statutory condition. We need not consider whether the individual shareholder who finds that an Exchange convenient to him has not listed the shares furnishes a cause of action to him for avoiding the contract.

19. We are in the view we have taken not called upon to decide whether the provisions of S. 73 of the Companies Act, 1956, are ultra vires, nor do we consider it necessary to decide whether S. 22 of the Securities Contracts (Regulation) Act, 1956, is ultra vires.

20. It was urged on behalf of the Delhi and Calcutta Stock Exchanges that the High Court ought, in exercise of the power under O. 41 R. 33 of the Code of Civil Procedure, to have vacated the writ of mandamus issued requiring them to grant permission for quotation of the Company's shares. An Appellate Court may in appropriate case pass any decree and make any order appropriate to the ends of justice, even if a party has not appealed against an adverse decision. That power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the parties, even though they may not have filed any appeal or objection. But the jurisdiction is discretionary and the High Court has not exercised it apparently for good reasons. The orders passed against the Union and the two Exchanges were in substance distinct. Against the Union the order was made quashing its order in appeal against the orders of the Exchanges; and against the Exchanges

the order was made directing inclusion of the shares in the list of quoted shares. The Exchanges acquiesced in the direction.

21. We need, however, not express any final opinion on this question. We are informed at the Bar that the Calcutta Stock Exchange has applied for certificate to the High Court of Delhi and that application is pending. We need not pre-judge the result of that application or the appeal, if any, which may be filed in this Court.

22. The appeals fail and are dismissed with costs. There will be one hearing fee in favour of the Company. The other parties will bear their own costs.

Appeals dismissed.

**AIR 1971 SUPREME COURT 257
(V 58 C 63)**

(From: Punj and Har)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Prabodh Chandra, Appellant v. Mohinder Singh, Respondent.

Civil Appeal No. 2631 of 1969, D/- 15-10-1970.

Representation of the People Act (1951), S. 116-A — Finding of trial Court that witnesses are not reliable is finding of fact — Supreme Court will not interfere unless it is perverse.

Evidence led before trial Court at variance with the pleadings — Conflicting versions put forward by interested witnesses — Trial Court's conclusion that witnesses were unreliable is justified. (Paras 13-16)

M/s. T. R. Bhasin and J. C. Talwar, Advocates, for Appellant; M/s. Hardev Singh and Hira Lal Kapur, Advocates, for Respondent.

Following Judgment of the Court was delivered by

HEGDE, J.: This is an appeal under S. 116A of the Representation of the People Act, 1951 (to be hereinafter referred to as the Act). It arises from the decision of the High Court of Punjab and Haryana in Election Petition No. 6 of 1969 on its file. In that

*(Election Petn. No. 6 of 1969, D/- 13-10-1969 — Punj & Har.)

KN/KN/E922/70/GDR/T

1971 S.C./17 II G—5

petition the appellant unsuccessfully challenged the validity of the election of the respondent to the Punjab Legislative Assembly in the mid-term election held in 1969.

2. The appellant and the respondent contested the Gurdaspur Assembly seat in the mid-term election held in 1969. The appellant was the congress nominee and the respondent was the candidate of the Akali party. It is said that he had the support of the Jan Sangh. One other candidate who filed his nomination for that constituency had withdrawn from the contest. It is not necessary to refer to him. Polling took place on February 9, 1969 and the result of the election was declared on February 10, 1969. The appellant secured 20044 votes and the respondent 25501. Hence the respondent was declared elected.

3. The validity of the election of the respondent was challenged by the appellant on various grounds. The trial judge, as mentioned earlier, rejected the petition. In this Court the appellant pressed for our consideration only one of the several grounds urged by him in his petition, and that ground is that the respondent was guilty of a corrupt practice under S. 123 (3) of the Act inasmuch as he exhibited the "Holy Cross", the sacred symbol of the Christians in front of his office for a period of about 15 days prior to the election. The respondent denied this allegation.

4. In support of the allegation relating to the exhibition of the "Holy Cross", the appellant has relied on documentary as well as oral evidence. But before referring to those pieces of evidence, it is necessary to deal with one of the grievances of the appellant. The appellant summoned the Government of Punjab to produce certain reports received by it from the C.I.D. relating to certain agitations said to have been made during the election in connection with the exhibition of the "Holy Cross" in front of the respondent's office. The concerned reports were sent to the court under a sealed cover but the Home Secretary claimed privilege in respect of the same on the ground that these documents are unpublished records relating to the affairs of the State. The learned trial judge upheld that claim and hence those documents

could not be brought on record. It is contended on behalf of the appellant that the trial court erred in upholding the privilege claimed by the government. It does not appear that the appellant asked the trial judge to peruse the records before considering the question of privilege or hold any enquiry relating to the claim made. In this Court no application has been made to receive any additional evidence; nor those reports have been summoned. Those reports are not before us. Hence we cannot go into the question whether privilege was properly claimed by the government. Now that we do not have those reports before us, we are unable to differ from the conclusion reached by the trial judge that they are documents relating to the affairs of the State.

5. Before we proceed to examine the oral and documentary evidence, it is necessary to refer to the pleadings relating to the charge of corrupt practice with which we are concerned in this case. The relevant averments on this point are found in paragraph 8 (c) of the election petition. Those averments read:

"That the respondent, his agents and other persons with the consent of the respondent have committed a corrupt practice within the meaning of S. 123 (3) of the Act by . . . use of the Holy Cross which is a sacred religious symbol of the Christians in order to further the prospects of the respondent's election. The details of the aforesaid corrupt practice are as under. . . .

(c) That the central Election Office of the respondent was situated in a central place Main Bazar, Gurdaspur, where he boldly exhibited the Holy Cross the sacred religious symbol of the Christians in front of his office which was visible to every passer-by. This was done by the respondent and his agents and other persons with his consent with a clear intention of using the religious symbol in order to further his election prospects."

6. In his written statement the respondent denied that he exhibited the "Holy Cross" in front of his office.

7. Documents relied on by the appellant in support of the charge are Annexures A, B, C, D, E and F. These are either correspondence that passed

between the appellant and the Salvation Army authorities or representations made by some persons, to the Deputy Commissioner. In all these documents, the allegation made is that the respondent had installed a "Holy Cross" in front of his office. The allegations contained in the letters written by the appellant to the Salvation Army authorities as well as the representations made to the Deputy Commissioner are at best accusations. They do not by themselves prove the truth of the allegations made. The truth of those allegations have to be proved by examining persons who made those allegations.

8. In order to prove the corrupt practice in question, the appellant has examined several witnesses. Out of them P. W. 1, the Deputy Commissioner and P. W. 4, the C.I.D. Inspector have not given any useful evidence in support of the appellant's case. All that P. W. 1 has deposed is that when he was coming out of the Red Cross building after making arrangements for the counting of votes, somebody told him that "he would raise an issue about the religious symbol of the "Cross" having been used by the alleged supporters of the respondent in the course of his election campaign." He had also deposed to the fact that during the election various complaints as well as cross-complaints had been made to him and he had forwarded the same for necessary action either to the Superintendent of Police or to the Election Commissioner or his subordinates.

9. None of the witnesses examined on behalf of the appellant to support the charge spoke to the exhibition of the "Holy Cross" in front of respondent's office. Not one of them had spoken to the fact that the "Holy Cross" was exhibited in front of the respondent's office. On the other hand they spoke to the flying of three or four flags in front of the office of the respondent. According to them on one of those flags a "Cross" had been painted. Even as regards the alleged flag the evidence is not consistent. According to the correspondent of the Tribune (P. W. 12), two Christians had gone on hunger strike because of the flying of the Masihi Dal flag. Hence he sent the following news item to the Tribune:

"Hunger Strike: Two Christian workers, Mr. B. M. Samuel and Mr. Chiman Lal started a fast outside the Town Hall on Tuesday, in protest against the flying of the Masihi Dal flag on the election office of the Akali candidate".

10. This news item was published on the 6th February, 1969.

11. In his evidence he deposed that the hunger strike was in connection with the flying of the Masihi Dal flag on the election office of the Akali candidate. He further deposed that after interviewing the hunger strikers, he went to the respondent's election office and saw that the "symbol in question was being displayed there." In the course of his cross-examination, this witness first tried to deny that the Masihi Dal is a political party. But later he stated that "Masihi Dal may be a political party in the sense that they may be fighting for their own rights". F.W. 8, Chimanlal, one of the persons said to have gone on hunger strike admitted in his cross-examination that "the Christian political party is known as Masihi Dal in Punjab in the same way as Jan Sangh and Akali parties are known." He also admitted that Masihi Dal has its own flag.

12. From what is stated above, it is seen that in the election petition, the allegation was that the respondent exhibited in front of his election office the "Holy Cross", while adducing evidence that case was given up and in its place a new version was introduced namely that a flag bearing "Cross" was flown in front of the office of the respondent. Even this version was not consistently adhered to. According to P. W. 12, the flag complained of is the flag of the Masihi Dal. Masihi Dal is proved to be a political organization. These contradictory versions are alone sufficient to reject the case of the appellant.

13. The oral evidence adduced on behalf of the appellant in support of the charge was disbelieved by the trial judge. After examining the evidence of the various witnesses examined in support of the charge, the court came to the conclusion that no reliance can be placed on their testimony. This finding of the trial court is a finding of

fact. Unless we are satisfied that this finding is basically wrong, this Court following its usual practice will not reappreciate the evidence on record. But that apart, we are not satisfied that the witnesses examined on behalf of the appellant in support of the charge are reliable witnesses. The appellant himself who spoke in support of the charge is an interested witness. As seen earlier the evidence given by him does not accord with the plea taken by him in his election petition. The other witnesses examined in support of the charge are P. Ws. 2, 3, 5, 6, 7, 8, 12 and 15. So far as P. W. 2 is concerned, his antecedents are such that his evidence cannot inspire confidence. He was prosecuted for an offence under S. 467/193, I.P.C. for identifying a wrong person for the purpose of cashing a cheque. According to his own admission he procured his acquittal by paying the complainant a sum of Rs. 1,000/-. So far as P.W. 3 is concerned he admits that he was working for the appellant during the election. From the admissions taken from him during his cross-examination, it is clear that he was a strong supporter of the appellant. Similarly it is clear from the evidence of P.W. 5 that he and his father were the supporters of the appellant. P.Ws. 6 and 3 are close associates. Further P.W. 6 was the polling agent of the appellant. P. Ws. 7 and 8 are said to be the persons who went on hunger strike as a protest against the flying of the flag bearing a "Cross". A comparison of the evidence of these two witnesses will show that they are wholly untruthful witnesses. According to P. W. 7, after holding a meeting of the Christians they went in a procession to the Deputy Commissioner and presented a written complaint to him; the Deputy Commissioner asked them to meet him next morning and when they met him on the next morning, he told them that he had forwarded that petition to the Superintendent of Police. No such case was suggested to the Deputy Commissioner. We have earlier referred to the evidence of the Deputy Commissioner. As regards the presentation of the written complaint to the Deputy Commissioner, the version given by P.W. 8 materially differs from that given by P.W. 7. He deposed as follows:

"At the meeting resolution was passed to represent the matter to the Deputy Commissioner and observe fast unto death. We went to the Deputy Commissioner and gave him a written complaint. He directed us to go to the Superintendent of Police there and then."

14. According to this witness they immediately went to the Superintendent of Police. We are inclined to accept the suggestion made on behalf of the respondent that P.Ws. 7 and 8 were the supporters of the appellant in the election.

15. We have already referred to the evidence of P.W. 12. So far as P.W. 15 is concerned he also appears to be interested in the appellant.

16. Taking into consideration the departure from the pleadings in the case, the various conflicting versions put forward in the case and the interested nature of the testimony adduced in support of the charge, we are not surprised that the learned trial judge was unable to place reliance on the evidence referred to earlier. In this view it is not necessary for us to consider whether the flag of Masihi Dal can be considered as a religious symbol.

17. For the reasons mentioned above this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 260
(V 58 C 64)

(From: Allahabad)*

S. M. SIKRI, K. S. HEGDE AND I. D. DUA, JJ.

Husaina, Appellant v. The State of U. P., Respondent.

Criminal Appeal No. 8 of 1970, D/- 12-10-1970.

Constitution of India, Art. 136 — Appeal in Supreme Court by special leave — Murder case — Interference with sentence — That accused was a young man of 25 at the time of incident is not sufficient reason for the Supreme Court to interfere with sentence passed by sessions judge and

*(Criminal Appeal No. 1656 of 1968, D/- 31-7-1969 — All.)

KN/KN/E818/70/MKS/T

confirmed by the High Court.

(Para 16)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 1313 (V 55)=

(1969) 1 SCR 32, Bashira v.

State of U. P. 14

Mr. S. S. Khanduja, Advocate, amicus curiae, for Appellant; Mr. O. P. Rana, Advocate, for Respondent.

Following Judgment of the Court was delivered by

SIKRI, J.: This appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad accepting the reference made by the learned Sessions Judge and dismissing the appeal of Husaina. There was a difference of opinion between Khare, J. and Hari Swarup, J., and the matter was referred to the third Judge, Gyanendra Kumar, J., who agreed with the opinion of Khare, J., and held that the offence of murder had been brought home to Husaina.

2. The prosecution case in brief is that Smt. Chhoti and her son Khalil lived in village Sirai. A wall divided their house from the house of Husaina, appellant before us. This wall had fallen down and Smt. Chhoti and Khalil wanted to reconstruct the wall in the morning of December 15, 1970, but Husaina took objection to this reconstruction and there was an altercation between them. Smt. Chhoti, Khalil and Husaina are khumhars. Mst. Chhoti and Khalil then proceeded to the village pond for digging earth. At about 12.30 p.m. Husaina also reached the pond and seeing Smt. Chhoti and Khalil digging the earth told them that they would not be permitted to build the wall. Husaina then gave blows on the head of Chhoti with his spade. Khalil got up and tried to save his mother but he was also struck by Husaina with the spade. Some persons chased Husaina but could not catch him. Smt. Chhoti died at the spot. Khalil who had become unconscious due to those injuries was taken to the police station on a tonga by Allahdiya, P.W. 8, and thereafter admitted into the hospital. The First Information Report was lodged by Allahdiya, P.W. 8, at 1.30 p.m. at the police station Main-ather, which was about 5 miles from the place of occurrence, and the investigation followed. The accused was

committed to Sessions. The appellant's defence was that he was not present in the village Sirsi on the date of occurrence and had been implicated in the crime due to enmity.

3. The post-mortem examination of Smt. Chhoti showed that she had sustained the following ante-mortem injuries:

1. Incised wound 2" x 1/4" x bone deep cutting the bone underneath on right side back of head.

2. Incised wound 1 1/2" x 1/2" x muscle deep on right arm outer side in middle.

3. Incised wound 2" x 1" x bone deep. Right scapula cut underneath on right side back.

4. Incised wound 1/2 x 1/2" x bone deep on the top of left index fingers. Dr. A. P. Singh, P.W. 3, who performed the post-mortem examination on the body of Mst. Chhoti deposed that the following injuries were found on internal examination:

"Right occipital bone was found cut under injury No. 1.

There was contusion over the membranes of the brain under injury No. 1. There was clotted blood in an area of 1 1/2" x 1" under injury No. 1. The bone of the right shoulder was found cut under injury No. 3." He opined that "cutting of bone shows that the weapon was very heavy." He was recalled by the High Court and stated before it as follows:

"The spade, Ex. 1, which is alleged to be the weapon of attack is now being shown to me. All the four external injuries could have been caused with the sharp side of this weapon. These injuries could not have been caused with the remaining three sides of this weapon."

He did not agree with the suggestion that with the sharp edge of the weapon, which is the lower edge of the weapon, no incised wound could be caused.

4. Dr. Singh had also performed post-mortem on the dead body of Khalil. He noticed the following ante-mortem injuries:

1. Healing wound, 2" x 1/2", on the left side of the head, back part bone was visible.

2. Healing wound 2" x 1/4", at the back of neck.

3. Swelling 1" x 1/2", on the right side of head 2 1/2" above the ear.

4. Healed abrasion, at the back of right little finger.

On internal examination he found the following things:

"Temporal and parietal bones on the right side were found fractured under injury No. 3. There was clotted blood in an area of 2" x 2" over the membranes of the brain under injury No. 3. The remaining organs had become pale."

5. It was urged that the evidence of Dr. Singh showed that Smt. Chhoti and Khalil could not have been injured by one weapon alone. The injuries on Smt. Chhoti were clearly incised and caused by a sharp-edged weapon while the injuries on Khalil were caused by a blunt weapon.

6. Dr. N. R. Bhatia, P. W. 1 had examined the injuries of Khalil when he was brought to the hospital. Dr. Bhatia was re-examined in the High Court. He stated:

"I have examined the spade (Ex. 1) today. Injuries Nos. 1 and 2 could be caused with this weapon from any of the four sides of this weapon. The spade (Ex. 1) as it is can be described as a blunt weapon, because there are no fine edges on any of its sides. Injury No. 3 mentioned by me in my statement dated 19th July, 1968, could also be caused with the spade (Ex. 1). Injuries Nos. 4 and 5 could either be due to fall or by friction with the back side of the spade. Injuries Nos. 1 and 2 could be caused even if the front side of the spade was used."

In cross-examination he stated that injuries Nos. 1 and 2 could be caused also with the back side of the spade.

7. In the High Court Gyanendra Kumar, J., carried out some experiments on 8 fold blotting paper to see the impression the spade made. The learned Judge observed:

"The experiment made by me on the 8 fold blotting paper also demonstrated that stroke made on it from the sharp edge of the blade (Ex. 1) created a clean cut incised. Therefore, relying on the testimony of the eye-witnesses Allah Dia (P. W. 8), the other Allah Dia (P. W. 10), the medical opinion of Dr. A. P. Singh, the report of the Chemical Examiner and Serologists and the experiment performed by me in the presence of the learned counsel for the parties, I am convinced that all the

incised wounds of Smt. Chhoti were caused by the sharp edge of the iron blade of the spade (Ex. 1) used by the appellant."

It seems to us that if the witnesses are believed, the so-called inconsistency in the opinion of the two doctors loses much of its force, specially as the appellant could have used the blunt side of the spade. The learned counsel for the appellant has not been able to show any convincing reason why the eye-witnesses should not be believed. They all support the prosecution case, as set out in the beginning of the judgment.

8. It was urged that there was no reason for Allah Dia (P. W. 8) to be present there. We are unable to appreciate the contention. He was, after the death of the husband of Mst. Chhoti, looking after their land and he happened to be in the village at that time. In the morning when Mst. Chhoti went to the pond it was natural that he would also go there. The fact that the F.I.R. was lodged by him at 1.30 p.m. on December 15, 1966, at Police Station Mainther, 5 miles from Sirsi, also shows that he was present at Sirsi at the time of the occurrence.

9. It was urged by the learned counsel that Budhan, son of Allah Dia, P. W. 8, was also alleged to be present there but was not produced as a witness, but it is not necessary that every person who was present should be produced, especially when he was the son of Allah Dia, P. W. 8.

10. The fact that P. W. 8, Allah Dia, was not injured does not weaken the prosecution case. He was an old man of 70 years and it may be that he thought it fruitless to intervene when he was not armed.

11. There is nothing against Rahim Baksh, P. W. 9, who was a khumhar by profession. He was digging earth some 35 paces in front of Smt. Chhoti.

12. The third eye-witness, P. W. 10, Allah Dia alias Gurra, was again a khumhar and his presence at the pond at that time was quite probable. It has not been established that he had any grievance or ill-will against the appellant.

13. We agree with the conclusion arrived at by Khare, J., and Gyanendra Kumar, J.

14. The learned counsel, relying on *Bashira v. State of U. P.*

(1969) 1 SCE 32 = (AIR 1968 SC 1313), urged that the appellant was not given reasonable opportunity of defending himself because the amicus curiae counsel was appointed only on July 19, 1968, i.e., on the day when the trial commenced. This point was, although not raised before the High Court when the case was heard by Khare, J., and Hari Swarup, J., was raised before Gyanendra Kumar, J., and the facts relating to this point, as found by Gyanendra Kumar, J., are as follows: On July 19, 1968, the State Counsel only opened the case and examined two formal witnesses, viz., P.W. 1, Dr. N. R. Bhatia, who had examined the injuries of Khalil, and P.W. 2, Prayag Singh, Head Constable, who had recorded the F.I.R. Both the witnesses were duly cross-examined by the counsel for the appellant. On July 20, 1968, five formal witnesses were examined. Dr. A. P. Singh, P. W. 3, who had conducted autopsy on the dead bodies of Smt. Chhoti and her son Khalil; Dr. K. P. Gupta, P. W. 4; P. W. 5, Radha Raman, Head Clerk in the office of the Civil Surgeon, Moradabad; and Constable Akbar Ali, P. W. 6, and P. W. 7, Harnam Singh. The next hearing of the case took place on July 22, 1968, when the three eye-witnesses, among other witnesses, were examined. No application was made by the counsel before the learned Sessions Judge asking for time to prepare the case and no application was made to recall any witness for further cross-examination. The appeal was filed in the High Court on July 30, 1968, but no application was made to recall any witnesses for cross-examination. It was the Judges hearing the appeal who considered it necessary to recall the Doctors to clarify their statements and this evidence was recorded on March 17, 1969.

15. We agree with Gyanendra Kumar, J., that in the circumstances narrated above it cannot be said that the counsel was handicapped for want of time and opportunity to prepare the case. It seems to us that Bashira's case has no application to the facts of this case.

16. The learned counsel finally urged that the capital sentence awarded was too severe in the circumstances of the case, and the only fact

relied on is that the appellant was aged only 25 years at the time of the incident. This is no reason for us, in an appeal by special leave, to interfere with the sentence passed by the learned Sessions Judge and confirmed by the High Court.

17. In the result the appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 263
(V 58 C 65)

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Chaju Ram, Petitioner v. The State of Jammu & Kashmir, Respondent.

Writ Petn. No. 32 of 1970, D/- 3-3-1970.

(A) Public Safety — J. & K. Preventive Detention Act (13 of 1964), S. 8 — Right to make representation — Deprivation of — Illiterate detenu — Grounds of detention in English — Necessity to explain grounds in the language detenu understands — (Constitution of India, Article 22 (5)).

It is absolutely necessary that when the Court is dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of making a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the detenu to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. (Para 9)

(B) Public Safety — J. & K. Preventive Detention Act (13 of 1964), Section 8 — Grounds of detention vague — (Constitution of India, Article 22 (5)).

Where the grounds of detention supplied to a detenu detained under Jammu and Kashmir Preventive Detention Act, 1964, charged him with having conspired with some leaders of Demo-

cratic Conference and having incited landless people of RSpura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm and to have persuaded them to resist violently any attempt to evict them, but no details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time when such Conference took place, were mentioned it would be impossible for anybody to make a representation against such grounds, and they must be held to be vague. (Para 10)

Mr. H. K. Puri, amicus curiae (The Petitioner was also present), for Petitioner; Mr. R. N. Sachthey, Advocate, for Respondent.

The Judgment of the Court was delivered by

HIDAYATULLAH, C. J.:— The petitioner Chaju Ram was detained under the orders of the District Magistrate, Jammu passed under Section 3 (2) read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964 on March 30, 1969. The order was served on him the same day and on the original order, we find an endorsement by the Station House Officer to the effect that in compliance with the District Magistrate's order, he arrested Chaju at 6-30 p.m. and that the contents of the order were explained to him in Urdu by reading over the same to him in token of which his thumb impression was obtained on the face of the order. Beneath this endorsement, there is a thumb impression although it is not stated there whose thumb impression it is. In any event, this was in compliance with the direction given in the order itself that notice of the order should be given to Sh. Chaju by reading over the same to him.

2. As required by Section 8 of the Act, grounds of the order of detention had to be disclosed to Chaju. It is claimed that this was done on April 6, 1969 and that order has been produced before us. The grounds stated as follows:

"1. That Shri Chaju s/o Gura is (sic) conspiracy with some other leaders of Democratic Conference incited landless people of RSpura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm, with the full knowledge that such action on

their part was likely to lead to disturbances in a sensitive border area.

2. As a result of his activities some area of the Nandpur Farm was occupied by landless people between 18th March, 1968 to 25th February, 1969 who also constructed 'Jhugies' on it. Chaju told them to persist in their illegal activities and urged them to resist violently any attempt to evict them. He told them the State Government would agree to allot this land to them only if a situation were created in which two or three persons were killed by Police firing.

3. Squatters were evicted on 26th March, 1968 some of whom offered resistance. Even after this, Chaju continued his campaign of asking people to forcibly occupy vacant Government land on a massive scale with the avowed objective of repeating a "Naxalbari" in our State".

We shall come to these grounds later. Chaju did not make a representation against his detention and on August 29, 1969, the Advisory Board held that the District Magistrate was fully justified and that there was sufficient cause for his detention.

3. Chaju made a petition under Article 32 of the Constitution for his release by a writ of Habeas Corpus in this Court. Rule nisi on this petition was issued on December 2, 1969. The petition was made from jail and contained not much material except to say that he had been illegally detained for one year and was languishing in jail. In reply to the rule nisi, an affidavit was filed by the Additional Secretary to the Government of Jammu and Kashmir Home Department. However, Chaju withdrew that petition with permission to file another petition and he has filed a second petition on January 20, 1970. In this petition he has stated in paras 3, 4 and 5 that he was given some papers five days after Baisakhi (which fell on April 13, 1969) and being an illiterate person, he could not read the contents of the papers given. He also alleged that he was not explained the grounds of his detention and therefore he was deprived of his right of making a representation under the statute. He also alleged that the grounds on which his detention had been ordered were vague and were

not sufficient for him to make a representation if he cared.

4. At the hearing we confined the case only to these two points, namely, whether Chaju was served the grounds of detention on April 6, 1969 as claimed in the reply affidavit and whether the contents of the grounds were explained to him in a language understood by him, and secondly whether the grounds were sufficiently precise and detailed for Chaju to make a proper representation as he was entitled to do under the Preventive Detention Act.

5. In regard to the first question, there is an affidavit sworn to by the Under-Secretary to the Government filed in answer to the second petition made in this Court. It is stated in that affidavit that the grounds were duly served upon the detenu, and in token of his having understood the same, he affixed his thumb impression thereon. In answer to the allegation that the grounds were served on him five days after Baisakhi, the affidavit does not seek to controvert it but only says that the detention order was duly read over to the detenu and the contents of the order explained to him in the language he understood. Therefore the claim of the Government is that on both the occasions, that is to say, when the detention order was served on him and also when the grounds were handed over to him, the contents of the documents were read over to him and translated to him in the language he understood (Urdu) and therefore there was compliance with the provisions of the law.

6. Now, if we accept the affidavit of the Government, it is obvious that the affidavit of the detenu must be false. Contrariwise, if we accept the affidavit of the detenu, we must reject the material placed before us on behalf of the Government. In view of the contradictory nature of these two affidavits, we went into the matter very closely and satisfied ourselves which of the two affidavits is acceptable, giving all the benefit of doubt to the detenu. To begin with, the order of detention had an endorsement on it that the order should be communicated to Chaju by reading over the same to him. This was probably done because we find an endorsement of the Station House Offi-

cer that he had read it over to him in Urdu. The thumb impression on this document does not state that it is the thumb impression of Chaju, but as he has not raised a controversy about it, we accept it as his.

7. In contrast to this order, the grounds of detention did not have an endorsement that the grounds should be explained to Chaju in the language he understood. In the affidavit in answer to the first petition, the grounds were filed but there was no endorsement on the copy of the grounds showing that it had been so read to him in Urdu and that he was explained the contents. Mr. Sachthey, however, brought to our notice the original file in which the copy of the grounds which was served upon the detenu has an endorsement in Urdu that they had been read over and fully explained to him in Urdu. There is a thumb impression and against the thumb impression is noted that it is that of Chaju. The date is April 6, 1969.

8. The question is whether in view of this endorsement we must hold that Chaju was properly explained the grounds of detention in Urdu which he understands. In our judgment, we cannot accept these documents at their face value. To begin with, the three endorsements on the copy, that is to say, (a) that the document was read over to him in Urdu, (b) the thumb impression and (c) the note that it is the thumb impression of Chaju, are in two different inks if not three. This raised a suspicion, that these might have been written later around the thumb impression taken from Chaju as was done when the order of detention was served on him. It may be recalled that at that time also there was an endorsement in English that it had been read over to him, but nothing had been written around the thumb impression of Chaju—whether in Urdu or otherwise to show that the thumb impression was that of Chaju. We looked carefully at the affidavit filed in this Court which is a cyclostyled document. We find in para 6 a correction in a very significant place. This correction has been made by typing certain words in the place between two lines with an oblique showing that it is an omission. The words beneath those added words

have been erased although some of them in part still appear. Now it is significant that the words which have been added are as follows:

“understood the same he”; and the para now reads as follows:

“Referring to para 7 of the petition, I say that the grounds were duly served upon the detenu and in token of having understood the same he affixed his thumb impression thereon.” (underlining by us).

The underlined words are the words which have been added in the place between the two lines. It appears that what has been erased must be some other words appropriate to what preceded and what followed. In our opinion the paragraph must have read:

“Referring to para 7 of the petition I say that the grounds were duly served upon the detenu and in token of having received the same he affixed his thumb impression thereon.”

The underlined words were erased and others substituted. There would be no occasion to erase one set of writing and write another if the words were there.

9. Of course Mr. Sachthey ingeniously suggests that this may be a case of erroneous typing necessitating the correction; but this correction comes at a significant spot after the detenu has sworn an affidavit that he was not explained the grounds of the detention in the language which he understood, and further the original document which is produced does not seem to bear authenticity because of the changes of ink. In these circumstances and regard being had to the fact that on the previous occasion in the affidavit there was no mention of having read over the grounds to him in the language he understood, we are constrained to hold that we should not go by the affidavit of the Under-Secretary, but in preference accept the affidavit of the detenu. The detenu is an illiterate person and it is absolutely necessary that when we are dealing with a detenu who cannot read or understand English language or any language at all that the grounds of detention should be explained to him as early as possible in the language he understands so that he can avail himself of the statutory right of mak-

ing a representation. To hand over to him the document written in English and to obtain his thumb impression on it in token of his having received the same does not comply with the requirements of the law which gives a very valuable right to the detenu to make a representation which right is frustrated by handing over to him the grounds of detention in an alien language. We are therefore compelled to hold in this case that the requirement of explaining the grounds to the detenu in his own language was not complied with.

10. Even as to the grounds, we have something to say. The grounds charge him with having conspired with some leaders of Democratic Conference and having incited landless people of RSpura Tehsil to forcibly occupy the land comprised in Nandpur Mechanised Farm and to have persuaded them to resist violently any attempt to evict them. No details of the leaders of the Conference or of the persons incited or the dates on which he conspired or incited the squatters or the time when such conference took place, are mentioned. It would be impossible for anybody to make a representation against such grounds. These grounds, on the authorities of this Court, too numerous to be cited here, must be held to be vague. Therefore on both the twin grounds, namely, that he was deprived of his right to make a representation and also because the grounds in themselves were very vague, we must hold that there was no compliance with the law as laid down in the Jammu and Kashmir Preventive Detention Act. The result, therefore, is that the detention must be declared to be unlawful and Chaju must be declared to be entitled to his liberty. He is ordered to be released. The detenu was questioned by us and he expressed a desire that he may not be released in Delhi, because he has no means of going back. He asked to be released in Jammu. We direct therefore that he shall be taken back to the place where he was in detention in Jammu and released within the shortest possible time.

Petition allowed.

**AIR 1971 SUPREME COURT 266
(V 58 C 66)**

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

Abdul Rehman Bhadarwahi, Petitioner v. The State of Jammu and Kashmir, Respondent.

Writ Petn. No. 310 of 1970, D/- 16-10-1970.

Public Safety — Jammu and Kashmir Preventive Detention Act (13 of 1964), Section 3 — Order of detention under — Detenu knowing English — Order of detention not explained in vernacular — Order not illegal.
AIR 1971 SC 263, Relied on. (Para 7)

Cases Referred: Chronological Paras
(1971) AIR 1971 SC 263 (V 58) =

Writ. Petn. No. 32 of 1970,

D/- 3-3-1970, Chaju Ram v.

State of Jammu and Kashmir

7

Mr. S. K. Gambhir, Advocate, amicus curiae, (Petitioner was also Produced in Court), for Petitioner; Mr. R. N. Sachthey, Advocate, for Respondent.

The Judgment of the Court was delivered by

SIKRI, J.:— The petitioner filed a petition under Article 32 of the Constitution alleging that he had been re-arrested after serving four years' of detention in different jails of the State under the Preventive Detention Act and the Defence of India Rules and that he was arrested on June 14, 1970 and was kept in Police Station Koti Bagh till June 30, 1970 without any warrants. He prayed that the Superintendent of Jails, Srinagar, be directed to produce him before this Court for pleading his case.

2. Upon perusing the petition this Court ordered the issue of rule nisi and directed a counsel to be assigned as amicus curiae.

3. The Deputy Secretary to Government of Jammu and Kashmir, Home Department, has filed on affidavit in reply on behalf of the State. In this affidavit it is stated that the District Magistrate, Srinagar, ordered vide order No. PDA/DMS/85/70 dated June 25, 1970, that the petitioner be detained under the Jammu and Kashmir Preventive Detention Act, 1964 with a view to preventing him from acting in any manner prejudicial to

security of the State. This order of detention was executed on June 30, 1970 by Shri Urgan Durjay, A. S. I., Police Station Kotibag, Srinagar. It is further stated that the petitioner was informed of the District Magistrate's order dated June 25, 1970 that it was against the public interest to disclose to him the grounds on which detention order was made. It is also stated that "thereafter the Government after placing the case before the Chief Minister in charge, Home Department, approved the said detention vide No. ISD-849 of 1970 dated 16-7-1970." There was no specific denial of the allegation in the petition that the petitioner was kept in Police Station Koti Bagh till June 30, 1970 without any warrants.

4. The petitioner has filed a rejoinder affidavit denying that he was arrested on June 30, 1970. He further alleged that the order of detention dated June 25, 1970, passed by the District Magistrate, was not read over and explained to him. He stated that the order was just shown to him on July 3, 1970, and he was not even furnished a copy of the said order, and further that he was never informed that the order dated June 25, 1970 was approved by the Home Department, and the order of Government, dated July 16, 1970, was not supplied to him.

5. The learned counsel contended, first, that the petitioner's detention from June 14 to June 30, 1970 was illegal. Assuming the facts stated by the petitioner to be correct and assuming that his detention was illegal this does not entitle us to hold that the present detention by virtue of the detention order passed on June 25, 1970, is illegal.

6. The learned counsel then urged that the order of the District Magistrate that the petitioner be informed that it was against public interest to disclose the grounds of detention to him was never communicated to him. We may mention that in the order it is stated that the petitioner be informed that it is against the public interest to disclose to him the grounds on which the detention order was made, and the order was forwarded to the Superintendent of Jails, Srinagar, for information of the con-

cerned. We have seen the order and we find that this order has been signed by the petitioner. This shows that the order must have been communicated to him.

7. The last point raised by the learned counsel was that it was necessary that this order should have been explained to the petitioner in vernacular even though he knew English. In this connection the learned counsel relied on the judgment of this Court in Chaju Ram v. The State of Jammu and Kashmir, W. P. No. 32 of 1970, D/- 3-3-1970 = (AIR 1971 SC 263). There is nothing in that judgment to warrant the argument that even if a detenu knows English it is necessary that the order be explained to him in vernacular. We may mention that the original petition which was filed in this Court is in English and signed by the petitioner in English.

8. In the result the petition fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 267 (V 58 C 67)

(From: Andhra Pradesh)*

J. C. SHAH AND A. N. GROVER, JJ.
Boddepalli Rajagopala Rao, Appellant v. N. G. Ranga, Respondent.

Civil Appeal No. 1436 of 1968, D/- 16-10-1970.

(A) Representation of the People Act (1951), Sections 123, 116-A — Charge of corrupt practice at election — Proof — Court of first instance refusing to place reliance upon testimony of appellant's witnesses — Appellate Court will not ordinarily re-appreciate the evidence.

A charge of corrupt practice under the Representation of the People Act must be established by clear and cogent evidence. When the Court of First Instance on a consideration of the evidence of the witnesses has refused to place any reliance upon their testimony the burden lying upon the party setting up a plea of corrupt practice becomes no lighter in appeal. The charge cannot be held establish-

*(Election Petn. No. 20 of 1967, D/- 28-3-1968 — Andh. Pra.)

JN/KN/F85/70/DHZ/G

ed merely upon suspicion, or preponderance of probabilities. Unless the appellant establishes that the appreciation of evidence was vitiated by gross misreading or misconception of the evidence or because of failure to consider important pieces of evidence which had a bearing on the charge or because of serious irregularities in procedure which amount to a denial of a fair trial the appellate Court will not proceed to reappreciate the evidence on which the findings are recorded by the Court of First Instance on the credibility of witnesses.

(Para 12)

(B) Representation of the People Act (1951), Section 123 (4) — Corrupt practice — Publication of statement — Consent of candidate or his agent.

To constitute corrupt practice under Section 123 (4) one of the conditions required to be fulfilled is that the statement was published by the candidate or his election agent or by any other person with the consent of a candidate or his election agent. If the publication is by a person other than the candidate or his election agent, the consent of the candidate or his election agent must be established before the charge is held proved. Proof of express consent is not necessary; inference of such consent may be raised from the circumstances. Prior knowledge of the contents and the knowledge that it is likely to be published may raise an inference of consent, if the candidate deliberately keeps quiet and does not stop the publication if it be within his power. Where the offending matter has already been published and thereafter it comes to the knowledge of the candidate at the election and he does not take steps to repudiate it, the consent may not necessarily be inferred unless the candidate or his election agent permits or aids in publication. In the matter of publication of statements which are false and are reasonably calculated to prejudice the prospects of the candidate's election, proof of consent not infrequently assumes great importance, for even if it be proved that the publication has been made, unless it is shown that it was with the consent of the candidate or his election agent, the corrupt practice may not be held to be committed so as to invalidate the election. (Para 16)

(C) Representation of the People Act (1951), Section 123 (6) — Corrupt practice — Proof — General allegation not sufficient proof — Expenditure by party of successful candidate.

It is not sufficient merely to allege that large sums of money were spent for the purpose of the election. Expenditure, if any, incurred by the party which sponsored the candidature of a candidate cannot be taken into account for the purpose of determining whether the corrupt practice within the meaning of Section 123 (7) was committed by the candidate. In the absence of any evidence to show that any specific sums of money were expended on certain items by the successful candidate or his election agent, on conjecture can be permitted to defeat the candidate. AIR 1954 SC 749 and AIR 1970 SC 110 and C. A. No. 1094 of 1969, D/- 10-9-1970 (SC), Rel. on. (Paras 32, 33, 35)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 110 (V 57) =

1970-1 SCR 530, Ram Dayal v. Brij Raj Singh 33

(1970) C. A. No. 1094 of 1969, D/- 10-9-1970 (SC), Meghraj Pato-dia v. R. K. Birla 33

(1954) AIR 1954 SC 749 (V 41) =
1955-1 SCR 671, Rananjaya Singh v. Baij Nath Singh 33

Mr. B. R. L. Iyengar, Sr. Advocate (Mr. A. V. V. Nair, Advocate, with him), for Appellant; Mr. A. S. R. Chari, Sr. Advocate, (M/s. P. Lingayya Choudhary, A. Pandurangarao, K. Rajendra Choudhuri, G. N. Rao & K. Nagirathnam, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

SHAH, J.:— At a bye-election held in April 1967 to elect a member of the Lok Sabha from the Srikakulam parliamentary constituency there were two contesting candidates—Boddepalli Rajagopala Rao—hereinafter called “the appellant”—and N. G. Ranga—hereinafter called “the respondent”. The respondent was declared elected. The appellant filed an application in the High Court of Andhra Pradesh to set aside the election of the respondent on the ground that the respondent had committed diverse corrupt practices described in Section 123 (1) (A) (a), (b), (5) and (6) of the Representation of the People Act,

1951. The respondent denied the allegations made in the petition. He also submitted that the allegations were vague and indefinite and some of those allegations did not constitute any corrupt practice within the meaning of the Representation of the People Act, 1951. The appellant amended the petition and submitted particulars of certain corrupt practices set out in the original petition. The appellant then filed his additional written statement. The High Court held on a detailed consideration of the evidence that the corrupt practices alleged by the appellant in the petition were not proved, and dismissed the petition. The appellant has appealed to this Court under S. 116A of the Representation of the People Act, 1951.

2. Counsel for the appellant restricted his argument to the following charges set out in the petition:

(1) A charge of bribery in respect of an amount of Rs. 4,000/- paid to a candidate in the election as gratification for not standing for election, Rs. 10,000/- for constructing a high school building in the village Kothakotha with the object of inducing the voters in the village and three other contiguous polling stations to vote for him; and Rs. 1,000/- paid for completing the excavation of a well in consideration of promise of votes for the respondent. Thereby corrupt practices of bribery within the meaning of S. 123 (A) & (IB) were committed;

(2) Providing on the day of polling a number of motor-vehicles for the free transport of voters to the polling stations, and especially motor-jeep No. APK-9486, motor-lorry No. APK-9250, motor-lorry No. APG-3511 and motor-bus No. APS-1315. Thereby a corrupt practice under S. 123 (E) was committed;

(3) Causing the printing and publication of a leaf-let containing false and defamatory statements in relation to the personal character of the appellant. Copies of the leaflet were distributed at several meetings held by the Swatantra Party at Srikalasulam and other places. The respondent and his election agent also exhorted with the object of tarnishing the image of the appellant and lowering him in the estimation of the voters, the voters at those meetings not to vote for the appellant who it was alleged had mis-

appropriated public funds. Thereby the respondent committed a corrupt practice under S. 123 (4) of the Representation of the People Act.

(4) That the account of the expenditure returned by the respondent did not disclose many items of expenditure which were incurred in connection with the election. The respondent had expended a sum exceeding Rupees 3 lakhs, and the expenditure returned was a gross under estimate of the expenses incurred by the respondent in connection with his election. Thereby he committed a corrupt practice under S. 123 (6) read with S. 77 of the Representation of the People Act, 1951.

In respect of the charge of bribery there were three heads — (i) that the respondent and his election agent G. Latchanna induced one Suvani Sanyasi Apparao not to stand as a candidate at the election by paying him Rs. 4,000/- as gratification. According to the appellant Suvani Sanyasi Apparao who was defeated in the contest for a seat in the Legislative Assembly of Andhra Pradesh in the general elections held in 1962 and February, 1967, intended to contest for the Lok Sabha seat in the bye-election and was canvassing support before the appointed date for filing nominations, but the respondent and his election agent at a meeting on March 29, 1967 in the travellers' bungalow at Amadalvalasa dissuaded Suvani Sanyasi Apparao from contesting the election in consideration of payment of Rs. 4,000/-. This was denied by the respondent. In support of his case the appellant examined Suvani Sanyasi Apparao P. W. 24 and B. Suryanarayana P. W. 25. He relied also upon two documents Exts. P-41 and P-83. In rebuttal the respondent relied upon his own testimony and of his election agent Latchanna. Suvani Sanyasi Apparao was also examined as a witness R. W. 2. The respondent examined a number of other witnesses K. Chalapatirao Patnaik R. W. 1, Bendi Appalla Suri R. W. 3 Dola Jagannatha Rao, R. W. 6, Sylada Pyditalli Naidu R. W. 9, B. Achuta Raju R. W. 10, B. Narayana Swamy R. W. 15, Kolanganti Sathi Raju R. W. 25 and Cokina Chandra Rao R. W. 26 and relied upon certain documents. The two witnesses examined on behalf of the appellant deposed to the circumstances leading

to their presence at Amadalavalasa travellers' bungalow and payment of Rs. 4,000/- to Suvvari Sanyasi Apparao by Latchanna after the respondent and Latchhana had requested him not to file the nomination paper and to help the respondent in the election. The learned Trial Judge made a detailed analysis of the evidence and held that there were "contradictions and material discrepancies" in the statements of the witnesses for the appellant, and that the statements of the witnesses "did not inspire confidence". The burden of proving that the respondent and his election agent went to Amadalavalasa travellers' bungalow and persuaded Suvvari Sunyasi Apparao not to file his nomination paper in consideration of receiving a bribe lay upon the appellant. The witnesses examined on his behalf are, as found by the High Court, "highly interested and their testimony was rebutted by the witnesses named by him as the persons present at the time". Besides, the evidence of the witnesses as found by the High Court.

"was discrepant and did not accord with probabilities. Both the oral and documentary evidence falsified it. There were inherent improbabilities in the allegation itself."

No substantial argument was advanced before us to persuade us to take a different view.

3. (ii) In respect of the charge of bribery of Rs. 10,000/-, it was alleged in the petition that Latchhana, election agent of the respondent visited Kothakota at 8-00 p.m. on April 26, 1967 and paid Rs. 10,000/- to one D. Jaganatha Rao a resident of that village for constructing a "High School building" in that village. The payment, it was said, was made with the object of inducing the voters of Kothakota and three contiguous polling stations to vote for the respondent. This was denied by the respondent. In support of the allegation the appellant examined Dhavala Appalla Suri P. W. 7, Kusumanchi Adinarayana P. W. 8, Galala Ramulu P. W. 9 and Amballa Appalla Suri P. W. 11 and relied upon some documentary evidence also. In answer the respondent examined himself, his election agent and witnesses K. Chalapatirao Patnaik, R. W. 1, Dola Jagannatha Rao R. W. 6, D. Kondaih Choudari R. W. 8 and Alla Venkatarao

R. W. 16, and relied upon certain documentary evidence. On a consideration of the evidence the learned Judge observed that the entire oral evidence in support of the appellant's case was "highly discrepant and did not merit credence". The High Court observed that

"the petition did not refer to the place of incident, whether it was rice mill premises or outside the rice mill where the payment is alleged to have been made. While some of the witnesses said it was rice mill premises itself, others said that it was near the rice mill".

The High Court also observed that

"apart from the interested nature and the fact that their testimony was replete with material contradictions, there were inherent improbabilities in the story told, which made it highly difficult to accept the testimony."

After considering the testimony of the respondent and his witnesses the Court observed that the oral testimony on behalf of the appellant was inconsistent and did not make out a case of corrupt practice, that the probabilities of the case were strongly against the appellant's contention and there was no reason to disbelieve the testimony of the witnesses for the respondent. Even in respect of this charge of corrupt practice no argument seeking to persuade us to take a different view was advanced by counsel for the appellant.

4. (iii) In respect of the third head of the charge of bribery, it was alleged by the appellant in his petition that at Pathokota a village falling within the limits of Budarsingi polling station the respondent and his election agent convened an election meeting on April 23, 1967, that the villagers assembled at that meeting requested the respondent to donate a sum of Rupees 1,000/- to complete the excavation of a well in return for their votes, and that as directed by the respondent on the same day at about 5-00 P.M. Negineni Venkayya agent of the respondent paid Rupees 1,000/- to Biridhar and Judisti, members of the village Youth League in the presence of the Sarpanch and village elders. In support of this plea the appellant examined Khanda Judis-

htra Kumaro P. W. 17 and Chinchalam Satyanarayana P. W. 18. In rebuttal, the respondent examined himself, his election agent Latchanna, Kavuri Venkaiah R. W. 28, Giridhar Kumar R. W. 13 of village Patakota and two others of the same village Harinarayan Dolao R. W. 17 and Mansing Kumarao R. W. 18. On a consideration of the evidence, the Court held that the evidence on behalf of the appellant was "marred by improbabilities", and it could not be accepted. Again the evidence for the respondent in the view of the High Court was "sufficient to disprove the corrupt practice" alleged. The High Court held that the corrupt practice was accordingly not established even in respect of this head of charge. Counsel did not urge any substantial argument to persuade us to take a different view.

5. The charge of corrupt practice under S. 123 (5) arose out of the allegation that Latchanna procured a number of lorries, jeeps, motor cars, buses and other vehicles, for free transport of voters to the polling stations on the date of polling. It was averred in the petition that jeep No. APK-9486 was used for the free transport of voters between 10-00 A.M. and 2.00 P.M. on the polling day from Killoi village and Killoi Colony to the polling station at Konkadapatti. The jeep, it was said, carried the Swatantra Party Flag as well as the agent of the respondent one Dunkuru Mangale. This was witnessed by the Presiding Officer, among others, when a complaint was made by the agent of the appellant Hadia Naiko to the Presiding Officer. In support of this plea of corrupt practice the appellant examined three witnesses Papi Naidu, Presiding Officer, P. W. 10, Hadia Naiko P. W. 20 and D. Ramamurthy P. W. 26. The respondent denied that the jeep No. APK-9486 was used for transporting voters as alleged. According to him the vehicle belonged to the Swatantra Party and stood registered in the name of Narayan Dandekar Secretary of the Party.

6. D. Ramamurthy P. W. 26 was examined on behalf of the appellant in support of his case on this plea of corrupt practice. The witness said that the jeep was entrusted to him at

Sompeta to deliver it to Dunkuru Mangalo, polling agent of the respondent at Konkadaputti. According to the witness it was jeep No. APK-9486 which Latchanna had brought from "Guntur side for purposes of election", that the jeep was delivered to the polling agent for bringing voters from neighbouring villages to the polling booths, that the jeep was used for that purpose from 10 A.M. to 2 P.M. and that he reached Konkadaputti at 9.30 A.M. and remained near the polling station till 2 P.M. asking voters to vote for the "Star Symbol" of the Swatantra Party. The learned Judge observed that the witness "did not impress him as a witness of truth and it was impossible to place reliance upon his testimony". His story that the voters were transported free of charge in the jeep to the polling station on the date of polling could not therefore be believed.

7. Papi Naidu, the Presiding Officer, stated that a complaint was lodged by the agent of the appellant that the voters were being brought by the supporters of the Swatantra Party to the polling station. The witness also stated that he saw voters getting down the jeep and joining the queue and that there were 7 or 9 such voters. But the witness admitted that the people who were getting down the jeep were not known to him, that he had no opportunity to get them identified, that they had joined the queue but whether they were voters or not he could not say, that he asked the agent to put his complaint in writing but that was not done, and that the agent was not known to him and he had never seen him afterwards. The witness did not mention this incident in the report "as such complaints were not usually mentioned at all." He did not give the number of the jeep, nor did he state that he had seen the Swatantra flag on the jeep. He could not vouch for the fact that those who alighted were voters or that they had voted at that polling station. In the view of the learned judge the testimony of Papi Naidu, P.W. 10, did not satisfy all the component elements of the corrupt practice alleged."

8. Hadia Naiko was the polling agent of the appellant. He stated that Dunkuru Mangalo was bringing voters

from Killoi Colony and Killoi village between 10 A.M. and 2 P.M. and on seeking this he told Dunkuro Mungalo that it was not proper for him to bring the voters in jeep cars and when the latter asserted that he had a right to do so, he complained "to the Presiding Officer who asked for a written complaint which he could not comply with as he was not proficient enough to write one and none on behalf of the appellant had come who could do the needful".

The witness did not give the number of the jeep nor the names of the voters. In the view of the learned Judge the "procurement of the jeep for free conveyance was not proved." The High Court observed that it was unnecessary to discuss the evidence on behalf of the respondent for the appellant had failed to establish the corrupt practice alleged.

9. The next head under this charge of corrupt practice as alleged by the appellant related to the use of motor-lorry No. APK-9250 which was flying the Swatantra Party flag and was used for free transport of voters on the polling day between 10 A.M. and 2 P. M. from the surrounding villages to the polling station at Guttavalli. During one of the trips, it was said that there ensued a free fight between the persons who were carried by the lorry and others who were present near the polling station as the former raised slogans acclaiming the respondent and denouncing the appellant. A complaint was given to the police by some of the voters that they were being conveyed in the lorry, two of those voters being Kotra Appanna and Sarpanch Sinupanapalaum. It was admitted therein that while they were being transported for exercising their vote for the respondent there was obstruction from the supporters of the appellant Sanapalli Manumula Appalaw and his son and that a free fight ensued. The respondent denied these allegations. In support of the allegations, the appellant examined Kolla Appanna P. W. 12, Gedala Lakshmi Naidu P. W. 16, Sanapala Narsimha Rao P. W. 21, Sanapali Raja Rao P.W. 24 and P. Chandra Rao P.W. 27. In rebuttal, the respondent examined Jammana Jogi R. W. 7, Garimella Kameswara Rao R.W. 11 and Dannana

Appanna R.W. 23 and relied upon "the first information" which was lodged about the fight. The High Court analysed the evidence of the witnesses on behalf of the appellant. In regard to the testimony of Kolla Appanna P.W. 12 the High Court observed that his assertion that he went in a lorry was "highly doubtful" and that the story deposed to by the witness was "palpably false", that the story that the witness Gedala Lakshmi Naidu P. W. 16 that he travelled by the lorry was "open to doubt", that testimony of Ganapala Narsimha Rao who is "closely related" to the appellant "was tainted", and that the evidence of Sanapali Raja Rao P.W. 24 was also "not believable". On a review of the evidence the High Court observed that the number of the lorry was not given by any of the witnesses, and there was no evidence about its ownership. There was again no evidence "as to its procurement for free conveyance" and "the alleged use of the vehicle for free conveyance was, therefore, not established. Thus the contention as to the alleged incidence must be held against the appellant."

10. The third branch under this head related to the use of motor-lorry No. APG-3911 and motor-bus No. APS-1315. It was alleged in the petition that the two vehicles were "flying the Swatantra Party flag" and were used for transporting voters free of charge on the polling day to Torrivandan polling station from Puruvinwada and Appanyaturu that a report was lodged by Boyana Kanakaiah and B. Mamaray to the police Sub-Inspector of Kothun who was on election duty at Sarnakota stating that a number of voters were being carried by lorry No. APG-3911 and bus No. APS-1315 to vote for the respondent, that the Sub-Inspector prepared the statement of the bus conductor, the lorry driver and other persons and that a mediation report" was also recorded in that connection. The respondent denied the allegations. In his additional written statement he also pleaded that there was absence of essential particulars relating to the names of the voters and that the petition did not disclose a cause of action since the allegations did not make out a corrupt practice. In support of his case the appellant relied upon his own evi-

dence and the evidence of the witnesses Boyana Kanakiah P. W. 13 and Boyina Kama Raju P. W. 14. It was the case of the appellant that these witnesses had seen the incident and had given a report promptly to the Sub-Inspector of Police, and that Sub-Inspector had detained the motor lorry and bus and got a mediators' report prepared. But the Sub-Inspector of police to whom the report is alleged to have been made was (though cited as a witness) not examined in the case and the report or the proceedings started pursuant thereto were not brought on the record. After the evidence was closed the appellant applied for calling the Sub-Inspector as a Court witness but the application was rejected. Boyana Kanakiah P.W. 13 and Boyina Kama Raju P.W. 14 are cousins of the appellant. In their evidence they did not specify the persons who used the said lorry and bus on behalf of the respondent, nor did their evidence disclose the names of the voters conveyed by the said lorry or bus.

11. In the view of the High Court the conditions of a corrupt practice falling within the meaning of S. 123 (5) of the Representation of the People Act were not established. The High Court pointed out that even if it be held that what Boyana Kanakiah P. W. 13 and Boyina Kama Raju P. W. 14 said that certain persons travelled by the lorry and bus was true unless it was established that the voters were taken to and from the polling stations at the instance of the respondent no charge of corrupt practice can be deemed to be made out for not a single person was named and no person was brought before the Court to prove that he had travelled in the bus or the lorry. The High Court held that the case set up in respect of the two vehicles was also not established.

12. The finding of the learned Trial Judge is based upon appreciation of evidence of the witnesses in the light of probabilities. A charge of corrupt practice under the Representation of the People Act must be established by clear and cogent evidence. When the Court of First Instance on a consideration of the evidence of the witnesses has refused to place any reliance upon their testimony the burden lying upon the party setting up a plea of corrupt practice becomes no lighter

in appeal. The charge cannot be held established merely upon suspicion, or preponderance of probabilities. Unless the appellant establishes that the appreciation of evidence was vitiated by gross misreading or misconception of the evidence or because of failure to consider important pieces of evidence which had a bearing on the charge or because of serious irregularities in procedure which amount to a denial of a fair trial the appellate court will not proceed to re-appreciate the evidence on which the findings are recorded by the Court of First Instance on the credibility of witnesses.

13. The third head of charge relates to the printing and publication of a leaflet defamatory of the appellant and falling within S. 123 (4) of the Act. It was stated in the petition that one Dola Jagannatha Rao agent of the respondent caused the printing and publication at the instance of the election agent of the respondent of a leaflet containing the following false and defamatory statements in relation to the personal character of the appellant:

(a) that the appellant misappropriated large amounts to the tune of about Rs. 60 lakhs belonging to the Co-operative Sugar Factory and the Co-operative Central Bank for his own ends;

(b) that the Supreme Court confirmed the order of the High Court sentencing the appellant for contempt of Court. The leaflet posed the question whether the Congress Party could not get a candidate with better character and record of selfless public service?

The appellant said that the leaflet was printed at Sri Ramakrishna Printing Works at Srikakulam and the printing expenses thereof amounting to Rupees 85/- were according to the appellant defrayed by the election agent of the respondent, that the election agent of the respondent caused the distribution of those leaflets at several meetings held by the Swatantra Party at Srikakulam at 9-00 P.M. on April 24, 1967, at Mandasa at 6-00 P.M. on April 21, 1967, at Takkali at 7-00 P.M. on April 20, 1967 and at Palasa at 11-00 A.M. on April 21, 1967 and at other places to sponsor the candidature of the respondent to a seat in the Parliament. It was further averred that the res-

pondent and his election agent exhorted the people at those meetings not to vote for a person who had misappropriated public funds. The respondent denied that he and his election agent had knowledge or had consented to, or were concerned with the leaflet, its printing, publishing and distribution. He also denied that he or his election agent exhorted the voters as alleged by the appellant.

14. The leaflet in question is in the form of several interrogations. The caption of the leaflet is "Peoples' Questionnaire to the Respected Minister." The relevant part of the leaflet is:

"1. Did not 18 gentlemen including Andhra Pradesh Congress Secretary Srikulapu Lokshammana Das, District Board President Sri Gorie Sriramulu Naidu, Ex-Assembly member Sri Andhavarapu Tavitayya Sri Challa Narasimhulu Naidu and others, present a memorandum in June 1966 to the Chief Minister and to the Minister for Co-operation stating that Sri Boddepalli Rajagopala Rao, who is to contest as a Congress party candidate in the Srikakulam Parliamentary Constituency bye-election on the 27th of this month, had misused like water nearly 60 lakhs of rupees of governmental monies and peoples' monies belonging to Co-operative Sugar Factory, District Co-operative Central Bank and such other co-operative institutions which were treated as his own and managed under his control? What action has been taken against it by the Government?

2. Did not your Government appoint the Regional Officer of Co-operative Societies, Panchayati Samiti, Amadalayalasa, to inquire into the affairs of the Gandhi Building Society which is managed under the control of Sri Boddepalli Narayana Murthy who is the brother of Rajagopala Rao, member of the Legislative Assembly? Could anybody deny the fact that when that officer brought to light the inner secrets and brought them to the notice of the Government, the Government on the ground that that officer did not obey their instructions, brought him out in the mid-night, beat him almost to death and broke his legs and threw him on the road? Is he not still in the hospital? When he complained to the police authorities,

what action has been taken? Is there no protection under your Government to your officers who are just and impartial?

3. Did not the Supreme Court confirm the fine of Rs. 500/- imposed by the High Court on Rajagopala Rao for contempt of court because he flouted the orders of the High Court in that he by force, oppressive behaviour and threat to the Factory Manager, forcibly took all ballot papers and himself, acting as an officer, conducted the Sugar Factory elections in an irregular manner? When it is clearly stated in the Co-operative Act that such persons should not be even primary members in co-operative societies, could you tell how this person could still be in the governing body of co-operative societies?

"Could you not get a candidate who is better and who could render selfless service to people? Of course, it is difficult to get men of high and moral caliber in the 1967 model congress."

15. Section 123 (4) of the Representation of the People Act, 1951, defines one of the corrupt practices, as under:

"The publication by a candidate or his election agent or by any other person with the consent of a candidate or his election agent of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, of any candidate, being a statement reasonably calculated to prejudice the prospects of the candidate's election."

16. To constitute a corrupt practice under S. 123 (4) four conditions are required to be fulfilled: (1) that there should be publication of a statement of fact relating to the personal character or conduct of the candidate; (2) that the statement should be false; (3) that the person making it should either believe it to be false or should not believe it to be true and that the statement was reasonably calculated to prejudice the prospects of that candidate's election; and (4) that it was published by the candidate or his election agent or by any other person with the consent of a candidate

or his election agent. If the publication is by a person other than the candidate or his election agent, the consent of the candidate or his election agent must be established before the charge is held proved. Proof of express consent is not necessary inference of such consent may be raised from the circumstances. Prior knowledge of the contents and the knowledge that it is likely to be published may raise an inference of consent, if the candidate deliberately keeps quiet and does not stop the publication if it be within his power. Where the offending matter has already been published and thereafter it comes to the knowledge of the candidate at the election and he does not take steps to repudiate it, the consent may not necessarily be inferred unless the candidate or his election agent permits or aids in publication. Section 100 of the Act sets out the grounds on which the election may be held to be void and one of the grounds is that if the High Court is of opinion that any corrupt practice has been committed by a returned candidate or his election agent or by any other person with the consent of a returned candidate or his election agent, the High Court shall declare the election of the returned candidate to be void. Mere commission of a corrupt practice is not sufficient: it is proof of consent of the candidate or his election agent to the commission of the corrupt practice which requires the Court to declare the election void. In the matter of publication of statements which are false and are reasonably calculated to prejudice the prospects of the candidate's election, proof of consent not infrequently assumes great importance, for, even if it be proved that the publication has been made, unless it is shown that it was with the consent of the candidate or his election agent, the corrupt practice may not be held to be committed so as to invalidate the election. Case of publication without authority or with a view to create evidence by interested persons against the candidate who is likely to be successful are not unknown.

17. It is not in dispute that the leaflet Ext. P-357 was published. The leaflet was again reasonably calculated to prejudice the prospects of the appellant's election. Parts of the

leaflet related to the personal character and conduct of the appellant and were defamatory of him and were likely to lower him in the estimation of the electorate.

18. It is not necessary to decide whether the statements of fact made were false, for the High Court has held that it is not proved that the respondent or his election agent was concerned with the publication or distribution of the leaflet and we agree with that view.

19. The evidence on this part of the case may be considered in three sections: evidence relating to the printing of the leaflet; evidence relating to the distribution of the leaflet at the meetings held at several places as part of the election campaign of the respondent; and evidence relating to the making of oral statements reproducing the contents of Ext. P-357 at those meetings.

20. It is common ground that one Dola Jagannatha Rao procured the leaflet printed at Sri Ramakrishna Printing Works at Srikakulam. It was averred in the election petition that the printing expenses were defrayed by Latchanna the election agent of the respondent and that Latchanna had caused distribution of the leaflet at several meetings held by the Swatantra Party at Srikakulam on April 24, 1967; at Mandasa on April 21, 1967, at Takkali on April 20, 1967; and at Palasa on April 21, 1967. This was denied by the respondent. D. Jagannatha Rao was examined as a witness for the respondent. He deposed that he did get the leaflet printed on his own account and not at the instance of anybody else, that he defrayed the expenses and paid on April 9, 1967 the printing charges amounting to Rs. 85, that he wrote the draft of the leaflet in his house at Srikakulam; that no one else was present on that occasion, that he did not consult any other person nor did he take any other person's advice in that behalf; that before he took it to the press he did not show it to any other person, and that as the printers could not properly decipher the manuscript they got prepared a fair copy by their own employee.

20. The witness admitted that he was a Swatantra party worker and put his signature on the fair copy of the leaflet. Consent of the candidate or his election agent to the printing of the pamphlet cannot be inferred from that circumstance. To establish the consent of the respondent or his election agent to the printing of the leaflet, the appellant examined the Managing Proprietor of Sri Ramakrishna Printing Works who deposed that D. Jagannatha Rao placed with him an order for printing 10,000 copies of the leaflet Ext. P-357 and that in his books of account the name of D. Jagannatha Rao was entered as of the person who ordered printing of the leaflet. The witness stated that D. Jagannatha Rao had brought the written matter on 2 or 3 pages, and that the Manager of the Printing Press got "it fair copied" and took his signature on the fair copy which is Ext. P-358. At the time when he took delivery of the printed leaflet, D. Jagannatha Rao paid an amount of Rs. 85 for printing charges. The witness stated that one Chelapati Rao also came over to the printing press but only after D. Jagannatha Rao had paid the charges and that Chelapati Rao had nothing to do with that leaflet. In support of the evidence the witness produced Exts. P-346 and P-346/1 copies of the order and the voucher evidencing payment by D. Jagannatha Rao. This testimony fully supported the case of D. Jagannatha Rao. There was some discrepancy about the date of placing the order. D. Jagannatha Rao said that the order was placed on April 7, 1967; the Managing Proprietor said it was on April 4, 1967, but that was a minor discrepancy which did not affect the testimony of either witness.

21. This evidence did not support the case of the appellant. He examined D. Ramamurthy P.W. 26 who stated that the leaflet Ext. P-357 was drafted in the house of Latchanna by K. Chelapati Rao Patnaik to the dictation of Latchanna in the presence of Dola Jagannatha Rao, that one week thereafter the leaflets were got printed by Chelapati Rao Patnaik and Dola Jagannatha Rao, and that Latchanna gave them Rs. 300 and sent them to Srikakulam. In cross-examination the witness stated that he could

not write Telugu, though he could read a little. He also admitted that he was not usually consulted in any matter, but whenever required the members of the party used only to take work from him. To explain his presence at the drafting of the leaflet he stated that Latchanna called him on April 25, 1967 at his residence, that when he reached Latchanna's place the leaflet was being drafted and that he was detained till the drafting was over and thereafter he was sent away. The witness could not explain the reason why the leaflet was not printed at Guntur. Witness D. Ramamurthy sought to support the case of the appellant on several other matters. The High Court observed that his statement was "highly artificial", that there was no reason why he should have been called by Latchanna to be a witness to the drafting of the manuscript of the leaflet, and that the "artificiality of his statement was obvious on the face of it and further his testimony did not bear scrutiny at all". Nothing has been said before us which would justify us in taking a different view.

22. Chalapati Rao, P.W. 1 was examined on behalf of the respondent. He denied that he wrote the draft or took any part in the printing of the leaflet at Latchanna's instance. He said that he had seen the leaflet for the first time only after it was printed and D. Jagannatha Rao had taken delivery and never thereafter.

23. Latchanna denied all knowledge in connection with the printing and dictation of the contents of the leaflet Ext. P-357.

24. The evidence clearly does not make out the case of the appellant. It was the case of the appellant, that Latchanna got the leaflet drafted and printed. From the mere fact that D. Jagannatha Rao was a partyman and a member of the State Council of the Swatantra Party of which Latchanna was the President, and that D. Jagannatha Rao had contested on the Swatantra Party ticket for a seat in the Andhra Pradesh Legislative Assembly in the general elections in 1967, no inference arises that the leaflet was published with the consent of the respondent or his election agent.

25. At the trial the appellant relied also upon the publication of the contents of the leaflet in two weekly newspapers — Bahujana and Vahini in their issues of April 17, 1967, and April 24, 1967 respectively. In the first newspaper the caption shows that it was a questionnaire of Srikakulam public to the Minister; and in the second newspaper the caption showed that it was a questionnaire by the Srikakulam public through D. Jagannatha Rao, President of Nogrskatakam Swatantra Party. Latchanna is the printer, publisher and editor of Bahujana. The contents which were published in the Bahujana largely tally with Ext. P-357. The caption, however, is different. Latchanna deposed that he did not send the leaflet for publication in the newspaper from Srikakulam to Hyderabad. He denied the suggestion that it was not D. Jagannatha Rao but he himself who caused the publication of the article in Bahujana. He further stated that though he was the editor of the paper he was away from Hyderabad and in his absence his brother's son G. Kranti Kumar was editing the paper, and that he came to know of the publication many days after the election was completed. There was no allegation in the petition that the publication in the Bahujana was caused by Latchanna or by the respondent. The evidence brought before the Court could not cure the defect in the pleadings. There is no evidence also that either the respondent or his election agent Latchanna had knowledge before the date of the publication or even before the date of the election of the respondent.

26. It was said that the respondent had expressed his thanks for the work done by the Vahini newspaper during the election. This was not a matter relevant to the issue under consideration, and the High Court was right in holding that it would be extending the scope of the inquiry contemplated to be made on the allegations made in the petition to hold that by reason of the publication in the Vahini and Bahujana the respondent or his election agent were guilty of any corrupt practice. In the petition it was expressly averred that the leaflet Ext. P-357 was published by the respondent and his election agent. It was not pleaded that the

contents of the leaflet Ext. P-357 with some modifications were published in the Vahini and Bahujana and that by that publication a corrupt practice under S. 123 (4) was committed by the respondent.

27. The appellant also alleged that at meetings held at four places Takkali, Palasa, Mandasa and Srikakulam — these leaflets were distributed. In support of this case Suri Suryanarayana P. W. 25, D. Ramamurthi P. W. 26, Kirtichandra Rao P. W. 28, C. V. Babu Rao P. W. 29, M. Narayana Rao P. W. 30 and Sana Veerabhadra Rao P. W. 31 were examined. In rebuttal, K. Chalapati Rao Patnaik R. W. 1, Suvari Sanyasi Appa Rao R. W. 2, Bendi Appalla Suri R. W. 3, D. Kondaih Choudari R. W. 8, Garimella Kameswara Rao R. W. 11, B. Narayana Swamy R. W. 15, Narayan Dandekar R. W. 20, G. Chandraiah Naidu R. W. 21, N. Veerachari R. W. 22, Bendalam Rama Murthi R. W. 24, Allu Suryanarayana R. W. 29 and Raj Vallabh Misra R. W. 30, besides the respondent and his election agent, were examined to disprove the case of the appellant. The case of the respondent was that he was not present at any of the meetings except at Srikakulam which he attended at its concluding stage. Latchanna also denied that he was present at any of those meetings.

28. The High Court made a painstaking analysis of the evidence of the witnesses relating to the holding of the meetings and the distribution of the leaflet Ext. P-357 and the witnesses examined on behalf of the respondent, which ran into as many as 23 printed pages, and in conclusion observed:

"From the above discussion it is clear that it was Dola Jagannadha Rao himself who got printed Ext. P-357 of his own accord and neither the respondent nor his election agent was in any way concerned with it. The respondent and the election agent were in no way connected with its publication, when several thousands of copies of the pamphlet had been printed; they must of course be for purposes of distribution. Dola Jagannadha Rao could have personally distributed them or caused their distribution through others. But there is no positive evidence that these pamphlets were dis-

tributed amongst the public either by Dola Jagannadha Rao himself or by the election agent, as alleged, or to the knowledge of either the respondent or his election agent."

We see no reason to disagree with the view of the High Court on the evidence.

29. The question which remains to be considered is whether a corrupt practice falling within sub-section (6) of S. 123 was committed by the respondent. Incurring or authorizing expenditure in contravention of S. 77 is a corrupt practice. Section 77 requires that every candidate at the election shall either by himself or by his election agent keep a separate and correct account of all expenditure in connection with the election incurred or authorised by him or by his election agent between the date of publication of the notification calling the election and the date of declaration of the result thereof, both dates inclusive. By sub-section (3) of Section 77 the total of the said expenditure shall not exceed such amount as may be prescribed. For the parliamentary election an amount of Rs. 25,000/- was prescribed as the maximum amount to be spent. The respondent submitted a return disclosing expenditure of Rs. 15,834-92

30. It was averred in the election petition that the total expenditure of Rs. 15,834.92 returned by the respondent as election expenditure under Rule 86 was a "gross under-estimate of the expenses incurred by the respondent in connection with the election", that the respondent had not included in the account various items of expenditure incurred and had also "given grossly diminished figures in respect of items included therein", that "it was obvious that his accounts did not reflect the expenditure actually incurred, but it only represented a fictitious figure manipulated with a view to conform to R. 90". It was further averred that a large amount aggregating to Rs. 3 lakhs and more was spent for the purpose of the election. After setting out certain argumentative matters, it was stated in the petition that the expenditure in respect of the following items "had been suppressed or diminished or reduced in the account rendered by the respondent":

1) the amount of Rs. 1,192/- paid to Vijaya Auto Service under voucher dated April 30, 1967 for the purchase of diesel oil motor-spirit and lubricants was not included;

2.) though in fact the respondent incurred and paid an amount of Rupees 10,000/- for the purchase of motor spirit from the Esso Standard Bunk, Srikakulam, only an expenditure of about Rs. 200/- was shown in the account of election expenses;

3) that an amount of Rs. 6,000/- was spent for the purchase of motor-spirit from Esso Standard Bunk, Sompeta, but only Rs. 607-94 were shown in the account;

4) that various amounts aggregating to Rs. 10,000/- were paid at different bunks for motor spirit and diesel oil but those amounts had been deliberately suppressed from the account. Thereafter five names of the proprietors of those petrol bunks were mentioned.

The petition then proceeded to say that the total expenditure incurred on motor spirit was far in excess of Rs. 1,000/- odd shown in the account rendered, and that the motor spirit purchased during the period from the motor spirit bunks at Srikakulam, Sompeta, Itchapuram, Amadalavalasa and Takkali and other places was "ridiculously low", that a number of lorries from outside or within the District were engaged by the respondent during the last week of the election for propaganda purposes, as also on the polling day for conveying voters to the polling stations, and the expenditure on diesel oil, drivers and cleaners in respect of those vehicles had not been included in the account. The petition then referred to the expenditure on "wall posters", on printing, distributing and exhibiting them was far below the amount incurred, and only an amount of Rs. 2,081/- was shown as expenditure incurred by the respondent in his account of election expenses on that account. It was then stated that the expenditure incurred by the respondent in respect of "cycle rickshaws and jutkas" was not shown, that wages and maintenance of about 1,000 workers for about three weeks and about 1500 polling agents on the day of poll "was not accounted for", that no expenditure incurred towards boarding

and lodging of the workers at the election "was accounted for"; that the amount of Rs. 4,000/- paid by the election agent of the respondent Venkayya to Sri Venkateswara Lodging & Boarding, Srikakulam was "suppressed in the account" of election expenses; and finally an amount of Rs. 500/- incurred for the purchase of voters' lists for the seven assembly constituencies was also not included.

31. The case of the appellant was sought to be proved by examining a large number of distributors at "petrol bunks" from whom motor-spirit was purchased on cash in respect of various vehicles. It was sought to be proved that a large number of vehicles were used for his election campaign by the respondent and the expenditure incurred according to the appellant exceeded Rs. 23,000/- for motor-spirit alone. A copy of a bank account maintained in the name of Latchanna with the Andhra Bank Ltd., Srikakulam, was tendered in evidence to support the case of the appellant that large amounts were withdrawn from time to time during the election days and it was suggested that all the money withdrawn was utilized by Latchanna for the election campaign of the respondent. It was the respondent's case that Latchanna did not have custody of the funds intended to be used for the election campaign, that he the respondent had kept his money for the election campaign with one Kavuri Venkaiah and that the latter spent the amount for election purposes. The respondent said that the amount spent by him was partly his own and partly received from donations. He denied that any election fund was opened by him, nor was such fund opened by Latchanna. He further stated that apart from Rs. 3,500/- provided by him in cash and Rs. 5,000/- being the proceeds of a cheque received by him as donation, a sum of Rs. 6,000/- was handed over to Kavuri Venkaiah and that some postal money orders addressed to him were received by Venkaiah in his absence. Those amounts were sent by his friends who were interested in him. The total amount that was received by way of donations or contributions from others was Rs. 18,000/- or Rs. 19,000/-. The entire amount was not spent for the election, and Venkaiah who had opened a bank ac-

count and kept the amounts in that account, returned the balance to him. According to the respondent the expenses of the election were met out of the amounts maintained in K. Venkaiah's name and not from the monies that belonged to Latchanna or the Swatantra Party or any other person. The case of the respondent was supported by Venkaiah. Latchanna also supported that case. Latchanna was the President of the State Swatantra Party. He stated that in the general elections, the Swatantra Party had spent large amounts of money and had incurred debts, and in order to pay off those debts the party had asked for donations from members of the State Party and also the Central Party, that an appeal was also made to the press to invite donations and also a request was made to the Central Party to make some grants, that in March and April 1967 some amounts were received in respect of which he maintained an account with the State Bank, Srikakulam, and a joint account in the State Bank at Sompeta in the names of his wife and himself, that certain amounts were received in his name by cheques and drafts and they were put in the joint current account at Srikakulam, but "not one pie out of this account" was used for the bye-election, and out of the amount that was left as balance after discharging debts he paid Rupees 16,000/- for the purchase of a jeep for the Central Party.

32. A mere general allegation that more than Rs. 3 lakhs were spent by the respondent or his election agent or other persons for the purposes of the election is not sufficient to make out a case under Section 123 (6) of the Representation of the People Act, 1951. It is not sufficient merely to allege that large sums of money were spent for the purpose of the election.

33. It is the case of the respondent that his friends and sympathisers sent him certain sums of money, and that whatever monies were received by him or in the name of his wife or by Venkaiah under his authority remained with Venkaiah. These receipts aggregated to Rs. 19,000 out of which Rs. 15,834-92 were spent for the election. Expenditure, if any, incurred by the party which sponsored the candidature of a candidate cannot be taken into account for the purpose of

determining whether the corrupt practice within the meaning of S. 123 (7) was committed by the candidate. In *Rananjava Singh v. Baijnath Singh*, 1955-1 SCR 671 = (AIR 1954 SC 749) this Court held that expenditure incurred by persons other than candidate for election purposes will not be taken into account (unless it is incurred by such third person as the candidate's agent) in determining whether a corrupt practice was committed by the candidate: see also *Ram Daval v. Brijraj Singh* 1970-1 SCR 530 = (AIR 1970 SC 110) and *Maḡraj Patodia v. R. K. Birla*, C. A. No. 1069 (1094) of 1969 decided on September 10, 1970 (SC). It is true that Latchanna had from time to time withdrawn from the Andhra Bank various amounts of money. Those amounts, he says, were utilised for satisfying the debts of the party incurred in the general elections. There is no evidence to the contrary led by the appellant. Nor is there any evidence to show that the respondent had received any amount in excess of Rs. 19,000/- out of which he claimed he had spent Rs. 15,834-92.

34. A considerable body of evidence was tendered by the appellant to prove that a large number of vehicles were used for the election campaign of the respondent. Many witnesses were examined to support that case. The High Court made a detailed analysis of the evidence and held that only four vehicles Nos. APK-9486 jeep, (2) APU 7414 Ambassador-car, (3) APY-7719 Ambassador-car and (4) APG-4329 Fiat-car, were retained and used for "election purposes" and expenses for purchase of motor-spirit and oil for those vehicles during the election days were shown in the account. Besides this, in the view of the High Court two more vehicles Nos. APG-2123 and APP-97 were used for some time for the purpose of the election. These two vehicles were taken by Balaram and Chitti Babu once to Kanchili petrol bunk, and to that extent they may be held to have been used for the errand of the respondent. Taking into account this amount, the total amount in relation to the motor-spirit used for Kanchili was Rupees 1,141-13. The High Court held that on the evidence, the cash bills which were produced by the appellant in respect of the motor-spirit expenses

were not connected with the motor vehicles of the respondent or of his agent or of any vehicles maintained by the respondent for election purposes. The High Court found the books of account of Vijaya Auto Service and the "petrol bunk" of Malla Satyanarayana and Brothers at Kanchili unreliable, and held that only those bill-books may be taken into consideration which recorded transactions signed by persons admitted to be the agents of the respondent. The High Court accordingly held that in addition to the amount admitted by the respondent an amount of Rs. 1,521-21 was proved. No substantial argument was advanced before us challenging the finding recorded by the learned Trial Judge on the question as to the expenditure incurred for the motor vehicles employed in the course of the election of the respondent, and we see no reason to disagree with the conclusion recorded by the High Court on a very elaborate and painstaking analysis of the evidence.

35. It was urged that as many as 1100 persons were employed by the respondent during the election days in the campaign for the respondent, and besides their remuneration, expenses for their boarding and lodging were incurred by the respondent, and that amount was not disclosed in the account filed under S. 77 (3). It was the case of the respondent that several persons had worked for the Swatantra Party candidate at the election. According to the rules of the Swatantra Party they worked voluntarily, and no remuneration was paid to any of the workers because payment of remuneration to any party workers was against the principles of that party. The High Court held that transport charges and expenses for meals for the workers were not incurred by the respondent, but by the Swatantra Party. In argument it was conceded there was nothing to show that any expenditure was incurred by the respondent for those workers. Venkaiah had, it is said, paid under the directions of Latchanna certain amounts of money for the expenses incurred for the workers of the Swatantra-Party. But in the absence of any evidence to show that any specific sums of money were expended on certain items by the respondent or his elec-

tion agent, no conjecture can be permitted to defeat a candidate who has been elected.

36. Towards the boarding and lodging expenses of the workers, it appears, Simma Jagannadham, President of the District Swatantra Party, had paid Rs. 5,000/- and Rs. 1,200/- after the election. It was proved by the evidence that the party office was in the house of Simma Jagannadham. The workers were lodged and boarded at a place called Sri Venkateswara Lodging and Boarding Lodge at Sriakulam, and the expenditure incurred for them was met by Sri Venkateswara Lodge. The amounts which were paid by Simma Jagannadham were not shown to be paid towards the expenses of lodging and boarding of the workers at Sri Venkateswara Lodge. The Manager of Sri Venkateswara Lodge apparently boarded and lodged those workers free of charge. In the absence of any reliable evidence to the contrary, the finding of the High Court that no expenditure was incurred in respect of those workers by the respondent must be accepted.

37. The appellant's case that expenditure was incurred for "wall posters" and for printing, distributing and exhibiting them amounting to Rs. 2,081/- was not pressed, nor was the case about the expenditure incurred in respect of "cycle-rickshaws and jutkas" pressed before us. Even if it be granted that an amount of Rupee 500/- which was incurred for purchasing voters' lists be taken into account the total amount proved to have been expended by the respondent does not exceed Rs. 25,000/- prescribed under the Act.

38. We have carefully considered the evidence in the light of the arguments advanced at the Bar, and we are of the view that no case is made out for our interference with the conclusion recorded by the High Court.

39. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 281
(V 58 C 68)

(From: Bombay)*

J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

Shankar Madhoji Nemade, Appellant v. Ghisuji Janaji Bhadke and others, Respondents.

Civil Appeal No. 85 of 1967, D/- 8-9-1970.

(A) Constitution of India, Article 136 — Revocation of special leave — Special leave application should not contain any untrue or false statements either in material particulars or on matters of importance or valuation — If proved to contain such statements which misled Supreme Court, leave granted will be revoked — Leave application adopting mistaken valuation given by High Court in its judgment — No deliberate attempt to mislead Court — Statement as to valuation not of much importance due to important points of law arising for decision in case — Leave held should not be cancelled. (Paras 8, 11 and 13)

(B) Constitution of India, Article 136 — Appeal by special leave — Costs — Normally costs should follow event — Appellant though successful not awarded costs on ground that he should have been more careful in giving valuation in special leave petition — (Civil P. C. (1908), Section 35). (Para 39)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act (99 of 1958), Sections 52 and 132 (2) (i) — Interpretation of — 'Protected lessee' in Berar — Landlord terminating tenancy on ground of requirement of personal cultivation and obtaining possession under Section 9, Berar Act (28 of 1951) — Section 52 of Bombay Act applies to all cases where possession is taken by landlord on or after 30-12-1958, and also to cases where two years personal cultivation required by Section 9 (6) read with Rule 9 of Berar Act had not been completed on 30-12-1958 — In such cases period of 2 years is extended to 12 years and if landlord has before

*(Special Civil Appln. No. 831 of 1965, D/- 19-8-1966 — Bom. at Nag.)

IN/IN/E181/70/KSB/M

expiry of 12 years transferred land tenant is entitled to restoration of possession — Special Civil Appln. No. 831 of 1965, D/- 19-8-1966 (Bom. at Nag), Reversed — AIR 1967 Bom 158 (FB), partially Overruled. (Tenancy Laws — Berar Regulation of Agricultural Leases Act (24 of 1951), Sections 9 (1) and (6) read with Rule 9 framed under Section 22).

Section 52 of the Bombay Act has to be interpreted in the light of Section 132 (2) (i) of that Act. Section 52 applies to all cases where possession is taken by the landlord on or after December 30, 1958 on the basis of an order obtained against a protected lessee under Section 9 of the Berar Act. It also applies to cases where possession had been taken by a landlord under the Berar Act but the two years period of personal cultivation had not been completed when the Bombay Act came into force. If the landlord on December 30, 1958 had completed the two years period of personal cultivation, his right not to be disturbed is continued and preserved under Section 132 (2) (i) of the Bombay Act. Again if the landlord in pursuance of an order obtained under the Berar Act, takes possession, after the commencement of the Bombay Act, Section 52 applies to him and his original obligation to cultivate personally for two years under the Berar Act gets extended by the 12 years period provided under that section. If he ceases to so cultivate land due to transfer by him within the period of 12 years from his taking possession, the tenant gets a right to apply for restoration of the land. Special Civil Appln. No. 831 of 1965, D/- 19-6-1966 (Bom. at Nag.), Reversed; AIR 1966 SC 557, Explained and Distinguished. (Paras 32, 33, 36 and 37)

The decision of the Full Bench in AIR 1967 Bom 158 laying down that the taking of possession of the land by the landlord after 30-12-1958 is the sole test for determining the applicability of Section 52 of the Bombay Act (99 of 1958) is too broad and is not correct. (Para 30)

Cases Referred: Chronological Paras
(1968) Civil Appeal No. 982 of 1965, D/- 25-4-1968 = 1968 SC (Notes) 305, Sita Bai v. Soni Vanji Wani 8, 10

(1967) AIR 1967 Bom 158 (V 54) = (1966) 68 Bom LR 954 (FB), Saraswati Bai v. Bhikam Chand Premasukhdas 4, 23
(1966) AIR 1966 SC 557 (V 53) = (1966) 1 SCR 594, Ramchandra v. Tukaram 6, 22
(1963) AIR 1963 SC 1558 (V 50) = (1964) 2 SCR 203, Hari Narain v. Badri Das 8
(1963) Civil Appeal No. 155 of 1963, D/- 5-4-1963 (SC), S. R. Shetty v. Phirozeshah Nusserwanji 8, 10

Dr. W. S. Barlingay, Sr. Advocate (Mr. A. G. Ratnaparkhi, Advocate, with him), for Appellant; M/s. M. S. Gupta and S. K. Dhingra, Advocates, for Respondent No. 1.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— The appellant was a protected lessee within the meaning of the expression contained in the Berar Regulation of Agricultural Leases Act, 1951 (Act 24 of 1951) (hereinafter called the Berar Act) in respect of the suit lands bearing survey No. 23 of an extent of 7 acres and 4 gunthas under the 5th respondent herein who was then the original owner of the lands. The 5th respondent served on the appellant (hereinafter called the tenant) a notice dated December 28, 1955 under Section 9 (1) of the Berar Act terminating the tenancy of the appellant on the ground that he required the lands for personal cultivation; and he also submitted an application to the Revenue Officer under Section 8 (1) (g) of the Berar Act for an order determining the tenancy. The 5th respondent obtained an order from the Revenue Officer on May 15, 1956 directing the tenant to surrender possession of the lands. The 5th respondent in pursuance of the order of the Revenue Officer obtained possession of the lands on April 4, 1957 and continued in such possession till June 21, 1961, on which date he transferred the suit lands to the first respondent (hereinafter to be referred as the landlord) and got in exchange 8 acres in survey No. 33 plus an amount of Rs. 13,000/-. In the meanwhile on Dec. 30, 1958 the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act of 1958 (Act No. XCIX of

1958) (hereinafter called the Bombay Act) came into force.

2. The tenant filed an application under Sec. 52 of the Bombay Act before the Naib Tahsildar, Achalpur against respondents Nos. 1 and 5 for restoration of the possession of the suit lands on the ground that the original owner, the 5th respondent, had ceased to cultivate the lands personally within the period of 12 years after obtaining possession of the lands on April 4, 1957. The Naib Tahsildar by his order dated November 14, 1962 dismissed the application on the ground that Section 52 does not apply and hence the application was not maintainable. On appeal by the tenant the Special Deputy Collector, Amravati by his order June 30, 1964 reversed the decision of the Naib Tahsildar and directed the landlord to restore possession of the lands as prayed for by the tenant. The first respondent's revision challenging the order of the Special Deputy Collector was dismissed on August 5, 1965 by the Maharashtra Revenue Tribunal. The Revenue Tribunal while dismissing the revision petition, inter alia, held that the tenant was a protected lessee and that in pursuance of the proceedings taken by the 5th respondent in terms of the notice under Section 9 (1) of the Berar Act, the tenant was deprived of the lands and his tenancy rights on the ground of personal cultivation by the then owner of the lands. The Tribunal further held that as the 5th respondent had transferred the suit lands in favour of the first respondent on June 21, 1961, the former must be considered to have failed to use the lands for the purposes specified in his notice within 12 years from the date on which he took possession and in consequence the tenant was entitled to be restored to possession under Section 52 of the Bombay Act. On this reasoning the Revenue Tribunal confirmed the order of restoration passed by the Special Deputy Collector in favour of the tenant.

3. The first respondent filed a writ petition under Article 227 of the Constitution, being Special Civil Application No. 831 of 1965, in the High Court of Bombay (Nagpur Bench) challenging the orders for restoration passed against him by the Special Deputy Collector and the Maharash-

tra Revenue Tribunal. The High Court by its judgment and order dated August 19, 1966 has set aside the orders of the Special Deputy Collector and the Revenue Tribunal, thus restoring the order of the Naib Tahsildar and has dismissed the application for restoration filed by the tenant. The tenant challenges the decision of the High Court in this appeal by special leave.

4. The High Court in its order under appeal has recorded the following findings: The original owner, the 5th respondent, was entitled to terminate the lease of the tenant by giving a notice under Section 9 (1) of the Berar Act. He accordingly terminated the tenancy by giving notice dated December 23, 1955. After initiating proceedings under Section 8 (1) (g) read with Section 19 (1) of the Berar Act, the owner also obtained possession of the lands on April 4, 1957. Under the Berar Act there was a duty cast on the landlord to cultivate the lands personally for a period of 2 years and in this case the 5th respondent has complied with this requirement. As possession was taken from the tenant by the 5th respondent when the Berar Act was in operation and as the latter had cultivated the lands for a period of 2 years, as required by Section 9 (6) of the Berar Act, the tenant had ceased to have any rights after the expiry of the period of 2 years and hence Section 52 of the Bombay Act was not applicable and it follows that the application for restoration under that section filed by the tenant was not maintainable. The position is concluded against the tenant by an earlier Full Bench decision of the High Court reported in *Saraswati-bai v. Bhikamchand Premasukhdas*, (1966) 68 Bom LR 954 = (AIR 1967 Bom 158) (FB) wherein it had been held that when possession of the lands had been taken before coming into force of the Bombay Act, the rights and liabilities of the parties are governed by the Berar Act and that Section 52 of the Bombay Act has no retrospective operation. On these findings the High Court by its order allowed the writ petition of the first respondent.

5. Dr. Barkingay, learned counsel for the appellant, has urged that

having due regard to the scheme of the Berar and Bombay Acts, the High Court's view that Section 52 of the Bombay Act has no application, is erroneous. In this case, he pointed out that Bombay Act has come into force on December 30, 1958 even before the expiry of the period of two years from April 4, 1957, on which date the original owner, the 5th respondent, had re-entered into possession after terminating the lease. Section 52 of the Bombay Act contains provisions substantially similar to Section 9 (6) of the Berar Act which was repealed and the only change was that the Bombay Act enlarged the period for which the landlord was required to continue to cultivate land personally from two years to 12 years. As the enlarged period under the Bombay Act has come into operation before the expiry of the shorter period under the Berar Act, which was repealed, the landlord was bound to conform to the requirements of the larger period provided under the Bombay Act. In this case the 5th respondent had transferred the suit lands to the first respondent on June 21, 1961 and hence there has been a failure in law on the part of the 5th respondent to utilise the lands for the purpose of personal cultivation for the period mentioned in S. 52 of the Bombay Act and so the said section fully applies and the dismissal of the tenant's application for restoration by the High Court is opposed to the mandatory provisions of the Bombay Act. The counsel, further pointed out that in the Full Bench decision, on which the present judgment of the High Court is rested is not applicable for the reason that the Full Bench was dealing with a case where the period provided under Section 9 (6) of the Berar Act had already expired before the coming into force of the Bombay Act, whereas in the case on hand even before the expiry of that two years' period the Bombay Act has come into force. This material difference has not been noted in the present order by the High Court. He further urged that if the Full Bench decision applies, as held by the High Court, it should be held by this Court that the Full Bench decision is not correct.

6. Mr. M. S. Gupta, learned counsel for the first respondent land-

lord raised a preliminary objection to the hearing of the appeal and prayed for cancellation of the special leave granted by this Court on January 11, 1967. According to him the appellant has made deliberately certain false statements in his application for grant of special leave. We will revert to this aspect a little later. On merits Mr. Gupta contended that the obligation of his client's transferor, the 5th respondent, after obtaining possession of the lands from the tenant under the Berar Act was only to cultivate the lands for two years. Admittedly in this case the 5th respondent had cultivated the lands for the said period of two years and the obligation incurred by him under Section 9 (6) of the Berar Act having been duly complied with, Section 132 (2) of the Bombay Act stands attracted. The counsel pointed out that Sec. 132 deals with repeals and savings. Sub-section (1) had repealed the enactments specified in Schedule I to the extent specified in column No. 4 of the said Schedule. Schedule I shows that the Berar Act has been repealed in its entirety. Notwithstanding the repeal sub-section (2) has saved certain matters and one of the matters so saved is the obligation or liability already incurred before the commencement of the Bombay Act. The 5th respondent, who had incurred the obligation or liability to cultivate the lands for two years under the Berar Act before the commencement of the Bombay Act, has discharged the said obligation or liability and hence the tenant has no further rights which he can enforce. He also urged that S. 52 protects even cases where possession has been taken after the coming into force of the Bombay Act on the basis of an order for restoration obtained under the Berar Act. In support of this contention he relied on the decision in *Ramchandra v. Tukaram*, (1966) 1 SCR 594 = (AIR 1966 SC 557).

7. Before we deal with the merits we will now dispose of the preliminary objection raised by Mr. Gupta and praying for cancellation of special leave granted by this Court. According to the learned counsel the appellant has deliberately made certain false statements in the application for grant of special leave and has misguided the Court. He also drew our attention to the statements made in

paragraph 6 of the application where-in the appellant has stated that the 5th respondent had transferred the suit lands in favour of the first respondent on June 21, 1961 by taking in exchange 8 acres of land plus a sum of Rs. 30,000/-. Again in paragraph 10 of the petition the appellant has stated that his claim in these proceedings is for restoration of possession of the lands measuring 7 acres and 4 gunthas, the market value of which happens to be more than Rs. 20,000/-, and that this fact is further strengthened because of the 5th respondent exchanging his lands with the first respondent for a sum of Rs. 30,000/- plus 8 acres of land. The appellant has filed an affidavit stating that the statements contained in the special leave petition 'are true and correct to the best of my personal knowledge'. From these statements Mr. Gupta pointed out that it is clear that the appellant has categorically stated that the value of the lands concerned in this appeal is over Rs. 20,000/- and he has also specifically stated that the suit lands were exchanged for Rs. 30,000/- plus 8 acres of lands and these statements have been affirmed to be true to the personal knowledge of the appellant.

8. Mr. Gupta pointed out that these statements regarding valuation are absolutely false to the knowledge of the appellant as will be clear from the value given in the writ petition filed by the respondent in the High Court. In para I of the writ petition the first respondent has stated that the 5th respondent after transferring the suit lands of 7 acres and 4 gunthas has taken in exchange from him 8 acres of land and a sum of Rs. 13,000/-. Thus making a total of Rs. 19,000/-. In the affidavit filed along with the writ petition the first respondent has again stated that the amount received from him along with 8 acres of land was Rs. 13,000 and the total value of the lands being only Rs. 19,000/-. He also drew our attention to the recitals in the judgment printed in the appeal records wherein the exchange has been stated as being of 8 acres of land plus a sum of Rs. 13,000. In view of these circumstances, the counsel points out that the statements made by the appellant, which have been affirmed to be true to his knowledge about valuation of

the suit lands being over Rs. 20,000/- and the exchange having been obtained of 8 acres and Rs. 30,000/- are false and have been deliberately made to mislead the Court so as to obtain special leave making it appear that the requirement regarding valuation is satisfied. Mr. Gupta drew our attention to the decisions of this Court, namely, *Hari Narain v. Badri Das*, 1964-2 SCR 203 = (AIR 1963 SC 1558), *Sita Bai v. Soni Vanji Wani*, Civil Appeal No. 982 of 1965 D/- 25-4-1968 (SC) and *S. R. Shetty v. Phirozeshah Nuserwanji*, Civil Appeal No. 155 of 1963 D/- 5-4-1963 (SC). Mr. Gupta pointed out that in all these decisions when there has been false statements made on material particulars or matters of importance either on facts or about valuation, this Court had cancelled special leave already granted. The proposition enunciated by Mr. Gupta that the statements in the special leave application should not contain any untrue or false statements either in material particulars or on matters of importance or about valuation is certainly laid down in those decisions and the requirement in this regard cannot be overemphasised. In (1964) 2 SCR 203 = (AIR 1963 SC 1558) this Court held that the special leave petition contained inaccurate, untrue and misleading statements and cancelled special leave already granted. This Court observed at p. 209 (of SCR) = (at p. 1560 of AIR) as follows:

"It is of utmost importance that in making material statements and setting forth grounds in applications for special leave, care must be taken not to make any statements which are inaccurate, untrue or misleading. In dealing with applications for special leave, the Court naturally takes statements of fact and grounds of fact contained in the petitions at their face value and it would be unfair to betray the confidence of the Court by making statements which are untrue and misleading."

9. From the facts in that case it will be seen that the material statements made in the special leave petition were false.

10. In Civil Appeal No. 982 of 1965, D/- 25-4-1968 (SC) this Court held that in the special leave petition there was a misrepresentation of facts

on a matter of importance, though it was not possible to say that when granting special leave these untrue facts had misled the Court. It has been further emphasised in this decision that the appellant had deliberately made untrue statements on matters of importance and that they were not the result of inadvertence. Similarly in Civil Appeal No. 155 of 1963, D/- 5-4-1963 (SC) a statement had been made regarding the value of the subject-matter as being above Rs. 20,000/- though the suit had been valued only in the sum of Rs. 500/- and court fee paid on that valuation. This Court held that the statements of valuation in the plaint, namely, Rs. 500/- cannot be reconciled with the statement regarding valuation in the special leave application and this Court took the view that the valuation has been deliberately inflated with a view to getting over the preliminary hurdle as regards valuation. In this view special leave granted was revoked.

11. If it is held that there has been an untrue averment regarding material statements or a false statement on matters of importance or a deliberate untrue statement regarding valuation has been made to mislead this Court, it cannot be gainsaid that the special leave granted by this Court will have to be revoked.

12. Dr. Barlingay pointed out that there has been no untrue or false statement made by his client on any material particular nor has any statement been deliberately made to mislead the Court so as to enable his client to obtain special leave. On the other hand, the counsel pointed out, that in the certified copy of the judgment of the High Court furnished to his client and which has been filed in this Court clearly shows that in the said copy the High Court has stated that the 5th respondent obtained an exchange from the first respondent 8 acres of land plus a sum of Rs. 30,000/-. That mistaken value given in the High Court judgment has been adopted in the special leave petition. The points that have been raised in the special leave petition are all questions of law relating to legal effect of possession under the Berar Act after coming into force of the Bombay Act. The valuation given in the certified copy of the High Court judgment was

incorporated in the special leave petition filed as early as January 11, 1967. He further pointed out that on March 28, 1967 his client had moved the High Court for correcting the High Court's judgment by deleting the valuation of Rs. 30,000/- and substitute the same by correct figure of Rs. 13,000/-. The counsel for both the parties agreed before the High Court that the figure of Rs. 30,000/- contained in the judgment was an error and that the correct figure should be Rs. 13,000/-. The High Court accordingly by its order dated April 17, 1967 corrected the judgment by stating that the valuation of Rupees 30,000/- should be corrected to Rupees 13,000/-. That order was passed nearly three months after the special leave application was filed in this Court. In view of the fact that his client and the counsel acting for him at the time of drafting the petition for special leave adopted the valuation given in the certified copy of the High Court's judgment, Dr. Earlingay pointed out that there has been no untrue or false statement given by his client so as to justify revocation of the leave already granted.

13. We have given due consideration to all these aspects presented before us by both the learned counsel and we are of the view that in the particular circumstances of this case it cannot be said that the appellant is guilty of making any false or untrue statement on any material particulars or matters of importance or regarding valuation. The mistake committed by the appellant regarding valuation was the result of the mistaken value given by the High Court itself in its judgment, which was corrected only long afterwards. No doubt, the appellant who is a party to the proceedings should have been a little more careful, but that does not disclose any deliberate attempt on his part to mislead this Court. Further the statement regarding valuation is not of much consequence in this case because the questions arising for decision are really points of law regarding applicability of either the Berar or Bombay Acts. Therefore, Mr. Gupta has not been able to make out a case for cancelling the special leave already granted.

14. We will now proceed to consider the appeal on merits. The suit

land was originally in the Vidharbha Region, which before the passing of Bombay Act of 1958 was part of the State of Madhya Pradesh and the tenancy of the appellant was governed by the Berar Act. As proceedings had been taken by the 5th respondent for evicting the appellant and for possession of the land under the Berar Act it is necessary to refer to some of the material provisions of that statute.

15. Section 2 (h) defines a protected lessee as 'a protected lessee within the meaning of S. 3.' Section 3 enumerates various lessees who are protected lessees. There is no controversy that the appellant before us was a protected lessee under the Berar Act. Section 3 (1) enumerates in cls. (a) to (g) the grounds on which the lease of a land held by a protected lessee can be got terminated under the orders of a Revenue Officer. One of the grounds for eviction is provided under cl. (g) of S. 8 (1), namely, lessee having been served with the notice by a landholder as provided in S. 9. Section 9 deals with the right of the landholder to terminate the lease of a protected lessee. Sub-sections (1) and (6) of the said section which are material for the present purpose are as follows:

"Right of landholder to terminate lease of a protected lessee.

Section 9(1). Notwithstanding anything contained in Sec. 8 the landholder may terminate the lease of a protected lessee by giving him notice in writing delivered not less than three months before the commencement of the next agricultural year stating therein the reasons for such termination and the description of the area in respect of which it is proposed to terminate the lease, if the landholder requires the lands for cultivating the land personally.

* * *

Section 9 (6). If on re-entering upon any land after termination of the lease of a protected lessee in accordance with this section, a landholder fails at any time during such period as may be prescribed to utilise the land for the purpose for which the lease was terminated, the dispossessed lessee may apply to the Revenue Officer to put him in possession of the land from the commencement of the agricultural year next following and

the Revenue Officer shall, after hearing the landholder and making such enquiry as he deems fit, put the lessee in possession of the land if he is satisfied of the failure and also award him such sum by way of compensation as the Revenue Officer may consider sufficient".

16. Section 19(1) provides for a landholder applying to the Revenue Officer to eject a protected lessee against whom an order for the termination of the lease had been passed under Section 8 or 9. Section 22 gives power to the State Government to make rules as stated therein. Under clause (3) of Section 22 (2) rules can be made regarding 'the period under sub-section (6) of Section 9'. Rules have been framed under Section 22 and in particular Rule 9 prescribes 'such period as that of two years'. Hence it will be seen that Section 9(6) read with Rule 9 requires the landholder who terminated the tenancy of his protected lessee on the ground that the land was required by him for his personal cultivation, to cultivate the land personally for a period of two years. Under the Berar Act, after having entered upon the land, if the landholder fails to cultivate the land personally during the above period, then S. 9 (6) confers a right on the former protected lessee to apply to the Revenue Officer for being restored to possession.

17. We have already indicated that the Bombay Act came into force on December 30, 1958. The material provisions to be referred to in the said statute are Ss. 52 (1) and 132. Section 52 (1) runs as follows:

"Landlord to restore possession if he fails to cultivate within one year:

Section 52 (1): Where after terminating the tenancy of any land under S. 9 of the Berar Regulation of Agricultural Leases Act, 1951, or under section 38, 39 or 39A of this Act, the landlord has taken possession of such land and he fails to use the land for the purpose specified in the notice given under the said S. 9 or as the case may be within one year from the date on which he took possession or ceases to use it at any time for any of the aforesaid purposes within twelve years from the date on which he took such possession, the landlord shall forth-

with restore possession of the land to the tenant whose tenancy was terminated by him, unless he has obtained from the tenant his refusal in writing to accept the tenancy on the same terms and conditions or has offered in writing to give possession of the land to the tenant on the same terms and conditions and the tenant has failed to accept the offer within three months of the receipt thereof:

Provided that no refusal of the tenant shall be valid unless it has been verified before the Tahsildar in the prescribed manner."

18. Section 132 relates to repeals and savings. Sub-section (1) states that the provisions of the enactments specified in Schedule I are repealed to the extent specified in column 4 of the said Schedule. It may be stated at this stage that one of the enactments so repealed was the Berar Act in its entirety. Sub-section (3) is not relevant. Sub-section (2) of S. 132 on which some reliance has been placed by both the parties is as follows:

"Repeals and Savings:

Section 132 (2): Nothing in sub-section (1) shall, save as expressly provided in this Act, affect or be deemed to affect —

(i) any right, title, interest, obligation or liability already acquired, accrued or incurred before the commencement of this Act, or

(ii) any legal proceeding or remedy in respect of any such right, title, interest, obligation or liability or anything done or suffered before the commencement of this Act,

and any such proceedings shall be instituted, continued and disposed of as if this Act had not been passed".

19. We have already referred to the fact that the 5th respondent had issued the necessary notice terminating the tenancy of the appellant on December 28, 1955 under S. 9 (1) and after initiating proceedings under Section 8 (1) (g) read with S. 19 (1) he obtained an order for possession as against the appellant from the Revenue Officer on May 15, 1956, and had also obtained possession of the lands on April 4, 1957. All these proceedings were under the Berar Act before the coming into force of the Bombay Act. The 5th respondent continued in such possession of the lands till June

21, 1961, on which date he transferred the suit lands to the first respondent in exchange for certain other lands. The appellant filed an application for restoration seeking relief on the ground that the 5th respondent had ceased to be in possession of the lands within twelve years from April 4, 1957.

20. Therefore the short question that arises for consideration is whether S. 52 of the Bombay Act applies to those lands the possession of which was obtained by the landlord under S. 9 of the Berar Act but in respect of which the period of two years' disability as imposed under Section 9 (6) read with rule 9 of the Rules was not over before the coming into operation of the Bombay Act.

21. From the scheme of the Berar and Bombay Acts, it will be noted that while S. 52 of the Bombay Act enlarged the period of personal cultivation to 12 years, the Berar Act had provided for personal cultivation only for a period of 2 years. Under the Berar Act if the landlord does not personally cultivate for 2 years, the tenant can apply for restoration of possession from the landlord. Similarly under the Bombay Act, if the landlord had ceased to cultivate the land within a period of 12 years, from the date of taking possession, the tenant can apply for restoration.

22. We have already referred to the fact that Mr. Gupta, learned counsel for the respondent, has relied on the decision of this Court in (1966) 1 SCR 594 = (AIR 1966 SC 557) in support of his proposition that S. 52 of the Bombay Act applies, even to cases where possession has been taken after the coming into force of the Bombay Act in pursuance of an order for restoration obtained by the landlord under the Berar Act. We have gone through the above decision and we are of the opinion that it does not lay down any such proposition. The question that arose for consideration therein was a totally different one. In that case one X was a protected lessee under the Berar Act and the landlord had terminated the tenancy under Section 9 (1) on the ground of personal cultivation and had also submitted an application to the Revenue Officer under S. 8 (1) (g) for an order terminating the tenancy. The Revenue Offi-

cer determined the tenancy by order dated July 2, 1957 and made it effective from April 1, 1958. But before the latter date, Ordinance No. 4 of 1957 was promulgated, which in turn was replaced by the Bombay Act IX of 1958. The said Act had imposed a ban on eviction of tenants and had also stayed all such proceedings pending on the date of commencement of the said Act. The landlord had applied on May 15, 1958 to the Naib Tahsildar for an order for restoration of possession of the land by the tenant. The Bombay Act which repealed the Berar Act and the Bombay Act No. IX of 1958 came into force on December 30, 1958, on which date the application filed by the landlord for restoration was pending before the Naib Tahsildar. There was a controversy as to the nature of relief that could be granted to the landlord. Having due regard to S. 132 (2) (ii) and (3) of the Bombay Act, this Court held that the application, filed by the landlord for restoration of possession on the basis of the order obtained under S. 8 (1) (g) of the Berar Act and which was pending when the Bombay Act came into force must be treated as an application under S. 19 of the Berar Act and had to be tried and disposed of by the appropriate authority. This Court further held that the application of the landlord being a pending proceeding in respect of a right acquired before the Bombay Act, it had to be continued and disposed of as if the Bombay Act had not been passed. It was further held that in so disposing of the application, treating it as one under S. 19 of the Berar Act, there was no scope for the application of the conditions and restrictions prescribed by sub-sections (3) and (4) of Section 38 of the Bombay Act as those provisions do not apply to proceedings to enforce rights acquired when the Berar Act was in operation. This judgment, in our opinion, does not support the landlord in the case before us.

23. We have already referred to the fact that the High Court, in its order under appeal, has held that Section 52 of the Bombay Act does not apply to the present case as the landlord had cultivated the land for two years though a part of that period was after the commencement of the Bombay Act. The High Court has also stated that S. 52 of the said Act will

have no application to the case on hand inasmuch as the landlord had obtained possession on April 4, 1957 long before the coming into force of the Bombay Act. For this proposition, the High Court has relied on an earlier decision of a Full Bench of the same Court in (1966) 68 Bom LR 954 = (AIR 1967 Bom 158). According to Dr. Barlingay, the High Court's view that even if a landlord completes the period of two years personal cultivation, as required under section 9 (6) of the Berar Act, after the coming into force of the Bombay Act, the larger period provided under Section 52 does not apply, is not correct. We have already stated that Dr. Barlingay has further urged that the Full Bench decision of the Bombay High Court does not apply and if that applies, the said decision must be held to be erroneous.

24. As the decision under appeal is substantially rested on the decision of the Full Bench, it is necessary to examine the scope of the Full Bench decision. But we may straightway say that the High Court's view that the Full Bench has held that S. 52 will not apply to cases where the two years' period is completed even after the Bombay Act came into force is not correct, because the Full Bench has not laid down any such proposition. The Full Bench has only held that Section 52 applies to cases where a landlord takes possession of the land on determination of a tenancy either under S. 9 of the Berar Act or under Sections 38, 39 or 39A of the Bombay Act, after the latter Act has come into force.

25. The facts in the Full Bench case were briefly as follows: X, a landlord obtained possession on July 3, 1955 of certain lands from his tenant under the Berar Act on the ground that he required the same for personal cultivation. After the death of X on October 28, 1955, his heirs inherited the property and continued in possession of the same till February 9, 1959, on which date they sold the lands to one S. After purchase by S, the original tenant applied under S. 52 of the Bombay Act for restoration of possession on the ground that the landlord had ceased to use the property for a period of 12 years as required by the Section. The heirs of X and the pur-

chaser S, were both made parties to the said application and relief was asked for against both of them. At this stage it may be mentioned that the Bombay Act came into force on December 30, 1958.

26. From the facts stated above, it will be seen that the landlord had obtained possession from the tenant on July 3, 1955 and he and his heirs had completed the requirement of Section 9 (6) of the Berar Act, namely, two years personal cultivation on July 3, 1957, long before the Bombay Act came into force. After having completed the said two years' period, the heirs were in possession not only on the date of the coming into force of the Bombay Act, but also till the date of sale to S. (February 9, 1959). The question naturally arose whether Section 52 of the Bombay Act will apply when the two years' period under the Berar Act had expired before December 12, 1958. There appears to have been earlier single Judge's decisions of the Bombay High Court holding that S. 52 of the Bombay Act will apply to cases where possession has been taken after the Bombay Act had come into force and also to cases where the period of 2 years' personal cultivation by the landlord had been completed even before the coming into force of the Bombay Act. Mr. Justice Wagle, before whom the matter came in the first instance expressed doubt about the correctness of the earlier decisions. Mr. Justice Wagle was inclined to take the view that S. 52 of the Bombay Act would apply only to those lands, the possession of which was obtained by the landlord under S. 9 of the Berar Act, but in respect of which the period of two years' disability as imposed under S. 9 (6) read with Rule 9 of the Rules was not over before the coming into force of the Bombay Act. As the learned Judge was inclined to take the view, which was in conflict with the previous view of the Bombay High Court, he referred the matter to a Division Bench, which in turn referred the matter to the Full Bench.

27. From what is stated above, it will be seen that in that case possession of the lands was taken by the landlord, from the tenant under the Berar Act and the two years' period as required under S. 9 (6) of the said

Act had also expired before the coming into force of the Bombay Act. The transfer in favour of S., no doubt, was made long after December 28, 1958. In the case before us the landlord had obtained possession under the Berar Act on April 4, 1957 and he had not completed the two years' period under S. 9 (6) of the Berar Act on December 30, 1958. We are only referring to these dates to show that the Full Bench decision did not have occasion to directly tackle the problem that arises for consideration before us. But nevertheless there are certain broad principles laid down in that decision, the correctness of which will have to be considered by us. The Full Bench posed the following two questions for consideration:

"1. Whether the provisions of section 52 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region and Kutch Area) Act, 1958 are attracted to cases where the lease of a protected lessee had been determined by the landholder under section 9 of the Berar Regulation of Agricultural Leases Act, 1951 and possession thereof taken prior to the date the new Tenancy Act came into force and the landholder continued to personally cultivate the land on the date the new Act came into force.

2. If the answer to the first question is in the affirmative, whether the expiry of two years prior to the coming into force of the new Act would have any bearing on the application of section 52."

The first question, it will be noted, refers to the effect of taking possession by the landlord before December 30, 1958 and his still being in possession on the date of the coming into force of the Bombay Act. The second question refers to the effect of the expiry of two years prior to the coming into force of the Bombay Act.

28. So far as the first question is concerned, the learned Judges held that S. 52 of the Bombay Act would be attracted only to such cases where a landlord takes possession after determination of tenancy either under S. 9 of the Berar Act or under Ss. 38, 39 or 39A of the Bombay Act, after the Bombay Act has come into force. So far as the second question is concerned, the learned Judges have not expressed any opinion on the ground

that it does not survive on the view expressed by them on the first question.

29. It will be noted from a reading of the Full Bench judgment that the learned Judges have placed considerable emphasis for the applicability of S. 52 of the Bombay Act about the landlord taking possession after the Bombay Act has come into force. If possession had been taken before December 30, 1958, according to the Full Bench, S. 52 does not apply; whereas if possession is taken after the said date, the said section will apply. For coming to this conclusion the Full Bench has given considerable importance to the fact that Section 52 refers also to Ss. 38, 39 and 39-A of the Bombay Act and that it uses the expression "landlord has taken possession of such land and he fails to use the land." These expressions, according to the Full Bench, can refer only to cases of lands taken possession by a landlord after the Bombay Act has come into force as S. 52 is not retrospective.

30. In our opinion, the Full Bench has too broadly stated the principles regarding the circumstances under which S. 52 of the Bombay Act will apply. If taking possession of the land by the landlord after December 30, 1958, is the sole test for the applicability of S. 52, the position, in our view, will be very anomalous. For instance if a landlord had taken possession on December 29, 1958, S. 52 will not apply and the requirement of two years' personal cultivation may not also become necessary as the Berar Act stands repealed as on December 30, 1958. Similarly if the landlord had taken possession and had also complied with the requirement of two years' personal cultivation long before December 30, 1958, but nevertheless if he is in possession of the land on December 30, 1958, according to the Full Bench, Section 52 will stand attracted. No doubt the Full Bench has not answered the second question posed before it, but the reasoning of the decision will be to that effect if the test of possession on December 30, 1958 is the only criteria.

31. We are of the opinion that the question of S. 52 being retrospective or not has no material bearing

in interpreting that section. That section had necessarily to refer Sections 38, 39 and 39A as they were also provisions enabling a landlord to get possession from a lessee. It is in the light of these matters that the expressions occurring therein have to be given their natural meaning. The Full Bench has misinterpreted that section.

32. In interpreting S. 52, in our opinion, S. 132 (2) (i) will be helpful. The obligation of the landlord when he takes possession of the land from the tenant under the Berar Act is to cultivate it personally for two years and once the landlord complies with that requirement before the Bombay Act came into force, the tenant's right to get restoration stands extinguished as the landlord has discharged his obligation.

33. Section 52 of the Bombay Act extends the period of personal cultivation to 12 years to all cases to which it applies. If the landlord had taken possession under the Berar Act, there was an obligation on him to cultivate personally for two years and if he had not so cultivated, the tenant had acquired a right to be restored to possession. That right which has been acquired by the tenant or accrued to him before the commencement of the Bombay Act is saved under Section 132 (2) (i). Similarly, if the landlord had cultivated the lands personally for the required period, before the Bombay Act came into force, the landlord had acquired a right not to be disturbed from his possession thereafter. That right again, which has been acquired by landlord or accrued to him, has been saved under Section 132 (2) (i). Having due regard to the provisions of the two statutes and what has been stated by us earlier the position is that if the landlord on December 30, 1958 had completed the two years period of personal cultivation, his right not to be disturbed is continued and preserved under Section 132 (2) (i) of the Bombay Act. Again if the landlord in pursuance of an order obtained under the Berar Act, takes possession, after the commencement of the Bombay Act, Section 52 applies to him and his original obligation to cultivate personally for two years under the Berar Act gets extended by the 12 years period provided under that section. If he ceases to so cultivate

within the period of 12 years from his taking possession, the tenant gets a right to apply for restoration of the land.

34. The several aspects enumerated above have not been considered by the Full Bench of the Bombay High Court and it has rested its decision for applying Section 52 by applying the sole test whether the landlord has taken possession before or after December 30, 1958. Such a test is not warranted by the provisions of both the statutes read together. A fair reading of Section 52 also, in our opinion, leads to the same conclusion. Section 52 provides for:

(i) the tenancy being terminated under Section 9 of the Berar Act;

(ii) the landlord taking possession of such land on the basis of such termination of the tenancy;

(iii) the landlord failing to use the land for the purpose specified in the notice under Section 9 of the Berar Act;

(iv) failure to use the land for the purpose mentioned in the notice within one year from the date on which he took possession;

(v) the landlord ceasing to use the land for the purpose for which he obtains possession within 12 years of his taking possession.

35. To the case of a landlord who had already completed two years personal cultivation before Dec. 30, 1958, the requirement of his failing to use the land for the purpose specified in the notice under Section 9 within one year from the date of his taking possession, will have no application whatsoever. The normal and reasonable construction to be placed upon Section 52 is that it will apply only to cases of lands, the possession of which was obtained by the landlord under Section 9 of the Berar Act, but in respect of which the period of two years' disability imposed under Section 9 (6) read with Rule 9 of the Rules was not over before the coming into force of the Bombay Act. In respect of such landlords, Section 52 enlarges the period for which he is required to personally cultivate the lands. In this respect we are inclined to agree with the view of Mr. Justice Wagle.

36. To conclude Section 52 applies to all cases where possession is taken by the landlord on or after December 30, 1958 on the basis of an order obtained under the Berar Act. It applies to cases where possession had been taken by a landlord under the Berar Act but the two years' period of personal cultivation had not been completed when the Bombay Act came into force. The instances of obtaining possession under Ss. 38, 39 or 39-A of the Bombay Act have not been considered by us in this appeal.

37. It follows that Section 52 of the Bombay Act applies to the case before us, as the landlord has not completed two years' personal cultivation on December 30, 1958, the date on which the Bombay Act came into force. He had taken possession on April 4, 1957, and the two years' period will expire only on April 4, 1959. In the meanwhile the Bombay Act had come into force on December 30, 1958. Under Section 52 the period of personal cultivation had been extended to 12 years from the date of taking possession. But as the 5th respondent, who obtained possession for personal cultivation had transferred the suit lands to the 1st respondent on June 21, 1961, on which date the 12 years' period had not expired, the appellant tenant was entitled to apply for restoration on the ground that the said landlord had ceased to cultivate the lands for the required period as provided under Section 52.

38. In the result the judgment and order of the High Court are set aside and the orders of the Special Deputy Collector and the Maharashtra Revenue Tribunal are restored and the appeal allowed.

39. Though normally costs should follow the event, in this case, though the appellant succeeds, we decline to award him costs, as we are of the view that he should have been more careful in giving the valuation in the special leave petition.

Appeal allowed.

1971 Sk. Mohd. Omer v. Collector of Customs, Calcutta [Prs. 1-2] S. C. 293

AIR 1971 SUPREME COURT 293
(V 58 C 69)

(From Calcutta: AIR 1967 Cal 16)
K. S. HEGDE AND A. N. GROVER JJ.
Sheikh Mohd. Omer, Appellant v.
Collector of Customs, Calcutta and
others, Respondents.

Civil Appeal No. 1645 of 1966, D/-
4-9-1970.

(A) Sea Customs Act (1878), S. 75 —
Passengers (Non-Tourist) by Baggage
Rules 1960, clarified by Notification of
Government of India, Ministry of
Commerce and Industries Import Trade
Control Public Notice No. 1 ITC (PN)/
61, D/- 2-1-1961 — Exemption of pet
animals from import trade control —
“Pet animal” — Meaning of.

There is no such species of animal
known as ‘pet animal’. What happens
is that certain kind of animals or birds
are often domesticated and when a
particular person becomes fond of such
an animal or bird it may be said to
have become a “pet” of that person
and may be called a “Pet animal”. It
is a subjective expression. (Para 12)

Where a person imports a mare for
the purpose of breeding on a condition
to return the mare along with the foals
and the mare is not even seen by the
person till it arrives in India, the mare
cannot be said to be the pet animal of
that person. AIR 1967 Cal 16, Affirmed.
(Para 12)

(B) Customs Act (1962), S. 111 (d) —
Imports and Exports (Control) Act
(1947), S. 3 — Imports Control Order
1955 Part IV Sch. 1 Item 1 — Expres-
sion “any prohibition” in S. 111 (d) —
It means every prohibition.

The expression “any prohibition” in
Section 111 (d) applies to every type of
prohibition. The prohibition may be
complete or partial. Any restriction
on import or export is to an extent a
prohibition. Therefore, Section 111 (d)
includes restrictions. Merely because
Section 3 of the Imports and Exports
(Control) Act uses three different ex-
pressions “prohibiting”, “restricting” or
“otherwise controlling”, the amplitude
of the word ‘any prohibition’ in Sec-
tion 111 (d) cannot be cut down.
Import of living animals of all sorts is
prohibited by part IV Sch. 1 Item 1 of
Import Control Order 1955. Certain
exceptions are provided for but none
the less the prohibition continues and

attracts S. 111 (d) of the Customs Act.
AIR 1967 Cal 16, Affirmed.

(Para 14)
M/s. A. N. Sinha and P. K. Mukher-
jee, Advocates, for Appellant; Mr. B.
Sen, Senior Advocate, (Mr. S. P. Nayar
Advocate, with him), for Respondents.

The following Judgment of the
Court was delivered by

HEGDE, J.—In this appeal by
certificate two questions of law arise
namely (1) whether on the facts of
this case the mare “Jury Maid” can
be considered as a “pet animal” with-
in the meaning of that expression in
the notification issued by the Govern-
ment of India, Ministry of Commerce
and Industries, Import Trade Control
Public Notice No. 1-I.T.C.(PN)/61 dated
2nd January 1961 and (2) whether the
expression “prohibition” contained in
Sec. 111 (d) of the Customs Act 1962
(which will hereinafter be referred to
as the Act) includes prohibition of im-
ports coupled with a power to permit
importation under certain conditions.

2. The facts relevant for the pur-
pose of deciding the points in issue
are not many. They may now be
stated. The appellant, Sheikh Mohd.
Omer, as found by the High Court
was a dealer in horses especially in
racing horses. He was breeding horses
out of mares owned by him. He own-
ed two stallions by name “Pieta” and
“Rontgen”. He claimed to have had a
considerable reputation as race horse
owner and for racing with horses bred
by himself. He appears to have won
several prizes awarded for horse races.
In September, 1964, the appellant
went to Europe. While he was in
Switzerland he received a letter from
M/s. British Bloodstock Agency Ltd.,
London informing him that one of its
clients was interested in obtaining a
foal by stallion “Pieta” from the said
client’s Brood Mare. After some cor-
respondence it was agreed that the
Glasgow Stud Farm would lease a
brown English mare to the appellant
which would be shipped to India and
would be kept there pending her pro-
ducing two foals by the appellant’s
breeding race horse “Pieta” after
which the mare will be returned to
England with one foal. The appellant
returned to Calcutta on November 7,
1964 by air. At the Dum Dum Airport
he gave a declaration showing that
his seven unaccompanied baggages
will follow him by sea or by air. Even-

tually, "Jury Maid" was shipped to Calcutta by S. S. "Chinkoa" which reached Calcutta port on December 25, 1964. When the appellant tried to take delivery of the same, the Customs authorities objected on the ground that the mare had been imported in contravention of the provisions of the Imports and Exports (Control) Act, 1947. After due enquiry the Customs authorities confiscated the mare. At this stage, it may be mentioned that when the mare came to India, it was pregnant. After its arrival in India it gave birth to a foal and thereafter it died. The foal given birth by it is alive.

3. The first question that arises for decision is whether by importing the mare in question the appellant contravened the provisions of the Act.

4. Section 111 (d) of the Act provides:

"The following goods brought from a place outside India shall be liable to confiscation:—.....

(d) any goods which are imported or attempted to be imported or are brought within the Indian customs waters for the purpose of being imported, contrary to any prohibition imposed by or under this Act or any other law for the time being in force."

5. "Prohibited goods" is defined in Sec. 2 (33) of the Act. That definition reads:

"Prohibited goods" means any goods the import or export of which is subject to any prohibition under this Act or any other law for the time being in force but does not include any such goods in respect of which the conditions subject to which the goods are permitted to be imported or exported have been complied with."

6. From this definition, it is clear that "prohibited goods" under the Act (Contd. on Column 2)

"Sl. No.	Name of Article	Item of First Schedule to Indian Tariff Act, 1934.
(1)	(2)	(3)
	Part IV	
1.	Animals, living all sorts	I and I (I)."

10. By the notification dated January 2, 1961 referred to earlier certain exemptions were provided for personal baggage of a passenger. One of the exemptions granted is for clearance of one dog, pet animal and birds

includes also such goods as may be imported by complying with the prescribed conditions. It is admitted that the import of horses or mares is not prohibited under the Act. Therefore the question is whether such import is prohibited "by any other law for the time being in force."

7. Section 3 (1) of the Imports and Exports (Control) Act, 1947 provides: "Powers to prohibit or restrict imports and exports:—

(1) The Central Government may, by order published in the Official Gazette, make provision for prohibiting, restricting or otherwise controlling, in all cases or in specified classes of cases and subject to such exceptions, if any as may be made by or under the order.—

(a) the import, export, carriage coastwise or shipment as ships' stores of goods of any specified description;

(b) the bringing into any port or place in India of goods of any specified description intended to be taken out of India without being removed from the ship or conveyance in which they are being carried."

8. In exercise of the powers conferred by Sec. 3 of the Imports and Exports (Control) Act, 1947, the Government of India promulgated an order known as the "Imports Control" Order, 1955 dated 7th December, 1955. Clause 3 (1) of the said order reads:

"Restriction on Import of Certain Goods.—

(1) Save as otherwise provided in this order, no person shall import any goods of the description specified in Schedule I, except under, and in accordance with, a licence or a customs clearance permit granted by the Central Government or by any officer specified in Schedule II."

9. The relevant Entry is to be found in Item I of Schedule I in Part IV which is as follows:—

in a limited number subject to certain conditions.

11. Now we shall go back to the question whether "Jury Maid" can be considered as a pet animal. A pet is explained in Concise Oxford Dic-

tionary of Current English as "any animal tamed and kept as favourite or treated with fondness."

The shorter Oxford Dictionary explains that word thus:

"Any animal that is domesticated or tamed and kept as a favourite or treated with fondness; esp. applied to a lamb reared by hand."

The same word is explained in Chambers's Twentieth Century Dictionary thus:

"Any animal, tamed and fondled."

12. There is no evidence to show that "Jury Maid" was tamed. That apart the "Jury Maid" was not fondled or treated with fondness by the appellant. He obtained that animal on lease for certain specified purpose. In respect of that animal he had only a business connection. Rejecting the contention of the appellant that "Jury Maid" is a pet animal, the learned Judges of the appellate bench of the Calcutta High Court observed:

"There is no such species of animal known as "Pet animal". What happens is that certain kind of animals or birds are often domesticated and when a particular person becomes fond of such an animal or bird it may be said to have become a "pet" of that person and may be called a "pet animal". It is a subjective expression. In the present case, the mare "Jury Maid" was not the "pet" of any particular person. So far as the appellant is concerned, he had not even seen the mare when it arrived in India. It cannot be said that he became fond of it at any relevant point of time. In actual life we find that men have at times become fond of strange animals like lions, tigers and even crocodiles. It was not intended to make the baggage rules a warrant for transforming passengers ships into a Noah's Ark....."

13. We entirely agree with those observations and reject the contention of the appellant that "Jury Maid" was a pet animal.

14. This takes us to the question whether by importing the mare "Jury Maid" the appellant contravened Section 111 (d) read with Sec. 125 of the Act. It was urged on behalf of the appellant that expression "prohibition" in Section 111 (d) must be considered as a total prohibition and that expression does not bring within its fold the restrictions imposed by Cl. 3

of the Imports Control Order, 1955. According to the learned counsel for the appellant clause 3 of that order deals with the restrictions of import of certain goods. Such a restriction cannot be considered as a prohibition under Sec. 111 (d) of the Act. While elaborating his argument the learned Counsel invited our attention to the fact that while Sec. 111 (d) of the Act uses the word "prohibition", Section 3 of the Imports and Exports (Control) Act, 1947 takes in not merely prohibition of imports and exports, it also includes "restrictions or otherwise controlling" all imports and exports. According to him restrictions cannot be considered as prohibition more particularly under the Imports and Exports (Control) Act, 1947 as that statute deals with "restrictions or otherwise controlling" separately from prohibitions. We are not impressed with this argument. What clause (d) of Sec. 111 says is that any goods which are imported or attempted to be imported contrary to "any prohibition imposed by any law for the time being in force in this country" is liable to be confiscated. "Any prohibition" referred to in that section applies to every type of "prohibition". That prohibition may be complete or partial. Any restriction on import or export is to an extent a prohibition. The expression "any prohibition" in Section 111 (d) of the Customs Act, 1962 includes restrictions. Merely because Section 3 of the Imports and Exports (Control) Act, 1947 uses three different expressions "prohibiting", "restricting" or "otherwise controlling," we cannot cut down the amplitude of the word "any prohibition" in Section 111 (d) of the Act. "Any prohibition" means every prohibition. In other words all types of prohibitions. Restriction is one type of prohibition. From item (I) of Schedule I, Part IV to Import Control Order, 1955, it is clear that import of living animals of all sorts is prohibited. But certain exceptions are provided for. But none the less the prohibition continues.

15. In the result this appeal is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 296

(V 58 C 70)

(From: Allahabad)*

V. BHARGAVA AND I. D. DUA, JJ.

Angnoo and others, Appellants v. State of Uttar Pradesh, Respondent.

Criminal Appeal No. 209 of 1967, D/- 11-9-1970.

Evidence—Appreciation of—Murder case — Witness brother of deceased — Fact of his relationship would add to value of his evidence because he would be interested in getting the real culprit, rather than innocent persons, punished. (Para 8)

M/s. S. C. Agarwal, R. K. Garg and D. P. Singh, Advocates of M/s. Ramamurthi and Co. and Miss S. Chakravarti, M/s. R. K. Jain and Anil Kumar Gupta, Advocates, for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

The following Judgment of the Court was delivered by

BHARGAVA, J.:— The ten appellants in this appeal were convicted for offences punishable under Section 148 of the Indian Penal Code and Section 302 read with Section 149 of the Indian Penal Code, and each one of them was awarded concurrent sentences of two years rigorous imprisonment for the first offence and imprisonment for life for the second offence. The conviction was recorded in respect of the murder of one Mahadeo on the 12th November, 1964.

2. The prosecution case was that Mahadeo had appeared as a witness in an enquiry under Section 202 of the Code of Criminal Procedure which was being held on a complaint filed by one Chotai for an offence under Section 500, I. P. C., against Angnoo appellant. That complaint was filed by Chotai on the ground that Angnoo had earlier lodged a false report with the Police against Chotai and his brother Sumer for an offence under S. 454, I. P. C. After Mahadeo had been examined as a witness in the enquiry, the Court issued summonses against the accused. The service of the summons on Angnoo took place on 12th November, 1964. On that day, at about noon, Mahadeo

had gone from his village Banyan Khera to another village Rampur, one mile away. It may be mentioned that eight of the appellants belonged to the same village Banyan Khera where Mahadeo resided, while two of them resided in neighbouring villages. When Mahadeo was returning about an hour before sunset and had reached a place, two furlongs away from his own village Banyan Khera, near the field of one Badal, the ten appellants are alleged to have come out of an ambush and attacked Mahadeo with spears and Kantas. Five of the appellants were armed with spears and other five with Kantas. Mahadeo raised a hue and cry and also tried to defend himself with the lathi which he was carrying. He was, however, badly injured and died as a result of those injuries on the spot. A number of witnesses had arrived near the place of occurrence and saw part of the attack on Mahadeo. When some of the witnesses wanted to come near, one of the appellants, Barjor fired a warning shot in the air with his pistol, so that none of the witnesses came very close. They all remained at a distance of about 50 paces from the place of incident. After having caused injuries to Mahadeo, the appellants escaped to the north through the fields and, thereafter, witnesses came near Mahadeo and found him dead. Mahadeo's brother Puttu Lal dictated a report of the incident which was written down by prosecution witness Raja Ram. It was then given to one Kallu to be taken to the police station Qasimpur. On the basis of that written report, the First Information Report was recorded at Qasimpur at 8.30 p.m. The offence was, however, committed at a place which fell within the circle of Police Station Auras, so that a copy of the report recorded at Police Station Qasimpur was sent to the Police Station Auras, where the information reached at 11.30 p.m. Thereafter, the case was investigated and the appellants were sent up for trial. The trial Court relied on the evidence of five eye-witnesses and the medical evidence to record the conviction of the appellants for the offences mentioned above. The High Court upheld the conviction and dismissed the appeal filed by the appellants. Consequently, the appellants have come up in this appeal by special leave.

*(Cri. Appeal No. 590 of 1965, D/- 17-3-1967 — All.)

3. The trial Court convicted the appellants on the basis of the evidence of five eye-witnesses P. W. 1, Puttu Lal brother of Mahadeo deceased, P.W. 2 Maiku, P.W. 3 Shri Krishna, P.W. 4 Raja Ram and P.W. 5 Juddhi. The argument that has been advanced before us on behalf of the appellants is that the evidence of these witnesses should not have been accepted by the Courts because of five reasons. First, there was delay in lodging the First Information Report; secondly, there was conflict between the medical evidence and the evidence of the eye-witnesses; thirdly, it was not probable that these witnesses could have arrived sufficiently close to the scene of occurrence in time to see the actual assault on Mahadeo; fourthly, it was not very probable that they would be able to recognise all the ten appellants as assailants of Mahadeo and fifthly, all the eye-witnesses are partisan witnesses and should not have been relied upon. All these arguments were advanced before the High Court also, and the High Court did not find any force in them. Having heard learned counsel, we are also unable to hold that any of these grounds would justify our interference with the concurrent decision of the trial Court and the High Court.

4. It is true that, according to the prosecution witnesses, the incident took place at about 4.30 P. M. The time has been estimated on the basis of the version of the witnesses that it took place one hour before sunset and, during those days, the time of sunset was about 5-30 P. M. The report was lodged at Police Station Qasimpur, five miles away, at 8-30 P. M. Part of the delay is explained by the circumstance that some time must have been taken in looking after Mahadeo before his brother Puttu Lal could gather his wits to dictate report, and then time must have been taken in actual dictation while the report was being recorded by P. W. 4 Raja Ram. It however, appears that the report was written without the aid of any artificial light and, consequently, the writing of the report must have been completed by about 6-30 P. M. Thereafter, that written report was given to one Kallu to be taken to village Qasimpur and he left the place of occurrence on a cycle. It is true that, normally, he should have gone straight to the police

station, in which case the report at the police station should have been recorded much earlier than 8-30 p. m. However, the explanation for the delay could not be put forward by the prosecution, because Kallu turned hostile and could not be examined by the prosecution for this purpose. It seems to be probable, as indicated by the High Court, that Kallu, for some reason or the other, did not proceed straight to the police station and went off for his own work and, realising that he had committed this mistake, he may have turned hostile to the prosecution. The absence of the explanation for the delay committed by Kallu; under these circumstances, cannot be considered to be a ground for disbelieving the eye-witnesses.

5. So far as the question of conflict between medical evidence and the evidence of eye-witnesses is concerned, the submission is based on the fact that, amongst the 27 injuries which were received by Mahadeo, there were 4 blunt-weapon injuries. According to the prosecution witnesses, the weapons that were carried by the assailants and were used in the attack were spears and Kantas. The argument was that neither a spear nor a Kanta could cause a contusion, bruises or a depression on the head and, consequently, the evidence given by the eye-witnesses does not fully explain all the injuries received by Mahadeo. It appears to us that most of these witnesses arrived at the scene of occurrence after the attack had already started and were able to see only part of the incident, so that some blows must have been inflicted on Mahadeo before their arrival and some after their arrival. It may be that they failed to notice that some of the assailants were carrying lathis or, more probably, some of the assailants used their spears like lathis. They gave blows wielding spears as lathis rather than thrusting the spears every time. They may have done so even before some of the witnesses arrived. The use of a spear in such a manner will not be very unnatural if a large number of persons surround one single man and try to beat him. In such a situation, it may be easier to wield the spear as a lathi than to try and thrust it at the person being attacked. There is, therefore, in our opinion, no conflict at all between the medical evidence

and the evidence given by the eye-witnesses.

6. The witnesses came from different places. Puttu Lal P. W. 1 and Juddhi P.W. 5 both came from their village Banyan Khera, which was at a distance of about two furlongs from the scene of occurrence. The distance was not so great that, after hearing the first hue and cry raised by Mahadeo, these two witnesses could not have come in time to see part of the assault on Mahadeo. They both stated that they stopped at a distance of about 50 paces from the place from where Mahadeo was being beaten and saw the occurrence from that place. As pointed out by the High Court, the appellants were in the field of Badal about 100 paces away where they were concealing themselves. It is possible that Mahadeo started raising a hue and cry as soon as he saw these appellants rushing at him. These cries having been heard by Puttu Lal and Juddhi, they must have started running immediately towards the scene of occurrence and could, therefore, very well come in time to see some of the blows falling on Mahadeo. The other three witnesses Maiku, Shri Krishna and Raja Ram were also not much further away. In this connection, Shri Krishna's evidence is challenged on the ground that, according to him, he arrived in village Khanjhri at about 2 or 2-30 P. M., stayed there for half an hour, and was then coming back when he saw this incident. Khanjhri is at a distance of only five furlongs from the scene of occurrence. The argument was that, if he left Khanjhri at about 3 P. M., he could not still be at that village and the scene of occurrence, because he could not have taken 1½ hours to cover a distance of less than five furlongs. This argument overlooks the circumstance that villagers have no watches or clocks and only give timing from their estimate. It can very well be that Shri Krishna may have made a mistake of more than an hour in respect of the time of his arrival in village Khanjhri and may have also under-estimated the period during which he stayed there before starting back. In fact, villagers have very little idea of distances also; and this is clear from the evidence of P. W. 4 Raja Ram who stated that his village was at a distance of half a mile from

the scene of occurrence. According to him, he heard the shouts when he had covered about 1½ field away from the village which distance, according to him, would be 90 steps. At the same time, he stated that when he heard the shouts, he was 50 steps away from the place of occurrence. It was pointed out to him by the Court that, according to his evidence, the total distance between the scene of occurrence and his village was half a mile, while, calculating from his own position, the distance would be only 90 steps plus 50 steps. He was unable to explain the discrepancy. It is obvious that he had no idea of distances. We are unable to agree with learned counsel for the appellants that, from this circumstance, an inference can at all be drawn that Raja Ram was nowhere near the scene of occurrence and did not see the assault on Mahadeo.

7. So far as the possibility of recognising the ten appellants is concerned, all the witnesses have stated that they arrived within a distance of about 50 steps while the assault was still going on. All the appellants were well-known to the witnesses and there is no reason to doubt their evidence that they were able to recognise all the ten of them. Persons well-known can be recognised within a very short time. The appellants were seen by them while continuing the attack on Mahadeo and while they were going away after completing the assault.

8. So far as the last point is concerned, it does appear that two of the witnesses are not independent. Juddhi is the son of Chotai who has litigation with Angnoo appellant. Seven of the other accused are related to Angnoo, while the two of them are said to be his friends, these two being Ram Adhar and Barjor Singh. Maiku once appeared as a witness for the prosecution in a case against Ram Adhar and, in that case, his evidence was disbelieved by the Court on the ground that he was a partisan witness. It, however, appears to us that at least the other three witnesses are quite reliable. Puttu Lal is, no doubt, the brother of deceased Mahadeo, but this very circumstance would, in our opinion, add to the value of his evidence, because he would be interested in ensuring that the real culprits responsible for the murder of Mahadeo

are punished and not innocent persons. Shri Krishna and Raja Ram are both totally independent. No relationship between them and any other interested person has been established. They have no motive to give wrong evidence against the appellants.

9. Considering all these circumstances, we are unable to hold that the High Court committed any error in upholding the conviction of these appellants. The appeal fails and is dismissed.

Appeal dismissed.

**AIR 1971 SUPREME COURT 299
(V 58 C 71)**

(From: Delhi) *

**M. HIDAYATULLAH C. J., J. C.
SHAH, K. S. HEGDE, A. N.
GROVER AND A. N. RAY, JJ.**

R. D. Agarwala and another, Appellants v. Union of India and another, Respondents.

1. Dalmia Cement (Bharat) Ltd.
 2. The Jaipur Udyog Ltd., Interveners.
- Civil Appeals Nos. 2634 of 1969 and 63 of 1970, D/- 23-2-1970.

Constitution of India, Article 132 (1) — Petition involving important questions before Single Judge of High Court — Application by party to refer petition for decision to a Bench of the High Court — Single Judge deciding case and granting certificate under Article suo motu to file appeal to Supreme Court — Held that the Judge was in error in not making reference to a Bench — Practice of deciding case sitting singly and giving certificate though technically correct was improper — Right of party to file appeal to High Court not to be short-circuited — Certificate granted in Civil Writs Nos. 220 and 725 of 1968, D/- 5-12-1969 (Delhi), Cancelled.

(Para 2)

Cases Referred: Chronological Paras
(1969) AIR 1969 Raj 281 (V 56) =

ILR (1969) 19 Raj 6, Jaipur
Udhyog Ltd. v. Union of India 1
In C. A. No. 2634 of 1969:

Mr. Sarjoo Prasad, Senior Advocate
(Mr. Prem Nath Chaddha, Advocate,

*(Civil Writs Nos. 220 and 725 of 1968, D/- 5-12-1969 — Delhi.)

IN/IN/E175/70/MVJ/B

M/s. K. L. Mehta and S. K. Mehta, Advocates of M/s. K. L. Mehta and Co. and M/s. K. R. Nagaraja, M. G. Gupta and Miss Sona Bhatiani, Advocates, with him), for Appellants; Mr. R. N. Sachthey, Advocate, for Respondent No. 1; Mr. M. C. Setalvad, Senior Advocate (M/s. Govind Das and B. P. Singh, Advocates, with him), (for No. 1) and Mr. M. C. Chagla, Senior Advocate (M/s. K. K. Jain, Bishambar Lal and H. K. Puri, Advocates, with him), (for No. 2), for Interveners.

In C. A. No. 63 of 1970:

Mr. R. V. S. Mani, Advocate, for Appellants; Mr. S. P. Nayar, Advocate (for No. 1) and M/s. S. K. Mehta, and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co. and Mr. K. R. Nagaraja and Miss Sona Bhatiani, Advocates, (for Nos. 3 and 4), for Respondents.

The following Order of the Court was delivered by

HIDAYATULLAH, C. J.—This order will govern the disposal of Civil Appeals Nos. 2634 of 1969 and 63 of 1970. These two appeals arise out of two writ petitions filed in the High Court of Delhi which were disposed of by a common judgment delivered by a learned single Judge on December 5, 1969. The appeals have been brought on certificate granted suo motu by the learned single Judge under Article 132 (1) of the Constitution of India. While granting the certificate, the learned single Judge observed that at an earlier stage in the case, request was made to him to refer these two petitions for decision to a Bench, because important questions were involved in them. At that time, the learned Judge felt that since there was a Division Bench decision of the Rajasthan High Court in Jaipur Udyog Ltd. v. Union of India, AIR 1969 Raj 281 there was no need to refer the matter to a larger Bench. The learned Judge goes on to say in the order granting certificate that at the time of the hearing, he found that several questions arose before him which were not covered by the Rajasthan decision. He probably felt that as the points which he had to decide were not considered by this Court in any earlier decision and as he had decided the case sitting singly, he should grant certificate suo motu for appeal to this Court.

2. In our opinion, and we say it respectfully, the learned Judge was in

error in not making a reference to a Bench when he found that important questions of law were arising before him. Even if he did not make any reference, he should have allowed the parties to take an appeal in the High Court itself under the provisions pertaining to appeals against decisions of a single Judge. The practice of deciding the case sitting singly and giving a certificate under Article 132 (1) for appeal to this Court, although technically correct, is an improper practice. It is the right of the party to file an appeal in the High Court itself against the decision of the single Judge and that right should not be short-circuited by passing on the case to the Supreme Court for decision. We think we should not endorse this practice which would create a bad precedent in India. We accordingly cancel the certificate and leave the parties free to file an appeal in the High Court, if they so desire. There will be no order as to costs.

Order accordingly.

AIR 1971 SUPREME COURT 300
(V 58 C 72)

(From Gujarat: AIR 1965 Guj 87)

**J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.**

Dhedh Nathu Raja (dead) by his legal representatives, Appellants v. Langha Nathu Jamal (dead) by his legal representatives and others, Respondents.

Civil Appeal No. 1456 of 1966, D/-16-9-1969.

States Reorganisation Act (1956), Ss. 52, 57 — Saurashtra High Court abolished and jurisdiction conferred on Bombay High Court — Appeal again transferred to Gujarat High Court under Bombay Reorganisation Act (1960) — Held appeal from single Judge to Division Bench was governed by Letters Patent Cl. 15 (Bom.) and not by Sec. 22A of Saurashtra Ordinance 2 of 1948. AIR 1965 Guj 87, Reversed.

By virtue of Section 22A (2) of the Saurashtra Ordinance (2 of 1948) (as amended by Ordinance 5 of 1950) an appeal lay to a Division Bench of the High Court from a judgment of a single Judge in respect of a decree or

order made in exercise of appellate jurisdiction, if the single Judge certified the case as fit for appeal. But an appeal under clause 15 of the Letters Patent of the High Court of Bombay in an appeal from the judgment of the Court of First instance could be filed without a certificate of the Judge hearing the appeal. The Saurashtra High Court was abolished from November 1, 1956 and the jurisdiction of the Saurashtra High Court was conferred upon the Bombay High Court. Subsequently the appeal under Bombay Reorganisation Act, 1960, stood transferred to the High Court of Gujarat. Once the Saurashtra Ordinance 2 of 1948 was repealed and the jurisdiction to try the appeal was conferred upon the High Court of Bombay, the right of appeal exercisable by the parties to the litigation decided by the High Court of Bombay was governed by the Letters Patent of that Court and not by S. 22A of the Saurashtra Ordinance 2 of 1948. Section 52 of the States Reorganisation Act preserved the original, appellate and other jurisdiction which was under the law in force immediately before the appointed day exercisable in respect of the territories within the State of Saurashtra. Unless in the exercise of that jurisdiction any restriction under the law then in force was by express provision or by clear implication preserved, the provisions of clause 15 of the Letters Patent must apply. 1905 AC 369 and AIR 1957 SC 540, Rel. on; AIR 1965 Guj 87, Reversed.

(Paras 7, 8, 10, 11)

Cases Referred: Chronological Paras

(1957) AIR 1957 SC 540 (V 44) =
1957 SCR 488, Garikapati
Veeraya v. N. Subbiah Choudhury

8

(1905) 1905 AC 369 = 74 LJ PC
77, Colonial Sugar Refining Co.
v. Irving

8

M/s. D. U. Shah and P. C. Bhartari, Advocates, and Mr. J. B. Dadachanji, Advocate of M/s J. B. Dadachanji and Co., for Appellants; M/s S. K. Dholakia and Vineet Kumar, Advocates, for Respondents Nos. 1 (a) to 1 (e) and (g).

The following Judgment of the Court was delivered by

SHAH, J.—The facts which give rise to this appeal are few and simple. The appellant commenced on May 3,

1951 an action in the Court of the Assistant Judge, Morvi, in the former Part 'B' State of Saurashtra for a decree for Rs. 9,387/5/- against one L. Angha Nathu. Jamal and respondents 2 and 3 in this appeal. The Trial Court decreed the suit on October 17, 1955. An appeal was filed against the decree in the High Court of Saurashtra at Rajkot. On November 1, 1956, the High Court of Saurashtra was abolished and the proceedings pending in that Court stood transferred to the High Court of Bombay. On February 21, 1958, Vyas, J., of the High Court of Bombay allowed the appeal. Against that order an appeal under clause 15 of the Letters Patent of the High Court of Bombay was filed by the plaintiff but without an order of Vyas, J., certifying that the case was fit for appeal to a Division Bench of the High Court. On May 1, 1960 under the Bombay Reorganisation Act, 1960 the appeal stood transferred to the High Court of Gujarat. The High Court of Gujarat held that the appeal was incompetent in the absence of an order under Section 22A of the Saurashtra Ordinance 2 of 1948 certifying that the case was fit for appeal to a Division Bench. With certificate granted by the High Court of Gujarat this appeal has been preferred.

2. The Rulers of Indian States in Kathiawar agreed "to unite and integrate" their territories in one State to be styled the United State of Saurashtra with a common executive, legislature and judiciary. By Ordinance 1 of 1948 the administration of the covenanting States was taken over by the Rajpramukh. The Rajpramukh issued, in exercise of power reserved to him by Article 9, clause (3) of the Covenant, Ordinance 2 of 1948 setting up with effect from February 29, 1948, a High Court of Judicature for the State of Saurashtra. The expression "High Court" was defined in Section 3 (c) as meaning "the High Court established and constituted by this Ordinance and functioning as the High Court of the Saurashtra State." By Section 21 the High Court was to be the highest Court of appeal and revision in the State and to have jurisdiction to maintain and dispose of such appeals, revision and other cases civil or criminal, as it may be empowered to do under the Ordinance or any enactment in force in the State. By Sec-

tion 22 the High Court was also to be a Court of reference with power to hear, revise and determine all cases referred to it. By Ordinance 5 of 1950, Section 22A was added: it was provided thereby:

"(1) Except as otherwise provided by any enactment for the time being in force, an appeal from any original decree, or from any order against which an appeal is permitted by any law for the time being in force or from any order under Art. 226 of the Constitution of India, made by a single Judge of the High Court, shall lie to a Bench consisting of two other Judges of the High Court.

(2) An appeal shall lie from a judgment of one Judge of the High Court in respect of a decree or order made in exercise of Appellate Jurisdiction to a Bench consisting of two other Judges of the High Court if the Judge who made the decree or order certifies that the case is a fit case for appeal."

3. Under the Constitution of India, the territory of the United State of Saurashtra was formed into a Part 'B' State of Saurashtra. By the States Reorganisation Act 1956 the territory of the State of Saurashtra merged into the State of Bombay.

4. By Section 49 of the States Reorganisation Act, 1956, it was enacted that the High Court exercising immediately before the appointed day, jurisdiction in relation to the existing State of Bombay shall, as from the appointed day, be deemed to be the High Court for the new State of Bombay. By Section 50 (1) as from the appointed day, the High Courts of all the existing Part B States (with certain exceptions not material) were to cease to function and were abolished. By Section 52 it was provided:

"The High Court for a new State shall have, in respect of any part of the territories included in that new State, all such original, appellate and other jurisdiction as, under the law in force immediately before the appointed day, is exercisable in respect of that part of the said territories by any High Court or Judicial Commissioner's Court for an existing State."

By Section 54 it was provided:

"Subject to the provisions of this Part, the law in force immediately

before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, with the necessary modifications, apply in relation to the High Court for a new State, and accordingly, the High Court for the new State shall have all such powers to make rules and orders with respect to practice and procedure as are, immediately, before the appointed day, exercisable by the High Court, for the corresponding State:

Provided that any rules or orders which are in force immediately before the appointed day with respect to practice and procedure in the High Court for the corresponding State shall, until varied or revoked by rules or orders made by the High Court for a new State, apply with the necessary modifications in relation to practice and procedure in the High Court for the new State as if made by that Court."

Section 59 (3) provided that all proceedings pending in the High Court of Saurashtra or in the Court of the Judicial Commissioner for Kutch immediately before the appointed day shall stand transferred to the High Court of Bombay. By Section 119 it was provided:

"The provisions of Part II shall not be deemed to have effected any change in the territories to which any law in force immediately before the appointed day extends or applies and territorial references in any such law to an existing State shall, until otherwise provided by a competent Legislature or other competent authority, be construed as meaning the territories within that State immediately before the appointed day."

Section 127 provided:

"The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law."

5. In exercise of the power conferred upon the Central Government by S. 120 of the States Reorganisation Act, 1956, the Saurashtra (Adaptation of Laws on Union Subjects) Order, 1957, was promulgated by the Central Government. By clause 5 of the order it was provided that Saurashtra Ordinance 2 of 1948 shall stand repealed with effect from November 1, 1956. The

High Court of Bombay for the new State added rr. 252-A and 252-B to the Rules of the High Court of Judicature at Bombay, Appellate Side, 1950.

By Rule 252-A it was provided:

"Rules and orders relating to practice and procedure in the High Court in force immediately prior to the appointed day in the High Court of Bombay shall, subject to modifications made from time to time thereto, apply to the practice and procedure in the High Court."

Rule 252-B provided:

"Rules and orders relating to practice and procedure in the High Court framed by the High Courts of Nagpur, Hyderabad and Saurashtra and Judicial Commissioner's Court, Kutch, shall stand abrogated as from the 1st November, 1956 in the areas of the new State of Bombay which before the 1st November, 1956 were parts of the States of Madhya Pradesh, Hyderabad, Saurashtra and Kutch."

6. The High Court of Gujarat held that the appeal filed by the respondents in the High Court of Saurashtra against the judgment of the Assistant Judge, was continued to remain subject to the provisions of Section 22A of Saurashtra Ordinance 2 of 1948 and an appeal could lie against the decision of Vyas J., only if he certified that the case was fit for appeal to a Division Bench. Clause 15 of the Letters Patent of the Bombay High Court provided:

"And we do further ordain that an appeal shall lie to the said High Court of Judicature at Fort William in Bengal (sic) from the judgment (not being a judgment passed in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, and not being an order made in the exercise of revisional jurisdiction and not being a sentence or order passed or made in the exercise of the power of superintendence under the provisions of Section 107 of the Government of India Act or in the exercise of criminal jurisdiction) of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act, and that notwithstanding anything hereinbefore provided an ap-

peal shall lie to the said High Court from a judgment of one Judge of the said High Court or one Judge of any Division Court, pursuant to Section 108 of the Government of India Act made on or after the first day of February 1929, in the exercise of appellate jurisdiction in respect of a decree or order made in the exercise of appellate jurisdiction by a Court subject to the superintendence of the said High Court, where the Judge who passed the judgment declares that the case is a fit one for appeal; but x x x right of appeal from other judgments of Judges of the said High Court or of such Division Court shall be to Us, Our Heirs or Successors. x x x"

By clause 15 of the Letters Patent a judgment in an appeal from a civil suit by a single Judge of the High Court of Bombay is subject to appeal to a Division Bench except where the order is made in exercise of the revisional jurisdiction of the Court or in second appeal, or in exercise of criminal jurisdiction, or in exercise of power of superintendence under Section 107 of the Government of India Act, 1935 (Article 227 of the Constitution). Vyas J., decided the appeal sitting as a Judge of the High Court of Bombay. Prima facie, his judgment delivered in a first appeal from a judgment of the subordinate court was subject to appeal to a Division Bench of the High Court of Bombay.

7. There was clearly an inconsistency between Section 22A of the Saurashtra Ordinance 2 of 1948, and clause 15 of the Letters Patent of the High Court of Bombay. By virtue of Section 22A (2) an appeal lay to a Division Bench of the Saurashtra High Court from a Judgment of one Judge,

"in respect of a decree or order made in exercise of Appellate Jurisdiction when the Judge who made the decree or order certified that the case is a fit one for appeal".

The Legislature made no distinction between a first appeal, a second appeal, an appeal from order and an application in exercise of revisional jurisdiction. But an appeal under clause 15 of the Letters Patent of the High Court of Bombay in an appeal from the judgment of the Court of First Instance could be filed without a

certificate of the Judge hearing the appeal.

8. The right to appeal from a decree or order is a substantive right. As a corollary thereto, the right to maintain a decree of a Court without interference by a superior Court and subject only to the limitation therein is also a vested right and may be taken away by express enactment or clear implication of the amending statute. In *Colonial Sugar Refining Co. v. Irving* 1905 AC 369, the Judicial Committee held that a provision which deprives a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right does not regulate procedure. The Australian Commonwealth Judiciary Act, 1903, came into force on August 25, 1903. Against the judgment of the Supreme Court of Queensland in an action commenced on October 25, 1902, an application was made for leave to appeal to the Judicial Committee and leave was granted on September 4, 1903. At the hearing of the appeal by the Judicial Committee the respondents applied that the appeal from the judgment of the Supreme Court of Queensland be dismissed on the ground that the power of the Court below to give leave to appeal stood abrogated by Sec. 39 of the Australian Commonwealth Judiciary Act, 1903. The application was rejected by the Judicial Committee. Lord Macnaghten observed:

"As regards the general principles applicable to the case there was no controversy. On the one hand it was not disputed that if the matter in question be a matter of procedure only, the petition (to dismiss) is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Judiciary Act, it was conceded that in accordance with a long line of authorities from the time of Lord Coke to the present day the appellants (the sugar Company) would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intent. And therefore, the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not ad-

mit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure."

In *Garikapati Veeraya v. N. Subbiah Choudhury*, 1957 SCR 488 = (AIR 1957 SC 540), this Court accepted the principle in *Colonial Sugar Refining Company's case*, 1905 AC 369. In the absence of any provision to the contrary, therefore, a right attached to the action when it was commenced in 1951, that an appeal against the decision of a single Judge of the High Court of Saurashtra shall lie only if the Judge deciding the case certified the case to be a fit one for appeal. But the Saurashtra High Court was abolished from November 1, 1956 and the jurisdiction of the Saurashtra High Court was conferred upon the Bombay High Court. The case was tried by Vyas, J., not as a Judge of the Saurashtra High Court but as a Judge of the High Court of Bombay. In terms the restriction placed by Section 22A applies to a judgment of one of the Judges of the High Court of Saurashtra: it does not apply to a judgment of a Judge of the High Court of Bombay. Once the Saurashtra Ordinance 2 of 1948 was repealed and the jurisdiction to try the appeal was conferred upon the High Court of Bombay, the right of appeal exercisable by the parties to the litigation decided by the High Court of Bombay was governed by the Letters Patent of that court and not by Section 22A of the Saurashtra Ordinance 2 of 1948. Granting that the incident prescribed by Section 22A continued to attach to the action, in terms of Section 22A of the Saurashtra Ordinance could not operate to restrict a right of appeal exercisable by clause 15 of the Letters Patent governing the judgments of the Judges of the High Court of Bombay. The expression "Judge of the High Court" in Section 22A of the ordinance for the purpose of giving effect to the rule in *Colonial Sugar Refining Company's case*, 1905 AC 369, cannot be read as meaning a Judge of the High Court of Bombay. By the clearest implication of the repeal by the Saurashtra (Adaptation of Laws on Union Subjects) Order, 1957, promulgated by the Central Government and by the application of clause 15 of the Letters Patent of the Bombay

High Court, the judgment of Vyas, J., was subject to appeal to a Division Bench without an order of the learned Judge certifying the case to be fit for appeal.

9. In support of his submission counsel for the respondents relied upon the terms of Section 52 of the States Reorganisation Act, 1956. But that section only confers upon the High Court of Bombay after November 1, 1956 the original, appellate and other jurisdiction, which was exercisable by the High Court of Saurashtra immediately prior to November 1, 1956, in respect of the territories within the State of Saurashtra. The section does not incorporate either expressly or by implication the limitations prescribed by Section 22A (2) of Saurashtra Ordinance 2 of 1948 into the Letters Patent of the High Court of Bombay. The jurisdiction—original, appellate and other—which the High Court of Saurashtra could exercise prior to November 1, 1956, survived to the High Court of Bombay in respect of the territories of the State of Saurashtra, and the appeal filed by the respondent before the High Court of Saurashtra was triable in the exercise of the appellate jurisdiction of the High Court of Bombay, after the case stood transferred to that Court by virtue of sub-sec. (3) of Section 59 of the States Reorganisation Act, 1956. Vyas, J., functioned as a Judge of the High Court of Bombay and his judgments in first appeals were, in the absence of an express provision to the contrary, subject to appeal under clause 15 of the Letters Patent to a Division Bench without a certificate.

10. The High Court of Gujarat was right in holding that in respect of the areas of the former Saurashtra State, the High Court of Bombay acquired the same jurisdiction which the High Court of Saurashtra possessed. That however, does not mean that the jurisdiction was to be regulated "with reference to the law which was in force on the appointed day i.e., November 1, 1956". Section 52 of the States Reorganisation Act preserved the original, appellate and other jurisdiction which was under the law in force immediately before the appointed day exercisable in respect of the territories within the State of Saurashtra. Unless

in the exercise of that jurisdiction any restriction under the law then in force was by express provision or by clear implication preserved, the provisions of clause 15 of the Letters Patent must apply.

11. It is necessary to recall the provisions of Section 57 of the States Reorganisation Act, 1956, which provide that the law in force immediately before the appointed day relating to the powers of the Chief Justice, single Judges and division courts of the High Court for the corresponding State and with respect to matters ancillary to the exercise of the powers shall, with the necessary modifications, apply in relation to the High Court for a new State. Immediately before November 1, 1956, against the judgment of a single Judge of the High Court of Bombay exercising power in a first appeal, an appeal lay to a Division Bench without a certificate. The power of a Division Bench to entertain an appeal continued to remain exercisable by the Judges of the Bombay High Court when dealing with cases transferred under Section 59 (3) to the Bombay High Court from the Saurashtra High Court. In terms Section 57 provides that powers of the Division Bench of the High Court for the corresponding State i. e. the new State of Bombay shall be the same as the powers of the Division Bench under the law in force immediately before the appointed day in the State of Bombay. A Division Bench of the High Court of Bombay was competent to entertain an appeal against the judgment of a single Judge deciding a first appeal from the decision of a subordinate court, without a certificate of the Judge deciding the appeal.

12. The High Court of Gujarat made a distinction between "power" and "jurisdiction", and held that when Section 52 of the States Reorganisation Act, 1956, enacts that the appellate jurisdiction of the High Court of Bombay for the new State of Bombay shall in relation to the Saurashtra area be the same as the jurisdiction which the Saurashtra High Court possessed, it is meant that the High Court of Bombay has the same jurisdiction which the High Court of Saurashtra originally had, and in exercise of that jurisdiction is subject to the same limitation which the High Court of Saurashtra was subject. We are un-

able to agree with that view. Section 52 of the States Reorganization Act, 1956, does not say so, and Sec. 57 of that Act provides to the contrary.

13. The High Court of Gujarat was also of the view that Section 52 of the States Reorganisation Act, 1956 "crystallizes the law" only with respect to the territorial jurisdiction of each of the areas comprised in the High Court of Bombay, and if the Legislature extended the jurisdiction of the High Court of Bombay and also retained the jurisdiction which the abolished High Court possessed, the result would be "odd and conflicting" — there being conflict of jurisdiction. But that, in our judgment, is a ground for holding that the jurisdiction of the Bombay High Court superseded in case of conflict the restrictions on the exercise of jurisdiction only, the original High Court qua the Saurashtra territory, and not that the jurisdiction of the High Court of Bombay was because of some unexpressed limitation restricted.

14. The High Court of Gujarat recognised that the conclusion to which they had reached "revealed a defect in the administration of justice." They observed:

"The Legislature may have had a good reason for preserving intact the old jurisdiction of the Saurashtra High Court in regard to pending cases. However, our conclusion affects cases instituted after the Reorganisation Act came into force. In our judgment, there is no reason why the litigants from the Saurashtra and Kutch areas should now be treated on a different footing from the litigants in the old Bombay area. In our judgment, the rights of appeal of litigants in all the areas should now be placed on the same footing. We would recommend to the authorities concerned to examine this question and, if so advised, to undertake the necessary legislation so as to confer the same rights of appeal to the litigants from the Saurashtra and Kutch areas as are given to the litigants from the rest of the State of Gujarat."

In our view the conclusion that the restriction on the "old jurisdiction of the Saurashtra High Court" in regard to pending cases was preserved by Sec. 52 is erroneous. The States Re-

organisation Act, 1960 (sic) does not purport to preserve the restrictions upon the exercise of jurisdiction and no implication arises from the use of the expression "original, appellate and other jurisdiction as under the law in force immediately before the appointed day," that the limitations upon the exercise of the jurisdiction which were existing prior to November 1, 1956, notwithstanding the provisions of Sec. 57 of the States Reorganisation Act were preserved.

15. The order passed by the High Court of Gujarat is set aside, and the case is remanded to the High Court to be re-entered under the original number and to be heard and disposed of according to law. Costs will be costs in the High Court.

Appeal allowed.

**AIR 1971 SUPREME COURT 306
(V 58 C 73)**

(From: Allahabad)*

S. M. SIKRI AND G. K. MITTER, JJ.

1. Narendrajit Singh (In C. A. No. 1192 of 1967); 2. Ranjit Singh and others, (In C. A. No. 1193 of 1967), Appellants v. The State of U. P. and others (in both the Appeals), Respondents.

Civil Appeals Nos. 1192 and 1193 of 1967, D/- 21-11-1969.

Land Acquisition Act (1894), S. 4 (1) — Notification under, is sine qua non of process of acquisition and must be strictly construed — Notification not complying with essential requirements of that provision is bad — Notification not specifying locality where lands were needed does not comply with essential requirement — Defect is not cured by giving particulars in later notification under Section 6 (1).

It becomes clear from a perusal of the sections of the Act that the process of acquisition must start with a notification under Section 4. Even in extremely urgent cases like those mentioned in sub-section (2) of Section 17, the notification under Section 4 is a sine qua non. In some cases the Government may not follow up the notification under sub-sec. (1)

*(Special Appeals Nos. 329 and 323 of 1963, D/- 8-10-1963-All.)

by further proceedings specially where it finds that the land was unsuited for the purpose for which it is required. But the issue of a notification under sub-section (1) of Section 4 is a condition precedent to the exercise of any further powers under the Act and a notification which does not comply with the essential requirement of that provision of law must be held to be bad. (Para 8)

Section 4 (1) does not require that the identity of the lands which may ultimately be acquired should be specified, but it enjoins upon the Government the duty to specify the locality in which the land is needed. (Para 9)

Any notification which is the first step towards depriving a man of his property must be strictly construed and Courts ought not to tolerate any lapse on the part of the acquiring authority in the issue of such notification if it be of a serious nature. AIR 1960 SC 1203, Ref. (Para 10)

The defect in a notification under Section 4 (1) cannot be cured by giving full particulars in the notification under Section 6 (1). (Para 10)

The fact that the petitioners (owners) did not go to Court immediately after the publication of the first notification is not a matter of any moment. The defects were not cured and cannot be glossed over by reason of the fact that the petitioners went to Court after the issue of the notification under Section 6 (1). AIR 1963 SC 151, Ref.; Special Appeals Nos. 329 and 323 of 1963, D/- 8-10-1963 (All), Reversed. (Paras 9, 10)

Cases Referred: Chronological Paras
(1963) AIR 1963 SC 151 (V 50)
= (1963) 2 SCR 774, Sm.
Somawanti v. State of Punjab 10
(1960) AIR 1960 SC 1203 (V 47)
= (1961) 1 SCR 128, Babu
Barkya Thakur v. State of
Bombay 5, 10

Mr. S. V. Gupte, Sr. Advocate (M/s. J. P. Goyal and G. N. Untoo, Advocates with him), for Appellants (in both Appeals); Mr. C. B. Agarwala, Sr. Advocate (Mr. O. P. Rana, Advocate, with him), for Respondents (in both Appeals).

The Judgment of the Court was delivered by

MITTER, J. — These two appeals by certificate from a common judg-

ment of the High Court of Allahabad arise out of certain land acquisition proceedings in the District of Rampur.

2. The facts relevant for the disposal of the appeals are as follows: On October 15, 1960 the Government of Uttar Pradesh issued a notification purporting to be one under Section 4 (1) of the Land Acquisition Act, 1894 to the effect that "the land mentioned

(Contd. on Column 2)

in the schedule is needed for a public purpose". The notification further showed that "the Governor being of opinion that the provisions of sub-section (1) of Section 17 of the said Act are applicable to the land, is further pleased under sub-section (4) of the said section to direct that the provisions of Section 5-A of the Act shall not apply". The schedule to the notification reads as follows:—

"SCHEDULE"

District	Pargana	Mauza	Approximate area	For what purpose required.
				For the rehabilitation of displaced families from East Pakistan, under the Ministry of Rehabilitation, Government of India.

NOTE.—The plan of the land may be inspected in the office of the Collector. Rampur."

3. This was followed by a notification under Section 6 (1) of the Act dated October 28, 1960. This notification shows that the Governor was pleased to declare under Section 5 of the Act that he was satisfied that the land mentioned in the schedule was needed for a public purpose and under Section 7 of the Act to direct the Collector of Rampur to take order for the acquisition of the land.

(Contd. on Column 2)

4. The case being one of urgency the Governor was further pleased under sub-section (1) of Section 17 of the Act to direct the Collector of Rampur, though no award under Section 11 has been made, on the expiration of the notice mentioned in sub-section (1) of Section 9, to take possession of the land, being waste or arable land mentioned in the schedule for a public purpose.

SCHEDULE

District	Pargana	Mauza	Approximate area	For what purpose required	Remarks,
Rampur	Bilaspur	Gokal Nagri	125 acres	For the rehabilitation of East Pakistan displaced families, under the Ministry of Rehabilitation, Government of India.	

5. The petitioners — appellants before us—filed writ petitions in the High Court on December 1, 1960. The appellant in Appeal No. 1192 of 1967 was the sole petitioner in Writ Petition No. 3274 of 1960 while his father, Ranjit Singh and two others, brothers of the petitioners were the applicants in Writ Petition No. 283 of 1961. The two writ petitions contained common complaints. The case of the petitioners was that it was the Maharaja of Dewas with whom the petitioners had certain litigation who was responsible for singling them out for the purported acquisition of their land for the rehabilitation of displaced families of East Pakistan. The first ground put forward in both the petitions was that the notice under Section 4 of the Act was invalid for non-compliance with

the mandatory provisions of the Act rendering the whole proceedings void. The points urged in support of the applications were turned down by the learned single Judge and a Special Appeal therefrom to a Division Bench met with no better fate. The learned Judges of the Division Bench noted that the exact land which was required by the State Government was not specified in the notification and that the petitioners had raised further objection that the notification under Section 4 was invalid because it had not been published at convenient places in the locality. The Division Bench relied on certain observations of this Court in Babu Barkya Thakur v. State of Bombay, (1961) 1 SCR 128 = (AIR 1960 SC 1203) to the effect that the notification under Section 4

was for the purpose of carrying on a preliminary investigation with a view to finding out after necessary survey and levels, and if necessary, digging or boring into the sub soil, whether the land was adapted for the purpose for which it was sought to be acquired. According to the Division Bench there was no substance in the pleas raised on behalf of the petitioners and their appeals were therefore dismissed.

6. Before us Mr. Gupte wanted to urge several points in support of the appeals. His first contention was that the notification under Section 4 was not in compliance with the Act and therefore it should be struck down and the proceedings held to be illegal. Sub-section (1) of Section 4 of the Act provides as follows:

"Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose, a notification to that effect shall be published in the Official Gazette and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality".

Sub-section (2) of the section shows that it is only after compliance with the provisions of sub-section (1) that the officers authorised by Government can enter upon the land and carry on the operations mentioned therein. Section 5-A gives persons interested in the land notified under Section 4 (1) a right to object to the acquisition. It is only after disposal of the objections that the State Government is empowered when satisfied after considering the report made under Section 5-A that any particular land is needed for a public purpose to make a declaration to that effect and such declaration has to be published in the Official Gazette under sub-section (2). In the normal course after lands have been declared to be needed for a public purpose the appropriate Government may direct the Collector to take orders for the acquisition of the land. Thereafter the Collector may proceed under Section 8 to mark out the land covered by the declaration. Section 9 enjoins upon the Collector to cause public notice to be given at convenient places after compliance with the provisions of Section 8 that the Government intends to take possession of the land and that claims to compensation for

interest in such land may be made to him. Section 11 enjoins upon the Collector to hear objections by persons interested after issue of notice under Section 9 to the measurements made under Section 8 and into the value of the land. It is only after compliance with the formalities of this section that the Collector has to make an award as to the true area of the land and the compensation to be allowed for the lands as also the apportionment of the compensation among all the persons known or believed to be interested in the land. The Collector after making an award may take possession of the land under the provisions of Section 16.

7. In cases of urgency however this elaborate procedure may be cut short. Under sub-section (1) of Section 17 the Collector under the directions of the Government may be authorised in cases of urgency, on the expiration of 15 days from the publication of the notice mentioned in Section 9 sub-section (1) to take possession of any waste or arable land needed for a public purpose and such land thereupon vest absolutely in the Government. Under sub-section (2) of Section 17 the Collector may immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government enter upon and take possession of the land if the same be needed owing to any sudden change in the channel of any navigable river or other unforeseen emergency it becomes necessary for any Railway administration to acquire the immediate possession of any land or for incidental purposes. Sub-section (4) of the section provides:

"In the case of any land to which, in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A shall not apply, and, if it does so direct, a declaration may be made under Section 6 in respect of the land at any time after the publication of the notification under Sec. 4, sub-section (1)."

8. It becomes clear from a perusal of the said sections of the Act that the process of acquisition must start with a notification under Section 4. Even

in extremely urgent cases like those mentioned in sub-section (2) of Section 17, the notification under Sec. 4 is a *sine qua non*. In some cases the Government may not follow up the notification under sub-section (1) by further proceedings specially where it finds that the land was unsuited for the purpose for which it is required. But the issue of a notification under sub-section (1) of Section 4 is a condition precedent to the exercise of any further powers under the Act and in our opinion a notification which does not comply with the essential requirement of that provision of law must be held to be bad.

9. Section 4 (1) does not require that the identity of the lands which may ultimately be acquired should be specified but it enjoins upon the Government the duty to specify the locality in which the land is needed. In the instant cases the notifications suffer from a very serious defect in that the locality where the lands were needed was not specified. The notification merely showed that lands mentioned in the schedule were needed. The schedule in its turn though it contained the heading District, Pargana, Mauza and approximate area, gave no particulars of the same and all that was mentioned by way of a note was that the plan of the land might be inspected in the office of the Collector of Rampur. As no details were given, the only indication about the locality of the lands was possibly the District of Rampur inasmuch as the plan of the land was to be found in the office of the Collector of the same district. Certainly the Act did not intend that all the persons owning land in a district should rush to the Collector's office to find out whether his lands were covered by the notification.

10. It was urged before us that the notification was in terms of the section and that the petitioners could not complain inasmuch as the defect was remedied by the notification under S. 6 which was issued within a fortnight after the Section 4 notification. In our view this contention cannot be accepted. Any notification which is the first step towards depriving a man of his property must be strictly construed and Courts ought not to tolerate any lapse on the part of the acquiring authority in the issue of

such notification if it be of a serious nature. In the case of Babu Barkya Thakur, (1961) 1 SCR 128 = (AIR 1960 SC 1203) (*supra*) it was pointed out by this Court that

"The proceedings begin with a Government notification under Section 4 that land in any locality is needed or is likely to be needed for any public purpose".

It is well known that a person interested in the land which is affected by any notification under Sec. 4 (1) may immediately object to it and take proceedings in Court against it. In *Smt. Somavanti v. State of Punjab*, (1963) 2 SCR 774 = (AIR 1963 SC 151), one of the main questions before this Court was whether a notification under Section 4 (1) and one under Section 6 (1) could be issued simultaneously. Although the Court took the view that where Section 5-A was not in the way there was no irregularity in publishing the notifications on the same day, yet it observed that:

"notification under sub-section (1) of Section 4 is a condition precedent to the making of a notification under sub-section (1) of Section 6".

In our view the defect in a notification under Section 4 (1) cannot be cured by giving full particulars in the notification under Section 6 (1). In this case it is apparent that even before the issue of the first notification Government had made up its mind to acquire the lands of the petitioners inasmuch as there was no enquiry in between the two notifications and no valid reason has been put forward to explain why the details specified in the notification under Section 6 (1) could not be given in the one under Section 4 (1). The fact that the petitioners did not go to Court immediately after the publication of the first notification is not a matter of any moment. The defects were not cured and cannot be glossed over by reason of the fact that the petitioners went to Court after the issue of the notification under Section 6 (1).

11. Moreover if it was the intention of the Legislature that in cases of urgency a notification under Sec. 4 (1) was not necessary, a suitable provision would have been made in Section 17 for that purpose. The provisions of that section show that even in cases of extreme urgency like the

maintenance of railway traffic by reason of any sudden change in the channel of any navigable river or other unforeseen emergency, the Legislature only thought it fit to bypass the provisions of Section 5-A but not those of Section 4, sub-section (1).

12. In this view, we did not think it necessary to hear Mr. Gupte on the other points. The appeals will therefore be allowed and the judgment of the High Court set aside. There will be no order as to costs.

Appeals allowed.

AIR 1971 SUPREME COURT 310
(V 58 C 74)

(From: Madhya Pradesh)*

**S. M. SIKRI, V. BHARGAVA AND
G. K. MITTER, JJ.**

Mathuralal, Appellant v. Keshar Bai and another, Respondents.

Civil Appeal No. 774 of 1967, D/- 20-2-1970.

Transfer of Property Act (1882), Sections 58, 60 — Mortgage with possession — Lease back to mortgagor — Preliminary decree on mortgage but no application for final decree — Mortgagee only loses his right to recover money by sale of property — Otherwise his security remains intact — Mortgagee can sue on rent note — Mortgageor continues to have his right to redeem — AIR 1958 Bom 8; AIR 1957 Pat 24 and AIR 1944 Pat 5, Overruled.

The leasing back of the property arises because of the mortgage with possession. If the security is good and considered to be sufficient by the mortgagee he should not be driven to file a suit on his mortgage when he can file a suit for realisation of the monies due under the rent note. The position of the creditor is strengthened where the interest on the amount of the mortgage is not the same as the rental fixed. Under the provisions of Order 34, Rule 4, Civil P. C. the mortgagee cannot deprive the mortgagor of his right to redeem excepting by proceeding on his mortgage. So long as the mortgagor has a right to redeem the mortgage he can always

pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of Order 34, Civil P. C. The rights of a mortgagee do not merge in his rights under the preliminary decree for sale. If the right of the mortgagee arose on the strength of the rent note which continued to be in force notwithstanding that the period for applying for a final decree for sale had expired, there could be no extinction of his right to sue for possession because of Section 28 of the Limitation Act. AIR 1958 Bom 8 and AIR 1957 Pat 24 and AIR 1944 Pat 5, Overruled; AIR 1963 Raj 69, Approved. (Paras 15, 16, 17)

Cases Referred: Chronological Paras

(1963) AIR 1963 Raj 69 (V 50)	
= ILR (1962) 12 Raj 947,	
Lalchand v. Nenuram	14
(1961) AIR 1961 Pat 133 (V 48)	
= 1960 BLJR 605, Ganpat	
Turi v. Md. Asraf Ali	12
(1957) AIR 1957 Pat 24 (V 44),	
Ramnarain v. Sukhi	9, 10
(1957) AIR 1957 Raj 32 (V 44)	
= ILR (1957) 7 Raj 268,	
Jankidas v. Laxminarain	13
(1953) AIR 1953 Bom 8 (V 40)	
= ILR (1958) Bom 765, Harilal	
Bhagwanji v. Hemshanker	9
(1944) AIR 1944 Pat 5 (V 31)	
= ILR 22 Pat 320, Umeshwar	
Prasad v. Dwarika Prasad	11
D. N. Mukherjee, Advocate, for Appellant; Janardan Sharma, Advocate, for Respondents.	

The following Judgment of the Court was delivered by

MITTER, J. — This is an appeal by special leave from a judgment of the Madhya Pradesh High Court dated 6th February 1967 dismissing a Second Appeal by the appellant before this Court against a decree passed by the Additional District Judge of Ratlam for ejectment of the appellant from a house mortgaged by the predecessor-in-interest of the appellant to one Kesharimal for Rs. 3,100/- and further decreeing a claim for arrears of rent amounting to Rs. 731-35 and mesne profits at the rate of Rs. 20/- per month until eviction.

2. The relevant facts are as follows. On July, 29, 1945 Mathuralal, predecessor-in-interest of the appellant, mortgaged his house in Ratlam

* (Second Appeal No. 327 of 1963, D/- 6-2-1967 — Madh. Pra.)

to Kesharimal for a sum of Rs. 3,100/- with possession. The deed of mortgage contained the following terms:—

1. That interest would run on Rs. 3,100/- at Re. 0-10-0 per cent per mensem till realisation.

2. The period of redemption would be two years.

3. During the period of mortgage "the tenant as may be shall execute the rent notes in favour of the mortgagee and whatever rent shall be realised will be credited in lieu of interest and if the amount of rent shall exceed the amount of interest, the difference shall be deducted from the original sum due, but if the amount of interest shall exceed the amount of interest, the difference shall be deducted from the original sum due". But if the amount of interest shall exceed the amount of rent, then the mortgagor shall pay it.

4. Notwithstanding any vacancy during the period of the mortgage the rent would continue.

5. During the period of the mortgage an account of the rent and interest shall be settled after every six months.

6. The mortgagor undertook to keep the house in repairs during the period of the mortgage and in default of repairs by him the mortgagee was to be entitled to execute the necessary repairs and add the cost to his dues.

7. "The burden of the mortgage money shall be on the mortgaged house. In case the amount is not realised from the house, the mortgagee shall have a right to take steps to realise his money" from the mortgagor and his property of every kind.

3. On the same day the mortgagor executed another document in favour of the mortgagee reciting that his house in Ratlam was mortgaged with possession to the creditor who was "having its possession" and the mortgagor had taken the same on rent at Rs. 20 per month on the following terms:—

1. The executant would pay the rent every month regularly and in default of payment of two months' rent the mortgagee would be entitled to get him evicted.

2. The executant would white-wash and repair the house and keep it in good condition.

3. Kesharimal would be entitled to increase or decrease the rent.

4. The executant would vacate the house whenever asked to do so.

5. The executant would hand over possession of the house in the same condition in which he had received it.

4. Kesharimal filed a suit on his mortgage in 1954 and a preliminary decree for sale for the amount of Rs. 5,637-6-0 besides interest at the rate of Re. 0-10-0 per cent per mensem for six months on the sum of Rs. 3,600 was duly passed. The defendant was directed to pay the full amount of the decree before the 24th May 1955 and in case of his doing so the property was to be released from the mortgage and the plaintiffs were to hand over all the documents which they had in their possession, but in case of failure to pay the plaintiffs would be entitled to file an application for the execution of the decree and get the property auctioned; and in case of non-satisfaction of the decree by the sale, the plaintiffs were to be at liberty to recover the balance of the decretal claim by a personal decree against the defendant.

5. It appears that Kesharimal had died during the pendency of the suit and his legal representatives were brought on record and the preliminary decree passed in their favour. Whatever be the reason no application for a final decree for sale of the property was made within the period fixed under the Limitation Act. The application for this purpose made by the executors to the estate of Kesharimal was dismissed on July 29, 1960 as barred by limitation. On December 27, 1960 the said executors filed a suit for ejectment against the appellant alleging that the rent for the premises had remained unpaid from September 29, 1957 till November 28, 1960. An amount of Rs. 731-75 was arrived at by totalling the rent for the period mentioned and mesne profits from 29th November 1960 to 26th December 1960 at the same rate and incidental charges and expenses and deducting therefrom the rent for two months which was barred by the lapse of time the plaintiffs asked for a decree for ejectment and further mesne profits. The trial Judge dismissed the suit. But on appeal this was set aside and the plaintiffs' claim allowed in full. The High Court in Second Appeal maintained the decree of the appellate Court.

6. The points urged by counsel for the appellant before us were:

1. The rent note executed simultaneously with the mortgage was a mere device to secure payment of interest and did not record an independent transaction. Further it did not create any relationship of landlord and tenant.

2. The plaintiffs' right as mortgagee merged in the decree and execution thereof being barred by the laws of limitation the plaintiffs had lost all their rights.

3. The mortgage being extinguished the mortgagor could not bring a suit for redemption.

7. Before examining the contentions urged we propose to note the substance of the two documents and what the parties sought to achieve thereby. It is clear that the mortgage was with possession of the house and that the mortgagee wanted to make sure of Rs. 20/- per month irrespective of the fact as to whether the mortgagor or some other person occupied the house and notwithstanding any vacancy during the period of the mortgage. The sum of Rs. 20/- per month which the mortgagee wanted to ensure payment of every month exceeded the interest stipulated for by Re. 0-10-0 per month. There was to be no decrease in this amount even if the mortgagor were to repay a portion of the principal. The mortgagee had further the right to increase or decrease the rent and the mortgagor covenanted to vacate the property whenever the mortgagee asked for possession. In other words, if the mortgagee chose to go into possession himself, the mortgagor would be entitled to have Rs. 20/- p. m. credited towards the dues on the mortgage so long as he continued in possession. Even during the period of redemption when the mortgagee could not have sued for the mortgage money he still had a right to evict the mortgagor in case the latter defaulted in payment of Rs. 20/- a month for two months.

8. It would appear that the relationship between the parties was not simply that of a mortgagee and mortgagor: the creditor also had the rights of a landlord qua his tenant besides other rights conferred on him which were greater than those possessed by an ordinary landlord. There can be no doubt that by leasing the property back to the mortgagor in the way

mentioned above the mortgagee tried to ensure the regular payment of interest but his rights were not limited to that alone. In case he decided to go into possession himself the only remedy left to the mortgagor was to sue for redemption. This right under the Limitation Act of 1908 was to ensure for 60 years from the date of the mortgage and the mortgagor had not lost his right to redeem notwithstanding the passing of the preliminary decree in the mortgage suit. The mortgage security continued even after the passing of the said decree: if the mortgagee had continued in possession of the property after the passing of the preliminary decree and did not apply for a final decree, he would only lose his right to recover the mortgage money by sale of the property unless he applied for that purpose within the period of limitation fixed by the Limitation Act. After the mortgagee had lost his right to apply for a final decree for sale he did not lose his status as a mortgagee: he only lost his remedy to recover the mortgage money by sale. The mortgagor did not lose his right to redeem.

9. We may now examine the authorities which were cited at the Bar in aid of the respective contentions. In aid of his first proposition Mr. Mukherjee relied principally on the decisions of the Bombay High Court in Harilal Bhagwanji v. Hemshanker, (AIR 1958 Bom 8) and Ramnarain v. Sukhi, (AIR 1957 Pat 24). The facts of the Bombay case were as follows. The defendant-appellant mortgaged with possession the house in suit for Rs. 7,500/- on August 23, 1952. Under the deed of mortgage the principal amount was to carry interest at 9 per cent and both principal and interest were charged on the mortgaged property. A portion of the house was already in the occupation of the plaintiff as the defendant's tenant on a monthly rental of Rs. 15/- and another portion was let out to one Mansukhlal at the rate of Rs. 17/- p. m., the defendant himself occupying the remaining part of the house. Simultaneously with the mortgage a rent note was executed on the same day in respect of the portion of the house in the defendant's occupation which was leased back to him by the plaintiff for a term of six months at the rate of Rs. 24-4-0 per month. The

plaintiff sued the defendant for possession of the said portion and for arrears of rent on the strength of the rent note. The defence was that the rent note was a nominal document executed for securing payment of interest and that no relationship of landlord and tenant was created. It was contended that the principal money and interest were to be realised from the mortgaged property and a suit for rent alone which was in reality interest would not lie. It was held by the High Court that the fact that the two documents had varying periods of operation would not make any difference in the determination of the question as to whether they formed part of the same transaction or not. Further the rent to be realised from the tenant Mansukhlal was to be credited towards interest and the significant circumstance was that the rent payable by the defendant under the rent note was fixed with a view to making up the interest on the mortgage sum at 9 per cent. Although the mortgage deed recited that the plaintiff could let out the property to anyone he liked but as the property was already wholly occupied the High Court took the view that the question of leasing it out to another tenant was not in contemplation of the parties. As a result of the above findings the Court held that the rent note was a mere device for securing payment of interest. Reference was placed on AIR 1957 Pat 24 (supra) and it was held that although the decree for eviction of the defendant from the suit property could not stand, that awarding arrears of rent was to be maintained.

10. In AIR 1957 Pat 24 (supra) an application was made by the defendant for setting aside the decree of the Small Cause Court evicting him. The defendant had executed a usufructuary mortgage in favour of the plaintiff and by a kerayanama executed on the same day had taken back the house on a rent of Rs. 6/- per month from the plaintiff. He had not paid any rent for over three years and the suit was brought for recovery of arrears of rent for the said period. It was his contention that the agreement between the parties was not for execution of a usufructuary mortgage but one of a simple mortgage. It was further contended on his behalf that

the mortgage and the kerayanama were one and the same transaction and no relationship of landlord and tenant was created and the ijara term having expired the plaintiff's remedy to recover the house rent which represented the interest on the mortgage money could only lie under Section 68 of the Transfer of Property Act. The High Court referred to several decisions and came to the conclusion that the intention of the parties was that the mortgagee would not get possession of the mortgaged property but would only get interest on the amount advanced in the shape of rent so long as the lease continued and the amount payable under the kerayanama was interest on the mortgage money and not rent for use and occupation of the mortgaged property. The mortgage bond and the kerayanama being part of the same transaction the mortgagee in execution of his decree for money obtained in respect of the so-called rent of the house against the mortgagor would not be entitled to execute the decree for arrears of rent by sale of the property, as such a case would be governed by Order 34, Rule 14, Civil Procedure Code. In the result the claim of the creditor in excess of 9 per cent. p. a. was rejected but as the defendant had been in occupation of the house, although under an invalid lease, he was directed to pay compensation to the plaintiff for use and occupation of the house for the period of his occupation.

11. Reference may also be made to the case of Umeshwar Prasad v. Dwarika Prasad, (AIR 1944 Pat 5). In this case the mortgagor executed a usufructuary mortgage of certain properties for Rs. 14,400/- for a period of seven years. Soon thereafter the mortgagee leased back the entire property to the mortgagor for a period of about seven years at the annual rent of Rs. 432/- which was equal to the interest on the sum advanced. It was held by the Patna High Court that the mortgage bond and the lease deed were parts of the same transaction and the fact that the periods of the two deeds were not identical was immaterial and the case was governed by Order 34, Rule 14 and as such the mortgagee could not execute the decree for arrears of rent by sale of equity of redemption.

12. In *Ganpat Ruri v. Md. Asraf Ali*, (AIR 1961 Pat 133) the plaintiff had filed a suit claiming arrears of rent at the rate of Rs. 20/- per month in respect of a house which had been given to him by the defendant in usufructuary mortgage by a registered document, the property being let out to the defendant on lease on the same day at the monthly rent of Rs. 20/-. Applying the test as to whether on a reasonable construction of the two documents the property given in security was not only for the principal amount secured under the bond but also for the interest accruing thereupon, the Court held that the transactions were two different transactions and for this reliance was placed on the fact that no rate of interest was prescribed in the bond and Rs. 20/- p. m. could not possibly be treated as interest due on the principal amount of Rs. 500/-.

13. In contrast with the above cases reference may be made to the case of *Jankidas v. Laxminarain*, ILR (1957) 7 Raj 268 = (AIR 1957 Raj 32). In this case the plaintiffs who were usufructuary mortgagees of a house gave a lease of it to the defendant mortgagor on rent and put the lessee in possession thereof on the same day. The rent remaining unpaid the plaintiff filed a suit for arrears of rent and ejectment. Ultimately however the High Court of the former State of Marwar granted a decree for arrears of rent but refused the prayer for ejectment. The plaintiff thereupon filed the suit in 1953 claiming arrears of rent amounting to Rs. 126/- for three years preceding the date of the suit. The suit was resisted by the defendant who among other pleas, contended that the suit was barred by Or. II, Rule 2, Civil P. C. There it was said that although the mortgage and the deed of lease represented one transaction that would not mean that no tenancy came into existence by the execution of the deed of lease. It was held that the right which arose to the mortgagees to sue for rent was an independent obligation though it might be part of the same transaction in the sense that it was brought into existence by an arrangement made at the same time for a common purpose.

14. In *Lalchand v. Nenuram*, ILR (1962) 12 Raj 947 = (AIR 1963 Raj 69) the defendants had executed a

mortgage in favour of the plaintiff's agreeing to pay interest at 8 per cent. p. a. which came to Rs. 27-8-0 per month. The mortgagors had delivered possession to the mortgagees and a registered qubuliat reciting that they were taking on lease the property described at a monthly rental of Rs. 27-8-0. The lower Courts took the view that the mortgage deed was a rent note and part and parcel of the same transaction and the plaintiffs were not entitled to get a decree for ejectment on the basis of the rent note. Rejecting this the Rajasthan High Court observed at p. 952 (of ILR Raj) = (at pp. 71-72 of AIR):

"Whether the two documents represent one transaction or two different transactions, a Court of law should be anxious to give effect to the terms in both the documents instead of being unduly critical about them Having secured the possession of the mortgage, the mortgagee is further entitled to lease it out even to the mortgagor. It is in the interest of the mortgagor that the property is leased out to him as he can better look after it. There is nothing objectionable in this, nor is there any statutory prohibition for such transactions. Now if the parties do this by executing proper documents, it is the duty of the Court of law to give effect to them".

15. The reasoning of the Rajasthan judgment seems to be logical and commends itself to us. In all such cases the leasing back of the property arises because of the mortgage with possession but we find ourselves unable to hold that the mortgagee does not secure to himself any rights under the deed of lease but must proceed on his mortgage in case the amount secured to him under the deed of lease is not paid. If the security is good and considered to be sufficient by the mortgagee there is no reason why he should be driven to file a suit on his mortgage when he can file a suit for realisation of the moneys due under the rent note. The position of the creditor is strengthened whereas in this case the interest on the amount of the mortgage is not the same as the rental fixed. If during the continuance of the security the mortgagee wants to sue the mortgagor on the basis of the rent note and take possession himself or to induct some other tenant thereby

securing to himself the amount which the mortgagor had covenanted to pay, there can be no legal objection to it. Under the provisions of Order 34, Rule 4, he cannot deprive the mortgagor of his right to redeem excepting by proceeding on his mortgage. Although we express no final opinion on this point it may be that a mortgagee who secures a decree for payment of arrears of rent cannot put the property to sale for realisation of the amount decreed but there can be no objection to his suing for possession if the rent note entitles him to do so. So long as the mortgagor had a right to redeem the mortgage he can always pay off the mortgagee and get back possession. This position would continue so long as the property is not sold under a final decree for sale under the provisions of Order 34, Civil P. C.

16. In our opinion the second contention put forward on behalf of the appellant has no force. The rights of a mortgagee do not merge in his rights under the preliminary decree for sale. As already mentioned, the mortgagee lost his right to recover the money by sale of the mortgaged property; otherwise his security remained intact and the mortgagor continued to have his right to redeem the property.

17. As regards the third point the only statutory provision to which a reference was made was Section 28 of the Limitation Act of 1908 which provided that:

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property, his right to such property shall be extinguished".

If the right of the mortgagee arose on the strength of the rent note which continued to be in force notwithstanding that the period for applying for a final decree for sale had expired, there could be no extinction of his right to sue for possession because of Section 28 of the Limitation Act.

18. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 315
(V 58 C 75)

(From: Bombay)*

J. M. SHELAT AND
C. A. VAIDIALINGAM, JJ.

Jijabai Vithalrao Gajre, Appellant
v. Pathankhan and others, Respondents.

Civil Appeal No. 40 of 1967, D/- 1-9-1970.

(A) Constitution of India, Art. 227 — Powers of High Court — Not greater than those under Article 226 — Power limited to seeing that tribunals function within limits of their authority — High Court cannot sit in appeal against order of Tribunal — High Court while agreeing with Revenue Tribunal on all material findings, differing in two material aspects which affect jurisdiction of Revenue Tribunal to grant necessary relief — High Court commits no error of jurisdiction.

(Para 9)

(B) Hindu Minority and Guardianship Act (1956), Section 6 — Natural guardians — Mother comes only after death of father — Position is same under Hindu Law — Father though alive not taking any interest in minor and as good as non-existent — Mother treated as natural guardian — (Hindu Law — Minority and Guardianship).

The position in the Hindu Law as well as under Section 6 of the Act is that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. Where the father was alive but had fallen out with the mother of the minor daughter and was living separately for several years without taking any interest in the affairs of the minor who was in the keeping and care of the mother it was held that in the peculiar circumstances, the father should be treated as if non-existent and therefore the mother could be considered as the natural guardian of the minor's person as well as property and had power to bind the minor by granting lease of her land in proper course of management of the property.

(Paras 11, 12)

(C) Tenancy Laws — Bombay Tenancy and Agricultural Lands

*(Special Civil Appln. No. 499 of 1965, D/- 13-7-1966 — Bom. at Nag.)

(Vidarbha Region) Act (99 of 1958), Sections 39 and 38 — Lease created by landlord prior to 1-4-1957 — Section 39 does not apply as one of essential conditions of maintainability of application under Section 39 is that lease should not be one created earlier than 1-4-1957 — High Court held was right in treating application as one under Section 36 read with Section 38 and granting relief of possession of half area of lands leased, under Section 38 (4) (a), proviso (i) with requisite direction to Revenue Court.

(Paras 13, 15)

Cases Referred: Chronological Paras

(1966) Civil Appeal No. 35 of 1966, D/- 17-3-1966 (SC), Ram-bhau v. Shankar Singh 9

(1958) AIR 1958 SC 398 (V 45) = 1958 SCR 1240, Nagendra Nath Bora v. Commr. of Hills Division and Appeals Assam 9

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.:— This appeal, by special leave, is directed against the judgment and order dated July 13, 1966 of the High Court of Bombay (Nagpur Bench) in Special Civil Application No. 499 of 1965 filed under Article 227 of the Constitution by the first respondent herein (to be referred as the tenant).

2. The appellant (to be referred as the landlord) was the daughter of one Champatrao. She had obtained from her father under a gift deed dated September 15, 1944 the suit field survey No. 56 of an extent of 27 acres 37 gunthas. As owner of the lands she served a notice dated March 31, 1962 on the tenant informing him of her intention to terminate his tenancy of the lands on the ground that she required the lands bona fide for her personal cultivation. On March 30, 1963 she filed an application before the Naib Tahsildar, Darwha under Section 36 read with Section 39 of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, Bombay Act No. XCIX of 1958 (hereinafter referred to as the Act) for termination of tenancy of the tenant and for directing him to surrender possession of the entire lands comprised in field survey No. 56. Later on she amended her application and prayed in the alternative that if for any reason she was found not entitled to get possession of the entire lands, she may be

allowed to recover half of the lands in the possession of the tenant and that in respect of that half, in the eastern portion 13 acres and 38 gunthas may be allotted to her.

3. The tenant resisted the claim of the landlord on various grounds. He pleaded that the father and mother of the landlord had fallen out very long ago and that the landlord was a minor, was being looked after and protected by her mother Smt. Chandrabhagabai and the mother was managing the suit properties on behalf of her minor daughter. In the course of such management the suit properties were being leased in his favour from time to time beginning from 1951-52 and as such he has been in possession as tenant from April, 1951. Though the original leases granted by the mother were oral, for the year 1956-57 he had executed a kabuliyat in favour of the landlord represented by her mother as guardian. Inasmuch as he had been the tenant of the properties under a lease created prior to April 1, 1957, he had acquired the status of a protected lessee even before the coming into force of the Act. He further pleaded that as the landlord had not filed the application within one year of the coming into force of the Act, her claim was barred by limitation and the application under Section 39 was not maintainable. He had also raised a controversy regarding her date of birth as well as the validity of the notice dated March 31, 1962, issued by the landlord.

4. The Naib Tahsildar held that the application filed by the landlord under Section 36 read with Section 39 was maintainable and that the notice issued by her on March 31, 1962 was valid. He further found that the landlord was born on July 6, 1944 and attained majority on July 6, 1962. On an interpretation of Section 39, the Naib Tahsildar found that the landlord was entitled to file the application within one year after her attaining majority and in this case the application has been filed within that time. He further found that there were oral leases granted by the mother of the landlord in favour of the tenant from 1951 onwards and that the tenant had also executed a lease deed in favour of the landlord represented by her mother on Febru-

ary 12, 1956 for the year 1956-57 and that he has been in possession of the lands as tenant even during the period 1958-59. But the Naib Tahsildar held that as the father of the appellant was alive and was in law her natural guardian, the lease executed by the tenant on February 12, 1956 was not legal and valid as the mother was not entitled to represent her minor daughter. But as the tenant was in occupation of the lands during the year 1958-59, he must be treated as a deemed tenant under Section 6 of the Act. On this reasoning he held that the lease in favour of the tenant can be taken as a lease after April 1, 1957 and hence the landlord was entitled to get relief under Section 39 of the Act. In view of his further finding that the landlord had no other land and no other source of income and as the suit lands were less than the family holding, she was entitled to get possession of the entire lands from the tenant. Accordingly he granted the relief asked for by the landlord in full. The findings of the Naib Tahsildar enumerated above were confirmed by the Sub-Divisional Officer, Darwha in the appeal filed by the tenant. The Maharashtra Revenue Tribunal, whose revisional jurisdiction was invoked by the tenant also substantially confirmed the findings of the two subordinate authorities.

5. All these three orders were challenged by the tenant before the High Court in the writ petition under Article 227 of the Constitution. The High Court, in its order under appeal, has accepted the findings of facts regarding the date of birth of the landlord; the date of her attaining majority as well as the legal validity of the notice issued by her on March 31, 1962. The High Court also accepted the finding recorded by the Revenue Tribunal that the father and mother had fallen out and were living separate and that the father was not looking after the interests of his minor daughter and that, on the other hand, the landlord was living under the care and protection of her mother Smt. Chandrabhagabai, who was also managing the suit properties on her behalf. The High Court also found that the tenant has been in possession of the lands on the basis of the lease granted in his favour by the mother from 1951 onwards. But the High

Court differed from the views expressed by the Revenue Tribunal on two important aspects, namely, (i) legal validity of the lease granted by the mother of the landlord in favour of the tenant and (ii) the maintainability of the application filed by the landlord under Section 39 of the Act. Regarding validity of the lease granted by the mother, the High Court held that even if the oral leases from 1951 onwards are eliminated, there has been a written lease executed by the tenant on February 12, 1956 in favour of the landlord represented by her mother for the year 1956-57. As the father was not taking any interest in his minor daughter's affairs and as the mother was looking after her minor daughter's interest and managing the suit properties, the mother must be considered, in the circumstances, to be the natural guardian of the landlord and as natural guardian she was entitled to lease the properties and hence the written lease granted by her on February 12, 1956 was legal and valid, and therefore the lease in favour of the tenant is one created prior to April 1, 1957 and hence Section 39 was not attracted.

6. The High Court on a construction of Section 39 of the Act held that as the Act had come into force on January 28, 1961, the application should have been filed within one year, namely, on or before January 28, 1962. The landlord was not entitled to file the application as she has done in the present case within one year of her attaining majority as Section 39 does not give any such extended period for minors. Hence the High Court held that application filed on March 30, 1963 was barred by limitation. Notwithstanding the finding that the application under Section 39 was not maintainable the High Court held that the landlord's application could be treated as one filed under Section 36 read with Section 38 and as the application had been filed within the period referred to in Section 38, she could be granted the relief under the latter section. In this view the High Court held that though the landlord was not entitled to possession of the entire field as claimed by her, she is nevertheless entitled to resume for personal cultivation one third of the family holding, or half of the land leased by her, whichever is more. In

this view the High Court remanded the proceedings to the Naib Tahsildar for passing necessary orders treating the application filed by the appellant as one under Section 36 read with Section 38.

7. Mr. G. L. Sanghi, learned counsel for the appellant raised three contentions: (i) the High Court in exercising jurisdiction under Article 227 of the Constitution has functioned in this case as a Court of Appeal and interfered with the concurrent findings of facts recorded by the three revenue tribunals and such exercise of jurisdiction is not warranted by the decisions of this Court; (ii) the High Court's view that the lease executed by the mother on behalf of the appellant on February 12, 1956, as guardian of the appellant is valid in law, is erroneous; (iii) the High Court's view that the application filed by the appellant before the Naib Tahsildar on March 30, 1963 is barred by limitation and as such the application under Section 39 is not maintainable, is again erroneous.

8. On the other hand, Mr. Danial A. Latifi, learned counsel appearing for the tenant respondent has urged that the High Court has not exceeded its jurisdiction under Article 227, but has strictly limited its inquiry to find out whether the subordinate tribunals have functioned within the limits of their jurisdiction. All the findings of facts recorded by those tribunals have been accepted by the High Court. The High Court has only differed on the question of interpretation to be placed on the material sections so as to find out whether the revenue tribunals had jurisdiction to entertain the application of the appellant under Section 36 read with Section 39 of the Act. The learned counsel also pointed out that on the findings recorded by the revenue tribunals about the father not taking any interest in the affairs of the minor daughter, the High Court has come to a different conclusion of law that the mother, under the circumstances, was the natural guardian of her minor daughter and was competent to enter into lease transactions on behalf of the appellant. If it was found that the lease transaction entered into with the tenant by the mother of the appellant was valid, the nature of the

reliefs to be granted to the appellant under the Act will radically differ. The counsel further urged that the construction placed upon Section 39 of the Act by the High Court is also correct.

9. Mr. Sanghi in support of his first contention has drawn our attention to the principles laid down in *Nagendra Nath Bora v. Commr. of Hills Division and Appeals, Assam*, 1958 SCR 1240 = (AIR 1958 SC 398) and in *Rambhau v. Shankar Singh*, Civil Appeal No. 35 of 1966, D/- 17-3-1966 (SC). It is no doubt true that this Court has held in those decisions that the powers of the High Court under Article 227 are not greater than the powers under Article 226 of the Constitution. It has been further laid down that the power of interference under Article 227 was limited to seeing that the tribunals function within the limits of their authority and that the High Courts cannot sit in appeal against the order of a tribunal in a petition under Article 227. In our opinion, the High Court in this case cannot be considered to have exceeded its jurisdiction under Article 227 of the Constitution. We have already stated that all findings on material facts have been accepted by the High Court. It is only on two material aspects which affect the jurisdiction of the revenue tribunals to grant the necessary relief under the Act that the High Court differed. Those were: (i) the power of the mother on the facts found by the tribunals to grant the lease on behalf of her minor daughter and its legal effect; and (ii) the maintainability of the application of the appellant under Section 39 of the Act. Therefore, we cannot accept the contention of Mr. Sanghi that any error has been committed by the High Court in considering these aspects in proceedings under Article 227.

10. The nature of the relief that could be granted to the appellant under the Act depends upon the question whether the tenancy in this case has been created "not earlier than the first day of April, 1957". There is no controversy that the appellant was not owning lands exceeding a family holding. If the tenancy in favour of the tenant in this case is one created "not earlier than the first day of April, 1957" and if the other conditions mentioned in Section 39 are

satisfied, the relief could be granted to the appellant under that section. We have already referred to the facts that the appellant's application was under Section 36 read with Section 39. In order to find out whether the lease in this case is one created "not earlier than the first day of April, 1957", it is really necessary to inquire about the legal effect of the lease executed by the mother as guardian of the appellant on February 12, 1956, for the year 1956-57. If that lease is valid and binding on the appellant, the result will be that Section 39 will not be attracted. Therefore, we will first consider the question as to the legal effect of the lease granted by the mother, which is the subject of the second contention raised by Mr. Sanghi. Mr. Sanghi urged that on the findings of all revenue tribunals and accepted by the High Court, Champat-rao, the father of the appellant was admittedly alive. If so, the father is the natural guardian of the appellant under the Hindu Law. Though the appellant may have been staying under the protection of her mother Smt. Chandrabhagabai, the mother had no authority in law to execute the lease deed so as to bind the appellant. The counsel further urged that even if it be held that the mother was competent to enter into lease transactions on behalf of her minor daughter, there is no evidence led by the tenant that the lease is beneficial or advantageous to the interest of the minor. Under those circumstances the counsel urged, the lease is void and has to be ignored, and if so, this is not a case of tenancy created "not earlier than the first day of April, 1957" and hence Section 39 fully applies to the facts of this case.

11. We are not impressed with this contention of Mr. Sanghi. Mr. Sanghi referred us to certain decisions where the powers of a guardian of a minor have been considered. But in the view that we take that the contention of Mr. Sanghi in this regard is not acceptable to us, no useful purpose will be served by reference to those decisions. We have already referred to the fact that the father and mother of the appellant had fallen out and that the mother was living separately for over 20 years. It was the mother who was actually managing the affairs of her minor daughter, who was under

her care and protection. From 1951 onwards the mother in the usual course of management had been leasing out the properties of the appellant to the tenant. Though from 1951 to 1956 the leases were oral, for the year 1956-57 a written lease was executed by the tenant in favour of the appellant represented by her mother. It is no doubt true that the father was alive but he was not taking any interest in the affairs of the minor and it was as good as if he was non-existent so far as the minor appellant was concerned. We are inclined to agree with the view of the High Court that in the particular circumstances of this case, the mother can be considered to be the natural guardian of her minor daughter. It is needless to state that even before the passing of the Hindu Minority and Guardianship Act, 1956 (Act 32 of 1956) the mother is the natural guardian after the father. The above Act came into force on August 25, 1956 and under Section 6 the natural guardians of a Hindu minor in respect of the minor's person as well as the minor's property are the father and after him the mother. The position in the Hindu Law before this enactment was also the same. That is why we have stated that normally when the father is alive he is the natural guardian and it is only after him that the mother becomes the natural guardian. But on the facts found above the mother was rightly treated by the High Court as the natural guardian.

12. It has also been found by the High Court and all the revenue tribunals that the mother was protecting the appellant and looking after her interest and was also managing the suit lands by leasing them to the tenant. There is no evidence to establish that the transaction of lease is in any way an imprudent one or not in the interest of the minor appellant. It has also been found that the lease in favour of the tenant has begun from 1951. Though the lease for some years was oral, for the year 1956-57 a written lease deed was executed on February, 12, 1956 by the tenant in favour of the appellant represented by her mother as guardian. If so, it follows, as held by the High Court, that the tenancy had been created even prior "to the first day of April,

1957". Though the revenue tribunals also found that the tenant was in possession of the properties as lessee from 1951 onwards, they declined to recognise his rights, on the view that those leases were not binding on the appellant. That view, as we have already pointed out, is erroneous. Therefore, it follows that the contention of Mr. Sanghi that the High Court's view about the validity and legality of the lease executed by the mother on February 12, 1956 is not correct, cannot be accepted.

13. In view of the above finding that the lease executed on February 12, 1956 is valid and binding on the appellant, it follows that this is not a case of a tenancy created by the landlord "not earlier than the first day of April, 1957" which is one of the essential ingredients for the maintainability of the application under Section 39. Therefore, the third contention of Mr. Sanghi that the construction placed upon Section 39 by the High Court and holding that the application of the appellant is barred by limitation is not correct, does not arise for consideration. The applicability of Section 39 would have arisen for consideration only if it had been found that the lease by the mother is not valid and by virtue of occupation of the land in 1958-59 the tenant is to be considered as a 'deemed tenant' under Section 6.

14. We may, however, indicate that the High Court has held that Section 39 will not apply on the ground that the lease in this case is prior to April 1, 1957, and the application filed by the appellant on March 30, 1963 was barred by limitation. So far as the view of the High Court that the lease in this case is one created prior to April 1, 1957 is concerned, we have already accepted that finding. Regarding the application being barred by limitation, the view of the High Court briefly is as follows: The Act in the Vidarbha region came into force on January 28, 1961. Under Section 39, sub-section (1), the application by the landlord should be filed within one year from the date of the Act coming into force, i.e., on or before January 28, 1962. Sections 38 and 39-A while providing a period for making the application had also enabled a minor to file an ap-

plication within one year of his or her attaining majority. Similar provisions are not to be found in Section 39 (1). Therefore, the fact that the appellant attained majority on July 6, 1962 and had filed the application within one year of her attaining majority, is of no avail. The High Court declined to accept the contention on behalf of the appellant that the words but subject to the provisions of sub-section (2) occurring in Section 39 (1) referred to the enabling provisions in favour of the minor contained in sub-section (2) of Section 38. At any rate as one of the ingredients for attracting Section 39, namely, the tenancy having been created after April 1, 1957, is not present in this case and as such Section 39 stands eliminated, we do not think it necessary to express any opinion on the construction placed by the High Court on Section 39 (1) regarding other aspects.

15. The High Court has rightly pointed out that the revenue tribunals have only proceeded to grant relief to the appellant on the basis that Section 39 is inapplicable. However, the High Court, even after holding that Section 39 does not apply, has shown consideration to the appellant when it has treated her application as one under Section 36 read with Section 38. Applying Section 38, the appellant would not be entitled to the possession of the entire field. As per clause (a) proviso (i) of sub-sec. (4) of Section 38, she would be entitled to resume for personal cultivation either one third of the family holding or half of the lands leased by her, whichever is more. It is seen that the High Court was informed that the family holding in this case consists of 32 acres and on that basis the High Court held that half of the land leased would be more and as such the appellant would be entitled to get possession of half of the area leased, namely, half of 27 acres and 37 gunthas. It is for the purpose of effecting a division of the leased properties into two halves and place the landlord and the tenant in possession of one portion, that the High Court after setting aside the order of the revenue tribunals remanded the matter to the Naib Tahsildar. Those directions given by the High Court, in our view, are perfectly correct and justified.

16. The appeal fails and is dismissed with costs of the first respondent.
Appeal dismissed.

AIR 1971 SUPREME COURT 321
(V 58 C 76)

(From: Company Law Board, New Delhi)*

M. HIDAYATULLAH, C. J., G. K. MITTER AND A. N. RAY, JJ.

Bajaj Auto Ltd., Poona, Appellant
v. N. K. Firodia and another etc., Respondents.

Civil Appeals Nos. 546, 547 and 692 to 1031 of 1970, D/- 4-9-1970.

Companies Act (1956), Section 111 (2) — Transfer of shares — Absolute discretion vested in directors under articles of company to refuse registration — Test for Court to consider how far reasons for refusal were justified — Refusal in this case was held arbitrary and unjustified.

Where the directors under the articles of a company have uncontrolled and absolute discretion in regard to declining registration of transfer of shares, discretion does not mean a bare affirmation or negation of a proposal. Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the directors will act for the paramount interest of the company and for the general interest of the shareholders because the directors are in a fiduciary position both towards the company and towards every shareholder. The directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive. (Para 13)

If the articles permit the directors to decline to register transfer of shares without stating the reasons, the Court would not draw unfavourable inferences against the directors because they did not give reasons. In other words, the Court will assume that the directors acted reasonably and bona fide and those who allege to the contrary would have to prove and establish the same by evidence. Where however the directors gave reasons

*(Appeals Nos. 4 to 7 of 1969, etc., D/- 14-3-1970 — Company Law Board, Delhi.)

the Court would consider whether they were legitimate and whether the directors proceeded on a right or wrong principle. (Para 14)

The reasons of the directors have to be tested from three points of view: First, whether the directors acted in the interest of the company; secondly, whether they acted on a wrong principle; and, thirdly, whether they acted with an oblique motive or for a collateral purpose. The discretion of the directors would be nullified if it were established that the Directors acted oppressively, capriciously or in some other way mala fide. (Para 15)

If the Court found that the Directors gave reasons which were legitimate, the Court would not overrule that decision merely on the ground that the Court would not have come to the same conclusion. (Para 22)

The discretion of the Directors is to be tested as the opinion of fair and sensible men in the interest of the company. (Para 34)

Held, (in the circumstances of the case) that the Directors did not act bona fide nor did they act in the general interest of the company. On the contrary they acted upon a wrong principle and for the oblique motive. The inescapable conclusion was that the Directors acted arbitrarily and unjustifiably. Case law discussed.

(Para 34)

Cases Referred: Chronological Paras

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 183, Ex parte Penney 17

M/s. C. K. Daphtary, A. K. Sen and Dr. D. M. Singhvi, Senior Advocates, (M/s. S. R. Swarup and B. Datta, Advocates, and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co., with them), for Appellant (In all the Appeals); M/s. F. S. Nariman, A. B. Diwan, K. J. Merchant and I. N. Shroff, Advocates, for Respondent No. 1 (In all the Appeals).

The following Judgment of the Court was delivered by

RAY, J.:— These appeals are by special leave against the order dated 14th March, 1970 made by the Company Law Board, Department of Company Affairs, Ministry of Industrial Development, Internal Trade and Company Affairs, New Delhi, under Section 111 (3) of the Companies Act, 1956 directing the appellant company to register transfer of 3643 shares forming the subject matter of these appeals.

2. The respondents in these appeals are Jaya Hind Industries Ltd., N. K. Firodia and other persons who will be referred to as the Firodia group. The appellant will be referred to as the Bajaj group.

3. The Firodia group lodged in different lots 3643 shares of the appellant for being transferred to different names. Jaya Hind Industries Private Ltd., applied for transfer of 1500 shares in their names. Firodia applied for transfer of 30 shares in his name. The other transfers were in the names of associates, nominees and friends of the Firodia group. The Board of the appellant refused to register transfer of the said shares at the Board meetings held on 23 May, 1968 in respect of 2532 shares and on 24 June, 1968 in respect of 1111 shares. The appellant communicated the said refusal to transfer the shares in the month of June, 1968.

4. Thereafter, in the month of August, 1968, 338 appeals were filed before the Company Law Board in respect of refusal of the appellant to transfer 3643 shares. The Company

Law Board by its letter dated 16th January, 1969 asked the appellant to disclose the reasons for refusal to register transfer of shares. The appellant company gave three reasons for refusal to register transfer of the said 3643 shares. First, that Jaya Hind Industries Private Ltd., was a beneficiary to the extent of 4th share in the Managing Agency remuneration receivable by Jamnalal Sons Private Ltd., from Bajaj Auto Ltd., and yet N. K. Firodia chose to write to the Company Law Board against the extension of the Managing Agency of Jamnalal Sons Private, Ltd. The company further said that N. K. Firodia, according to the appellant company, was their representatives and when N. K. Firodia acted in such a treacherous fashion and against the interest of the company and behind the back of the Board of Directors it became evident that Firodia's design was to create mischief. Secondly, the transfer of shares received from Jaya Hind Industries Private Ltd., was part of the design to acquire interest in the company which was likely to result in a threat to the smooth functioning of the management of the company, and to vote down the passing of a special resolution required for the management of the company, and, therefore, transfer should not be permitted. Thirdly, the purchase of shares by Jaya Hind Industries Private Ltd., was not with a view to bona fide investment but was with a mala fide purpose and evil design. It was said that the issued share capital of the company was 1,04,250 shares of Rs. 100 each. Firodia group was holding 21,500 shares. Transferring further shares to the names of Firodia group would obstruct the business of the appellant company in the passing of special resolution which was required in the day to day business of the company. It was also said that from the investment point of view with a dividend of Rs. 10 per share on a paid up share of Rs. 100 the purchase price paid by Firodia group was artificial and could only be with a view to try to take control and/or obstruct the business and smooth working of the company and to injure the existing management. The appellant company concluded by saying that the Board of Directors came to the conclusion that it was in the interest

of the company to refuse the said transfers.

5. In order to appreciate whether the Directors used the discretion in proper exercise of their fiduciary power and the reasons were bona fide and legitimate in the interest of the company as a whole, it is necessary to refer to certain features of the case.

6. In the year 1947 a joint venture business was entered into between Jaya Hind Industries Ltd. and Bachhraj Trading Corporation Ltd. In the month of March, 1950, Bachhraj Trading Corporation suffered heavy losses and the joint venture was transferred to Bajaj Factories Ltd., with the consent of Jaya Hind Industries Ltd.

7. In the year 1952 N. K. Firodia became a Director of Eachhraj Trading Corporation Ltd. In the month of April, 1954 Jaya Hind Industries Ltd., acquired 1800 shares of the face value of Rs. 1,80,000 of Bachhraj Trading Corporation Ltd., at Rs. 36/8/- per share which together with 50 shares held by N. K. Firodia equalled 3/8ths of the share capital. In the month of May, 1954, Bachhraj Trading Corporation Ltd., again took over the business of the joint venture from Bajaj Factories Ltd. In the year 1955 N. K. Firodia as a Director of Eachhraj Trading Corporation Ltd., applied to the Central Government for the manufacturing licence of scooters, auto rickshaws and tempo three wheeler vehicles. In the year 1957 Bachhraj Trading Corporation Ltd. was granted the manufacturing licence of tempo three wheelers. In 1958 Bajaj Tempo Private Ltd. was formed to manufacture tempo three wheeler vehicles and N. K. Firodia was appointed the Managing Director of the same. In the year 1959 Bachhraj Trading Corporation Ltd. was granted licence to manufacture scooters and auto rickshaws. In the year 1960 the name of Bachhraj Trading Corporation Ltd. was changed to Bajaj Auto Private Ltd. Shares of Bajaj Auto Private Ltd. were offered to shareholders of Bachhraj Trading Corporation in proportion to their shareholding.

8. Between the years 1954 and 1960, Jaya Hind Industries Private Ltd. of the Firodia group had provided substantial funds amounting to Rs. 4,36,000 to the appellant company in

its former name. In the year 1960 there was a Managing Agency agreement between the appellant company and Jamnalal Sons Private Ltd. for a period of five years. In 1960 when the appellant was converted into a public limited company and Firodia was appointed as its Chief Executive, the respondent company of the Firodia group by themselves, their shareholders and friends subscribed for 37½ per cent of the shares offered to the then existing shareholders of the appellant company. An agreement was entered into between Jamnalal Sons, Private Ltd. Managing Agents of the appellant company and the respondent Jaya Hind Industries Private Ltd., on 15th August, 1960 by which the Managing Agents agreed to pay 25 per cent of the remuneration of the Managing Agency to the respondent company in consideration of services rendered to the appellant company. Gradually, the appellant company grew into a prosperous and very well developed automobile unit. Land was acquired, buildings were constructed and machinery and equipment worth more than a crore of rupees was purchased and installed. The manufacturing activity of the appellant company made good progress and 90 per cent. of the components of scooters and auto rickshaws were capable of being manufactured indigenously.

9. In the month of June, 1965 the appellant company applied to the Central Government for re-appointment of Jamnalal Sons Private Ltd., as Managing Agents of the appellant company for a period of 10 years. The Central Government on 11 August, 1965 sanctioned the said re-appointment of Managing Agents for the period commencing 16 August, 1965 and ending 31 March, 1968, viz., for an approximate period of three years. The appellant company entered into an agreement with the Managing Agents on similar terms.

10. In the month of August, 1967, Kamalnayan Bajaj of the Bajaj group proposed at the Board meeting of the appellant that an application should be made to extend the term of the Managing Agency. Firodia of the respondent company group opposed any such extension. In the month of December, 1967 the appellant applied to the Company Law Board for extension of the term of Managing

Agency of Jamnalal Sons Private Ltd., for a period of 7 years so that the Managing Agents would have a term of 10 years commencing 16 August, 1965. The letter of the appellant company was signed by the Secretary. In the month of March, 1968 Firodia came to know about the said letter and wrote to the Chairman of the Company Law Board that there was neither any resolution of the general meeting of the Company for such extension nor any publication of such appointment. Firodia said that the appellant company contravened, in particular, the provisions contained in Sections 326 and 640B of the Companies Act, 1956. The Company Law Board, however, approved of the extension of the Managing Agency for a period of two years from 31 March, 1970.

11. The appellant company was converted into a public limited company in 1960 and the share capital was increased from Rs. 9,90,000 to Rs. 70,00,000. In the months of February and March, 1967 the capital of the appellant company was increased by issue of right shares. By the end of February, 1968 out of the issued share capital of 1,04,250 shares the Bajaj group held about 58,600 shares, the Firodia group 23,400 shares and the general public about 52,250 shares. The Bajaj group however alleged that in February, 1968 they held 31,500 shares and the Firodia group had 21,735 shares. In the month of March, 1968 the Bajaj group bought about 16,230 shares up to the maximum value of Rs. 411 per share. It may be mentioned here that out of the said 16,230 shares the Bajaj group bought about 4000 shares from the Life Insurance Corporation Ltd., and the Unit Trust of India. The Bajaj group obtained transfer of the said 16,230 shares in their names. The Firodia group, on the other hand, from the month of April, 1968 onwards lodged in different lots 3643 shares of the appellant company for being transferred to their names. The Board declined to register any transfer in respect of the said 3643 shares.

12. It is also necessary to know about the antecedents and activities of Firodia in relation to the affairs of the appellant company. When the joint venture was started in the year 1946 between Bachhraj

Trading Corporation Ltd., and the respondent company Firodia was in actual charge of the joint venture. In the year 1950 Firodia went to Germany and obtained representation from Vidal and Sohn Tempo Works Hamburg, Germany in connection with the manufacture of tempo three wheeler vehicles. In 1952 Firodia became a Director of Bachhraj Trading Corporation Ltd. Firodia thereafter submitted a scheme for the manufacture of scooters and auto rickshaws and obtained a licence for Bachhraj Trading Corporation Ltd., in that behalf. The Firodia group acquired shares of the face value of Rs. 1,80,000 in Bachhraj Trading Corporation in the year 1954 and helped its rehabilitation after it suffered heavy losses. The Firodia group provided funds to the extent of Rs. 4,36,000 to the Bajaj group during the years 1954 and 1960. When the appellant company became a public limited company in the year 1960 the Firodia group subscribed for 37½ per cent. of the shares and assisted in procuring subscription to the shares offered to the public. Jamnalal Sons Private Ltd., the Managing Agents of the appellant agreed to pay 25 per cent. of their remuneration of the Managing Agency to the respondent company of the Firodia group in consideration of the services rendered.

13. Article 52 of the appellant company provided that the Directors might at their absolute and uncontrolled discretion decline to register any transfer of shares. Discretion does not mean a bare affirmation or negation of a proposal. Discretion implies just and proper consideration of the proposal in the facts and circumstances of the case. In the exercise of that discretion the Directors will act for the paramount interest of the company and for the general interest of the shareholders because the Directors are in a fiduciary position both towards the company and towards every shareholder. The Directors are therefore required to act bona fide and not arbitrarily and not for any collateral motive.

14. If the Articles permit the Directors to decline to register transfer of shares without stating the reasons the Court would not draw unfavourable inferences against the Directors because they did not give

reasons. In other words, the Court will assume that the Directors acted reasonably and bona fide and those who allege to the contrary would have to prove and establish the same by evidence. Where however the Directors gave reasons the Court would consider whether they were legitimate and whether the Directors proceeded on a right or wrong principle. As a result of the introduction of Sec. 111 (5-A) in the Companies Act, 1956 two consequences follow. First, if the Articles permit the Directors not to disclose reasons for declining to register a transfer the statute confers power to interrogate the Directors and disclose the reasons. Secondly, if the Directors do not disclose reasons presumption can be drawn against the Directors for non-disclosure of reasons in spite of being called upon to do so.

15. In the present appeals, the reasons of the Directors have to be tested from three points of view. First, whether the Directors acted in the interest of the company; secondly, whether they acted on a wrong principle; and, thirdly, whether they acted with an oblique motive or for a collateral purpose. This Court in *M/s. Harinagar Sugar Mills Ltd. v. Shyam Sundar Jhunjhunwala*, (1962) 2 SCR 339 = (AIR 1961 SC 1669) said that "the discretion of the Directors would be nullified if it were established that the Directors acted oppressively, capriciously or corruptly or in some other way mala fide".

The decision in *Harinagar Sugar Mills Ltd.*, (1962) 2 SCR 339 = (AIR 1961 SC 1669) (supra) related to a case under the Companies Act, 1956 prior to the introduction of Section 111 (5A). That is why if the Directors under the Articles were not to disclose reasons it was said that the Court would presume where the Directors refused to register the transfer of shares that their power of absolute discretion was exercised bona fide unless corrupt or mala fide motives were affirmatively pleaded and proved. It would be for the aggrieved transferor to show that the refusal to register transfer was exercised mala fide and not in the interest of the company and thereby the presumption of bona fide would be displaced.

16. The words 'bona fide and for the benefit of the company as a whole' have been considered in some English decisions. Reference may be made to the decision in *Greenhalgh v. Arderne Cinemas Ltd.*, (1950) 2 All ER 1120, where Evershed, M. R. said that if a resolution had the effect "to discriminate between the majority shareholders and the minority shareholders so as to give the former advantage of which the latter were deprived", the resolution could be attacked on grounds of elements of dishonesty or impropriety. The acts of the Directors would have to be scrutinised as to whether they were the honest opinion of the Directors acting for the company as a whole.

17. Melish, L. J. in *Ex parte Penney*, (1872) 8 Ch A 446, said that the Directors would have no right to force a particular shareholder to continue as a shareholder and not to allow him to transfer shares at all because that would be an abuse of their power. Lord Cozens-Hardy, M. R. in *Re. Bede Steam Shipping Co. Ltd.*, (1917) 1 Ch 123, said that the personal objections to a transferee were where the transferee would be a quarrelsome person or he would be an unreasonable person or he would be acting in the interest of a rival company. The Directors there had power to refuse to register transfer of shares if "in their opinion it is contrary to the interest of the company that the proposed transferee should be a member thereof". In that case there were disputes between the Elder brothers who were Directors. One of the Elder Brothers sold his two shares to a clerk of his and another share to his house-keeper. The other Director said that the company was really a family concern and therefore shares should not be transferred singly or in small lots to outside persons having no interest in, or knowledge, of shipping.

18. In *Bede Steam Shipping Co.*, (1917) 1 Ch 123 (supra) the power of the Directors was to refuse to register the transfer of share to any person of whom the Directors did not approve as transferee. The Directors in declining to register the transfer gave two reasons. First, that there would be increase in expenditure if the body of shareholders who numerically increased and secondly the

individuals who were neither related to the founder's family nor connected in business with the company would become members by the proposed transfer. Neither of these reasons was held to touch the fitness of the transferees. The real power of the Directors in refusing registration of transfer was on the ground of personal objections to the transferees. The apprehension on the part of the Directors in the increase in the number of shareholders was therefore found to be an abuse of power. It was found that the Directors in refusing registration to transfer thought of the proposed transferees as mere nominees who could adopt the attitude of the transferor who had disagreed with the Directors of the company. The Directors did not look at the relevant circumstances in which they were placed, namely, their status, their occupation, and, in particular, whether the transferees were interested in any private business competing with the company.

19. Reference may be made to an old decision in *Re. Bell Brothers, Ltd.*, (1891) 7 TLR 689, as an illustration of the power of the Directors to refuse registration of transfer. The relevant Article in the case of *Bell Brothers*, (1891) 7 TLR 689 (supra), conferred discretionary power on the Directors to refuse registration of transfer of shares on the ground that the Directors did not approve of the transferee. Chitty, J. said in relation to the Directors' power that the Directors must act in good faith and in the interest of the company and with due regard to the right of a shareholder to transfer his shares and they must fairly consider the question of the transferee's fitness at a Board meeting. The Directors in that case were not required to disclose reasons. Three propositions can be extracted from that case. First, where the Directors do not assign any reason because of the Articles it is competent for those who seek to have the transfer registered to show affirmatively by proper evidence that the Directors had not duly exercised their power. Secondly, if reasons are given by the Directors and the reasons are legitimate the Court will not overrule the Directors' decision merely because the Court itself would not have come to the same conclusion. Thirdly, if the

reasons are not legitimate, the Court would hold that the power had not been duly exercised. An example would be where the Directors said that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them among his nominees.

20. In the case of *Bell Brothers*, (1891) 7 TLR 689 (supra), two *Bell Brothers* John and Lowthian and the members of their families were shareholders in *Bell Brothers*. John died leaving a will and the beneficiaries under the will were his widow and children. The will provided for the widow an annuity. The will contained a general trust for conversion. John's shares were sold to provide a fund to meet the annuity. Hodgson purchased those shares. The Directors were Lowthian, his son Hugh and his son-in-law. Hugh was an executor trustee under the will of John and as such was one of the transferors of the shares of John. The shares of the testator were in the names of Hugh, the nephew and Charles, the son of the testator as executor trustees. The shares being registered in two names, Hugh as the first on the register had the right to vote. Hugh had on the one hand expressed the opinion to sell the shares in the true interest of the beneficiaries and on the other hand as a Director opposed the sale to Hodgson on the ground that the shares should be held by the members of the *Bell* family. The Directors did not allow registration either in the name of Hodgson or his nominees.

21. It has been well settled since the decision in *Pender v. Lushington*, (1877) 6 Ch D 70, that the Directors are not entitled to look behind the register for any purpose. They do not take notice of trust. Similarly, they cannot say that the transferee is the nominee of some one whom they consider objectionable. The accent is always on personal objections to the transferee. The solicitors of the Directors in the case of *Bell Brothers*, (1891) 7 TLR 689, gave the real reason for refusal of registration that Hodgson was holder of shares in a rival company. Chitty, J. said that the Directors carefully abstained from stating what their personal objection to Hodgson was

and put forward their solicitors to assign the reason for it. The Directors who had an opportunity of exercising their power attempted to exercise it upon a wrong principle and therefore their power was gone. It is quite likely that if the Directors had given evidence of their real reason the Court might have accepted it as legitimate. The decision in the case of Bell Brothers (supra) illustrates that where the Directors have the power to refuse registration of the transfer of shares, their exercise of power on a wrong principle will vitiate the exercise of the power.

22. It follows that where the Directors have uncontrolled and absolute discretion in regard to declining registration of transfer of shares the Court will consider if the reasons are legitimate or the Directors have acted on a wrong principle or from corrupt motive. If the Court found that the Directors gave reasons which were legitimate, the Court would not overrule that decision merely on the ground that the Court would not have come to the same conclusion. Reference may be made to the decision in *Balwant Transport Co. Ltd., Amratti v. Y. H. Deshpande*, AIR 1950 Nag 20 which is a Bench decision of the Nagpur High Court. Sapate was a shareholder in the company and owned 31 shares. One of his shares was sold by public auction and was purchased by Deshpande. Deshpande applied for registration. The Article in the Nagpur case conferred absolute and uncontrolled discretion on the Directors to refuse to register transfer where in the opinion of the Directors it was not in the interest of the company to admit the proposed transferee to membership. The evidence in that case was that Deshpande was the lawyer of Sapate. Sapate was quarrelling with the company. Sapate also joined a rival concern. The Directors' decision in those surrounding circumstances was found to be a legitimate exercise of the power of the Directors in the interest of the company.

23. The decision in *Re. Smith & Fawcett Ltd.*, 1942 Ch 304 indicates the extent to which the Court upholds the exercise of absolute and uncontrolled discretion of the Directors to refuse to register any transfer of shares. In that case there were two Directors who held the shares in

equal numbers. One died. The other Director refused to register the transfer of shares in the names of the executors of the deceased Director except in respect of a part of the holding and upon the condition that the balance be transferred to the surviving Director. It was found to be a justifiable act of the Director in the interest of the Company.

24. In the old Bombay decision in *Kaikhosro Muncharji Heeramanek v. Coorla Spinning and Weaving Co.*, (1892) ILR 16 Bom 80, (sic) (one of the Articles of Association of a company provided that?) the Board of Directors might decline to register any transfer of shares, unless the transferees were approved by the Board. A shareholder became insolvent. His share vested in the Official Assignee. The Official Assignee sold the shares. The purchaser applied for registration. The Directors declined to approve of the transferees unless the transferees would pledge themselves not to oppose a certain change in the mode of remunerating the Agents of the company, which the Directors desired to effect, and which they believed would be very advantageous to the company. It may be mentioned here that the purchaser of the shares required the Official Assignee to register transfer in the names of the two nominees who were already the holders of shares in the company. The company, however, did not take any objection to the nominees in their personal capacity. The Directors acted on wrong principle and in abuse of power in insisting on obtaining a pledge from the transferees not to oppose change in remuneration of the Managing Agents.

25. A Bench decision of the Allahabad High Court in *Muir Mills Co. Ltd. of Cawnpore v. T. H. Condon*, (1900) ILR 22 All 410, related to the absolute power of the Directors to refuse registration of transfer of shares on personal objections to the transferee. The Muir Mills in that case disallowed the transfers on the ground that the transferees were subordinates of McRobert, the Managing Director of Cawnpore Mills. There was personal animosity between Johnson, the Managing Director of the Muir Mills and McRobert. The Directors of the Muir Mills came to a conclusion that McRobert should not add

to his voting power and 'harass the management'. It was found to be abuse of fiduciary discretionary power of the Directors when they wanted to safeguard the Director's personal interest against McRobert.

26. The first reason of the appellant company for the refusal of registration of transfer of the shares was that Firodia acted in a treacherous fashion against the interest of the company and behind the back of the Board of Directors. The evidence is that the Managing Agents of the Bajaj group in the year 1965 failed to obtain from the Government approval of an extension of term for 10 years. The Government sanctioned the term for about three years which was to expire on 31 March, 1968. In the month of August, 1967 when Kamalnayan Bajaj of the Bajaj group proposed an extension of the term of the Managing Agents Firodia represented to the Board that Firodia was opposed to the same. No application for extension of the term of Managing Agents was made at that time. The appellant however behind the back of Firodia wrote to the Company Law Board in the month of December, 1967 and though Firodia was the Chief Executive the letter was signed by the Secretary and kept concealed from Firodia. Firodia came to know of the letter in the month of March, 1968 and he wrote to the Company Law Board that the company had made "false statement" in the application for extension of the term, namely, that the appellant company gave a wrong impression that it had received permission to increase its production to 60,000 scooters per year whereas in fact no such permission had been granted. Firodia also pointed out that the appellant suggested that its progress was because of the Bajaj group and made no reference to Firodia who was the Chief Executive of the appellant.

27. In 1965 the appellant asked for appointment of the Managing Agents for ten years. The Company Law Board approved of the appointment upto 31 March, 1968. It is true that there was a resolution of the appellant company in the year 1965 for the appointment of the Managing Agents for a period of ten years. That resolution of 1965 after the appointment of the Managing Agents for a

term of less than three years and, in particular, after an agreement had been entered into between the appellant company on the one hand and the Managing Agents on the other in that behalf, was exhausted, and spent its force and could not be said to have either a life of its own for 10 years or to spring into action in the year 1968 for a revival of the resolution to enable the appellant company to ask for appointment of Managing Agents for a period of seven years on the basis of any such resolution. Firodia rightly protested against the absence of any resolution of the shareholders and also against the absence of any publication of proposal for appointment of Managing Agents for seven years. Firodia furthermore rightly cavilled against the total obscurity of his name or of any reference to his activities in relation to the affairs of the company and the contrary suggestion in the letter that the prosperity of the appellant company was on account of Kamalnayan Bajaj. This aspect is important to show that the allegations of Firodia were against the Managing Agents and further that Firodia was acting in the larger interest of the company whereas the Managing Agents were actuated by their personal motives of preservation and aggrandisement of their power. The letter written by the appellant to the Company Law Board was not circulated to the shareholders. Firodia came to know about the letter and that is why he informed the Company Law Board of the state of affairs.

28. On this evidence it is apparent that Firodia wrote to the Company Law Board in the larger interest of the company. Firodia's allegations were against the Managing Agents. Firodia was justified in opposing re-appointment of the Managing Agents without a specific resolution of the shareholders of the company and without a public notice to the shareholders to represent their views in the matter. The Bajaj group acted behind the back of Firodia and wanted to steal a march. The real motive of the Bajaj group was revealed first by imposing restrictions in the month of March, 1968 on the powers of Firodia as Chief Executive of the appellant company and secondly by the resolution in the month of May, 1968 to terminate the services of Firodia as Chief Executive.

The refusal to register the transfers was at the meetings of the Board held in the months of May and June, 1968.

29. The Directors had a hostile feeling against Firodia and they had the dominant desire to keep Firodia out of the company. The Directors did not act in the interest of the company and their discretion was tainted by unfair conduct and unjustifiable attitude against Firodia.

30. The second reason given by the appellant company was that the Firodia group acquired the shares with a design of acquiring interest in the company which was likely to result in a threat to the smooth functioning of the management of the company and to vote down the passing of the special resolution. There are well-recognised safeguards as to notice and content for passing special resolution. Special resolutions are for limited purposes and are not matters of daily occurrence or of daily routine administration. The mere apprehension that a special resolution will not be passed is not a legitimate reason. The shareholders will bestow their intention on matters forming the subject matter of resolution. Passing of special resolutions will depend upon the mandate of the shareholders. It is manifest that the reason given by the Directors was a camouflage to cover their collateral and corrupt motive of preserving the hegemony of the Bajaj group. The motive is corrupt because the Bajaj group acted for their personal interest and not in the bona fide general interest of the company.

31. The third reason given by the appellant company was that the shares were being acquired by the Firodia group not with a view of bona fide investment but with a mala fide purpose and evil design of obstructing the business of the appellant company. Acquisition or transfer of shares under the Articles in the present case does not suffer from any restrictive impediment like pre-emption or personal objections to the transferees. There is no evidence that the transferees belonged to a rival concern. Equally, there is no evidence that the Firodia group ever obstructed in the management of the company. On the contrary, the Firodia group advanced large sums of money.

Firodia was largely responsible for the gradual growth of the appellant company and for the prosperity of the company. It was therefore an abuse of the fiduciary power of the Directors to refuse to register transfer of shares.

32. The Bajaj group obtained transfer of 16230 shares in their favour in the month of March, 1968. The Bajaj group purchased shares in the market at a maximum value of Rs. 411 per share. The holding of the Bajaj group prior to the acquisition of the said 16230 shares was 28600 shares or according to the Bajaj group 31,500 shares. The Firodia group on the other hand prior to the proposed transfer had 23,400 shares or 21,735 shares according to the Bajaj group. The general public held 52,250 shares. This was the position in the month of February, 1968. The Bajaj group by the acquisition of 16230 shares would have a numerical strength of 44830 shares where as the Firodia group would be having 26863 shares if the proposed transfers were allowed by the Directors. The Bajaj group paid Rs. 411 per share. The Firodia group paid roughly about Rs. 200 per share. Firodia was not on the Board of Directors of the appellant company. The Bajaj group and their friends were the Directors. In the year 1967 the Firodia group lodged 4243 shares for transfer in their names and the transfers were registered. Again, in the month of February, 1968 when the Firodia group lodged 68 shares with the appellant company for transfer, the appellant company accepted the said transfer. It is therefore, revealed that after the appellant came to know that Firodia wrote to the Company Law Board in the month of March, 1968 that the Directors of the appellant company developed antipathy against Firodia. The refusal to register the shares was a sequel to the termination of the appointment of Firodia as Chief Executive and it is manifest that the Directors acted for collateral reasons and in their own interest.

33. Counsel on behalf of the appellant contended that of the seven Directors only Kamalnayan Bajaj belonged to the Bajaj family and each Director was an independent industrialist and could not be described to be of Bajaj group. Neither the status and wealth of the Directors nor their

lack of relationship with the Bajaj family could be decisive as to whether they exercised their discretion on correct principle or without any corrupt motive. The Firodia group alleged that Kamalnayan Bajaj was an arbitrator in the family dispute of Ramnath A. Podar and that Shriyans Prasad Jain was a close associate of Kamalnayan Bajaj. Irrespective of these allegations, we have already indicated that the Directors failed to exercise their discretion properly by refusing to register transfer of shares on wrong principles and for corrupt and oblique motives.

34. The discretion of the Directors is to be tested as the opinion of fair and sensible men in the interest of the company. In the present case, the Directors did not act bona fide nor did they act in the general interest of the company. On the contrary, they acted upon a wrong principle and for the oblique motive of squeezing out Firodia. The inescapable conclusion is that the Directors acted arbitrarily and unjustifiably.

35. For these reasons we are of opinion that the appeals fail. They are dismissed with costs. The respondents will be allowed one set of hearing fees.

Appeals dismissed.

AIR 1971 SUPREME COURT 330
(V 58 C 77)

(From: Allahabad)

J. C. SHAH AND V. BHARGAVA, JJ.
Manni Lal, Appellant v. Parmai Lal and others, Respondents.

Civil Appeal, No. 2632 of 1969, D/-13-8-1970.

(A) Representation of the People Act (1951), Section 8 (2) — "Disqualified from the date of such conviction" — Disqualification is wiped out and does not exist at all when an appellate order of High Court sets aside conviction — Appellate order of acquittal takes effect retrospectively and conviction and sentence are deemed to be set aside from date they were recorded. (Para 4)

(B) Representation of the People Act (1951), Sections 100 (1) (a) and 8(2) — Question whether returned candidate was disqualified on date of elec-

tion — Opinion as to, is to be formed at the time of pronouncement of judgment in election petition.

Under Section 100 (1) (a) the opinion has to be formed as to whether the successful candidate was disqualified on the date of election; but this opinion is to be formed by the High Court at the time of pronouncing the judgment in the election petition. (Para 4)

Last date for filing nomination 9-1-69 — Returned candidate convicted on 11-1-69 and sentenced to 10 years R. I. — Appeal against conviction to High Court filed on 16-1-69 — Polling taking place on 9-2-69 and result declared on 11-2-69 — Conviction and sentence set aside in appeal on 30-9-69 — Judgment in election petition pronounced on 27-10-69 — Held, High Court was right in holding that the returned candidate was not disqualified and that his election was not void on that ground — High Court had before it order of acquittal which had taken effect retrospectively from 11-1-69 — Disqualification which existed on 9-2-69 and 11-2-1969 was wiped out when conviction was set aside. (Para 4)

(C) Conduct of Elections Rules (1961), Rule 56 (2) (b) — Rejection of ballot papers on ground that marks made on them were made otherwise than with instrument supplied for the purpose — Burden lies on person, who challenges decision of returning officer in his election petition, to establish that officer had wrongly rejected ballot papers — He can only succeed if he had proved that the marks made were with instrument supplied for the purpose — Finding of Court, that papers bore no recognizable seal impression that might be said to have been made with the instrument supplied for marking vote, amounts to holding that the marks made could not be identified with the seal which was supplied for marking. (Para 6)

The following judgment of the Court was delivered by

BHARGAVA, J. — This is an appeal by Manni Lal who was one of the candidates for election to the U. P. Legislative Assembly from Ahirori (Scheduled Caste) Constituency of Hardoi District, and who was defeated at that election by respondent No. 1, Parmai Lal. The election was

challenged on two principal grounds. One ground was that respondent No. 1 was disqualified under Section 8 (2) of the Representation of the People Act, 1951 (hereinafter referred to as "the Act") for being chosen as a member of the Legislative Assembly, because he was convicted for offences under Sections 148 and 304 of the Indian Penal Code on 11th January, 1969, and was sentenced to imprisonment exceeding two years. The other ground was that a number of ballot papers cast in favour of the appellant had been wrongly rejected instead of being counted in favour of the appellant, that some ballot papers were wrongly counted for respondent No. 1 instead of being rejected, and that some ballot papers were wrongly counted in favour of respondent No. 1 instead of being counted in favour of the appellant or other candidates. The High Court of Allahabad framed three different issues in respect of this claim of wrong rejection or wrong counting of the ballot papers. In the written statement, respondent No. 1 pleaded that a number of ballot papers were wrongly counted in favour of the appellant instead of being counted in favour of the other candidates, that a number of ballot papers were wrongly rejected instead of being counted in favour of respondent No. 1, and, further, that a number of ballot papers were wrongly counted in favour of the appellant instead of being rejected. The learned Judge, who tried the election petition, framed three issues in respect of these pleadings also which were put forward in the written statement and not by way of a petition of recrimination. On the basis of examination of the ballot papers and the evidence before him, a finding was recorded that, after correcting the errors made in counting, the net result would be that the appellant will have a net gain of only 6 votes, while respondent No. 1 would have a net loss of 24 votes. It appears that respondent No. 1 had received 13,508 votes, while the appellant had received 13,271 votes. After taking into account the finding, the valid votes received by the appellant would total to 13,277, while respondent No. 1 would still have 13,484 valid votes, so that the election of respondent No. 1 could not be declared void. The appellant had

claimed that, on a proper counting, it would be found that he had a majority of votes, and had prayed for a declaration that he is the successful candidate. On the finding recorded, both the prayers of the appellant failed. The High Court further held that respondent No. 1 was not disqualified under Section 8 (2) of the Act and, consequently, his election was valid. The petition having been dismissed by the High Court, the appellant has now come up in this appeal under Section 116-A of the Act.

2. On the issue relating to disqualification, the facts that need be noticed are that 9th January, 1969 was the last date for filing nominations in this constituency and respondent No. 1 was convicted two days later on 11th January, 1969 and sentenced, *inter alia*, to ten years' rigorous imprisonment under Sec. 304, I. P. C. On 16th January, 1969, he filed an appeal against this conviction in the High Court. Polling took place on 9th February, 1969 and the result was declared on 11th February, 1969. Respondent No. 1 was declared as the successful candidate having secured the largest majority of votes. On 30th September, 1969, his appeal was allowed by the High Court and his conviction and sentence were set aside. At this time, the election petition was still pending. In fact, the judgment in the election petition was delivered on 27th October, 1969.

3. On these facts, it is clear that, though the conviction of respondent No. 1 was recorded by the trial Court on 11th January, 1969, he was acquitted on 30th September, 1969 in appeal which acquittal had the effect of completely wiping out the conviction. The appeal having once been allowed, it has to be held that the conviction and sentence were vacated with effect from the date on which the conviction was recorded and the sentence awarded. In a criminal case, acquittal in appeal does not take effect merely from the date of the appellate order setting aside the conviction; it has the effect of retrospectively wiping out the conviction and the sentence awarded by the lower Court. The disqualification relied upon by the appellant was laid down under Section 8 (2) of the Act read with Article 102 (1) (e) of the Constitution. The provision is that a person convict-

ed by a Court in India for any offence and sentenced to imprisonment for not less than two years shall be disqualified from the date of such conviction and shall continue to be disqualified for a further period of five years since his release. The argument on behalf of the appellant was that, though respondent No. 1 was not disqualified at the time of filing of nomination, he was, in fact, disqualified on 9th February, 1969, the date of polling, as well as on 11th February, 1969, when the result was declared, because his conviction had been recorded and he had been sentenced to ten years' rigorous imprisonment on 11th January, 1969. It was further urged that, though the appeal had been filed, that appeal did not have the effect of wiping out this conviction. In these circumstances, it was urged that his election was void and should have been set aside on the ground of this disqualification.

4. This argument overlooks the fact that an appellate order of acquittal takes effect retrospectively and the conviction and sentence are deemed to be set aside with effect from the date they were recorded. Once an order of acquittal has been made, it has to be held that the conviction has been wiped out and did not exist at all. The disqualification, which existed on the 9th or 11th February, 1969 as a fact, was wiped out when the conviction recorded on 11th January, 1969 was set aside and that acquittal took effect from that very date. It is significant that the High Court under Section 100 (1) (a) of the Act, is to declare the election of a returned candidate to be void if the High Court is of opinion that, on the date of his election, a returned candidate was not qualified, or was disqualified, to be chosen to fill the seat under the Constitution or the Act. It is true that the opinion has to be formed as to whether the successful candidate was disqualified on the date of his election; but this opinion is to be formed by the High Court at the time of pronouncing the judgment in the election petition. In this case, the High Court proceeded to pronounce the judgment on 27th October, 1969. The High Court had before it the order of acquittal which had taken effect retrospectively from 11th January, 1969. It was, therefore, impossible for the High Court to arrive

at the opinion that on 9th or 11th February, 1969, respondent No. 1 was disqualified. The conviction and sentence had been retrospectively wiped out, so that the opinion required to be formed by the High Court to declare the election void could not be formed. The situation is similar to one that could have come into existence if Parliament itself had chosen to repeal Section 8 (2) of the Act retrospectively with effect from 11th January, 1969. Learned counsel conceded that, if a law had been passed repealing Section 8 (2) of the Act and the law had been deemed to come into effect from 11th January, 1969, he could not have possibly urged thereafter, when the point came up before the High Court, that respondent No. 1 was disqualified on 9th or 11th February, 1969. The setting aside of the conviction and sentence in appeal has a similar effect of wiping out retrospectively the disqualification. The High Court was, therefore, right in holding that respondent No. 1 was not disqualified and that his election was not void on that ground.

5. On the second point, the main argument of counsel for the appellant was that the High Court committed the error of framing three issues on the basis of pleading in the written statement which challenged the correctness of the acceptance or rejection of ballot papers without any recrimination being filed by respondent No. 1 under Section 97 of the Act. Counsel wanted to argue this question of law in detail, but we consider that, in the present case, it is not necessary to go into this point at all. Even if the three issues framed on the basis of pleadings in the written statement are ignored, and account is taken only of findings recorded on the three issues framed on the basis of pleadings in the election petition, it would be found that respondent No. 1 still had a majority of valid votes, and the appellant could not claim that the election of respondent No. 1 be set aside and the appellant be declared as the successful candidate. The findings of fact recorded by the Judge are that, under Issue Nos. 5, 18 ballot papers mentioned in Schedules III and IV should be counted as valid votes for the appellant, while 24 ballot papers were wrongly counted in favour of respondent No. 1.

Under Issue No. 3, the finding is that the appellant is entitled to add 111 valid votes in his favour and, under Issue No. 4, the finding is that 74 votes would be lost by respondent No. 1. If these figures are accepted and taken into account, the appellant would receive 13,400 valid votes, being the total of 13,271 votes found in his favour at the time of declaration of the result and 129 votes which the appellant is entitled to add as a result of the findings on the three issues. So far as respondent No. 1 is concerned, he loses 98 votes as a result of the findings recorded by the High Court; and, on deducting these votes from 13,508 received by him, respondent No. 1 is left with 13,410 votes. Respondent No. 1, thus, has a majority of 10 votes, so that his election is valid.

6. Counsel, however, challenged one finding recorded by the High Court in respect of 64 ballot papers which, the appellant had claimed, had been wrongly rejected and should have been counted in his favour. These ballot papers have not been produced before us. The learned Judge held that they were invalid votes because "they bear no recognisable seal impression that might be said to have been made with the instrument supplied for marking the vote". The argument of counsel for the appellant is that, even on this finding recorded by the High Court, those votes should have been counted in his favour, because they cannot be held liable to rejection under Rule 56 (2) (b) of the Conduct of Elections Rules, 1961. That sub-rule runs as follows:—

"The returning officer shall reject a ballot paper if, to indicate the vote, it bears no mark at all or bears a mark made otherwise than with the instrument supplied for the purpose". The argument urged is that, according to the Judge, the impressions on these 64 ballot papers could not be identified with the seal supplied for marking the votes, which only leads to the inference that they may bear marks with that seal or may not. For rejection under Rule 56 (2) (b), there must be a definite finding that they bore marks made otherwise than with the seal supplied for the purpose. In this case, the Returning Officer rejected the ballot papers holding that the marks made on these ballot papers

were made otherwise than with the instrument supplied for the purpose. The appellant challenged that decision of the Returning Officer in this election petition. The burden lay on him to establish that the Returning Officer had wrongly rejected these ballot papers. He could only succeed if he had proved that the marks made were with the instrument supplied for the purpose. This the appellant failed to do. In fact, the finding recorded by the learned Judge of the High Court amounts to holding that the marks made cannot be identified with the seal which was supplied for marking the votes and, consequently, an inference follows that they must have been made by some other means. On this finding, the learned Judge was quite correct in not upsetting the order of the Returning Officer rejecting these votes. If these 64 votes are not counted in favour of the appellant, the appellant's case fails, for the majority of votes still remains in favour of respondent No. 1.

7. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 333 (V 58 C 78)

(From: Punjab and Haryana)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Gyan Chand and others, Appellants
v. State of Haryana and others, Respondents.

Civil Appeal No. 64 of 1970, D/-
21-8-1970.

Constitution of India, Articles 226 and 227 — Procedure — Dismissal of application in limine. Decision of Punjab and Haryana High Court, Reversed.

Application to quash order superseding Municipality — Mala fides alleged against Government — Applicants responsible persons like the President, Vice-President and elected members of the Municipal Committee — Petition should not be dismissed in limine without calling on the respondent to file a return and considering it. Decision of Punjab and Haryana High Court, Reversed. Civil Appeal No. 36 of 1963, D/- 16-9-1963 (SC), Rel. on. (Para 3)

IN/IN/E12/70/MKS/M

Cases Referred: Chronological Paras
 (1963) Civil Appeal No. 36 of
 1963, D/- 16-9-1963 (SC),
 Ram Saran Dass v. State of
 Punjab

3

The following judgment of the Court was delivered by

GROVER, J.:— This is an appeal from an order of the Punjab and Haryana High Court dismissing a writ petition in limine.

2. The Municipal Committee of Kaithal consists of 17 elected members. Prior to the election held on March 10, 1968, the previous Committee functioned from 1962 to 1968. According to the appellants the majority of members constituting the Committee from 1962 to 1968 belonged to the Congress Party. On March 10, 1968 fresh elections were held. The new Committee which was elected was to remain in office for a period of three years. It has been alleged by the appellants that the majority of members constituting the new Committee belonged to the Jan Sangh Party. The members of the new Committee took oath of office on April 6, 1968. On February 27, 1969 a notice was served by the Secretary, Local Government Department, Haryana, on the President of the Committee inviting reference to the inspection note on the working of the Committee recorded by the Sub-Divisional Officer, Kaithal a copy of which was sent which contained serious complaints of irregularities committed by the Municipality. It was stated that the inspection note revealed that the civic administration had deteriorated, encroachments had not been removed, the income of the Committee was spent mostly on staff maintenance of civil amenities, no development work had been done, there were heavy arrears of taxes, there was nepotism and party faction and that the various registers were not being properly maintained etc. It was further stated that the inspection note clearly showed that the Municipal Committee was incompetent to perform and had persistently made defaults in the performance of duties entrusted to it. There was thus a prima facie case for superseding it under Section 238 of the Punjab Municipal Act, 1911, hereinafter called the "Act" but the Committee was being given an opportunity to show cause as to why it should

not be superseded by the Government under the provisions of that section. The explanation was to be sent by the Committee within 21 days from the receipt of the communication and in case the Committee failed to send the explanation ex parte orders were to be made. The Vice-President sent a reply dated March 19, 1969 saying that the allegations contained in the memorandum sent to the Committee were baseless and without any foundation. It was stated that the allegations had been levelled merely as a cloak to serve extraneous ends of somehow superseding the Municipal Committee. In this reply it was mentioned that Shri P. N. Bhalla who had been working as an Executive Officer of the Committee had been removed for the reasons which had been mentioned in the show cause notice. The charges which were levelled against him contained various matters which were common to the items mentioned in the show cause notice sent to the Committee. Shri Bhalla had challenged his removal in a petition which was still pending. It was maintained that since the aforesaid matter was sub judice it was not proper and might amount to contempt of court to adjudicate upon the matters which were common to the show cause notice and the allegations against Bhalla. It was further pointed out in the reply that a detailed answer could not be given unless inspection was allowed of the various records and files relating to the allegations made. Inter alia, the most important document was the report made by Shri V. P. Dhir, Deputy Director, Urban Local Bodies, Haryana, who had inquired into the affairs of the Committee. It was essential to inspect the file containing his report before any reply could be given. It was requested that time be extended for giving reply to the allegations made in the show cause notice till the writ petition filed by Bhalla had been disposed of. No reply was apparently sent to this letter by the Government. An order was made on April 9, 1969 superseding the Committee under Section 238 of the Act and its powers were to be exercised by the S. D. O. Civil as Administrator. A schedule of the reasons was given in the notification which contained mostly the same allegations which were con-

tained in the statement attached to the show cause notice.

3. The appellants filed a petition under Articles 226 and 227 of the Constitution in the Punjab & Hariana High Court challenging the aforesaid notification of supersession of the Committee. This came up before a Division Bench consisting of Mehr Singh, C. J. and Prem Chand Jain, J., on April 16, 1969. The petition was dismissed in limine although the learned judges recorded an order. It is somewhat unfortunate that a copy of the writ petition has not been produced in this Court. Presumably the allegations were on the same lines as made in the petition for special leave before us. But in the absence of a copy of the writ petition we need not refer in detail to the allegations made and the contentions raised by the appellants before the High Court. It is, however, apparent and is abundantly clear from the order of the High Court that allegations of mala fides had been made and it had been urged that the Government had not acted in a bona fide manner. The learned judges were largely influenced by the fact that the Committee had not sent any explanation or reply to the show cause notice. It was therefore considered that the charges and allegations made against it stood un rebutted. A constitution bench of this Court has observed in *Ram Saran Dass v. State of Punjab*, Civil Appeal No. 26 of 1963, D/- 16-9-1963 (SC), as follows:

"As we have briefly indicated, the petition filed by the appellant makes serious allegations in support of his case that the impugned order amounts to punishment and had been passed mala fide. It appears that the High Court was not impressed by these allegations, and so chose to dismiss the petition summarily. In our opinion, the High Court should not have adopted such a course in the present case. It may sound elementary to say so, but nevertheless, we ought never to forget that justice must not only be done fairly but must always appear to be so done. When a responsible public servant holding a judicial office moves the High Court under Article 226 and contends that the termination of his services, though ostensibly made in exercise of the power conferred under Rule 23 of the Rules, really amounts to his dismissal,

or that its exercise is mala fide, the High Court should have called upon the respondent to make a return and then considered whether the allegations made by the appellant had been proved, and if they were, what would be the result of the said finding on his argument that the impugned order amounts to dismissal, or has been passed mala fide".

In the present case the appellants are responsible persons. Appellant No. 2 is the President and Appellant No. 3 is the Senior Vice-President of the Committee which has been superseded. The other appellants had been elected members of that Committee. In our judgment in a case of the present kind the writ petition ought not to have been dismissed in the manner in which it was done without obtaining any return from the respondents and considering the same.

4. Mr. M. C. Chagla for the appellants has pointed out that certain affidavits have been filed under the orders of this Court by the respondent and has urged that the legality and validity as also the mala fide nature of the impugned order could be examined in this appeal by this Court. We do not consider that that would be a proper course to follow. It is for the High Court to issue a rule and hear and dispose of the writ petition after returns have been filed by the respondents.

5. The appeal is therefore allowed and the matter is remanded to the High Court for disposal of the writ petition in accordance with law. Costs shall abide the event. We have no doubt that since the term of the Committee will expire in a few months, the writ petition will be disposed of with the utmost expedition.

Appeal allowed.

AIR 1971 SUPREME COURT 335
(V 58 C 79)

(From: Allahabad)

K. S. HEGDE AND I. D. DUA, JJ.

Munir Khan, Appellant v. State of U. P., Respondent.

Criminal Appeal No. 203 of 1967, D/- 17-8-1970.

(A) Penal Code (1860), Section 149 — Common object — In a mutual fight there is no common object —

IN/IN/D965/70/YPB/T

None of the accused can be convicted by having recourse to Section 149.

(Para 4)

(B) Penal Code (1860), Section 324 — Mutual fight between two parties — Death of one person of complainant's party — Conviction of accused under Sections 304, Part I/149, Ss. 307/149 and Ss. 323/149 — High Court acquitting accused under Ss. 304, Part I/149 on ground that in F. I. R. there was no reference to the accused's stabbing deceased, though it was clearly so mentioned — Absence of nature of injury caused by accused — Held, accused could be convicted only under Section 324 — His convictions under Sections 307/149 and 323/149 were unsustainable — Decision of Allahabad High Court, Reversed.

(Para 5)

The following Judgment of the Court was delivered by

HEGDE, J.:— This is an appeal by special leave. The appellant and two others were tried for various offences before the learned Sessions Judge, Rampur. The appellant was convicted under Sections 304 (I)/149, 307/149 and 323/149, I. P. C. We are not concerned with the convictions of the other accused. The sentences imposed on various counts were ordered to run concurrently. The maximum sentence imposed on the appellant is 10 years rigorous imprisonment under Section 304 (I). In appeal the appellant was acquitted under Section 304 (I), I. P. C. The sentence imposed on him under Ss. 307/149 was reduced from five years to two years rigorous imprisonment. His conviction under Section 323 was maintained for which a sentence of one year rigorous imprisonment had been awarded by the trial Court.

2. The incident giving rise to this prosecution took place on May 7, 1964 at about 10 p. m. The complainant as well as the appellant were having cycle stands near the exhibition ground, Rampur. The appellant and another had taken a cycle stand on contract from the municipal council. They were permitted to charge for each cycle 12 N. P. whereas the complainant was having a private cycle stand. It is said that he was charging only 5 N. P. per cycle. As a result of this, the prosecution case is that there was a trade rivalry between the appellant and his men on

the one side and the complainant and his men on the other. It was further stated that on the date of the occurrence the appellant and several others went and attacked the complainant's party as a result of which several persons sustained injuries and one Anwarul Hasan died.

3. The defence admitted that there was trade rivalry between the appellant's party and the complainant's party. Their case was that it was the complainant's party who came suddenly and attacked the appellant's party as a result of which there was marpit in which both sides sustained injuries. The appellant's party pleaded self-defence. The trial Court after carefully examining the evidence came to the following conclusions:

(1) that the marpit was not pre-planned. It developed suddenly as a result of some abuses given by P. W. 1.

(2) that the marpit took place near the second gate of the accused and not in front of the cycle stand of the complainant.

4. In effect the learned trial judge accepted the defence version that it was the complainant's party which started abusing the appellant's party as a result of which a sudden fight developed in front of the second gate of the appellant's cycle stand. On the facts found by the trial Court, it follows clearly that there was a mutual fight between the parties. In that view, the trial Court was not justified in convicting any of the accused by having recourse to Section 149, I. P. C. In a mutual fight, there is no common object. But the trial Court arrived at the conclusion that the appellant was one of the persons who stabbed the deceased Anwarul Hasan. It did not give any finding as regards the nature of the injuries caused by the appellant.

5. In appeal the learned appellate judge on the erroneous basis that in the First Information Report, there is no reference to the appellant's stabbing Anwarul Hasan, acquitted the appellant under Section 304 (I), I. P. C., but sustained his conviction under Section 307/149 and Section 323/149, I. P. C. We have gone through the First Information Report. Therein it is clearly stated that the appellant was one of the persons who

stabbed Anwarul Hasan; but there is no evidence as to the nature of the injury caused by him. We have earlier come to the conclusion that injuries to deceased were caused during the course of a mutual fight. Hence on the basis of the evidence on record, the appellant can be convicted only under Section 324, I. P. C. His convictions under Section 307/149, I. P. C. as well as under Section 323/149, I. P. C. are clearly unsustainable.

6. In the result we allow the appeal, set aside the conviction of the appellant under Sec. 307/149, I. P. C. as well as under Section 323/149, I. P. C. But he is convicted under Section 324, I. P. C. and for that offence we sentence him to suffer rigorous imprisonment for one year. The appellant is on bail. He shall forthwith surrender and serve out the remaining portion of his sentence, if any.

Appeal allowed.

**AIR 1971 SUPREME COURT 357
(V 58 C 80)**

(From: Jammu and Kashmir)
I. D. DUA, J.

Anwar, Petitioner v. The State of J. and K., Respondent.

Writ Petn. No. 131 of 1970, D/-7-7-1970.

(A) Constitution of India, Articles 19, 20, 21, 22 — Non-citizen cannot claim fundamental right under Article 19 but can claim rights under Articles 20, 21 and 22. (Para 4)

(B) Foreigners Act (1946), S. 3 (2)

(c) — Deportation of foreigners — Notification under Art. 258 by President entrusting Government of J. & K. functions of Central Government under S. 3 (2) (c) — Government of J. & K. can validly order deportation of foreigner. (Para 5)

(C) Constitution of India, Art. 32 — Habeas corpus — Writ of — Nature — Foreigner entering India illegally — His detention for purpose of deportation is not illegal — Habeas corpus cannot be issued for his release.

Habeas corpus, though a writ of right, is not a writ of course. Its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from

wrongful restraint on their rightful liberty. But when, a person has no right to move about freely in the country without a proper legal sanction, the restraint exercised on him for expelling him from India cannot be construed as to amount to his custody being illegal so as to require that his immediate release be directed. The constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens to remain in India contrary to the provisions of the law governing foreigners. (Para 9)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 1506 (V 49)

= 1962 (2) Cri LJ 499, State

of U. P. v. Abdul Samad

(1953) AIR 1953 SC 10 (V 40)

= 1953 SCR 254 = 1953 Cri

LJ 180, State of Punjab v.

Ajaib Singh

The following Judgment of the Court was delivered by

DUA, J.:— The petitioner, Anwar alias Raldu son of Basawa Batwal, resident of Nathu Pora, District Sialkot, (West Pakistan), forwarded to this Court his application dated March 11, 1970, from Central Jail, Jammu where he was being detained, praying for a writ in the nature of habeas corpus for his production in this Court to enable him to challenge his detention. In the application it was asserted, inter alia that the petitioner had been brought from Pakistan to the State of Jammu and Kashmir by his uncle Shri Dosa, son of Jumma, who was working for Indian Intelligence. The petitioner had crossed the cease-fire line and come to India for the purpose of taking to Pakistan the necessities of life. His uncle who was inimical towards him got him arrested after he had crossed the cease-fire line on the basis of the allegation that the petitioner was a smuggler and had opium on his person. The petitioner was thereafter convicted and sentenced. His sentence expired in January, 1970. After his release he was again arrested. His detention after his re-arrest was challenged in this application.

2. In the return it was sworn by Shri A. K. Hamdani, Under Secretary, Home Department, Jammu and Kashmir State that the petitioner had been detained on January 30, 1970 pursuant to an order dated January

27, 1970. The petitioner was duly informed of the grounds of his detention and also of his right to make a representation. He, however, made no representation. His case was referred to the Advisory Board and the opinion of the Board was being awaited. The petitioner, according to the return, had been detained earlier and on the expiry of two years of detention he was re-arrested with the object of making arrangements for his expulsion from the State of Jammu and Kashmir.

3. On June 9, 1970 this case was heard by the Vacation Judge (Ray J.) and time was granted to the petitioner upto June 23, 1970 for filing a rejoinder to the return. On June 15, 1970 the State filed an application stating that the order of the petitioner's detention had since been revoked and that the petitioner had been ordered on June 9, 1970 to leave India within ten days. This application came up for hearing on June 16, 1970 when the State took time for producing the orders, of revocation of the detention order and, of the petitioner's deportation. The case was accordingly adjourned to June 18, 1970 when by means of a short order the writ petition was dismissed and the petitioner was permitted to be sent out of India. I now proceed to give reasons for the order.

4. The petitioner is not a citizen of India. He is, therefore, a foreigner as defined in the Foreigners Act. Not being a citizen, he is clearly not entitled to any fundamental right guaranteed by Article 19 of the Constitution. He has thus no right to remain within the territories of India. His entry into this country was also without any right and indeed he himself does not claim to have entered into India in accordance with the provisions of the Foreigners Act and the Orders made thereunder. The only rights which he can claim in the present proceedings are those contained in Articles 20 to 22. The order dated January 27, 1970 reads as under:

"Whereas Anwar @ Raldu s/o Basawa Batwal r/o Nathupora District Sialkot presently in the State is a foreigner within the meaning of the Foreigners Act, 1946, and;

Whereas the Government is satisfied that with a view to making

arrangements for his expulsion from the State, it is necessary to do so;

Now, therefore, in exercise of the powers conferred by Section 3 (1) (b) read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964, the Government hereby direct that the said Anwar @ Raldu be detained in the Central Jail, Jammu subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified in the Jammu and Kashmir Detenus (General) Order, 1968".

5. This order was made in exercise of the powers conferred by Section 3 (1) (b) read with Section 5 of the Jammu and Kashmir Preventive Detention Act, 1964. The Government felt satisfied that the petitioner who was a foreigner within the meaning of the Foreigners Act (Act 31 of 1946) should be expelled from the State of Jammu and Kashmir and it was with a view to making arrangements for his expulsion that it was considered necessary to detain him. It appears that in the opinion of the Authorities making the order it was necessary to give to the petitioner an opportunity of making a representation to the Government against the order of detention. In order to give this opportunity, on February 4, 1970 the grounds of detention were disclosed to the petitioner and he was further informed that if he so desired he could make a representation to the Government. It may be recalled that according to the return he was actually detained on January 30, 1970 though the order of detention had been made on the 27th of that month. The petitioner, without making any representation, apparently sent the present application to this Court through the jail authorities at Jammu. On April 9, 1970 this Court directed a rule nisi to issue in his case along with some other cases. Apparently, the State authorities did not consider it proper to take any further steps for implementing the orders of the petitioner's expulsion because this Court had been seized of the habeas corpus proceedings. According to the application dated June 15, 1970 the order of detention was revoked on June 9, 1970 with the result that the habeas corpus petition assailing that order must be considered to have become infructuous. The question naturally

arose if this Court should order the petitioner's release forthwith on account of the revocation of the impugned order of detention or it should dismiss the writ petition as infructuous and send the petitioner back to Jammu to be released from the detention under the order dated January 27, 1970 and leave it to the Government to deal with the petitioner in accordance with law. The petitioner not being a citizen of India obviously had no right to remain in Delhi and according to the order of deportation he was bound to leave India by June 19, 1970. The order of deportation may at this stage be reproduced:

"In exercise of the powers conferred by Clause (c) of sub-section (2) of Section 3 of the Foreigners Act, 1946 (Act No. XXXI of 1946), read with Ministry of Home Affairs Notification issued under S. O. 590 dated 19th of April, 1958, the Government of Jammu and Kashmir hereby direct that the persons named below who are foreigners shall not remain in India and shall leave India within ten days from the date of this order:—

1. Anwar @ Raldu s/o Basawa Batwal r/o Nathpora District Sialkot.

... ..
This order has to be read with the Ministry of Home Affairs Notification issued under S. O. 590 dated April 19, 1958. That notification is in the following terms:

"In exercise of the powers conferred by Clause (1) of Article 258 of the Constitution and all other powers enabling him in this behalf and in supersession of all previous notifications on the subject in so far as they relate to the Act, rules and orders hereinafter mentioned, the President with the consent of the State Government concerned hereby entrusts to the Government of each of the State of A. P., Assam, Bihar, Bombay, J. and K., Kerala, M. P., Madras, Mysore, Orissa, Punjab, Rajasthan, U. P. and West Bengal the functions of the Central Government,

(1) under Section 5 of the Indian Passports Act, 1920 (34 of 1920),

(2) under Rules 2 and 4 of the Indian Passports Rules, 1950,

(3) under Rule 3 of the Registration of Foreigners Rules, 1939,

(4) in making orders of the nature specified in Clauses (c), (cc), (d) (e) and (f) of sub-section (2) of Section 3

of the Foreigners Act, 1946 (31 of 1946) and

(5) under the Foreigners Order, 1948 subject to the following conditions, namely,

(a) that in the exercise of that function, the said State Government shall comply with such general or special directions as the Central Government may from time to time issue, and

(b) that notwithstanding this entrustment the Central Government may itself exercise any of the said functions should it deem fit to do so in any case.

I have reproduced this notification because Shri H. K. Puri, the learned counsel appearing *amicus curiae* in support of the petitioner's application for habeas corpus, had raised the point that it was the Central Government alone which could make a lawful order of deportation under Section 3 (2) (c) of the Foreigners Act. This notification is a complete answer to this objection because the President has under Article 258 lawfully entrusted *inter alia* to the Government of Jammu and Kashmir the function of the Central Government under Section 3 (2) (c), (d), (e) and (f) of the Foreigners Act.

6. Reverting to the fundamental right claimable by the petitioner who is not a citizen of India it is clear that Article 20 of the Constitution is not attracted to this case. Article 21 merely lays down that no person shall be deprived of his life or personal liberty except according to procedure established by law. Article 22 deals with detention of persons in certain cases. In the case in hand in January, 1970 an order of detention was made under Section 3 (1) (b) of the J. and K. Preventive Detention Act which clearly empowers the Government to detain a foreigner within the meaning of the Foreigners Act with a view to *inter alia* making arrangements for his expulsion from the State. The petitioner not being a citizen of India is, as already stated, a foreigner and therefore liable to be so detained. The Government, it appears, considered it incumbent to comply with the provisions of Sections 8 to 11 of the Jammu and Kashmir Preventive Detention Act even when the petitioner was being detained for the purpose of expelling him from

India. The period fixed for the Advisory Board to submit its report had not yet expired when the petitioner, without making any representation, applied to this Court on March 11, 1970 and initiated the present proceedings. After the present application for a writ of habeas corpus was entertained by this Court, the orders in respect of his custody were subject to the control and permission of this Court and the State authorities were naturally reluctant in taking any step towards implementation of the order of expulsion, without this Court's permission. As soon as the order of detention was revoked the State Government made an order under Section 3 (2) (c) of the Foreigners Act read with the Ministry of Home Affairs Notification issued under S. O. 590 dated April 19, 1958 directing the petitioner not to remain in India and to leave India within ten days from June 9, 1970, the date of the order. Soon thereafter the State Government filed an application in this Court stating all the relevant facts. The petitioner was informed of this order and Shri Puri the learned Counsel appearing as *amicus curiae* actually addressed this Court on its legality after consulting the petitioner. This order appears to be consistent with the order of detention dated January 27, 1970 which was also made with the object of expelling the petitioner from India. Since the order dated June 9, 1970 had to be complied with by June 19, one day earlier, as already noticed, on June 18 this Court permitted the State authorities to take suitable steps for deporting the petitioner from India.

7. The question arises if in these circumstances it can be said that after the revocation of the detention order the petitioner was deprived of his personal liberty illegally or without procedure established by law so as to require this Court to order his immediate release. In *State of Punjab v. Ajaib Singh*, 1953 SCR 254 = (AIR 1953 SC 10), this Court held that physical restraint put upon an abducted woman (abducted during the partition of the undivided Punjab in 1947) in the process of recovering and taking her into custody without any allegation or accusation of any actual or suspected or apprehended commission by her of any offence of a criminal or

quasi-criminal nature or of any act prejudicial to the State or the public interest and handing her over to the custody of the officer-in-charge of the nearest camp under Section 4 of the Abducted Persons (Recovery and Restoration) Act, 55 of 1949 could not be regarded as arrest and detention within the meaning of Article 22 (1) and (2). In the *State of U. P. v. Abdul Samad*, AIR 1962 SC 1506, two persons (Mr. and Mrs. Abdul Samad) were in Pakistan in March, 1955. In September, 1955 they obtained a Pakistani pass-port and came to India after securing a visa for temporary stay till December 16, 1955. They secured repeated extensions of the period of stay. In 1957 they unsuccessfully applied for their registration as Indian citizens. Against refusal to register them as Indian citizens their application under Article 226 of the Constitution also failed in 1959. The State Government then directed them to leave India. They secured several extensions of time for complying with this order. Finally on July 7, 1960 they were required to leave India within 24 hours. On their failure to do so they were taken into custody on July 21, 1960 and sent by train to Amritsar for being deported to Pakistan. They were produced before a Magistrate at Amritsar who ordered that they be kept in the Civil Lines Thana till further orders. Meanwhile an application was filed before the Lucknow Bench of the Allahabad High Court under Section 491, I. P. C. on July 25, 1960. On being informed that the two persons concerned having been sent to Amritsar were no longer within its territorial jurisdiction, the High Court recorded an order that it had no jurisdiction in the matter and that the proceedings be consigned to records. In the meantime a spurious telegram and a spurious telephone message purporting to emanate from Saxena, Under Secretary, Home Department, U. P. were received by the police at Amritsar stating that the High Court had issued orders for Mr. and Mrs. Abdul Samad to be brought back to Lucknow to attend the case on July 25, 1960. Pursuant to this message Mr. and Mrs. Abdul Samad were taken to Lucknow and produced before the Deputy Registrar of the High Court, but after the Court had disposed of the habeas corpus petition.

They were produced before the Deputy Registrar who directed their production in the High Court on July 26, at 10.15 a. m. An application was thereupon filed on behalf of Mr. and Mrs. Abdul Samad on July 25, 1960 to revive their earlier habeas corpus petition. A fresh habeas corpus petition was also filed on July 26, 1960 praying for their release. On July 27, 1960 the High Court passed an interim order of their release on bail on the fresh habeas corpus petition that application was ultimately allowed and Mr. and Mrs. Abdul Samad were released on the ground that after their arrival in Lucknow at 1 p. m. on July 25, 1960 they had not been produced before a Magistrate within 24 hours and this was in breach of the mandatory provisions contained in Article 22 (2) of the Constitution. On appeal by the State, the Supreme Court set aside the order of the High Court and held that there was no violation of Article 22 (2). In this connection it was emphasised that Mr. and Mrs. Abdul Samad had actually been produced before the High Court on July 26, 1960 within 24 hours of their arrival at Lucknow on July, 25, 1960 and that they were again produced before the High Court on July 27, 1960. On both occasions they had full opportunity of representing their case. The view expressed in this decision would rule out the argument of non-compliance with Article 22 (2) on the facts and circumstances of the present case.

8. As observed earlier the petitioner had no right to enter and remain within the territories of India and indeed he was bound, under the order dated June 9, 1970, to leave India by June 19, 1970. According to Clause (3) of the Foreigners Order, 1948 no foreigner can enter into India:—

- “(a) otherwise than at such port or other place of entry on the border of India as a Registration Officer having jurisdiction at that port or place may appoint in this behalf; either for foreigners generally or for any specified class or description of foreigners; or
- (b) without the leave of the civil authority having jurisdiction at such port or place”.

Under Clause (5) of this Order no foreigner can leave India:

- “(a) otherwise than at such port or other recognised place of departure on the borders of India as the Registration Officer having jurisdiction at that port or place may appoint in this behalf either for foreigners generally or for any specified class or description of foreigners; or
- (b) without the leave of the civil authority having jurisdiction at such port or place”.

9. It would thus be seen that the petitioner who had illegally and clandestinely entered into India could not stay in any part of its territory. Indeed, he had to leave India by June 19, 1970 and this had to be done in accordance with the statutory regulations. The order of his release by this Court would, therefore, not only have resulted in his presence in a part of India in contravention of the statutory provisions but would in addition have rendered it somewhat difficult for the authorities to enforce compliance with the order of his expulsion. In those circumstances the restraint on his personal liberty for the purpose of taking him to the border in order to expel him from India in accordance with the statutory provisions could by no means be considered to be an illegal custody justifying an order of release by this Court. While dealing with cases like the present one cannot ignore the historical fact of Pakistan's extremely hostile attitude towards the State of Jammu and Kashmir and also the fact that from the borders of the State of Jammu and Kashmir adjoining those of West Pakistan infiltrators have constantly been surreptitiously entering that part of the Indian territory for unfriendly activities which endanger maintenance of public order and security of the State. The petitioner had on his own showing crossed the cease-fire line secretly with the object of taking out of India the necessities of life. Regulations governing the entry into and departure from India as also the presence in this country of Pakistani infiltrators from across the cease-fire line on the Jammu and Kashmir border demand strict enforcement and the claim to personal liberty made by unlawful infiltrators from Pakistan cannot be

placed above the security of the country and maintenance of law and order. Habeas corpus, though a writ of right, is not a writ of course. Its scope has grown to achieve its purpose of protecting individuals against erosion of the right to be free from wrongful restraint on their rightful liberty. But when, as in the present case, the petitioner has no right to move about freely in this country without a proper legal sanction, the restraint exercised on him for expelling him from India by June 19, 1970 cannot be construed on the facts and circumstances of this case to amount to his custody being illegal so as to require this Court to direct his immediate release. The constitutional protection against illegal deprivation of personal liberty construed in a practical way cannot entitle non-citizens like the petitioner to remain in India contrary to the provisions of the law governing foreigners. It is accordingly difficult to hold that the petitioner is being illegally deprived of his right to personal liberty to stay and move about in India without restraint. The petition accordingly fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 342
(V 58 C 81)

(From: Patna)*

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

Jagat Kishore Prasad Narain Singh,
Appellant v. Rajendra Kumar Poddar
and others. Respondents.

Civil Appeal No. 1925 of 1969, D/-
14-8-1970.

Representation of the People Act (1951), Sections 81 (3), 86 (1) — Discrepancies between copy of petition supplied to opposite party and actual petition presented to Court — Discrepancies misleading opposite party and prejudicing its defence — No substantial compliance of Section 81 (3) — Petition liable to be dismissed under Section 86 (1). AIR 1964 SC 1545 and AIR 1964 SC 1027, Rel. on.
(Para 6)

*(Election Petn. No. 1 of 1968, D/-
14-7-1969 — Pat.)

IN/IN/D959/70/RGC/T

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1027 (V 51)

= (1964) 6 SCR 213, Ch. Subbarao v. Member Election Tribunal Hyderabad

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(1964) AIR 1964 SC 1545 (V 51)

= (1964) 3 SCR 573, Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore

6

The following Judgment of the Court was delivered by

HEGDE, J.: This is an appeal under Section 116A of the Representation of the People Act, 1951 (to be hereinafter referred to as the Act) from the judgment and order dated July 14, 1969 of the Patna High Court in Election Petition No. 1 of 1968.

2. A biennial election to the Rajya Sabha was held in March 1968. In that election, Bihar Legislative Assembly had to elect seven members to the Rajya Sabha. Twenty persons contested for those seven seats. The appellant is one of them. The appellant failed to get the required number of votes. By means of an election petition which has given rise to this appeal, he challenged the validity of the election of the 1st respondent on two grounds viz. (1) that the nomination of respondent No. 1 was improperly accepted inasmuch as he was not qualified to be enrolled as an elector in the electoral roll of West Patna Assembly constituency for the time being in force on the ground that he was then not ordinarily resident in the said constituency, but was on the other hand, ordinarily resident in Alipur constituency of the West Bengal Legislative Assembly and (2) that he was guilty of corrupt practice within the meaning of sub-section (1) of Section 123 of the Act, inasmuch as he had not only made offers but also payments of money to various electors as motive or reward for voting in his favour.

3. The election petition was resisted by the 1st respondent on various grounds. One of the contentions taken by him was that the petition was not in accordance with the provisions of Sections 81, 82 and 117 of the Act and therefore it was not maintainable. The High Court has accepted that contention. It has also rejected the other pleas taken by the appellant. As we are in agreement with the High Court that the election peti-

tion is liable to be dismissed under Section 86 of the Act, we do not think it necessary to go into the merits of the case.

Section 86 (1) of the Act provides: "The High Court shall dismiss an election petition which does not comply with the provisions of Section 31 or Section 82 or Section 117".

4. Section 81 (3) requires (i) that every election petition shall be accompanied by as many copies hereof as there are respondents mentioned in the petition and (ii) that every such copy shall be attested by the petitioner under his own signature to be a true copy of the petition. The contention of the 1st respondent is that the copy served on him which is marked Exh. 'O' in the trial Court is not the true copy of the election petition filed in Court. In the High Court it was contended that Exh. 'O' is not a genuine document but that contention was not pressed before us. Therefore, we have to proceed on the basis that Exh. 'O' is a copy served on the 1st respondent.

5. The discrepancies between the election petition filed in Court and Exh. 'O' are set out by the High Court in paragraph 15 of the its judgment. That paragraph to the extent material for our present purpose reads:

" x x x x

(a) In paragraph 12, as also in paragraph 13 of the original, it has been stated that the total number of elected members of the Bihar Legislative Assembly at the time of the impugned election was 316, whereas in Ext. 'O' this figure has been stated to be 317 in both these paragraphs.

(b) In paragraph 16 of the original it has been stated that respondents 2 and 3 had been set up as candidates in the election by the Samyukta Socialist Party, and as to respondents 6 and 5, it was stated that they had been set up by the Communist Party of India and the Jana Sangh respectively. But in Ext. 'O' it has been stated that the candidates who were set up by the Samyukta Socialist Party were respondents 2 and 6, while respondents 3 and 5 had been set up by the Communist Party of India and the Jana Sangh respectively.

(c) In paragraph 28 of the original the following passage occurs:

"Particulars of the gifts and gratifications in the form of bribe offered

by respondent No. 8 and his election agent and his agent with the connivance and consent of the said respondent No. 8 and his election agent are set out in Annexure 'D' hereto annexed".

But the passage in Ext. 'O' reads:

"Particulars of the gifts and gratifications in the form of bribe offered by respondent No. 8 and his election agent and his agent with the connivance and consent of the said respondent No. 1 and his election agent are set out in Annexure 'D' hereto annexed".

(d) In paragraph 3 of the verification at page 25 of the original, it has been stated, inter alia, that the statements made in paragraph 3 of the election petition are true to the petitioner's information, but in Exh. 'O' no verification has been made with respect to the statements made in paragraph 3 of the election petition, and instead verification has been made twice with respect to the statements made in paragraph 2, once as true to the petitioner's knowledge and again as true to his information.

(e) In paragraph 3 of Annexure 'B' a list of 20 persons has been given, one of which is Shri Brindaban Swana, M. L. A., in the original and Shri Brindaban Swansi, M. L. A. in Ext. 'O'.

(f) In Annexure 'C' relating to the particulars of corrupt practice mentioned in paragraph 25 of the election petition, it has been stated in the original that Shri Munshi Hansda, M. L. A. had offered money and promised to pay money to Shri Jetha Kiski, M. L. A. for casting his first preference vote in favour of respondent No. 1 at the M. L. A. Flat on 19-3-1968, but in Ext. 'O' mention has been made of the name of Paul Hansda, M. L. A., as the alleged offerer of money to Shri Jethu Kisku, M. L. A.; and

(g) In Annexure 'C' again, the original reads that the offer of money and promise of payment of money was made to Shri Mahabir Paswan by respondent No. 1 and Shri Balwant Nath Singh, M. L. A. on 26-3-1968 but in Ext. 'O' this date has been stated as 28-3-1968".

6. Mr. M. C. Chagla, learned Counsel for the appellant contended

that Section 81 (3) is merely directory and not mandatory. We do not think it necessary to go into that question, as in our opinion that provision has not even been substantially complied with. The requirements of Sec. 81 (3) have been laid down by this Court in *Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore*, (1964) 3 SCR 573 = (AIR 1964 SC 1545). In that case this Court ruled that the word 'copy' in Section 81 (3) of the Act did not mean an absolutely exact copy but a copy so true that nobody could by any possibility misunderstand it, and that the test whether a copy was a true one was whether any variation from the original was calculated to mislead an ordinary person. The same view was taken by this Court in *Ch. Subbarao v. Member Election Tribunal, Hyderabad*, (1964) 6 SCR 213 = (AIR 1964 SC 1027). In our opinion, it is not necessary to refer to the discrepancies between the original petition and the copy served excepting that referred to in Clause (f) of paragraph 15 of the trial Court's judgment. Admittedly Shri Munshi Hansda and Paul Hansda are members of the Patna Legislative Assembly. In the election petition it was stated that money was offered to Shri Jetha Kisku, M. L. A. by Munshi Hansda but in Exh. 'O' it was stated that money was offered to the said Jetha Kisku by Paul Hansda. This divergence was bound to mislead the contesting respondents and prejudice their defence. Pleadings in a case has great importance and that is more so in election petitions particularly when the returned candidate is charged with corrupt practice. He must know what the charge against him is so that he may prepare his defence. If relying on the allegations in the copy of the petition served on him that the money was paid to Jetha Kisku through Paul Hansda, the 1st respondent had collected evidence to show that that allegation is false then the entire basis of his defence would have fallen to the ground because at a later stage he had to meet a totally different case. The law requires that a true copy of the election petition should be served on the respondents. That requirement has not been either fully or substantially complied with. Therefore, we have no doubt in our mind that the election petition is liable

to be dismissed under Section 86 of the Act.

Mr. Chagla tried to extricate his client from the difficult position in which he had placed himself by urging that two copies of the election petition had been served on the 1st respondent as required by the rules of the Patna High Court, one through the Court and another through registered post; the 1st respondent has produced only one of those copies; it is not known whether the other copy was also defective and therefore there is no ground to reject the election petition at the very threshold. We are unable to entertain this contention. If it was the case of the appellant that the 1st respondent was not prejudiced by the service of Exh. 'O', he should have got summoned the other copy said to have been served on him. No such attempt appears to have been made. No explanation was offered how several wrong statements came to be made in Exh. 'O'. There is hardly any doubt that the relevant papers filed in Court on behalf of the appellant were prepared in a callous manner.

7. For the reasons mentioned above we agree with the trial Court that the petition is liable to be dismissed under Section 86 of the Act. Hence, this appeal is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 344 (V 58 C 82)

(From: ILR (1965) 2 Punj 216)

J. C. SHAH, V. RAMASWAMI AND
A. N. GROVER, JJ.

The Delhi Cloth and General Mills Co. Ltd., Appellant v. The Chief Commissioner, Delhi and others, Respondents.

Civil Appeal No. 1424 of 1966, D/- 11-9-1969.

(A) Factories Act (1948), S. 112 — Rules under — Delhi Factories Rules, 1950, Rule 7 — Rule 7 read with R. 5 and its Schedule — Imposition of fee under, for renewal of licence — Levy is in nature of fee and not tax.

A levy in the nature of a fee does not cease to be of that character

IM/FN/E579/69/BNP/D

merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax. (Para 6)

The levy of the licence fee for renewal of licence under the Delhi Factories Rules is not wholly unrelated to the expenditure incurred out of the total realisation. When it was never made out that the collections on account of the licence fee were merged in the general public revenue and were not appropriated in the manner laid down for the appropriation of expenses for the department concerned it could not be said that amount so paid was a tax and not fee. (Para 9)

(B) Factories Act (1948), S. 3 — Inspector appointed under Act — Duties of.

The Inspectors of factories appointed under the Factories Rules do not simply carry out the duties laid on them under the Act. In the course of discharge of their duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act. It can well be said that on certain occasions factory owners are bound to receive a good deal of benefit by being saved from the consequences of the working of dangerous machines or employment of such processes as involve danger to human life by being warned at the proper time as to the defective nature of the machinery or of the taking of precautions which are enjoined under the Act. It involves a good deal of technical advice. It is clear that the nature of the work of the Inspector is such that he is to render as much if not more service than a Commissioner would; in the matter of supervision, regulation and control over the way in which the management of the trus-

tees of religious and charitable endowment was concerned. (Para 9)

Cases Referred: Chronological Paras

- (1965) AIR 1965 SC 1107 (V 52) =
 (1965) 2 SCR 477, Corporation of Calcutta v. Liberty Cinema 5, 6
 (1963) AIR 1963 SC 966 (V 50) =
 1963 Supp (2) SCR 302, H. H. Sudhindra Tirtha Swamiar v. Commr. for Hindu Religious and Charitable Endowments, Mysore 5, 6
 (1954) AIR 1954 SC 388 (V 41) =
 1954 SCR 1055, Ratilal Panachand Gandhi v. State of Bombay 6
 (1954) AIR 1954 SC 400 (V 41) =
 1954 SCR 1046, Sri Jagannath Ramanuj Das v. State of Orissa 6
 Mr. H. R. Gokhale, Sr. Advocate, (M/s. D. R. Thadani and A. N. Goyal, Advocates, with him), for Appellant; Mr. Jagdish Swarup, Solicitor-General of India and Dr. L. M. Singhvi, Sr. Advocates (Mr. R. N. Sachthey, Advocate, with them), for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal from a judgment of the Punjab High Court (Circuit Bench, Delhi) involving the question of the validity of Rule 7 read with Rule 5 and its Schedule of the Delhi Factories Rules 1950 made under Section 112 of the Factories Act, 1948, hereinafter called the Act. The impugned Rules relate to the grant of a licence for a factory and renewal thereof, the fees being prescribed by the Schedule to Rule 5.

2. The Delhi Cloth and General Mills Co. Ltd., operates within the Delhi area a number of industrial establishments which are factories within the meaning of Section 2 (m) of the Act. The company has to pay a total sum of Rs. 12,775.00 as annual licence fee for all its factories in Delhi, the fees being calculated according to the horse power and the maximum number of workers to be employed on any day during the year as given in the Schedule. The Maximum fee that is payable is Rs. 2,000 for a factory. The factories can be run only after registration and under a licence granted under the Act and the Rules on payment of the prescribed fee. The licence is renewed every year under Rule 7 on payment of the same fee which is paid at the time of the grant-

ing of the licence. Every licence granted or renewed remains in force upto Dec. 31, of the year for which it is granted or renewed. In January 1963 the company filed a petition under Articles 226 and 227 of the Constitution in the High Court challenging the validity of the Rules under which the licence fee for renewal of the licence for each of its factories in Delhi was being levied and collected i.e., Rule 7 read with Rule 5 and its Schedule. This petition was dismissed by a Division Bench on February 11, 1965. The company then filed the present appeal by certificate.

3. The principal point which has been canvassed on behalf of the appellant company is that the payment made for renewal of the licence was and is only to endorse the licence as valid for the next year and the amount charged for the renewal thereof cannot and does not entail services which can reasonably be regarded to be commensurate with the amount so charged. In other words the element of quid-pro-quo which distinguishes a fee from a tax is absent and lacking. The Act, it is pointed out, contains specific provisions for rendering of benefit and service to the workmen by the owners of the factories. The Inspectors who are appointed under the Act to ensure that its provisions are complied with by the factory owners constitute a policy agency and it is not possible to say that the powers and duties of the Inspectors when exercised and carried out amount to services rendered for the benefit of the factory owners or the workmen.

4. Falshaw, C. J., who delivered the judgment of the Division Bench was of the view that the work carried out by the Inspectors under the Act of seeing that all its beneficent provisions for the health and welfare of the workers employed in the factories were fully implemented must definitely be regarded as services rendered in return for the fee levied for the annual renewal of the licence for the factory. It was further observed on an examination of the affidavit which had been placed before the Court that at least 60 per cent of the amount realised as licence fee was being utilised on running the department.

5. Mr. H. R. Gokhale for the appellant company has contended that the High Court failed to apply the principles which are settled by certain decisions of this Court for determining whether a fee for a licence or a renewal thereof in circumstances similar to the present case is in substance and effect a tax. He has relied largely on *Corporation of Calcutta v. Liberty Cinema*, (1965) 2 SCR 477 = (AIR 1965 SC 1107). In that case the licence fee had been raised from Rupees 400 to Rupees 6,000 per year. It was observed in the majority judgment that the provision under which the licence had to be taken out for a cinema did not refer to the rendering of any service by the Corporation of Calcutta. It was also not obligatory on the Corporation to make any bye-law under which services were to be rendered. If the bye-laws were not made there would be no service to render. It was further pointed out that inspection by the authorities concerned could not be regarded as a service to the licensee as it was meant only to make sure that the licensee carried out the conditions on which the licence had been granted to him. Some of the earlier decisions were considered as also the pronouncement in *H. H. Sudhindra Thirtha Swamiar v. Commr. for Hindu Religious & Charitable Endowments, Mysore*, 1963 Supp (2) SCR 302 = (AIR 1963 SC 966) and with regard to the latter case it was said that a service resulting in the control of the Mathadipathi conferred special benefit on the institution which alone paid the levy.

6. As far back as 1954 it was laid down in *Sri Jagannath Ramanuj Das v. State of Orissa*, 1954 SCR 1046 = (AIR 1954 SC 400) that the contributions levied for the expenses of the Commr. and his staff who were to exercise effective control over the trustees of the Maths and the temples was to be regarded as a fee and not a tax. Two reasons were given for this: (1) The payment was demanded only for the purpose of meeting the expenses of the Commissioner and his staff which is the machinery set up for due administration of the affairs of the religious institution. (2) The collections made were not merged in the general public revenue. Similarly in *Ratilal*

Panachand Gandhi v. State of Bombay, 1954 SCR 1055 = (AIR 1954 SC 588) the contributions imposed under the Bombay Public Trusts Act was held to be fee and not tax. It was stated that in the first place these contributions were to be created to the Public Trusts Administration Fund which was a special fund and were not to be merged in the general revenue. Secondly, it was not necessary that services should be rendered only at the request of particular people and it was enough that payments were demanded for rendering services which the State considered beneficial in the public interest and which the people had to accept whether they were willing or not. The following observations in H. H. Sudhindra Thirtha Swamiar, 1963 Supp (2) SCR 302 = (AIR 1963 SC 966) may be referred to with advantage:

"A levy in the nature of a fee does not cease to be of that character merely because there is an element of compulsion or coerciveness present in it, nor is it a postulate of a fee that it must have direct relation to the actual services rendered by the authority to individual who obtains the benefit of service. If with a view to provide a specific service, levy is imposed by law and expenses for maintaining the service are met out of the amounts collected there being a reasonable relation between the levy and the expenses incurred for rendering the service, the levy would be in the nature of a fee and not in the nature of a tax". According to Mr. H. R. Gokhale the present case is of the type which would fall squarely within the decision in Liberty Cinema case, (1965) 2 SCR 477 = (AIR 1965 SC 1107). It is difficult to agree. In each case where the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of work done by them will have to be examined for the purpose of determining the rendering of the services which would make the levy a fee. It is quite apparent that in the Liberty Cinema case it was found that no service of any kind was being or could be rendered and for that reason the levy was held to be a tax and not a fee. In our judgment the present case falls within the other

class of cases to which reference has been made in which contributions for the purpose of maintaining an authority and the staff for supervising and controlling public institutions like Maths etc., were held to be fee and not tax.

7. We may now look at the provisions of the Act. Chapter II provides for the inspecting staff. Section 9 gives the powers of the Inspectors. They can enter any factory and inter alia make examination of the premises, plant and machinery. Under Section 10 qualified medical practitioners can be appointed to be certifying surgeons for the purpose of the Act. The certifying surgeon has to carry out such duties as may be prescribed in connection with the examination and certification of young persons under the Act, the examination of persons engaged in factories in dangerous occupation or process as also the exercising of medical supervision. Chapter III deals with health. Section 11 contains detailed provisions about cleanliness. Sections 12 to 14 relate to disposal of waste and effluents, ventilation and temperature and dust and fume. Sections 17 to 20 concern lighting, drinking water, latrines and urinals, and spittoons. Chapter IV contains the provisions relating to safety. Section 21 deals with fencing of machinery. Section 22 with work on or near machinery in motion and Section 23 with employment of young persons on dangerous machines. The other sections which may be noticed in this Chapter are Section 27 containing the prohibition of employment of women and children near cottonopeners; Section 35 in the matter of protection of eyes, Section 36 dealing with precautions against dangerous fumes, Section 37 relating to explosive or inflammable dust, gas etc., and Section 38 relating to precautions in case of fire. Under Section 39 if it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life and safety he may serve on the manager of the factory an order in writing requiring him to furnish the particulars for determining whether the building, machinery, plant etc., can be used with

safety or to carry out such tests as may be specified and convey the result thereof to the Inspector. Under Section 40 if it appears to the Inspector that any building or part of a building is in such a condition that it is dangerous to human life or safety he can serve an order on the manager of the factory specifying the measures which should be adopted and requiring him to carry out the same before a specified date. Similarly if it appears to him that the use of any building or machinery or plant involves imminent danger to human life or safety he can serve an order prohibiting its use until it has been properly repaired or altered. Chapter V deals with welfare and provisions are made therein for such amenities as washing facilities for storing and drying clothing, for sitting, first aid appliances, canteens and creches and every factory is required under Section 49 wherein 500 or more workers are ordinarily employed to have such number of welfare officers as may be prescribed. The Rules also contain various provisions where the Inspector has to be consulted and his approval obtained for doing certain things. For instance Rule 65 (3) says that the manager of a factory shall submit for the approval of the Chief Inspector plans of the building to be constructed or adapted for use as a canteen. It is unnecessary to refer to several other provisions contained in the Act and the Rules which show that the Chief Inspector and his staff play a very important role in the working of the factory.

8. In the return which was filed in the High Court to the writ petition it was stated in paragraph 8 that the fees were being charged for the running of the whole establishment including the Factory Inspectorate which in its turn "provides free inspection and expert technical advice etc., to factory owners in matters connected with safety, health, welfare and the allied matters in respect of compliance with the provisions of the Factories Act". It has further been stated that in our country matters relating to health, safety, welfare and employment have to be looked after and the desired results have been sought to be achieved by the legislature by providing statutory inspection service.

9. According to Mr. Gokhale the Inspectors only carry out the duties laid on them under the Act and all that they have to do is to ensure that the statutory provisions and the rules are carried out properly and launch prosecutions against factory owners under the provisions of Chapter X of the Act in case of any breach or default on the part of the factory owners. We do not consider that the functions and duties of the Inspectorate are confined only to the limited task which has been suggested on behalf of the appellant company. A large number of provisions to which reference has been made, particularly in the Chapter dealing with safety, involve a good deal of technical knowledge and in the course of discharge of their duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act. It can well be said that on certain occasions factory owners are bound to receive a good deal of benefit by being saved from the consequences of the working of dangerous machines or employment of such processes as involve danger to human life by being warned at the proper time as to the defective nature of the machinery or of the taking of precautions which are enjoined under the Act. Similarly if a building or a machinery or a plant is in such a condition that it is dangerous to human life or safety the Inspector by serving a timely notice on the manager saves the factory owner from all the consequences of proper repairs not being done in time to the building or the machinery. Indeed it seems to us that the nature of the work of the Inspector is such that he is to render as much, if not more service than a Commissioner would, in the matter of supervision, regulation and control over the way in which the management of the trustees of religious and charitable endowment was concerned. The High Court further found, which finding being of fact, must be considered as final that 60 per cent of the amount of licence fees which were being realized was actually spent on services rendered to the factory owners. It can, therefore, hardly be contended that the levy of the licence fee was wholly unrelated to the ex-

penditure incurred out of the total realisation. Before the High Court the appellant company never made out any case that the collections on account of the licence fee were merged in the general public revenue and were not appropriated in the manner laid down for the appropriation of expenses for the department concerned.

10. There can be no manner of doubt that the amount which the appellant company has to pay as licence fee is not in the nature of a tax but is a fee which could be properly levied.

11. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 349
(V 58 C 83)

(From: Railway Rates Tribunal at Madras)*

J. C. SHAH AND A. N. GROVER, JJ.
Union of India, Appellant v. West Coast Paper Mills Ltd., Respondent.

Civil Appeal No. 1742 of 1966,
D/- 14-10-1970.

(A) Railways Act (1890), Ss. 41, 28 42, 29 (3) — Railway Rates Tribunal — Jurisdiction — Declaration that rates between two stations are unreasonable — Within Tribunal's Jurisdiction.

Where the Railway Rates Tribunal constituted under Section 34 of the Railways Act (1890) declares without giving any consequential relief that the charge made by the railway administration under the order of the Railway Board levying tariff at the standard rates but on the footing that for each kilometer the goods are transported the charge will be levied at three times the standard rate is unreasonable and discriminatory, the Tribunal does not exceed its jurisdiction. The Tribunal is invested with the authority subject to the limitations contained in Section 29 (3) and Section 42 to entertain a complaint and to give relief in respect of rates which are found to be unreasonable between two stations. There is also nothing in the Rules under Goods Tariff No. 38 (as in force from 1-8-

*(Complaint No. 4 of 1963, D/- 18-4-1966 — Rly. Rates Tribunal — Mad.)

KN/LN/E918/70/DVT/G

1950) which even indirectly affects the jurisdiction of the Tribunal to determine whether the rates for carriage of certain specified commodities between two stations are unreasonable. (Paras 11, 12, 13)

(B) Constitution of India, Article 136—Appeal with special leave—Finding by Railway Rates Tribunal that rates are unreasonable and discriminatory — Cannot be challenged — Railways Act (1890), S. 41. (Para 11)

Mr. Jagadish Swarup, Solicitor-General of India, (M/s. A. S. Nambiar and S. P. Nayar, Advocates with him), for Appellant; M/s. H. R. Gokhale and M. K. Ramamurthi, Senior Advocates, (Mrs. Shyamla Pappu and Mr. B. D. Sharma, Advocates, with them), for Respondent.

The Judgment of the Court was delivered by

SHAH, J.:— This is an appeal with special leave against the order of the Railway Rates Tribunal constituted under Section 34 of the Indian Railways Act 9 of 1890.

2. The West Coast Paper Mills Ltd. — hereinafter called 'the Company' — is a manufacturer of paper and paper products. It has set up a factory at Bengurnagar in Dandeli at the terminus of Alnawar-Dandeli branch line of the Southern Railway. This branch line 32 Kilometers in length was a "light railway" constructed and opened for traffic by the Government of Bombay in 1919, principally for the purpose of transporting forest produce collected in the surrounding region. With the reorganisation of the States under the States Reorganization Act the ownership of the Railway passed to the Mysore Government. The Railway was finally taken over by the Government of India with effect from October 1, 1962, and now forms part of the Indian Railways.

3. The Company used the branch line for transporting coal, limestone etc., required for its manufacturing activities, and also for transporting its manufactured products. Initially the Railways were levying freight over this branch line at "common rates" for all commodities on "a weight basis". On representations made by the users of this branch line, the Indian Railways substituted, with effect from February 1,

1964, the "standard telescopic class rates". In charging the goods freight, however, the actual distance of the branch line was multiplied by three.

4. The Company filed a complaint before the Railway Rates Tribunal and challenged as "unjust, unreasonable and discriminatory" the method of levy of freight on goods traffic. The Company claimed that the levy of rates offended the provisions of Section 28 of the Indian Railways Act, 1890, and that the existing rates were per se unreasonable. The Company claimed a declaration that the rate between the stations specified in the complaint were unreasonable and a direction to the Railway to levy with effect from the date of the complaint standard rates and charges for the traffic on the branch line without "inflating the distance".

5. The Union of India as representing the Southern Railway defended the complaint. They contended that the introduction of "standard rates and fares" over the section "on a continuous distance basis with three times inflation of the chargeable distance" for goods was made on the authority of the Central Government under its directive and the Railway Rates Tribunal is precluded from questioning its legality or propriety. They also contended that in any event the levy is not unjust, unreasonable or discriminatory; that the increased rate on the basis of "inflated distance" was in vogue in different sections of the Indian Railways; that such inflation was adopted either because of the higher cost of operation of the particular section or because of unusually heavy capital costs involved on a particular system of Railway and for similar reasons; that the reason for inflation on the branch line was due to large capital investment for the rehabilitation of this branch line by the Central Government after it was taken over from the previous owners; that before the branch line was purchased it was working at a loss for a number of years and for effectively working the branch line it had become necessary to undertake extensive repairs and renewal work including complete relaying of the track, construction of crossing stations, etc., that the total costs of such repairs

and renewal was Rs. 28.99 lakhs, and that even after the introduction of higher rates and fares with 'three times inflation' in distance, the users of branch line will be paying less than what they were paying before the introduction of the new rates. The Union denied the charge of discrimination and undue preference and contended that the Tribunal had no jurisdiction to hear the complaint merely because the Company had selected certain commodities and certain sets of stations in support of its grievance under Section 41 (1) (b) of the Indian Railways Act, 1890.

6. On the pleadings before the Tribunal, six issues were settled, four of which are material:

"(1) Is the complaint not maintainable against the respondent (Union of India) under Section 41 (1) (b) of the Indian Railways Act, 1890 (Act 9 of 1890)?

(2) Whether rates for the carriage of complainant's traffic have become unreasonable as a result of inflating the chargeable distance over the Alnavar-Dandeli Section?

(3) Whether the impugned method of charging on inflated distance (at three times the actual distance over the Alnavar-Dandeli Section to arrive at the distance for charge) is governed by any order of the Central Government, and if so, whether the complaint is not maintainable for the same reason?

(4) Whether the respondent (Union of India) in charging the complainant's traffic over the Alnavar-Dandeli Section at tariff rate on continuous distance basis, but with three times the inflation in the chargeable distance over the Section, is subjecting the complainant's traffic to the undue prejudice in contravention of Sec. 28 of the Indian Railways Act?"

The Tribunal decided the case against the Railway Administration. In the view of the Chairman and Mr. Munshi (one of the members of the Tribunal), on issue No. (1) the complaint was maintainable against the Union of India under Section 41 (1) (b) of the Indian Railways Act. They observed that though a class rate between two stations for a commodity would fall outside the scope of Section 41 (1) (b),

it was still open to the Company to make a grievance in respect of the selected few items for the purpose of attack. On Issue No. (2) they held that the Railway had not made out any "justification for inflating the chargeable distance over the Alnawar-Dandeli Section". On Issue No. (3) they held that the jurisdiction of the Tribunal to examine the validity of the impugned method of charging the distance by a multiple of three of the actual distance over the section to arrive at the distance for determining freight, though governed by the order of the Central Government, was not excluded. On Issue No. (4) the Chairman observed:

"There is x x x no doubt that the order in question (Ext. R-4) is one issued under Section 29 (1) of the Act. If the Tribunal were to give "any relief which might have even indirectly the effect of cancelling the said order, it would amount to changing the maxima and minima rates and the level of class rates applicable to Alnawar-Dandeli Section which would not be within its power or jurisdiction. However, if it declared only certain rates for specific commodities between specific pairs of stations to be unreasonable and fixed new rates in lieu thereof, the level of class rates as such would not be affected. If such rates are based on the actual distance they would also fall within the maxima and minima under the inflated distance sanctioned by Ext. R-4. I, therefore, find that though the method of charging on inflated distance over the Alnawar-Dandeli Section is governed by the order of the Central Government (Ext. R-4) this Tribunal does not lose jurisdiction to decide on the unreasonableness of rates arrived thereby and the complaint cannot be said to be not maintainable for that reason".

Mr. Munshi agreed with that view. In his view charging the company's traffic over the branch line at tariff rates on continuous distance basis but at three times the chargeable distance over the branch line was "unwarranted, unjustified and therefore unreasonable".

7. Mr. V. K. Rangaswami the third member of the Tribunal agreed with the Chairman and Mr. Munshi on the issue of unreasonableness of

the rate charged by multiplying the distance by three. He also agreed that the jurisdiction of the Tribunal to entertain a complaint relating to levy of unreasonable charge between specific stations was not excluded. But he differed with the other members on the competence of the Tribunal to declare invalid the method of levy of freight and to fix new rates in lieu of rates declared unreasonable. In the opinion of the majority it was competent to the Tribunal to do so. Mr. Rangaswami held that it was for the Railway Administration to consider the matter and to take action to cancel the inflated distance over the branch line generally, and to fix new rates.

8. The Tribunal by a unanimous order made the following directions:

"..... that the class rate with inflated distance applicable to the Alnawar-Dandeli Branch, subject the complainant to an undue disadvantage in contravention of Section 28 of the Indian Railways Act, and also render unreasonable per se the rates for the complainant's traffic to and from Dandeli".

Against that order, this appeal has been filed with special leave.

9. The relevant provisions of the Indian Railways Act 9 of 1890 may be briefly set out:

S. 28 — "A railway administration shall not make or give any undue or unreasonable preference or advantage to, or in favour of, any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever".

S. 29 — "(1) The Central Government may by general or special order fix maximum and minimum rates for the whole or any part of a railway, and prescribe the conditions in which such rates will apply.

(2) x x x x x

(3) Any complaint that a railway administration is contravening any order issued by the Central Government under sub-section (1) shall be determined by the Central Government".

S. 41 — "(1) Any complaint that a railway administration—

(a) is contravening the provisions of Section 28, or

(b) is charging for the carriage of any commodity between two stations a rate which is unreasonable, or

(c) x x x
may be made to the Tribunal, and the Tribunal shall hear and decide any such complaint in accordance with the provisions of this Chapter.

x x x x".
S. 42 — "The Central Government alone shall have power—

(a) to classify or reclassify any commodity;

(b) to increase or reduce the level of class rates and other charges".

10. The jurisdiction conferred upon the Tribunal by Section 41 and relating to matters set out in clauses (a) to (c) thereof is restricted by the terms of Section 29 (3) and Sec. 42. Section 28 prohibits a railway administration from making undue preference or subjecting any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage. But even in a dispute relating to the matters set out in Section 41 (1) (a), (b) and (c), where the Central Government has fixed by general or special order maximum and minimum range of rates for the whole or any part of a railway the complaint that the railway administration has contravened any order issued by the Central Government may be determined by the Central Government and not by the Tribunal. Similarly, the Central Government has and the Tribunal has not the power to classify or reclassify any commodity and to increase or reduce the level of class rates and other charges. Subject to these restrictions, the Tribunal has the power to determine whether the Railway Administration has acted in contravention of the provisions of Section 28, i. e., it has granted any undue or unreasonable preference or advantage to, or in favour of any particular person, or shown any undue or unreasonable prejudice or disadvantage to any person or railway administration or any particular description of traffic, and was charging for the carriage of any commodity be-

tween two stations a rate which was unreasonable or was levying any other charge which was unreasonable.

11. In the present case the maximum and minimum range of rates have been fixed by the Central Government. A complaint that the railway administration has acted in contravention of the order issued by the Central Government may be determined by the Central Government and not by the Tribunal. Again the Central Government alone has the power to classify or reclassify any commodity or to increase or reduce the level of class rates and other charges. The Tribunal accepted these limitations upon the exercise of its powers. The Tribunal however found that the charge made by the railway administration under the order of the Railway Board levying tariff at the standard rates but on the footing that for each kilometer the goods are transported the charge will be levied at three times the standard rate is unreasonable and discriminatory. The finding proceeds upon appreciation of evidence which has been examined in great detail. The finding of the Tribunal cannot be challenged in this appeal with special leave under Art. 136 of the Constitution, and no attempt has been made to challenge before us that finding.

12. On behalf of the Union it was urged by the Solicitor-General that the impugned rates were station to station rates "and relying upon certain rules framed by the Railway Board, counsel contended that in respect of station-to-station rates the Tribunal had no jurisdiction to give relief. Rule 63 of Goods Tariff No. 28 in force from August 1, 1950, provided for the station-to-station rates as one of the types of rates chargeable. Cl. (7) provided that a "station-to-station rate" is a special rate for the total distance between two specific points (stations only): and cl. (8) provided that:

"Station-to-station rates are as follows—

(i) those between two stations on the same Railway, that is, local station-to-station rates;

(ii) those between a station on one railway and a station on another railway."

Similarly in Rule 67 of Goods Tariff No. 29 in force from June 1, 1954, similar definition of station-to-station rates was given. In Rule 67 of Goods Tariff No. 29 effective from October 1, 1958, rates were divided into two types — (i) Class rates; and (ii) station-to-station rates. By cl. (3) it was provided:

"(i) 'Station-to-station rate' means a special reduced rate applicable to a specific commodity booked from one specified station to another specified station.

(ii) Station-to-station rates may be quoted from and to stations on the same railway or from a station on one railway to a station on another railway."

These rules have, in our judgment, no relevance in determining the matter in dispute in this appeal, for in S. 41 (1) (b) the expression used is not "station-to-station rates", but a rate between two stations which is unreasonable. There is nothing in the rules which even indirectly affects the jurisdiction of the Tribunal to determine whether the rates for carriage of certain specified commodities between two stations are unreasonable. The Tribunal has expressly observed that the relief granted to the Company must be within the range of rates prescribed by the Central Government. The Tribunal has expressly observed that it is incompetent to grant relief which might even indirectly cancel the order of the Central Government under Section 10 (1), for, it would amount to changing the range and level of class rates applicable to the branch line. But if the Tribunal declared that only certain rates for specific commodities, between specified pairs of stations, are unreasonable, the level of class rates is not affected. The Tribunal is invested with the authority subject to the limitations contained in S. 29 (3) and S. 42 to entertain a complaint and to give relief in respect of rates which are found to be unreasonable between two stations. The complaint made by the Company did not seek intervention of the Tribunal in matters which may be raised only for decision to the Central Government by S. 29 and S. 42 of the Act, and the Tribunal has not given any relief in contravention of those provi-

sions. The Tribunal has merely declared that the chargeable rate of freight determined by multiplying by three the distance over which the goods are transported for specific commodities is in contravention of S. 28 of the Indian Railways Act, 1890.

13. We do not see force in the opinion expressed by Mr. V. R. Ranganaswami and even if the Tribunal holds that the rates between two stations in respect of a specific commodity are unreasonable, it cannot make a declaration to that effect. Such a view would deprive the Tribunal of its power to give formal shape to its view. We are not called upon to decide whether the Tribunal has power to fix rates in substitution of rates declared unreasonable in exercise of the jurisdiction under S. 41 (1) (b), because no such rates are fixed by order of the Tribunal.

14. The relief granted by the Tribunal is, in our judgment, within its jurisdiction.

15. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 353 (V 58 C 84)

(From: Andhra Pradesh)*

J. C. SHAH AND A. N. GROVER, JJ.
Guntur Municipal Council, (in all appeals), Appellant v. Guntur Town Rate Payers' Association, etc., Respondents.

Civil Appeals Nos. 1650 to 1652 of 1966, D/- 18-9-1970.

Municipalities — Madras District Municipalities Act (5 of 1920) S. 82 (2) — Method of assessment of annual value of lands and buildings — Measure of fair rent determinable under Rent Control Act must be taken into account.

Section 82 (2) of the Act makes provision for the fixation of annual value of lands and buildings. The test essentially is what rent the premises can lawfully fetch if let out to

*(Second Appeals Nos. 367, 368 and 369 of 1962, D/- 3-12-1965—Andh Pra.)

KN/KN/E334/70/RGC/D

hypothetical tenant. The municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or standard rent which would be payable for a particular premises under the Rent Control Act in force during the year of assessment.

There is no distinction between buildings the fair rent of which has actually been fixed by the Rent Controller and those in respect of which no such rent has been fixed. When the controller has not fixed the fair rent, the municipal authorities will have to arrive at their own figure of fair rent in accordance with the principles laid down in the Rent Control Act. AIR 1962 SC 151, Rel. on. (Paras 4, 5)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 151 (V 49) =

(1962) 3 SCR 49, Corporation of

Calcutta v. Smt. Padma Debi 4

Mr. B. V. Subrahmanyam, Senior Advocate, (Mr. A. V. Rangam, Advocate, with him), for Appellant (in all appeals); Mr. M. Natesan Senior Advocate, (Mr. K. Jayaram, Advocate, with him), for Respondents (in all appeals).

The Judgment of the Court was delivered by

GROVER, J.: These appeals have been brought by special leave from a judgment of the Andhra Pradesh High Court.

2. Three suits, namely, O. S. Nos. 222, 223 and 466 of 1960 were filed in the Guntur court in which the relief claimed was for a declaration that the general revision of the rental values of the houses and buildings effected by the Guntur Municipality in the year 1960 for the purpose of assessment of tax was ultra vires and illegal and for a consequential relief of a permanent injunction restraining the municipality from acting on the special notices issued to the tax payers.

3. Section 81 of the Madras District Municipalities Act 1920, hereinafter called the "Municipalities Act" gives the description and classes of property tax and other taxes leviable by the municipality. Section 82 gives the method of assessment. It is provided by sub-s. (2) of that section that the annual value of lands and buildings shall be deemed to be the gross annual rent at which they may reasonably be expected to let from month to

month or from year to year less certain deductions. The District Munsif by a common judgment delivered in the three suits held that the annual value had to be computed in the context of the rent that was payable under the Rent Control legislation. The suits were decreed and a declaration was granted that the general revision made by the Guntur Municipality in 1960 by increasing the rental value of houses to more than the rental value which prevailed on the dates provided in the Rent Control Acts in force prior to 1960 was ultra vires and illegal and a permanent injunctions were granted restraining the municipality from acting upon the special demand notices issued to the rate-payers and from collecting the enhanced tax. Appeals were filed and the first appellate court substantially upheld the judgment of the trial court though certain modifications were made in the decrees passed by that court. Appeals were taken to the High Court but the same were dismissed.

4. The only point which we are called upon to decide is whether before the fixation of a fair rent of any premises the municipality was bound to make assessment in the light of the provisions contained in the Rent Acts. A subsidiary question has also arisen whether the courts below were justified in referring to and passing the decrees keeping in view the Rent Acts which were in force prior to the enactment of the Andhra Pradesh Buildings (Lease, Rent and Eviction) Control Act, 1960, hereinafter called the "Act". Now S. 82 (2) of the Municipalities Act, as stated before, makes provision for the fixation of annual value according to the rent at which lands and buildings may reasonably be expected to be let from month to month or from year to year less the specified deduction. The test essentially is what rent the premises can lawfully fetch if let out to a hypothetical tenant. The municipality is thus not free to assess any arbitrary annual value and has to look to and is bound by the fair or the standard rent which would be payable for a particular premises under the Rent Act in force during the year of assessment. In Corporation of Calcutta v. Smt. Padma Debi, (1962) 3 SCR 49 = (AIR 1962 SC 151), it was held that on a fair

reading of the express provisions of S. 127 (a) of the Calcutta Municipal Act 1923 the annual rent could not be fixed higher than the standard rent under the Rent Control Act. There the Rent Control Act of 1950 came into force before the assessment was finally determined and it was observed that the corporation had no power to fix the annual valuation of the premises higher than the standard rent under that Act. The learned counsel for the appellant has not made any attempt nor indeed he could do so to contest the above view. What has been stressed by him is that S. 7 of the Act makes it clear that it is only after the fixation of the fair rent of a building that the landlord is debarred from claiming or receiving the payment of any amount in excess of such fair rent. It is urged that so long as the fair rent of a building or premises is not fixed the assessment of valuation by a municipality need not be limited or governed by the measure provided by the provisions of the Act for determination of fair rent. Logically such buildings or premises as are not let out to a tenant and are in the self occupation of the landlords would also fall within the same principle if no fair rent has even been fixed in respect of them.

5. We are unable to agree that on the language of S. 82 (2) of the Municipalities Act any distinction can be made between buildings the fair rent of which has been actually fixed by the Controller and those in respect of which no such rent has been fixed. It is perfectly clear that the landlord cannot lawfully expect to get more rent than the fair rent which is payable in accordance with the principles laid down in the Act. The assessment of valuation must take into account the measure of fair rent as determinable under the Act. It may be that where the Controller has not fixed the fair rent the municipal authorities will have to arrive at their own figure of fair rent but that can be done without any difficulty by keeping in view the principles laid down in S. 4 of the Act for determination of fair rent. This would of course be with regard to the assessment of valuation for the period subsequent to the coming into force of the Act. For the prior period it would be the rent Act in force during the

year of assessment in the light of the provisions of which the figure of the fair rent would have to be determined and assessment made accordingly.

6. There is a good deal of confusion in the judgments of the trial court and the first appellate court with regard to the Rent Acts the provisions of which would have to be kept in view for the assessment of valuation for the purpose of S. 82 (2) of the Municipalities Act. The decrees which have been granted suffer from the same infirmity. It has been pointed out by the learned counsel for the respondents that according to the rules contained in the fourth schedule to the Municipalities Act the assessment book have to be revised once in every five years and the quinquennial assessment thus made enures for that period. But it appears from the rules that a procedure has been prescribed for changing the assessment whenever a case is made out for doing so. We are not concerned with the procedural difficulties which may be experienced; we have to declare what the law is and as appears to be well settled the assessment of valuation for the purpose of tax must be made in accordance with and in the light of the provisions of the Rent Act which would be in force during the period of assessment.

7. In the result the decrees which have been granted are hereby modified by declaring that the general revision made by the Guntur Municipality by increasing the rental valuation of houses and buildings beyond the fair rent determinable under the Rent Act in force for the period of assessment shall be illegal and ultra vires and a permanent injunction shall issue restraining the municipality from realizing any amount in excess of such tax which may be found due on the valuation fixed according to the principles laid down in our judgment. In view of the entire circumstances the parties are left to bear their own costs in this court.

Ordered accordingly.

AIR 1971 SUPREME COURT 356
(V 58 C 85)

(From: Punjab & Haryana)*

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**Hira Lal, Appellant v. State of**
Haryana, Respondent.**Cr. Appeal No. 60 of 1969, D/- 4-**
12-1970.**(A) Evidence — Appreciation of—**
Trap witness — Prosecution for offence
under S. 165A of Penal Code — Junior
officer of status of Sub-Inspector of
Police himself laying trap — This fact
itself makes evidence of such officer
and witnesses procured by him unreliable.
(Para 2)**(B) Evidence — Appreciation of—**
Interested witness — Prosecution for
offence of offering bribe — Sub-Ins-
pector of Police himself a participant
in offence in having accepted offer
though for working out case against
accused — He is an interested witness.
(Para 4)**(C) Evidence — Appreciation of —**
Police witness — Person appearing as
prosecution witness four or five times
in police cases pertaining to particular
police witness — Evidence of such wit-
ness does not carry any value.
(Para 4)**M/s. Frank Anthony, M. V. Go-**
swami, S. R. Agarwala, A. T. M. Sam-
path and E. C. Agrawala Advocates,
for Appellant; M/s. V. C. Mahajan and
R. N. Sachthey Advocates, for Respon-
dent.**The following Judgment of the**
Court was delivered by**BHARGAVA, J.:**— Hira Lal ap-
pellant was tried by the Special Judge
of Rohtak for an offence punishable
under S. 165A of the Indian Penal Code
on the charge that he offered to pay a
sum of Rs. 1100/- to Kundan Lal
Sahwney, Station House Officer, Police
Station City Rohtak for allowing him
and his associates to carry on Satta
gambling. The prosecution case was
that, on 9th July, 1967, at 9.45 a. m.,
the appellant approached Sub-Inspector
Kundan Lal at the Police Station,
told him that he was carrying on
khaiwali Satta in association withMangtu, Omi and Jaggu and offered to
pay him a sum of Rs. 1100/- per men-
sem as illegal gratification, provided
Kundan Lal promised to shield him
and his associates in those gambling
activities. Kundan Lal kept quiet
and the appellant left promising to
come to the police station at 3 p.m.
to give the sum of Rs. 1100/-. Accord-
ing to Kundan Lal, he made an entry
of this incident in the daily diary of
the police station and also took into
confidence the Superintendent of
Police, Rohtak. Thereafter, he orga-
nised a trap party which included
three persons, Amir Singh, Chaudhary
Ram and Ram Rang. These members
of the party sat in an adjoining room
at about 2.45 p.m., while Kundan Lal
continued in his own office where the
appellant came at 3 p.m. The appel-
lant again told Kundan Lal that he
would continue to pay Rs. 1100/- on
the first of every month, while he and
his associates should be allowed to
indulge in Khaiwali Satta. Thereafter,
the appellant took out a bundle of
currency notes from his pocket and
offered them to Kundan Lal. As this
money was being passed on, the three
persons associated in the trap, viz.,
Amir Singh, Chaudhary Ram and Ram
Rang entered the office. In their pre-
sence, Kundan Lal counted the curr-
ency notes which were found to con-
tain nine currency notes of the deno-
mination of Rs. 100/- each and twenty
currency notes of Rs. 10/- each, mak-
ing up a total of Rs. 1100/-. Kundan
Lal took the currency notes into pos-
session and recorded a recovery report.
He detained Hiralal, while he record-
ed a First Information Report of this
incident. Thereafter, Harinder Singh,
Deputy Supdt. of Police, Rohtak, came
to the police station on a telephone
call at about 3.30 p.m. He then inves-
tigated the case which was sent to
Court after investigation. The Special
Judge accepted this case of the pro-
secution, convicted Hira Lal appellant
for the offence under section 165A of
the Indian Penal Code and sentenced
him to undergo rigorous imprisonment
for one year. He also ordered confis-
cation of the sum of Rs. 1100/- which,
according to the prosecution, was given
by him as bribe to Kundan Lal. On ap-
peal, the High Court of Punjab and
Haryana upheld the conviction, but
reduced the substantive sentence of*(Cri. Appeal No. 198 of 1968, D/- 13-
12-1968 — Punj. & Har.)

rigorous imprisonment from a period of one year to six months. The appellant then applied for a certificate under Art. 134 (1) (c) of the Constitution. The High Court granted the certificate on two grounds. One ground was that the appeal in this Court would involve consideration of the question whether Kundan Lal, Amir Singh and Ram Rang, who were the only witnesses examined, were accomplices and required corroboration by independent witnesses before their evidence could be believed. The second ground related to the question whether Kundan Lal, in taking the steps, after he was approached in the morning by the appellant, of laying the trap, carried on investigation which he was not authorised to do under section 5A of the Prevention of Corruption Act, 1947, which required that the investigation must be by an officer of a rank not below that of a Deputy Superintendent of Police unless there was an order of the Magistrate of the First Class authorising him to investigate; and there was no such order of the Magistrate in this case. This appeal has thus been brought up to this Court on the basis of the certificate granted under Art. 134 (1) (c) of the Constitution. In this appeal, we had passed orders on November 17, 1970 allowing the appeal and acquitting the appellant after stating that the reasons will be given later. We now proceed to give the reasons.

2. In this case, the main point of law that was argued before us was that Kundan Lal, in taking the step of laying the trap in the afternoon, after he had been approached earlier in the morning and had been offered a bribe, did carry on investigation of the offence of offer of bribe which had been committed earlier in the morning. It was urged that this illegality in the investigation would totally vitiate the trial for that offence. It appears to us that it is not necessary in this case to go into this question of law which has been contested on behalf of the State Government on the ground that Kundan Lal was himself the person to whom the bribe was offered and, if he made arrangements merely to ensure that some persons were present when the bribe was given to him, this step taken by him cannot be said to be a part of the investiga-

tion. In our opinion, the circumstance that Kundan Lal, who was merely a junior officer of the status of a Sub-Inspector of Police, himself laid the trap itself makes the evidence of Kundan Lal and the witnesses procured by him unreliable.

3. Kundan Lal, according to his own version, was approached by the appellant in his office who came and immediately made the offer of bribe at 9.45 a.m. on the 9th July, 1967. It appears to us that no person like the appellant could have dared to approach Kundan Lal in this manner at the Police Station itself, unless he had some belief that Kundan Lal was a person who would be amenable to such an offer. In case he had any doubt that Kundan Lal would refuse the offer, he would not have taken the courage to go to the Police Station itself for this purpose. Then, it is significant that, according to Kundan Lal, when the offer was made to him, he neither accepted nor refused it and the appellant left the office promising to come at 3 p.m. with the money. When Kundan Lal gave no reply at all to him, the appellant could not be expected to come again and try to thrust the money on Kundan Lal, because even a person with some common-sense would be afraid that subsequent offer may be witnessed by other persons and he might thus render himself liable to prosecution. It might have been different if Kundan Lal had accepted the offer in the morning. When Kundan Lal remained silent, it seems to us highly improbable that the appellant would go and actually offer money in the office at the Police Station with all the attendant risks.

4. Kundan Lal was himself a participant in the offence as the offer was made to him and he accepted the offer though, according to him, it was with the object of working out a case against the appellant of offering a bribe. He was, therefore, an interested witness. The other two witnesses examined are Amir Singh and Ram Rang. Amir Singh, on his own admission, has appeared as a prosecution witness four or five times in police cases pertaining to this police station. The evidence of such a witness can hardly carry any value in Court. The other witness Ram Rang, no doubt,

was a Municipal Commissioner; but it is significant that, while Amir Singh, according to his evidence, became a witness as he happened to come to the police station for a purpose of his own, Ram Rang was specially sent for by Kundan Lal. The fact that Kundan Lal particularly chose Ram Rang as the person to be called to be a witness itself makes the evidence of Ram Rang of doubtful value.

5. It is further to be noted in this connection that, according to the defence, the appellant, who had earlier been convicted for carrying on gambling activities, was stopped by a constable when he had gone to catch a bus in the company of one Bale Ram carrying a sum of Rs. 1510/- with him. He was told that he was wanted by the Station House Officer. When he came to the Police Station accompanied by Bale Ram, Kundan Lal, Station House Officer, was standing in the verandah, and the appellant's associates Omi and Jaggu were also there. Kundan Lal told him that he was indulging in Khaiwali Satta and, when the appellant repelled the assertion, Kundan Lal searched his person and recovered the entire sum of Rs. 1510/-. The appellant was then made to sit at the Police Station and, later on, this case was foisted on him by Kundan Lal. It is obvious that, according to the appellant's version, Kundan Lal stood to gain considerably if he could secure the conviction of the appellant for the offence of offering a bribe. Kundan Lal would not only get the credit for working out such a case, but, if the defence version is true, he could also pocket a sum of Rs. 410/-, while producing Rs. 1100/- out of the money recovered from the appellant's possession as representing the amount of bribe offered to him. It is true that the evidence of defence witnesses, who came to prove this version, has been concurrently disbelieved by the Special Judge and the High Court; but the appellant got an opportunity to put forward such a version, even if it is untrue, merely because Kundan Lal took the extraordinary step of laying the trap himself, instead of the trap being arranged by some senior officers.

6. According to Kundan Lal, he took the Superintendent of Police into

confidence before the trap was actually laid and after he had been approached by the appellant in the morning. The Supdt. of Police has not been examined to prove that such information was conveyed to him before 3 p.m. On the other hand, there appear to be circumstances which indicate that no such information could have been conveyed to the Supdt. of Police. According to Kundan Lal, the Deputy Supdt. of Police, Harinder Singh, was informed by telephone after the money had been recovered by him at 3 p.m. and, thereafter, he came to the Police Station to investigate the case at 3.20 p.m. On the other hand, according to Harinder Singh himself, he came to the Police Station under the instructions of the Superintendent of Police. He does not bear out the statement of Kundan Lal that he came on information given by Kundan Lal on the telephone. His statement that he came under the instructions of the Supdt. of Police clearly leads to the inference that the Supdt. of Police must also have received information after 3 p.m. and that is why instructions were issued at that time and not earlier. No explanation is forthcoming why the Supdt. of Police did not send the Deputy Supdt. of Police or some other senior officer for the trap in case he did receive information after the morning offer and before the money was actually paid at 3 p.m. This circumstance throws very considerable doubt on the evidence of Kundan Lal and the witnesses procured by him.

7. In these circumstances, we consider that no conviction could be safely based on the evidence of Kundan Lal and his witnesses, Amir Singh and Ram Rang. That is why we allowed the appeal acquitting the appellant.

Appeal allowed.

AIR 1971 SUPREME COURT 359
(V 58 C 86)

(From: Assam and Nagaland)*

J. M. SHELAT, C. A. VAIDIALINGAM AND P. JAGANMOHAN REDDY, JJ.

Paresh Chandra Nandi, Appellant v. Controller of Stores, N. F. Railway, Pandu and others, Respondents.

Civil Appeal No. 191 of 1967, D/- 7-12-1970.

Civil Services — Railway Fundamental Rules, Rules 2011, 2007 and 2010 — Transfer of permanent employee and consequent transfer of his lien cannot be challenged when transfer is to a permanent post in the same cadre not carrying less pay, even if such transfer materially affects chances for promotion. (Paras 11 & 12)

Mr. A. K. Nag, Advocate, for Appellant; Dr. V. A. Seyid Muhammad, Sr. Advocate, (Mr. B. K. P. Sinha, Advocate, with him), for Respondents Nos. 1 to 3 and 9.

The following Judgment of the Court was delivered by

SHELAT, J.: This appeal is founded on a certificate granted by the High Court of Assam and Nagaland against its order of dismissal of the writ petition filed by the appellant.

2. The appellant joined service in the North-East Frontier Railway as a Depot clerk in 1942 and was confirmed and made permanent in that post on August 15, 1947. He was promoted to the post of a Ward Keeper on June 4, 1949 in the Depot Wing of the Controller of Stores.

3. During the last World War, the said Railway organised temporarily a Food Supply Organisation wherein a number of persons, including respondents 4 to 8, were appointed. Respondent 4 was appointed as a salesman in the said organisation in 1944 and was confirmed with effect from August 15, 1947 under the Deputy Traffic Superintendent, Lumding. Respondent 5 was appointed a clerk in 1943 and was confirmed in the Head Office Wing of the Controller of Stores Department in 1944. Respondent 6 was appointed in 1943 and was

confirmed in his post under the Deputy Traffic Superintendent, Lumding with effect from August 15, 1947. Respondent 7 was appointed first as a salesman in 1943, and then as a clerk in 1944 in that organisation and was confirmed with effect from August 15, 1947. Respondent 8 was appointed a Ward Keeper in 1943 and was confirmed as ticket-collector under the Deputy Traffic Superintendent, Lumding with effect from August 15, 1947. Thus, both the appellant and respondents 4 to 8 were confirmed in their respective posts on the same day, i.e., August 15, 1947.

4. On termination of the War, the Food Supply Organisation was wound up. The Railway Board, thereupon, decided that the temporary staff employed in that organisation should be absorbed in the other departments and should be confirmed in the same manner as the temporary staff initially recruited in the other departments. With a view to implement this policy directions were issued to keep unfilled 10 per cent of the vacancies in permanent posts and accommodate in such vacancies the staff of the said organisation. Accordingly, the members of the staff of the said organisation were gradually absorbed in the various departments. In January 1951, the then Chief Administrative Officer issued a list showing the absorption of the staff of the said organisation against the 10 per cent reservation in the permanent posts in the different departments and their confirmation in such posts. Respondents 4 to 7 were shown in the said list in the category and scale of TYC/55-130 and respondent 8 as ticket collector with effect from August 15, 1947 and were allotted to the office of the Deputy Traffic Superintendent, Lumding. They, therefore, acquired their lien on the respective posts assigned to them and declared against their names in the said list.

5. The Controller of Stores, by a Memorandum dated May 26, 1960, transferred the lien of respondents 4 to 8 to the Stores Department wherein the appellant, as aforesaid, was a permanent time-keeper, from the respective posts to which they were assigned with effect from August 15, 1947 against the posts of Depot Clerks. The Memorandum also declared that the seniority of respondents 4 to 8 should

*(Civil Rule No. 132 of 1964, D/- 14-9-1965 — Assam and Nagaland.)

be given effect to as from August 15, 1947 in the Stores Department.

6. The grievance of the appellant was that by bringing in respondents 4 to 8 in the Stores Department and transferring their lien in the Stores Department and calculating their seniority with effect from August 15, 1947, his chances for promotion were materially affected. His case was that the two wings, namely, the Depot Wing and the Head Office Wing, being separate and having separate cadres, and respondents 4 to 7 having been absorbed as permanent employees in the Head Office Wing with effect from August 15, 1947, their liens could not be validly transferred. This was particularly so, as, according to him, there were no permanent vacancies in the Stores Department over which their liens could be transferred. According to him, therefore, the transfer effected under the said memorandum was invalid and inoperative.

7. Having unsuccessfully exhausted his departmental remedies through representations, the appellant filed the writ petition in the High Court challenging the validity of the said memorandum and, as aforesaid, the High Court dismissed the writ petition. Hence this appeal.

8. In our view, the High Court rightly rejected the appellant's challenge to the validity of the said memorandum as he was not able to show that the said memorandum was in any manner contrary to the statutory rules governing the employment of the railway employees.

9. Rule 2003 of the Railway Fundamental Rules defines in cls. 3 and 14 the terms 'cadre' and 'lien'. 'Lien', as defined in cl. 14 means the title of a railway employee to hold substantively a permanent post to which he has been permanently appointed. According to this definition, therefore, the appellant and respondents 4 to 8 were entitled to, with effect from August 15, 1947 (when all of them were made permanent), a lien on the respective posts to which, as from that day, they were confirmed and made permanent. So far as respondents 4 to 8 were concerned, this was done, as explained earlier, as a result of the closure of the Food Supply Organisation which necessitated

the absorption of those employed therein during the War period in the different departments of the railways in Assam. Accordingly, the authorities had published the said list in 1951 showing how and where the absorbed staff was fixed up in accordance with the reservation of 10 per cent vacancies in the various departments.

10. The question is, could the railway authorities, under the rules, transfer or not any one or more of the said staff so absorbed from the posts where they were allotted to any other department or departments where such transfer or transfers became administratively necessary. We may note that the transfer of lien enjoyed by respondents 4 to 8 in the Head Office was not a mere paper transfer, for, respondents 4 to 8 were actually transferred from the Head Office Wing to the Stores Department. Since they were permanent employees, enjoying liens in their respective posts to which they were confirmed since August 15, 1947, ordinarily their conditions of service, e.g., salary and seniority, could not be affected to their prejudice as a result of their transfer to any other department or wing. Once, therefore, they were transferred from one permanent post to another permanent post they would be entitled to hold substantively the permanent posts to which they were transferred bringing along with them the seniority which they had in the posts from which they were transferred. If that were not so, the result of a transfer from one post to another would mean that a transferred employee would have to start de novo, from a scratch and would consequently stand last in the department to which he is transferred. In actual practice, therefore, no transfer can be effected from one department to another without materially affecting the chances of promotion of such an employee. As we shall presently show, the rules do not contemplate such a position.

11. Rule 2007 provides that unless the lien of a permanent employee is suspended under R. 2008 or transferred under R. 2010, a railway servant holding substantively a permanent post retains a lien on that post while performing the duties of that post, or while on foreign service or holding a temporary post or officiating

in another post, or during joining time or transfer to another post, or while on leave, or lastly, while under suspension. Under R. 2010, the power to transfer lien is confined to any other permanent post in the same cadre. But R. 2010 is subject to the provisions of R. 2011 which confers power to transfer a railway servant from one post to another post. Rule 2011 reads as follows:

"Transfer of Railway servant:

(a) A competent authority may transfer a railway servant from one post to another; provided that, except —

(1) on account of inefficiency or misbehaviour; or

(2) on his written request, a railway servant shall not be transferred substantively to, or, except in a case covered by Rule 2038, appointed to officiate in a post carrying less pay than the pay of the permanent post on which he holds a lien and his lien has not been suspended under Rule 2003." Thus, the only limitation to the power conferred on the competent authority to transfer a railway servant from one post to another is that such transfer cannot be to a post carrying less pay than the pay of the post on which the transferred employee had a lien.

12. Two things are thus clear, (1) that the competent authority has the power to transfer a railway employee even though he holds a permanent post from one such post to another under R. 2011, and (2) that once such an employee is transferred from one permanent post to another permanent post, he is entitled to a lien in respect of that another post to which he is permanently posted as a result of the transfer. This is the effect of R. 2007. That being so, the appellant could not possibly contend that the transfers of respondents 4 to 8 to the Stores Department were contrary to the Fundamental Rules or that the transfer of their liens from the posts to which they were posted in 1947 to the posts in the Stores Department was in any manner contrary to the rules.

13. The other point raised by the appellant was also without substance as he failed to show before the High Court that these transfers were made without there being vacancies in the respective posts to which respon-

dents 4 to 8 were transferred. That being the position, the High Court was right in dismissing the appellant's writ petition.

14. The appeal must consequently fail and is dismissed, but in the circumstances of the case there will be no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 361 (V 58 C 87)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Mohammad Mustafa, Appellant
v. Sri Abu Bakar and others, Respondents.

Civil Appeal No. 2301 of 1966, D/-
8-12-1970.

(A) Civil P. C. (1908), Order 20
Rule 4 — Contents of judgment —
Finding without proper pleadings and
necessary issues — Not binding on
parties to suit. (Para 5)

(B) Civil P. C. (1908), Order 6
Rule 17 — Application for amendment
by defendant appellant in appeal arising
from suit for partition — High
Court rejecting application and taking
highly technical view in granting relief
— On appeal to Supreme Court application
was allowed in interest of justice
— Constitution of India, Article 136.

In appeal before High Court arising from suit for partition in a Muslim family, the defendant appellant sought amendment of written statement by addition of plea that certain items of properties of his deceased father were joint properties of parties to suit. His written statement did contain the plea that the suit was bad for partial partition but no issue was framed by trial court. High Court rejected the application for amendment. While dismissing the appeal, the High Court arrived at specific conclusion that the items of properties as mentioned in application for amendment belonged to father of defendant. Though these properties could be considered as joint properties, the High Court refused to grant relief in absence of plea thereof. High Court rejected the plea of suit being bad for partial partition as there was no issue about that plea. On appeal to Supreme Court by special leave:

Held (1) that the High Court took a highly technical view of the matter. On facts and circumstances of the case, it should have allowed the application for amendment. (Para 7)

And (2) that in the interests of justice the Supreme Court allowed the application for amendment and remanded the case to trial court.

(Para 7)

The following Judgment of the Court was delivered by

HEGDE, J.:— This is a defendant's appeal by special leave from a suit for partition in a Muslim family. The appellant was the first defendant in that suit. The first respondent brought the suit for partition claiming 14/88 share in the properties detailed in the plaint schedules. The parties to the suit are the heirs of one Sanaullah. The family genealogy is given in the plaint. The correctness of that genealogy is not disputed. It was alleged in the plaint that the properties detailed in the plaint schedules are the joint properties of the parties to the suit. The appellant contested the suit. He contended that his father Sanaullah had three pharmacies; sometime before his death he gifted to each one of his three sons one pharmacy. The pharmacy which was originally known as Darul Adviya was gifted to him; therefore he is the exclusive owner of that pharmacy. He further contended that some of the other items shown in the plaint schedules are his self-acquisitions and hence they are not partible. But it may be noted that the appellant did not take the alternative plea that in the event the court holding that the gift pleaded by him is not true, the other two pharmacies should be considered as joint properties. But he did take a bald plea that the suit was bad for partial partition. On the basis of the pleadings the trial court framed several issues. The only issue that is relevant for our present purpose is issue No. 1 namely:

"Whether the concern known as Hind C. C. Works (formerly known as Darul Adviya) was the joint property of the parties? If so, what is the plaintiff's share?"

2. No issue was struck in respect of the appellant's plea that the suit was bad for being one for partial partition.

3. The trial court came to the conclusion that the properties shown in List A-1, A-2 and B are joint properties and hence liable to be partitioned. It gave the plaintiff 14/88 share in the same. It held that the properties mentioned in C-1, C-2, D-1 and F are individual properties of the appellant.

4. Both the parties appealed to the High Court as against the decree of the trial court. During the pendency of the appeal, the appellant applied to the High Court on April 1, 1966 to permit him to amend his written statement and take the plea that the two pharmacies alleged to have been gifted to the other sons of Sanaullah should also be considered as joint properties. The High Court rejected that application by its order dated April 5, 1966.

5. The High Court by its judgment dated April 7, 1966 dismissed the appeal of the appellant, 1st defendant, but partly allowed the cross-appeal of the respondent. It held that the properties mentioned in List C-1, C-2, D-1 and F are also joint properties. In the course of its judgment it observed:

"The true position appears to be this: Sanaullah had three pharmacies. He was getting old. He placed the three pharmacies in charge of his three sons for purposes of management. There was no gift as alleged by the appellant. Management of three pharmacies by the three sons separately continued after Sanaullah's death. As each brother was in charge of one pharmacy, profits were not distributed. This arrangement continued upto the date of the suit." This finding having been reached without proper pleadings and necessary issues the same cannot bind any of the parties to the suit though it does indicate the serious injustice that is likely to happen to the appellant because of his defective pleadings.

6. Dealing with the contention of the appellant that the suit was bad for being one for partial partition, the court rejected that contention on the ground that the trial court did not strike any issue in respect of that plea though that plea was taken both in the written statement as well as in the appeal memo. As Mst. Rukaia Bibi, wife of Sanaullah (Respondent No. 3 in the appeal) had died during the pendency of the appeal, the High

Court enhanced the share of the plaintiff to 16-1/5 share.

88

7. Both the trial court as well as the High Court have come to the conclusion that the gift pleaded by the appellant is not true. In fact the High Court has specifically come to the conclusion that all the three Pharmacies referred to in the appellant's written statement belonged to Sanaullah. If that conclusion is correct those pharmacies should also be considered as joint properties of the parties to the suit. But the High Court refused to grant any relief in respect of those items of properties on the sole ground that the appellant did not take the plea that those items of properties are joint properties of the parties to the suit. As seen earlier it rejected the appellant's contention that the suit is bad for partial partition on the ground that no issue had been framed as regards that plea. In our opinion the High Court took a highly technical view of the matter. On the facts and circumstances of this case, the High Court should have allowed the amendment application moved by the appellant on April 1, 1963. We think that in the interest of justice, we should now allow that application and permit the appellant to amend his written statement. We order accordingly. As a result of this decision of ours it is now necessary to set aside the judgment and decree of the High Court as well as of the trial court and remand the case to the trial court. We direct the trial court to permit the defendant to carry out the necessary amendments in his written statement, permit the respondents to file their rejoinders, raise proper issues on the new pleadings, give parties an opportunity to adduce evidence on the newly raised issues and decide the case on merits. But the decision of the trial court as modified by the High Court regarding the items of property already held to be joint property of the parties is not to be reopened. That decision is final. The further trial will be confined to the new issues that may be raised on the basis of the pleas put forward in the amendment application. The case is remanded only for that purpose. The trial court shall now proceed to

hear the case expeditiously and pass a fresh preliminary decree.

8. So far as the costs are concerned, under the circumstances of the case we direct that the appellant do bear his own costs up till this stage in all the courts. The costs of the plaintiff-1st respondent in all the courts up till this stage shall come out of the estate. The other respondents shall bear their own costs throughout.

9. Civil Miscellaneous Petition No. 1881 of 1970 is dismissed — no costs.

Order accordingly.

**AIR 1971 SUPREME COURT 363
(V 58 C 88)**

(From Allahabad)*

**S. M. SIKRI, V. BHARGAVA
AND I. D. DUA JJ.**

Jadunath Singh and another, Appellants v. The State of U. P., Respondent.

Criminal Appeal No. 55 of 1970,
D/- 7-12-1970.

**Evidence Act (1872), Section 9 —
Absence of test identification is not
fatal in all cases — In case of doubt
however identification parade should
be held.**

Failure to hold test identification of accused is not fatal in all cases. If the accused is well known to prosecution witnesses it would be waste of time to put him up for identification. If, however, there is any doubt in the matter the prosecution should hold identification parade. Where during the course of investigation of a murder case the accused files an application for holding an identification parade on allegation that the accused is not known to eye-witnesses and that application is rejected on the ground that charge-sheet against accused has been filed and the accused has been named by eye-witnesses, but during the course of the trial the allegation of the accused is found to be true, then the rejection of the application on aforesaid ground is not valid and unless there is some other evidence

*(Criminal Appeal 1037 of 1969 and Referred No. 82 of 1969, D/- 26-9-1969—All.)

the trial will be liable to be vitiated. The fact that there is no provision in Criminal P. C. enabling accused to insist on identification parade is not material. (On facts held that trial is not vitiated by denial of test identification to accused). (Paras 18, 20, 22)

Cases Referred: Chronological Paras

- (1968) AIR 1968 All 333 (V 55)=
1968 Cri LJ 1320, State of U. P.
v. Jagnoo 12
 - (1958) AIR 1958 SC 350 (V 45)=
1958 SCR 1218 = 1958 Cri LJ
698, Kanta Prasad v. Delhi
Administration 17
 - (1957) Criminal Appeal No. 92 of
1956, D/- 15-1-1957 (SC), Parkash
Chand Sogani v. State of
Rajasthan 14, 18
 - (1954) AIR 1954 Pat 483 (V 41)=
1954 Cri LJ 1546, Awadh Singh
v. State 14, 15
 - (1951) AIR 1951 Cal 475 (V 38)=
52 Cri LJ 819, Provash Kumar
Bose v. The king 14, 16
 - (1948) AIR 1948 Mad 113 (V 35)=
49 Cri LJ 89, In re Sangiah 13
 - (1945) AIR 1945 Lah 48 (V 32)=
46 Cri LJ 550, Sajjan Singh v.
Emperor 11, 13
- M/s. Yogeshwar Prasad, S. K. Bagga and Mrs. Shureshta Bagga, Advocates, for Appellants; Mr. O. P. Rana, Advocate; for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.:— This appeal by special leave is directed against the judgment of the High Court of Judicature at Allahabad confirming conviction of the two appellants by the Sessions Judge Mainpuri, under Section 302/34 of the Indian Penal Code. Appellant Jadunath Singh was sentenced to death by the Sessions Judge and appellant Girand Singh was sentenced to undergo imprisonment for life.

2. In order to appreciate the points raised before us by the learned counsel for the appellant it is necessary to state a few facts. It is alleged against the appellants that on February 26, 1968 at about 7.30 a. m., in furtherance of their common intention, they murdered one Ram Swarup Pandey by repeatedly stabbing him to death, when he was passing on the Grand Trunk Road in the town of Bewar to catch a truck. As many as 34

injuries were found on the deceased at the post-mortem conducted on his body on the same day at about 3 p. m.

3. The prosecution case in brief is as follows. It is common ground that there was great enmity between the deceased and Laturi Ahir and his sons, the two appellants. The deceased apprehended danger to his life from them, and on November 23, 1967, he sent an application to the Superintendent of Police, Mainpuri, alleging that Laturi and his son, Jadunath, Brahma, Panna Lal and Anokhey, etc. were terrorising the weaker and poorer sections of the village community and declaring openly that they would kill the deceased to silence his opposition forever. He prayed that an enquiry may be made and suitable action taken against them. On February 25, 1968 the deceased came to Bewar in the evening to meet the A. D. O. in connection with an enquiry on a complaint made against Munshi Lal Pradhan of the village. He could not meet the A. D. O. as he was out of Station. He stayed during the night with Prem Narain, P. W. 1 who happened to be a brother-in-law of his cousin Gulati Ram. According to Prem Narain, both of them got up in the morning at 6.45 a. m. and since it was Shivaratri that day the deceased did not take any food and they left for the bus-stand at Bewar. When they reached the bus-stand at about 7.10 a.m. they found that the bus for Etah via Sultanganj had already left. The next bus was due to go at 9.30 a. m. but, as the deceased thought that he could get a seat in some truck near the Prem Hotel and the Octroi Barrier, they left the bus-stand for the Octroi Barrier. When they reached the house of Kotwal Singh on the way, both the accused attacked the deceased with chhuri and knife, respectively; Jadunath had the chhuri and Girand Singh had the knife. Both the deceased and Prem Narain were unarmed. On hearing the cries of the deceased Prem Narain asked the appellants why they were attacking the deceased. Then Girand Singh, appellant, advanced towards him and gave a knife cut at his right wrist. On the deceased falling down both accused persons attacked him with their respective weapons. On his raising the alarm Mahesh Chandra and Dwarka Prasad who were coming

along the same road came and they shouted at the appellants. On hearing their shouts the accused ran away. The deceased died on the spot.

4. The First Information Report was lodged at 8 a. m., the Police Station being only two furlongs from the scene of occurrence. In the First Information Report, in the second column, under the heading "Name and residence of accused", it was stated as follows:

"1. Jadu Nath Singh, father's name not known and

2. Girand Singh father's name not known. Ahirs by caste residents of Garhia Kishunpur P. S. Bewar, Distt. Mainpuri."

The accused surrendered on March 12, 1968, and it appears that an application was filed by the advocate on their behalf that they be kept *ba pardah* as they might claim identification. Another application was put in on March 25, 1968, in which it was stated that the witnesses other than Prem Narain were strangers and they applied that there should be an identification parade. On April 19, 1968 the then public prosecutor submitted a report to the Additional District Magistrate as under:

"Accused Jadu Nath Singh and Girand Singh in case Cr. No. 24 under Section 302, I. P. C. P. S. Bewar have applied for identification, vide application herewith attached. It may be submitted that they are named in the F. I. R. and charge-sheet against them has also been received. The applications are moved to delay this case. Submitted for n. a."

The Additional District Magistrate (Judicial) passed the following order on the application, on April 20, 1968:

"As charge-sheet has already been received and the accused have been named by P. Ws. there appears to be no justification for ordering test identification. Accused be informed accordingly. The jail authorities be informed not to keep them *ba Pardah*."

5. We have set out these facts in detail because as will presently appear, one of the points raised by the learned counsel is that failure to put up the accused for identification either vitiated the trial or, in any case, rendered the evidence of P. W. 2, Mahesh Chandra, and P. W. 3, Dwarka Prasad, useless.

6. We may here notice that portion of the evidence of Dr. N. K. Mital, who conducted the post-mortem examination and on which one other point is sought to be founded. He found that the stomach was empty and the small intestines were half full and the large intestines were also half full. In cross-examination he stated that "since the stomach was empty, the deceased should have taken his last meal about 4 to 6 hours before the infliction of the injuries." He was asked: "The evidence is that the deceased took puries and vegetable at 8 p.m. on 25-2-68; and according to the case for the prosecution his murder took place at 7.30 a. m. on 26-2-68. At the time of post mortem the stomach was found empty and both the small and large intestines were found half full. Does it not indicate that in all likelihood the man was murdered between 3 and 4 a.m.?" To this question Dr. Mital answered:

"No. It is not an indication of this fact. After finishing his meal at about 8 or 8.30 p. m. on 25-2-68 the stomach could have got empty by 2 or 2.30 a.m. The digested food material should have come in the small intestine by about 2 or 2.30 a.m. Complete digestion takes place in the small intestine. . . And if he had answered the call of nature the preceding evening fully and completely, even then the small and large intestines might be half full and stomach empty if he had taken puries with vegetable at 8 p.m. on 25-2-68."

7. The learned Sessions Judge believed the evidence of Prem Narain, corroborated as it was by the injuries sustained by him in the course of the occurrence at the hands of one of the assailants, namely, Girand Singh. He also believed the evidence of Mahesh Chandra, P.W. 2, and Dwarka Prasad, P.W. 3. He relied on the fact that the appellants had absconded immediately after the crime and had only appeared before the Court as late as March 12, 1968, after proceedings under Sections 87 and 88 of the Code of Criminal Procedure had been taken against them. Regarding the claim of the appellants for identification the learned Sessions Judge observed that during the course of investigation both Mahesh Chandra and Dwarka Prasad had named the accused persons, and it would indeed have been surprising if the

Additional District Magistrate (Judicial) had directed the accused to be paraded at a test identification parade in the jail. He observed that the evidence indicated that the accused persons were not strangers even to Mahesh Chandra and Dwarka Prasad at the time of the occurrence. Mahesh Chandra had stated in his evidence that he had known the accused persons for about 4 years and that they were living at village Garhiya lying at a distance of three furlongs from Bewar, and that Girand Singh was reading at the Amar Shaheed Inter College, Bewar. Dwarka Prasad had stated that he had seen Girand visiting Bewar before that day. He had also seen Jadu Nath Singh at Bewar but only once or twice before that. For all these reasons the learned Sessions Judge held that the applications claiming identification were not bona fide and were intended to protract the proceedings, and accordingly he was unable to draw any adverse inference against the prosecution for the omission to parade the accused persons at a test identification parade in the jail.

8. The High Court believed the three eye-witnesses, Prem Narain, Mahesh Chandra and Dwarka Prasad. The High Court held that "Mahesh and Dwarka Prasad are wholly independent witnesses having no affinity with the deceased and entertaining no animosity towards the appellants." The High Court observed that these witnesses had claimed to have known the appellants for the last six or seven years as they had been frequently visiting the town of Bewar, and the appellant, Girand Singh, was a student in a college at Bewar.

9. The learned counsel for the appellants raised two principal points before us:

(1) Since the accused were denied identification the trial was vitiated;

(2) The medical evidence is in conflict with the prosecution case about the time of the assault.

10. The learned counsel further urged that the number and nature of injuries belie the prosecution story, and that the application by the deceased to the Superintendent of Police was nothing but a neshbandhi. He urged that the eye-witnesses were not reliable and the courts below had missed

the points that the appellants could not have anticipated that the deceased would be at this particular spot at that time.

11. The learned counsel relied on the following observations of the Lahore High Court in Sajjan Singh v. Emperor, AIR 1945 Lah 48 at p. 50.

"If an accused person is already well known to the witnesses, an identification parade would of course, be only a waste of time. If however, the witnesses claim to have known the accused previously, while the accused himself denies this, it is difficult to see how the claim made by the witnesses can be used as a reason for refusing to allow their claim to be put to the only practical test. Even if the denial of the accused is false, no harm is done, and the value of the evidence given by the witnesses may be increased. It is true that it is by no means uncommon for persons who have been absconding for a long time to claim an identification parade in the hope that their appearance may have changed sufficiently for them to escape recognition. Even so, this is not in itself a good ground for refusing to allow any sort of test to be carried out. It may be that the witnesses may not be able to identify a person whom they know by sight owing to some change of appearance or even to weakness of memory, but this is only one of the facts along with many others, such as the length of time that has elapsed, which will have to be taken into consideration in determining whether the witnesses are telling the truth or not."

12. State of U. P. v. Jagnoo, AIR 1968 All 333, refers to AIR 1945 Lah 48 with approval.

13. In re Sangiah, AIR 1948 Mad 113 the decision of the Lahore High Court in AIR 1945 Lah 48 was dissented from. Rajamannar, J., observed:

"I am unable to find any provision in the Code which entitles an accused to demand that an identification parade should be held at or before the enquiry or the trial. An identification parade belongs to the stage of investigation by the Police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that

which is given by the witness in Court. The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in Court. If a witness has not identified the accused at a parade or otherwise during the investigation the fact may be relied on by the accused, but I find nothing in the provisions of the Code which confers a right on the accused to demand that the investigation should be conducted in a particular way."

14. In *Parkash Chand Scgani v. State of Rajasthan*, an unreported decision of this Court Criminal Appeal No. 92 of 1956, D/- 15-1-1957 (SC) in connection with the point regarding identification it was observed:

"Much is sought to be made out of the fact that no identification parade was held at the earliest opportunity in order to find out whether P.W. 7 Shiv Lal could have identified the appellant as the person who was at the wheel of the car and drove it and reliance is placed upon *Awadh Singh v. State*, AIR 1954 Pat 483, *Pravash Kumar Bose v. The King*, AIR 1951 Cal 475 and also *Phipson on the Law of Evidence*, 9th Ed., p. 415 to justify the contention that in criminal cases it is not sufficient to identify the prisoner in the dock but the police should have held an identification parade at the earliest possible opportunity to show that the accused person had been connected with the crime. It is also the defence case that Shiv Lal did not know the appellant. But on a reading of the evidence of P.W. 7 it seems to us clear that Shiv Lal knew the appellant by sight. Though he made a mistake about his name by referring to him as Kailash Chandra, it was within the knowledge of Shiv Lal that the appellant was a brother of Manak Chand and he identified him as such. These circumstances are quite enough to show that the absence of the identification parade would not vitiate the evidence. A person, who is well known by sight as the brother of Manak Chand, even before the commission of the occurrence, need not be put before an identification parade in order to be marked out. We do not think that there is any justification for the contention that the absence of the identification parade or a mistake made as

to his name, would be necessarily fatal to the prosecution case in the circumstances."

15. In AIR 1954 Pat 483 it was held that the accused person may or may not have legal right to claim for test identification and the holding of test identification may or may not be a rule of law, but it is a rule of prudence. Test identification parade should be held especially when the accused persons definitely assert that they were unknown to the prosecution witnesses either by name or by face and they requested the authorities concerned to have the test identification parade held."

16. In AIR 1951 Cal 475, a Division Bench of the Calcutta High Court (Harries C. J. & Das Gupta, J.) held:

"The fact that the witnesses have identified in Court the accused is of very little consequence in a prosecution under S. 384, Penal Code, when none of the witnesses knew the accused from before. . . the corroborative evidence which one is entitled to expect in cases of this nature is the evidence of the witnesses having pointed the accused whom they identified in Court from the midst of other persons with whom they were mixed up at a test identification parade. The evidence of their having identified such persons at a test identification parade has no substantive value, but is very important corroboration of their evidence in Court."

17. In *Kanta Prasad v. Delhi Administration*, 1958 SCR 1218 at p. 1221 = (AIR 1958 SC 350 at p. 351), a point was made regarding non-holding of test identification parade by the police and this Court observed:

"As for the test identification parade, it is true that no test identification parade was held. The appellants were known to the police officials who had deposed against the appellants and the only persons who did not know them before were the persons who gave evidence of association, to which the High Court did not attach much importance. It would no doubt have been prudent to hold a test identification parade with respect to witnesses who did not know the accused before the occurrence, but failure to hold such a parade would not make inadmissible the evidence of identifi-

cation in court. The weight to be attached to such identification would be a matter for the courts of fact and it is not for this court to reassess the evidence unless exceptional grounds were established necessitating such a course."

18. It seems to us that it has been clearly laid down by this Court in Criminal Appeal No. 92 of 1956, D/-15-1-1957 (SC) that the absence of test identification in all cases is not fatal and if the accused person is well-known by sight it would be waste of time to put him up for identification. Of course if the prosecution fails to hold an identification on the plea that the witnesses already knew the accused well and it transpires in the course of the trial that the witnesses did not know the accused previously, the prosecution would run the risk of losing its case. It seems to us that if there is any doubt in the matter the prosecution should hold an identification parade specially if an accused says that the alleged eye-witnesses did not know him previously. It may be that there is no express provision in the Code of Criminal Procedure enabling an accused to insist on an identification parade but if the accused does make an application and that application is turned down and it transpires during the course of the trial that the witnesses did not know the accused previously, as pointed out above the prosecution will, unless there is some other evidence, run the risk of losing the case on this point.

19. In the present case, however, it is clear that P.W. Mahesh Chandra knew the accused persons for about four years for he said:

"I know the accused persons, Jadunath Singh and Girand Singh for about 4 years. They live at village Garhiya lying at a distance of three furlongs from Bewar. Girand Singh is reading at the Amar Shaheed Inter College, Bewar."

No cross-examination was directed on this point. P.W. 3, Dwarika Prasad, stated:

"I had seen Girand visiting Bewar before that but I had seen Jadunath at Bewar only once or twice before that day. Identifies both the accused persons in the dock. Lays hand correctly on Jadunath; and also lays hands correctly on Girand in the dock."

In cross-examination he stated:

"I had seen Jadunath accused at Bewar at the shop of one Chhaku once or twice before the occurrence. I had seen him two or 2½ years back."

20. It seems to us that the reason given by the Public Prosecutor in the report and the reason given by the Additional District Magistrate (Judicial) in the order directing that identification requested for be not held were not valid. The fact that a charge-sheet had been received and the accused had been named by P.Ws. was no justification for not having ordered the test identification. But on the facts of this case it is clear that P.W. 2 at least knew the accused from before. As regards P.W. 3, although he claims to have known the accused, it is clear that his knowledge of the accused was very scant and if it had not been for the evidence of P.W. 2 we would not have placed reliance on the evidence of P.W. 3 in view of the fact that the police did not ask him to identify the appellant.

21. It is stated in Phipson on the Law of Evidence, 9th Ed., p. 415, as follows:

"In criminal cases it is improper to identify the accused only when in the dock; the police should place him, beforehand, with others, and ask the witness to pick him out. Nor should the witness be guided in any way, nor asked 'Is that the man?'". We consider that the same is the law in India, if the identity is in doubt.

22. Accordingly on the facts of this case we are of the opinion that the trial was not vitiated because the accused persons were denied identification.

23. Regarding the second point, we have already extracted the evidence of the doctor, and it is quite clear to us that the evidence is not in conflict with the prosecution case. If the occurrence took place at about 7.30 a.m. and the deceased had not taken any food in the morning, his stomach would still be empty at 7.30 a.m. If anything the medical evidence destroys the case of the defence that the murder took place at about 3 in the morning. We are unable to think that the deceased would leave with Prem Narain at 3 a.m. to catch a bus which was supposed to leave at about 7 a.m.

24. This appeal is by special leave and this court does not re-ap-

preciate the evidence. The other points raised by the learned counsel are of that nature and at any rate there is no substance in those points.

25. The appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 369
(V 58 C 89)

(From: Punjab and Haryana)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Bhagwan Das (dead) by his legal representatives and others, Appellants
v. Chet Ram, Respondent.

Civil Appeal No. 192 of 1970, D/- 16-10-1970.

(A) Punjab Pre-emption Act (1 of 1913), Section 15 (1) (a) Fourthly (as amended by Act 10 of 1960) — Right of pre-emption of tenant — Right of tenancy must be subsisting at time of institution of suit for pre-emption as also at time of passing of decree by trial Court. (1970) 72 Pun LR 325 and (1967) 69 Pun LR 414, Overruled; R. S. A. No. 1949 of 1968, D/- 15-12-1969 (Punj & Har), Reversed.

A pre-emptor in order to succeed must have a right to pre-empt not only at the time of sale of the lands by the landlord but also at the time of the institution of the suit for pre-emption and also at the time of passing of the decree in the suit by the trial Court. In other words his tenancy must remain intact and he must hold the land in his capacity as a tenant till the date of the decree. (1970) 72 Pun LR 325 and 1967-69 Pun LR 414, Overruled; R. S. A. No. 1949 of 1968, D/- 15-12-1969 (Punj. and Haryana), Reversed; AIR 1941 Lah 433 (FB) and AIR 1932 PC 57 and AIR 1944 Lah 172 (FB) and AIR 1966 Punj 374 (FB), Relied on; 1964-66 Pun LR 1063, Ref. to. (Para 6)

The sale of the lands alone cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the vendor. But if his tenancy is determined by a decree for eviction he loses

* (R. S. A. No. 1949 of 1968, D/- 15-12-1969 — Punj. and Har.)

his status of a tenant. He then does not satisfy the first requirement of Section 15 (1) (a) Fourthly, that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of decree. (Para 7)

(B) Constitution of India, Art. 136 — Question not raised in Courts below and involving an investigation into matters of fact — Cannot be allowed to be raised in appeal by special leave. (Para 9)

Cases Referred: Chronological Paras

- (1969) Letters Patent Appeal No. 71 of 1965, D/- 19-11-1969 =
(1970) 72 Pun LR 325, Kashmiri Lal v. Chuhan Ram 4
- (1967) 69 Pun LR 414 = ILR (1967) 2 Punj 654, Sohan Singh v. Udho Ram 4
- (1966) AIR 1966 Punj 374 (V 53) = 1966-68 Pun LR 345 (FB), Ramji Lal v. State of Punjab 5
- (1964) 66 Pun LR 1063 = 1966 Cur LJ 480, Surjit Singh v. Gurnam Singh 6
- (1944) AIR 1944 Lah 172 (V 31) = ILR (1944) 25 Lah 473 (FB) Faiz Mohd. v. Fajar Ali Khan 5
- (1941) AIR 1941 Lah 433 (V 28) = ILR (1942) 23 Lah 155 (FB), Thakur Madho Singh v. Lt. James R. R. Skinner 5
- (1932) AIR 1932 PC 57 (V 19) = 59 Ind App 138, Hans Nath v. Ragho Prasad Singh 5

S. C. Manchanda, Sr. Advocate (M/s. S. K. Mehta and K. L. Mehta, Advocates of M/s. K. L. Mehta and Co. and K. R. Nagraj, Advocate, with him), for Appellants; M/s. Rameshwar Dial, S. K. Bagga, S. D. Sood and Mrs. S. Bagga, Advocates, for Respondent.

The Judgment of the Court was delivered by

GROVER, J. — This is an appeal by special leave from a judgment of the Punjab and Haryana High Court.

2. In December 1966 Labhu Ram who was the owner of the land in dispute sold the same in two lots to Bhagwan Das (deceased) now re-

presented by his legal representatives and others. The lands mentioned in cls. (a) and (b) of the title of the plaint in the suit out of which the present appeal has arisen were sold for Rs. 20,000 and Rs. 1,000/- respectively. The respondent Chet Ram was a tenant-at will of the lands covered by the sales. Bhagwan Das and others filed a suit against Chet Ram in the revenue Court for ejectment under Section 14-A (i) read with Section 9 (1) of the Punjab Security of Land Tenures Act 1953 which was decreed on July 31, 1967. On August 31, 1968, Bhagwan Das and others entered into possession of the aforesaid lands after evicting Chet Ram by virtue of the decree for eviction obtained against him.

3. After his eviction Chet Ram the present respondent filed a suit for possession of the lands which were the subject matter of sale by pre-emption under Section 15 (1) (a) Fourthly of the Punjab Pre-emption Act, 1913, (Punjab Act 1 of 1913), hereinafter called the 'Act'. By that provision the right of pre-emption has been declared to vest in the tenant who holds under tenancy of the vendor the land or property sold or a part thereof. It was admitted before the trial Court that the respondent was a tenant before July 31, 1967 and that before the institution of the pre-emption suit his tenancy had been determined. The trial Court dismissed the suit. On appeal the learned Additional District Judge, in view of certain decisions of the Punjab High Court, allowed the appeal and decreed the suit. The Judgment was upheld in second appeal by the High Court.

4. The sole question for determination is whether a person who has ceased to hold the land sold as a tenant can succeed in a suit for possession by pre-emption under Section 15 (1) (a) Fourthly. The Punjab Haryana High Court in *Kashmiri Lal v. Chuhan Ram*, Letters Patent Appeal No. 71 of 1965, D/- 19-11-1969 = (1970) 72 Pun LR 325 had expressed the view that in a suit based on a right under the aforesaid clause the plaintiff was required to prove only that he was a tenant under the vendors on the date of the sale and not at any time thereafter as he could not remain a tenant under the vendors after they had sold the pro-

perty. In certain other judgments delivered by learned single Judges of the Punjab High Court it had been recognised that the rule was firmly established in the law relating to pre-emption that a pre-emptor in order to succeed must have a right to pre-empt not only at the time of sale but also at the institution of the suit and the passing of the decree by the trial Court. In other words, the pre-emptor's right should subsist up to the date of the passing of the decree and if he lost that right at any time before the decree was granted his suit must fail. These learned Judges of the High Court, however, considered that the language of Section 15 (1) (a) Fourthly showed that the legislature intended to depart from the well-settled principle mentioned before and all that has to be seen is whether the plaintiff was a tenant of the vendor on the date of sale (see *Sohan Singh v. Udho Ram*, 1967-69 Pun LR 414).

5. In *Hans Nath v. Ragho Prasad Singh*, 59 Ind App 138 = (AIR 1932 PC 57), it was laid down by the Privy Council that the decisive date as regards the right of a pre-emptor to pre-empt the sale was the date of the decree. A Full Bench of the Lahore High Court in *Thakur Madho Singh v. Lt. James R. R. Skinner*, ILR (1942) 23 Lah 155 = (AIR 1941 Lah 433 (FB)), while considering the relevant provisions of the Act applied this rule to a case where a vendee had improved his status during the pendency of the pre-emption suit and held that a vendee could defeat the right of a pre-emptor by improving his status at any time before the passing of the decree. The right of pre-emption is a weak one and is liable to be defeated by all legitimate means at the instance of a vendee against whose contract an inroad is being attempted by the pre-emptor. The vendee is on the defensive and is entitled to arm himself with a shield in order to protect his right. The pre-emptor is an aggressor and as he wishes to dislocate the vendee he must show that the superior right of pre-emption which he had at the date of the sale continued to remain superior at all relevant times: vide *Faiz Mohammad v. Fajar Ali Khan*, ILR (1944) 25 Lah 473 = (AIR 1944 Lah 172 (FB)). In the latest Full Bench

decision of the Punjab High Court in *Ramji Lal v. The State of Punjab*, 68 Pun LR 345 = (AIR 1966 Punj 374 (FB)) the rule that a pre-emptor must maintain his qualification to pre-empt upto the date of the decree was recognised as well settled.

6. In the presence of the above principle which is firmly entrenched in the law of pre-emption it is difficult to conceive that the legislature intended to depart from it in Section 15 (1) (a) Fourthly nor has any reason been suggested for doing so. The language employed is not very happy but the clear requirement is that the tenant must hold the land as such. If his tenancy has come to an end and he has been dispossessed it can never be said that he is holding the land under tenancy of any one. The legislature can hardly be attributed the intention of giving the right to a tenant, who has been dispossessed and whose tenancy has been determined either before or during the pendency of the suit, to obtain a decree for possession by pre-emption. This is particularly so as the statutory right of pre-emption is one which attaches to the land and is not a mere personal right. There could be no basis for the legislature giving an indefeasible right to a person who happens to be in possession of the land sold as a tenant of the vendor. His right is neither better nor worse than any other person who has been conferred that right by the provisions of Section 15 of the Act. For instance, a co-sharer has been given a right to pre-empt the sale of a share out of joint land by Clause (b) Fourthly of Section 15 (1). If a co-sharer must retain his right upto the date of the decree, which he must, (See *Surjit Singh v. Gurnam Singh*, 1964-66 Pun LR 1063), there is no intelligible ground for treating a tenant differently. The tenant must show his right at all material times before he can succeed in a suit for pre-emption. In other words his tenancy must remain intact and he must hold the land in his capacity as a tenant till the date of the decree.

7. It must be remembered that sale alone does not and cannot divest the tenant of his right to hold the land of which he is in possession by virtue of his tenancy under the ven-

dor. But if his tenancy is determined by a decree for eviction he loses his status of a tenant. He then does not satisfy the first requirement of Section 15 (1) (a) Fourthly that he is a tenant who holds the land. In that situation he cannot succeed in a pre-emption suit if the decree for eviction has been passed after the sale but before the institution of the suit or during its pendency and before the date of the decree. This would be so by applying the well-established rule which, as stated earlier, has become a part of the law relating to pre-emption.

8. In the present case not only a decree for eviction was passed against the respondent but he was also actually dispossessed from the land in his tenancy pursuant to the decree before he filed the pre-emption suit. We are altogether unable to see how he could be granted a decree in such a suit.

9. An attempt was made by means of C. M. P. No. 4634 of 1970 on behalf of the respondents to reopen the question of the area in respect of which the decree for eviction had been passed on July 31, 1967. It was maintained that it related only to certain Khasra Numbers which were covered by the first sale shown as clause (a) in the heading of the plaint and that there was no order relating to eviction from the land covered by the second sale mentioned in clause (b) therein. This question was never raised in the courts below and as it involves an investigation into matters of fact it was not possible to allow the same to be reopened at this stage.

10. The appeal is allowed and the suit of the respondent is dismissed. In view of the nature of the points involved the parties are left to bear their own costs in this court.

Appeal allowed.

AIR 1971 SUPREME COURT 372
(V 53 C 90)

(From: Allahabad)*

J. C. SHAH AND A. N. GROVER, JJ.

Kashinath, Appellant v. Smt. Kudsia Begam and others, Respondents.

Civil Appeal No. 230 of 1970, D/- 16-12-1970.

(A) Representation of the People Act (1951), Section 83 — Amendment of election petition — Rectification of defective petition by way of amendment after expiry of period of limitation for filing it is not permissible. (Para 4)

(B) Representation of the People Act (1951), Section 82 (1) (b) — Parties to petition — A candidate who has withdrawn has also to be joined as respondent if there is allegation of corrupt practice against him. (Paras 6, 7)

Cases Referred: Chronological Paras
(1958) AIR 1958 SC 857 (V 45) =
1959 SCR 868, S. B. Adityan v.
S. Kandaswami 6

M. C. Chagla, Sr. Advocate, (Mr. N. K. Shejwalkar, Miss Swaranjit Sodhi and Mr. S. S. Khanduja, Advocates, with him), for Appellant; Mr. C. B. Agarwala, Sr. Advocate, (M/s. Saghar Ahmad, C. P. Lal, Sri Ram Srivastava and N. N. Sharma, Advocates, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

GROVER, J.: This is an appeal under S. 116-A of the Representation of the People Act 1951, hereinafter called the "Act" from a judgment of the Allahabad High Court dismissing an election petition filed by the appellant challenging the election of respondent No. 1 to the U. P. Legislative Assembly from Constituency No. 84 Sandila (District Hardoi) held in February 1969 on the ground that one of the candidates had not been made a party to the petition.

2. The date for filing the nomination papers of the candidates for the mid-term election in the State of U. P. was January 9, 1969. On that date nine candidates filed their nomination papers. Aizaz Rasul, who had the title of Nawab and who is the husband of respondent No. 1, had been nominated

as a candidate and his nomination papers were held to be in order by the Returning Officer on January 9, 1969. After the nomination papers had been accepted Aizaz Rasul and one other candidate withdrew from the contest and seven candidates were left in the field. The polling took place on February 7, 1969. Respondent No. 1 was declared elected on February 10, 1969. It is unnecessary to mention the votes polled by all the candidates. It would be sufficient to mention that respondent No. 1 secured 32,031 and the appellant 31,955 votes. On March 27, 1969 the appellant filed an election petition in the High Court of Allahabad. Respondent No. 1 and other six candidates who had contested the election were duly impleaded as parties but Aizaz Rasul who had withdrawn from the contest was not made a party. The petition was dismissed in accordance with the terms of S. 86 (1) of the Act on the ground that the allegations of commission of corrupt practices had been made against Aizaz Rasul and therefore it was incumbent on the election petitioner to have impleaded him as a respondent.

3. It is not disputed on behalf of the appellant that Aizaz Rasul was a necessary party and the failure to implead him would entail dismissal of the election petition if there was a candidate against whom allegations of corrupt practice had been made in the petition. Section 82 (b) of the Act lays down in mandatory terms that such a candidate must be impleaded as a party. The allegations relevant for the purpose of disposal of this appeal which need be noticed from the election petition are contained in clauses (b) and (c) of para 20 and para 21. These are in the following terms:

(b) "That respondent No. 1 herself and through her consent, her agents obtained or procured and attempted to obtain or procure the services of Sri Madan Gopal Misra, Sanitary Inspector Kachauna Block Sandila, a person in the service of the U. P. Government who resides in the kothi of respondent No. 1 at Sandila for the furtherance of the prospects of her election. A complaint regarding her working at the aforesaid election was made by Bishamber Dayal Gupta of Jan Sangh party to the District Magistrate, District Medical Officer of Health and District Election Officer, Hardoi on 3-

* (Ele. Petn. No. 2 of 1969, D/- 16-12-1969 — All—Luck. Bench.)

2-1969, particulars of this corrupt practice as far as possible are being given in schedule VIII annexed to this petition.

(c) "That the said Madan Gopal Misra, Sanitary Inspector (mentioned in foregoing paragraph) committed corrupt practice of undue influence defined in S. 123 (2) of the Representation of the People Act with the consent of respondent No. 1 her election agent by interfering with the free exercise of electoral rights of electors taking advantage of his official position and telling them that they will have to suffer from his hands in case they will not support the candidature of respondent No. 1 and vote for her. The name, date and place of commission of such corrupt practice are the same as

(Contd. on Col. 2)

are given in Schedule VIII to the election petition.

That in case it is not proved that the corrupt practices mentioned in paragraph 20 (and in its sub-paragraphs) were committed by respondent No. 1 and her election agent or by her agents with her consent they were committed by the persons named in respective Schedules viz. Schedules VIIA and VIII in the interest of the respondent No. 1 and the same has materially affected the result of the election as the respondent No. 1 who has succeeded by a margin of 76 votes she secured more than 1000 votes due to the corrupt practices committed in her interest". Schedule VIII of the petition which is a part of para 20 (c) may also be reproduced to the extent necessary:

"SCHEDULE VIII

Name of the person committed corrupt practice.	Date	Place	Remarks
Nawab Ezaz Rasool husband and Election Agent of respondent No. 1.	2.2.1969	Village Malaiya	He went with Nawab Ezaz Rasool in a Jeep and canvassed support for her in that village along with him.
Respondent No. 1.	3.2.1969	Village Raison	He accompanied respondent No. 1 in her jeep and canvassed support for her in the village along with her.
"	"	Village Samodha	"
Nawab Ezaz Rasool.	4.2.1969	Kachauna	He accompanied the Nawab and canvassed support for respondent No. 1 in the said village."

4. An attempt was made long after the period of limitation for filing the election petition had expired to amend column I of the heading of Schedule VIII by the insertion of words "in whose company Madan Gopal Misra" between the words persons and committed in column I of that Schedule. That was rightly disallowed by the learned trial judge as a defective petition could not be allowed to be rectified after the period of limitation for filing it had expired.

5. It has been pointed out by the learned counsel for the appellant that so far as the allegation contained in para 20 (b) is concerned it has been found by the High Court that the officer mentioned therein does not fall within the category of officers specified in Section 123 (7) of the Act. It has, therefore, to be decided whether the allegations in para 20 (c) read with Schedule VIII relate to the commission

of a corrupt practice by respondent No. 1's husband and election agent Aizaz Rasul within the meaning of Section 123 (2) of the Act. A great deal of stress has been laid on the contents of para 20 (c) and it has been emphasised that the allegation of commission of a corrupt practice of undue influence was made against Madan Gopal Misra Sanitary Inspector, although it was stated that the alleged corrupt practice had been committed with the consent of respondent No. 1 and her election agent. Reliance has been placed on S. B. Adityan v. S. Kandaswami, 1959 SCR 868 = (AIR 1958 SC 857) where it was observed at page 876 that a corrupt practice committed with the consent of a candidate was not in itself a new kind of corrupt practice. The consent by a candidate to the commission of a corrupt practice by someone else, whatever its consequences might be, was not itself a cor-

rupt practice. Therefore to say that a candidate consented to corrupt practice being committed by accepting a gift made to him to induce him to withdraw his candidature was not to say that he himself committed the corrupt practice. The decision in that case is clearly distinguishable on facts.

6. Now S. 123 (2) defines "undue influence" as meaning any direct or indirect interference or attempt to interfere on the part of the candidate or his agent or of any other person with the consent of the candidate or his election agent with the free exercise of any electoral right. According to proviso (a) (i) any such person referred to above who threatens any candidate or any elector, inter alia, with injury of any kind shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector. The meaning of corrupt practice in cl. (b) of S. 82 of the Act has to be determined with reference to S. 123 (2). It has thus to be seen whether any allegations of corrupt practice were made against Aizaz Rasul who was admittedly a candidate within the meaning of S. 79 (b) of the Act.

7. In our judgment the High Court was right in reading the contents of Schedule VIII in the context of the allegations made in paragraphs 20 (b) and 20 (c) of the petition. The election agent of respondent No. 1 Aizaz Rasul is alleged to have availed of the services of Misra the Sanitary Inspector who is stated to be living in his kothi at Sandila to exercise undue influence on the voters with his assistance and he is actually alleged to have exercised the said influence by carrying Misra in his jeep to Malaiya and Kachauna villages where along with him the voters were asked by Misra to vote for respondent No. 1 on pain of their suffering injury at his hands if they did not do so. The fact that corrupt practices were alleged in the aforesaid sub-paragraphs of Para 20 as having been committed by respondent No. 1 and her election agent is proved from what is stated in the first part of para 21 as well. We are unable to accept that whatever allegations of corrupt practices were made they were confined only to Misra the Sanitary Inspector. The High Court was, therefore, justified in dismissing the petition under S. 86 (1) of the Act.

8. The appeal fails and it is dismissed. But in the circumstances we make no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 374

(V 58 C 91)

(From: Rajasthan)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Smt. Jatan Kanwar Golcha, Appellant
v. M/s. Golcha Properties Private Ltd.,
(In Liquidation), Respondent.

Civil Appeal No. 1104 of 1970, D/-
16-12-1970.

Companies Act (1956), Sections 483, 446, 457 — Order by Company Judge to sale by auction lease-hold rights of Company under liquidation — Notice of either sale or of proceedings culminating in order of sale not given to landlord either by Official Liquidator or by Court — Right of landlord to file appeal under Section 483 is not deprived by Rule 139 of the Companies (Court) Rules (1959) — No necessity of filing separate suit under Sec. 446 — Both Official Liquidator and Company Judge are bound by rules of natural justice to issue notice to landlord — Civil Spl. Appeal No. 126 of 1970, D/- 9-4-1970 (Raj), Reversed — Companies (Court) Rules (1959), Rules 139, 103 — Civil P. C. (1908), Section 96.

Where on report of the Official Liquidator under Section 457 the Company Judge orders sale of lease-hold rights of a Company under liquidation, but no notice of the proceedings is given to landlord either by the Official Liquidator or by the Court, the landlord is entitled to appeal under Section 483 against the order of sale. The Official Liquidator as well as the Company Judge are bound by the rules of natural justice to issue a notice to the landlord before ordering the sale. The provisions of Rule 103 of the Companies (Court) Rules (1959) also expressly provide issue of notice before exercising power under Section 457 (1) (c). In absence of such notice the landlord cannot be deprived of his right to file appeal under Section 483 on ground that he failed to appear before Court as required by Rule 139 of the Companies (Court)

*(Civil Special Appeal No. 126 of 1970,
D/- 9-4-1970 — Raj.)

AO/AO/G171/70/DVT/G

Rules (1959) and he cannot be directed to file separate suit after obtaining leave of Company Judge under Section 446. It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment. Civil Spl. Appeal No. 126 of 1970, D/- 9-4-1970 (Raj), Reversed.

(Paras 3, 4)

Mr. M. C. Chagla, Senior Advocate, (M/s. F. S. Nariman and P. N. Tewari, Advocates, and Mr. O. C. Mathur, Advocate, of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. M. C. Setalvad, Senior Advocate, (Mr. B. P. Maheshwari, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.:— This is an appeal from a judgment of the Rajasthan High Court holding that the appellant was not entitled to file an appeal against the order of the Company Judge directing sale of lease hold rights of the Golcha Properties (P) Ltd. (in liquidation) in the land belonging to the appellant.

2. The facts briefly are that on November 5, 1960, an agreement was entered into between the appellant the respondent Company allowing Golcha Properties (P) Ltd. to construct a cinema theatre within three years from the issue of the 'No-Objection Certificate' on land measuring 42,900 sq. feet at Bhagvandas Road, Jaipur belonging to the appellant. The Company deposited a sum of Rs. 5 lakhs by way of security. In October 1963 no objection certificate is stated to have been issued for construction of a cinema theatre. In 1966 a petition for winding up of the company was filed in the Rajasthan High Court. On May 10, 1968 an order for winding up of the Company was made and a liquidator was appointed. On July 11, 1969 the Official Liquidator made a report to the Company Judge for sale of the lease-hold rights of the Company in the land belonging to the appellant and the structures standing on it. It appears that the Official Liquidator made a report under Sec. 457 of the Indian Companies Act 1956 to obtain the necessary orders for sale. On July 21, 1969 the Company Judge without hearing any one or issuing notice to the appellant ordered that the lease-hold rights and the structures be auctioned as proposed by the Official Liquidator. On October 3, 1969 the appel-

lant's attorney sent a letter to the Official Liquidator stating that the licence granted to the Company under an agreement dated November 5, 1960 stood revoked and called upon him to deliver possession of the land and also pay compensation amounting to Rs. 10 lakhs. On February 9, 1970 the Official Liquidator sent a reply claiming that the company was entitled to a lease for 20 years under the agreement. On March 14, 1970 a notice was issued in a newspaper (Times of India) in respect of the proposed auction sale of lease-hold rights which was to take place on April 14, 1970. According to the appellant she enquired from the Official Liquidator under whose authority the property was being sold to which no reply was sent by the Official Liquidator. On April 3, 1970 the appellant applied for a certified copy of the order dated July 21, 1969 after taking inspection of the record in the High Court. The certified copy was sent on April 24, 1970. On the same date the appellant filed an appeal before the High Court. The High Court rejected that application summarily but recorded a short order.

3. In the order of the High Court reference has been made to Rule 139 of the Companies (Court) Rules 1959 and it has been pointed out that since the appellant had not appeared before the Company Judge she was not entitled to maintain the appeal. It was conceded that no notice had ever been sent to her either by the Official Liquidator or the Company Judge before the order appealed against relating to appellant's property was made. The High Court was of the view that the only remedy of the appellant was by way of a suit after obtaining leave of the Company Judge under Section 446 of the Act. Now an appeal lies under Section 483 of the Act from any order made or decision given in the matter of winding up of a company by the Court and it lies to the same Court to which, in the same manner in which and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. There can be no manner of doubt that an appeal was competent against the order made by the Company Judge on July 21, 1969 in view of the terms of Section 483. The only question is whether because the official liquidator failed to discharge his duties properly by having a notice issued to the appellant, whose rights were directly affected by the order proposed to be

made, the appellant was debarred from filing the appeal. In our opinion apart from Rule 139 to which reference has been made by the High Court the Official Liquidator as well as the learned Company Judge were bound by the rules of natural justice to issue a notice to the appellant and hear her before making the order appealed against. If there was default on their part in not following the correct procedure it is wholly incomprehensible how the appellant could be deprived of her right to get her grievance redressed by filing an appeal against the order which had been made in her absence and without her knowledge. It would be a travesty of justice if a party is driven to file a suit which would involve long and cumbersome procedure when an order has been made directly affecting that party and redress can be had by filing an appeal which is permitted by law. It is well settled that a person who is not a party to the suit may prefer an appeal with the leave of the appellate Court and such leave should be granted if he would be prejudicially affected by the judgment.

4. Rule 103 of the Company's (Court) Rules provides for taking out summons for directions not only with reference to the settlement of the list of contributories and the list of creditors but also the exercise by the official liquidator of all or any of the powers under Section 457 (1) and any other matter requiring directions of the Court. The exercise of the power under Section 457 (1) (c) of the Act to sell the immoveable and moveable property of the Company by public auction or private contract would certainly fall within the ambit of the Rule. That Rule expressly provides for issuing of a notice of the summons to the petitioner on whose petition the order for winding up was made. It is implicit that if the directions which have to be given by the Court would affect any person prejudicially he must be served with a notice of the summons under the general rule of natural justice and that no order should be made affecting the rights of a party without affording a proper opportunity to it to represent its case. The High Court was thus clearly in error in not entertaining and deciding the appeal preferred by the appellant who was the owner of the land in which lease hold rights said to have been created by her in favour of the Company in liquidation were sought to be sold.

5. The appeal is allowed and the order of the High Court is set aside. The case is remanded to the High Court for disposing of the appeal in accordance with law. Costs shall abide the event.

Appeal allowed.

AIR 1971 SUPREME COURT 376
(V 58 C 92)

(From:— Calcutta)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Maharajadhiraj of Burdwan, Udaychand Mahatab Chand, Appellant v. Subodh Gopal Bose and others, Respondents.

Civil Appeal No. 2412 of 1966, D/- 17-12-1970.

(A) Constitution of India, Article 136 — Unless important piece of evidence has been ignored or any irrelevant consideration had entered into the decisions of Courts below, the Supreme Court would not interfere with the concurrent findings of fact reached by them.

(Para 6)

(B) Constitution of India, Article 136 — New plea raising question of fact cannot be entertained in appeal with special leave.

(Para 9)

(C) Limitation Act (1963), Article 65 — Possession of the lands by a co-owner however long it might be cannot confer on him any right unless it is adverse to other co-owners.

(Para 11)

Mr. P. Chatterjee, Sr. Advocate, (M/s P. K. Chatterjee and Rathin Das, Advocates, with him), for Appellant; Mr. A. K. Sen, Sr. Advocate, (M/s. Somen Bose and Joy Gopal Ghosh, Advocates, and Mr. G. S. Chatterjee, Advocate of M/s. Kshatriya and Chatterjee, with him), for Respondent No. 1.

The Judgment of the Court was delivered by

HEGDE, J.:— This is an appeal by certificate. The defendant No. 1 is the appellant in this appeal. Respondent No. 1 is the plaintiff in the suit. The material facts of the case are as follows:

2. Respondent No. 1 purchased Touzi No. 6 in Mahal Roynagar in a sale under Act XI of 1859 on January 6, 1936.

*(A. F. O. D. No. 243 of 1954, D/- 7-6-1965 — Cal.)

AO/AO/G173/70/MLD/T

That sale took effect from September 29, 1935. He took delivery of possession of the property purchased by him through the Collector of 24, Parganas on June 4, 1936. Thereafter he got his name registered under the Land Registration Act in substitution of the name of the previous recorded proprietor. According to Respondent No. 1 he had a share in the suit property, but as his claim was denied by the appellant, he instituted a title suit in the Court of the Subordinate Judge, Alipore against the appellant and others for declaration of his title and for joint possession to an undivided 1 anna 3 gondas share in 74 Bighas 4 Cottahs of land in premises No. 2, Judge's Court Road, Alipore, Calcutta which comprised former premises Nos. 5, 5/1 and 6, Alipore Lane and Nos. 13 and 14 of Bainabpara Lane and mesne profits. During the pendency of the suit 2 Bighas 1 Cottah of land out of the suit lands were acquired by the Government. Thereupon Respondent No. 1 got his plaint amended and confined the relief asked for to 72 Bighas and 3 Cottahs but he claimed a decree against the appellant for a proportionate share i.e., Rs. 17,609-6-0 from out of the compensation amount paid for the lands acquired. The suit lands are in Mouja Alipore. According to the respondent they are joint lands of Toujis Nos. 1 to 6, 8 to 16, 33, 51, 53 and 91 of the 24 Parganas District excepting 2 Blocks of separately demarcated lands which are in Touji No. 1070.

3. The appellant denied the plaintiff's claim that the suit lands or any portion thereof were parts of Touji No. 6. According to him they were of his exclusive ownership and the plaintiff had no right, title or interest therein. In the alternative he pleaded that he had acquired permanent rights in those lands by being in exclusive possession thereof for a long time and further that Toujis Nos. 33 and 53 were divided. The other pleas taken by him and pressed in this Court will be considered at the appropriate stage.

4. The trial Court came to the conclusion that 51 Bighas, 17 Cottahs 1 Chittak in Mouja Alipore were joint lands of Toujis 1 to 6, 8 to 16, 33, 51, 53 and 91 and respondent No. 1 had title to an undivided 1 anna, 3 gondas share therein as owner of Touji No. 6. Consequently it gave to respondent No. 1 a decree for joint possession with the appellant of his undivided 1 anna 3 gondas share and mesne profits. Further it decreed the 1st respondent's claim for his share in the

compensation amount. The Court rejected the defendant No. 1's plea that Toujis 33 and 53 were divided.

5. Defendant No. 1 appealed to the High Court of Calcutta against the judgment and decree of the trial Court. The High Court agreeing with the trial Court held that the division pleaded by the defendant No. 1 is not true. It also came to the conclusion that Mouja Alipore were the joint lands of Toujis 1 to 6, 8 to 16, 33, 51, 53 and 91. But on an examination of the oral and documentary evidence, it held that the extent of joint lands was only 25 Bighas 5 Cottahs 1 Chittak and 45 Sq. Feet. Accordingly it gave the plaintiff a decree for joint possession in respect of 1 anna 3 gondas share in respect of those lands. It also decreed mesne profits but the amount of mesne profits was left to be determined by separate proceedings. It confirmed the decree of the trial Court as regards respondent No. 1's share in the compensation amount.

6. Both the trial Court and the High Court have concurrently come to the conclusion that 25 Bighas 2 Cottahs 1 Chittak and 45 Sq. Feet in Mouja Alipore are joint lands pertaining to Toujis 1 to 6, 8 to 16, 33, 51, 53 and 91. This Court does not ordinarily interfere with the concurrent findings of fact reached by the Courts below unless it is shown that any important piece of evidence has been ignored or any irrelevant consideration had entered into the decision of the Courts below. The Counsel for the appellant contended that in arriving at their conclusions both the trial Court and the High Court have overlooked Section 27 of Regulation VIII of 1793. This Regulation does not appear to have been relied on by any of the parties to the proceedings either in the trial Court or in the appellate court, nor do we think that that Regulation has any bearing on the issues arising for decision in this case. That Regulation says:

"When a portion of land stands in the joint names of several proprietors or of one for many, but each proprietor has his separate share in his own possession and management or in that of an agent for him, the settlement is to be made for each share with the person in possession and his land is to be held exclusively responsible for the revenue assessed upon it."

7. In the present case it is not the case of respondent No. 1 that each proprietor in the joint estate had a separate share in his own possession and management or that of an agent for him; nor do

we think S. 23 (sic) of that Regulation which was repealed as far back as 1805 has any relevance for our present purpose.

8. So far as the question of division pleaded by the appellant in respect of some of the Toujis is concerned, the concurrent finding of the Courts below is not liable to be reopened.

9. It was urged on behalf of the appellant that the lands in possession of the appellant are not in excess of his share in the joint property; hence the plaintiff cannot get any relief in the present suit. No such plea was put forward in the trial Court or in the High Court. The plea raised raises a question of fact. Hence that question cannot be gone into in this appeal.

10. In view of the finding of the High Court that 25 Bighas 2 Cottahs and 1 Chittak 45 Sq. Feet in Mouja Alipore are joint lands pertaining to Toujis 1 to 6, 8 to 16, 33, 51, 53 and 91, it must be held that respondent No. 1 has a share in those lands.

11. We are unable to appreciate the contention of the appellant that he had acquired a permanent right in the suit lands in view of the fact that he was in exclusive possession of the same for a long time. The appellant had not put forward a plea of adverse possession. Once it is held that he is a co-owner of the lands in question, his possession however long it might be unless it is adverse to the other co-owners cannot confer on him any right.

12. It was next contended by the appellant that no decree for a share in the compensation amount could have been granted as the acquisition proceedings proceeded on the basis that the appellant was the owner of the acquired lands. This is an untenable contention. The acquisition proceedings could not have conferred any title on the appellant. The compensation amount paid to the appellant represents the value of the lands acquired. The appellant is liable to make over to respondent No. 1 his share therein.

13. At one stage the learned Counsel for the appellant contended that the decree for mesne profits cannot be sustained as his possession cannot be held to be unlawful but at a later stage he gave up that contention because a decree for accounts might turn out to be more harmful to his client.

14. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 378
(V 58 C 93)

(From: Allahabad)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

M/s. Baidyanath Ayurved Bhawan (Pvt.) Ltd., Jhansi, Appellant v. The Excise Commissioner, U. P. and others, Respondents.

Civil Appeal No. 1924 of 1970, D/- 14-10-1970.

(A) Medicinal and Toilet Preparations (Excise Duties) Act (1955), Sch. I, Item 1, Ss. 3 (1), 4 — Excise Duty on medicinal preparations — Preparation by adding tincture of which alcohol is component — Preparation is liable to excise duty.

In order to attract duty all that is required is that a medicinal preparation should contain alcohol. Alcohol may be a part of the preparation either because it is directly added to the solution or it came to be included in it because one of the components of that preparation contained alcohol.

(Para 8)

Where tincture is added to medicinal preparation as its component alcohol being a component of tincture and it not having undergone any chemical change into some other substance but being present in the liquid form in the preparations duty under Section 3 (1) is attracted though alcohol is not directly added. Special Appeal No. 368 of 1970, D/- 28-4-1970 (All.), Affirmed.

(Para 3, 8)

Even if imposition of excise duty under Section 3 (1) on preparations in which alcohol is indirectly introduced attracts multipoint taxation that by itself does not render the duty illegal. The provisions for rebate of duty on alcohol contained in Section 4 show that multipoint tax on medicinal preparations containing alcohol was within the contemplation of the legislature otherwise there was no purpose in incorporating Section 4 into the Act. AIR 1969 Mad 448, Approved.

(Para 9)

(B) Interpretation of Statutes — Taxing provision — Rule of interpretation.

*(Special Appeal No. 368 of 1970, D/- 28-4-1970, — All.)

KN/KN/E920/70/YPB/T

In interpreting a taxing provision, the Courts should not ordinarily concern themselves with the policy behind the provision or even with its impact. In a taxing statute one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. (1921) 1 K.B. 64, Rel. on. (Para 8)

Cases Referred: Chronological Paras
(1969) AIR 1969 Mad 448 (V 56) =

(1968) 2 Mad LJ 395, M/s.
Pharm Products Ltd. Thanja-
vur v. District Revenue, Officer
Thanjavur 9

(1921) 1921-1 KB 64 = 90 LJ
KB 461, Cape Brandy Syndi-
cate v. Land Revenue Commrs. 8

Mr. S. V. Gupte, Senior Advocate,
(Mr. Sobhagmal Jain, Advocate, with
him), for Appellant; M/s. O. P. Rana
and R. Bana, Advocates, for Respon-
dents.

The following Judgment of the
Court was delivered by

HEGDE, J.: In this appeal by spe-
cial leave the true ambit of item 1 in
the Schedule to the Medicinal and Toi-
let Preparations (Excise Duties) Act,
1955 (to be hereinafter referred to as
the Act) read with S. 3 (1) of that Act
comes up for consideration.

2. The appellant is a manu-
facturer of certain medicines with the aid
of substances like tincture, spirit etc.
The tincture and spirit in their turn
contain alcohol. The Superintendent
of Excise called upon the appellant to
pay duty under the Act on the medi-
cinal preparations on the ground that
they contain alcohol. The appellant
resisted the demand on the ground that
the medicines in question were not
prepared by adding pure alcohol; the
fact that the tincture which is a com-
(Cont. on Col. 2)

ponent of that preparation contains
alcohol does not make it a prepara-
tion containing alcohol. That conten-
tion was rejected by the Superinten-
dent of Excise as well as by the High
Court in the Writ petition brought by
the appellant.

3. It is admitted that alcohol
though it was not directly added, is a
component of the medicinal prepara-
tions in question. That alcohol has not
undergone any chemical change into
some other substance. It is present in
a liquid form in those preparations.
The question for decision is whether
the preparations in question do not
attract duty because alcohol was not
directly added to the solution. The
contention of the appellant is that un-
less alcohol is added into the prepara-
tion in its free condition, a medicinal
preparation does not become dutiable.
For deciding this question we may now
read the relevant provisions of the
Act.

4. Section 3 (1) of the Act
says:

"There shall be levied duties of
excise, at the rates specified in the
Schedule, on all dutiable goods manu-
factured in India."

5. "Dutiable goods" is defined
in S. 2 (c) as meaning the medicinal
and toilet preparations specified in the
Schedule as being subject to the duties
of excise levied under this Act. "Medi-
cinal Preparation" is defined in S. 2
(g) in these words:

" 'medicinal preparation' inclu-
des all drugs which are a remedy or
prescription prepared for internal or
external use of human beings, or ani-
mals and all substances intended to be
used for or in the treatment, mitiga-
tion or prevention of disease in human
beings or animals."

6. Item 1 of the Schedule, the
only item with which we are concern-
ed in this case reads as follows:

Item No.	Description of dutiable goods.	Rate of duty.
	Medicinal preparations.	
1.	Medicinal preparations, being patent or proprietary medicines, containing alcohol and which are not capable of being consumed as ordinary alcoholic beverages.	Ten per cent ad valorem.

7. The only other provision
which we need consider is S. 4 of the
Act. That section reads thus:

"Where alcohol, opium, Indian

hemp or other narcotic drug or narco-
tic had been supplied to a manufac-
turer of any dutiable goods for use as
an ingredient of such goods by, or

under the authority of, the collecting Government and a duty of excise on the goods so supplied had already been recovered by such Government under any law for the time being in force, the collecting Government shall, on an application being made to it in this behalf, grant in respect of the duty of excise leviable under this Act, a rebate to such manufacturer of the excess, if any, of the duty so recovered over the duty leviable under this Act."

8. It was conceded that the preparations with which we are concerned in this case are medicinal preparations. They are proprietary medicines and that they are not capable of being consumed as ordinary alcohol i.e. beverages. The only question that has to be decided is whether those preparations contain alcohol. It is admitted that tincture is a component of that preparation and alcohol is a component of tincture. Therefore we fail to see how it can be urged that those preparations do not contain alcohol. In order to attract duty all that is required is that a medicinal preparation should contain alcohol. Alcohol may be a part of the preparation either because it is directly added to the solution or it came to be included in that medicinal preparation because of one of the components of that preparation contained alcohol. According to the plain language of the provision all that is required is that the preparation should contain alcohol. In interpreting a taxing provision, the courts should not ordinarily concern themselves with the policy behind the provision or even with its impact. As observed by Rowlatt J. in *Cape Brandy Syndicate v. Commrs. of Inland Revenue*, (1921) 1 KB 64 that in a taxing Act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. It was urged on behalf of the appellant that if we hold that even indirect introduction of alcohol into a medicinal preparation brings that preparation within the scope of S. 3 (1) of the Act, it would mean multipoint taxation. Coming to the medicinal preparations with which we are concerned in this case, it was urged that if the view

taken by the High Court is correct then, first the tincture used became dutiable and thereafter the medicinal preparations in which tincture was used became dutiable. It was said that that could not be the intention of the Parliament. We are unable to appreciate this contention. Multipoint taxation is not unknown to us.

9. Our attention was invited to S. 4 of the Act in support of the contention that the legislature did not intend to levy multi-point tax. Section 4 provides for rebate of duty on alcohol supplied to the manufacturer of dutiable goods for use as an ingredient of such goods by or under the authority of the collecting government and a duty of excise on goods so supplied had already been recovered by such government under any law for the time being in force. In our opinion this provision instead of supporting the appellant goes to show that multi-point tax on medicinal preparations containing alcohol was within the contemplation of the legislature otherwise there was no purpose in incorporating Section 4 into the Act. If Section 3 did not impose any levy on medicinal preparations of which pure alcohol is not a component, there was no need for Section 4. There can be no question of any rebate if there was no levy at all. Every rebate presupposes an imposition of tax or duty. But the rebate under Section 4 is confined only to those goods which directly come within the scope of S. 4 and not to others. That was the will of the Parliament. If the Parliament desired to give rebate only in certain cases not to others, it cannot be said that as regards the other medicinal preparations there can be no levy. In our judgment the language of the provision imposing the levy is plain and unambiguous. It imposes duty on all medicinal preparations containing alcohol. At the hearing our attention was invited to the decision of the Madras High Court in *M/s. Pharm Products Ltd. Thanjavur v. Dist. Rev. Officer, Thanjavur*, AIR 1969 Mad 448. The conclusion reached by that High Court accords with our conclusion.

10. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 381
(V 58 C 94)

(From: Bombay)

K. S. HEGDE AND I. D. DUA, JJ.State of Maharashtra, Appellant
v. Nasimkhan Ahmad Khan Mali Khan
etc. Respondents.Criminal Appeals Nos. 181 and
182 of 1967, D/- 17-8-1970.**Bombay Probation of Offenders
Act (19 of 1938), S. 5 (1) (a) — Release
of accused on probation — Held, order
was not based on proper considera-
tions.**

Accused, workmen on strike, convicted of offences of arson and assault of serious character — Release of accused on probation — Order passed on the ground that they did not belong to any regular class of criminals but were honest men who had acted in heat and anger on mistaken notions about the manner in which they could better their conditions of lives and that no useful social purpose would be served by an immediate sentence of imprisonment — Age or physical or mental conditions of accused not considered — Order is not based on proper considerations — Character could be considered only in the context of their act and the offence showed that they were desperate characters.

(Para: 6, 9)

The following Judgment of the Court was delivered by

HEGDE, J.: In these appeals by special leave, we are only concerned with the question of sentence. The respondents in Criminal Appeal No. 182 of 1967 are not represented though they were served with the notice of the appeal.

2. The question of sentence in this case has assumed considerable importance. In order to assess that question, it is necessary to refer to the incidents that led up to the prosecution of the respondents. The respondents in both the appeals were prosecuted in case No. 254 of 1964 in the court of Sessions for Greater Bombay. They were charged with various offences. These respondents were members of a Union known as B.E.S.T. Union. In about the middle of August of 1963, that Union declared a strike. B.E.S.T. is running bus services in the city of Bombay. As a result of the

declaration of the strike several workers struck work. It appears that some of the workers disregarded the call for strike and continued to work. On the third day of the strike when a single decker bus No. BMR 3561 was proceeding on the road, the respondents and others stopped the bus and the respondent in Criminal Appeal No. 181 of 1967 threw burning petrol on the conductor, Abdul Kadar as a result of which Abdul Kadar sustained several severe injuries. His face was partially burnt up. At the time of the occurrence one of the respondents caused grievous hurt to the driver, Kamalashankar Mishra. During the course of the incident, injuries were also caused to police constable Namdeo Arjun Kharat who was on bandobast duty in the bus. Injuries sustained by the conductor and the driver were quite serious. The conductor sustained burns on the face, left ear and in the arms and he had to be in the hospital for over 20 days. The driver's left ear was cut and the flap of the ear was hanging. Further there was a fracture of cartilage.

3. The learned trial judge summarised the prosecution case thus:

"The miscreants had invaded the bus from both the sides: some came from the front side and some from the rear near the entrance. They were not bona fide passengers. Though they rushed near the entrance they did not enter the bus but engaged the conductor in talking. Accused No. 2 was one of the persons invading the bus from the front. He tampered with the machine which stopped and the bus could not start. Some of them had assaulted the driver and accused No. 1 had thrown the container with the burning petrol into the bus which clearly shows that the common object of the offenders was to break down the bus service, run and operated by the loyal servants and to intimidate them by acts of violence and causing damage and destruction by fire to the vehicle. It is clear that on the rear side there were accused Nos. 1, 3, 5 and 6 and others. On the front side there were accused No. 2 and two others, who had assaulted the driver"

4. From this summary of the facts found, it is quite clear that the offence committed by the respondents was a serious one. It did not only

result in serious damage to the bus it also caused serious injuries to the conductor and the driver.

5. After taking all the facts into consideration, the learned trial judge convicted the respondents under various charges. The sentences imposed on various charges were made to run concurrently and the maximum sentence imposed on Accused No. 1 (respondent in Cr. Appeal No. 181 of 1967) is two years and on the rest one year. The sentences imposed by the learned trial judge cannot be considered by any standard as having been excessive.

6. The accused took up the matter in appeal to the High Court of Bombay and the same was heard by Paranjape J. At the hearing Counsel for the accused did not challenge the conclusion reached by the trial court or the conviction of the respondents. They merely prayed for alteration of the sentences. The learned Judge, in our opinion, erroneously acceded to this request. He thought that on the facts and circumstances proved in this case, it is sufficient to take action against the respondents under S. 5 (1) (a) of the Bombay Probation of Offenders Act, 1938. This is what the learned judge observed:

"It is clear that these offences were committed by the accused who entertained wrong notions as to the manner in which they could make the strike successful. Obviously the persons who had sponsored the strike were the leaders of the Union of which the accused were members and no doubt the leaders of the Union could have observed greater restraint and could have controlled the members in a better manner. But the fact still remains that the accused have acted on a sudden impulse and on account of the heat and anger that was generated, they have committed these acts of violence. The accused do not belong to the regular class of criminals. They were honest workers and if on account of their wrong notions about the manner in which they could better the conditions of their lives they have committed these offences, I do not see how any useful purpose will be served by asking them to undergo a sentence of imprisonment immediately. I think a better social and useful purpose will be served if I direct

each of these accused to enter into a bond under S. 5 (1) (a) of the Bombay Probation of Offenders Act, 1938, instead of sentencing them at once to undergo imprisonment. . . "

7. Some of the findings reached by the learned judge are factually incorrect. His notions about the social purpose behind S. 5 (1) (a) of the Bombay Probation of Offenders Act, 1938 may endanger law and order. It may encourage violence. The learned judge seriously erred in thinking that the respondents acted on a sudden impulse and on account of the heat and anger that was generated. It is clear from the facts established in the case that the acts complained of were done after premeditation. It was a concerted and a well-planned attack. No one but a mad man commits a crime without some motive or some real or imaginary grievance. If perverted notions are considered as mitigating circumstances then there will be chaos in society. We do not know what the learned Judge meant by saying that the accused did not belong to a regular class of criminals. Most accused who come up before courts are not old offenders nor do they belong to any criminal tribe. That does not mean that the offence committed by them should not be dealt with in accordance with law.

8. Section 5 (1) of the Bombay Probation of Offenders Act, 1938 reads: "Notwithstanding anything contained in any enactment for the time being in force, when—

(a) any male person is convicted of an offence not punishable with death or transportation for life, or

(b) any woman is convicted of an offence of any kind,

if it appears to the court by which the offender is convicted, that regard being had to the age, character, antecedents or physical or mental condition of the offender, or to the circumstances in which the offence was committed, it is expedient that the offender should be released on probation of good conduct, the Court, may for reasons to be recorded in writing instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period not being less than one

year and not exceeding three years as the Court may direct, and in the meantime to keep the peace and be of good behaviour."

9. In this case, the learned appellate Judge did not take into consideration the age or the physical or mental conditions of the offenders. So far as the character of the accused is concerned, he could have considered it only in the context of what they did on the day of the occurrence. There was no other material before him. The offences committed by them show that they are desperate characters. The only thing that the learned appellate Judge can be said to have considered is the circumstances in which the offences were committed. The fact that there was a call for strike is no ground for arson and assault of a grievous character. No section of the society can be permitted to take law into its own hand. There are ways to remedy social injustices. No individual can take upon himself the right to remedy any wrong done to him. It is impossible to have an orderly society, if we take to the ways of the jungle. There may be a genuine desire to change the present social order but that must and can be done through the instrumentalities of the State. In the final analysis, it is the people of this country through their representatives that must decide the social goals. If social wrongs are sought to be remedied in the streets then there can be neither peace nor progress. Without progress the attainment of social justice is impossible. Under our Constitution the rule of law has been made our way of life. It is a fallacy to think that rule of law and the law of the jungle can co-exist.

10. After having expressed our views on the question presented for our determination and thereby corrected the error of law committed by the High Court, we feel there is no need at present to send the respondents to jail by having recourse to our power under Art. 136 of the Constitution. The offence in this case was committed as far back as in August, 1963. The respondents are all workers. We are told that as a result of this incident they have been dismissed from service. Most of them have not even put in their appearance in these appeals. The judgment of the

High Court was delivered on 5-11-1966 nearly four years back. The suspended sentence imposed by the High Court has now been fully undergone by the respondents. We take it that the State filed these appeals primarily to get an authoritative interpretation of S. 5 (1) of the Bombay Probation of Offenders Act, 1938. That purpose is now achieved. Hence we dismiss these appeals subject to the observations made above.

Appeals dismissed.

AIR 1971 SUPREME COURT 383
(V 58 C 95)

(From: Madhya Pradesh)

J. C. SHAH AND K. S. HEGDE, JJ.

Commissioner of Income Tax, Madhya Pradesh, Appellant v. Hukumchand Mannalal and Co., Respondent.

Civil Appeal No. 1774 of 1969, D/-20-7-1970.

Income-Tax Act (1922), S. 26A — Registration of firms — Joint Hindu family — Two or more coparceners entering into partnership — Firm can be granted registration. (Contract Act (1872), S. 11) — (Partnership Act (1932), S. 4.)

One or more members of a Hindu undivided family may enter into a contractual relation in the nature of a partnership with a stranger and they qua the stranger become partners. The Contract Act imposes no disability upon them in the matter of entering into a contract inter se or with a stranger. If the relation as is referred to in S 4 Partnership Act exists, partnership will not be invalid merely because two or more of the persons who have so agreed to share the profits of the business are members of a Hindu undivided family. Consequently, a firm can be granted registration under Section 26A of the Act. The Income Tax Officer is not concerned to determine in whom the beneficial interest in the share in the partnership vests. Decision of Madh. Pra. High Court Affirmed. (1967) 66 I.T.R. 613 (SC) & AIR 1960 SC 910 and AIR 1965 SC 1703 & AIR 1965 SC 1708 Rel. on.

(Paras 4, 5)

Cases Referred: Chronological Paras
(1967) 66 ITR 613 (SC), Ram Laxman Sugar Mills v. Commr. of Income-tax, U. P.

IN/IN/D526/70/YPB/B

(1965) AIR 1965 SC 1703 (V 52) =
(1965) 55 ITR 651, Commr. of
Income-tax v. A. Abdul Rahim
& Co. 5

(1965) AIR 1965 SC 1708 (V 52) =
(1965) 55 ITR 660, Commr. of
Income Tax, Madras v.
Bhagyalakshmi & Co. 5

(1960) AIR 1960 SC 910 (V 47) =
(1960) 39 ITR 202, Charandas
Haridas v. Commr. of Income-
tax Bombay North Kutch and
Saurashtra Ahmedabad 4

(1934) AIR 1934 PC 192 (V 21) =
1934 All LJ 895, Pichappa Chet-
tiar v. Chokalingam Pillai 4

The Judgment of the Court was
delivered by

SHAH, J.: A firm styled Sir Hu-
kumchand Mannalal & Company was
formed under a deed dated July 16,
1948 to carry on the business of
"managing and selling agents" of
Hukumchand Mills Ltd. Sir Hukum-
chand and his son Rajkumar Singh
were two of the five partners of the
firm. They represented the interest
of the Hindu undivided family of Sir
Hukumchand and his sons. On March
31, 1950 the property of the Hindu un-
divided family was partitioned and
the interest of the family in the part-
nership was taken over by a private
limited company styled Sir Sarupchand
Hukumchand Ltd.

2. For the assessment years
1950-51, 1951-52, 1952-53 and 1953-54
the Income-tax Officer granted regis-
tration of the firm under S. 26A of the
Indian Income-tax Act, 1922. In 1954-
55 the Income-tax Officer declined to
grant registration. In appeal the Ap-
pellate Assistant Commissioner con-
firmed the order on the ground that
two coparceners could not represent
the interest of the Hindu undivided
family in a partnership. The Tribu-
nal reversed the order. They held
that Sir Hukumchand and his son Raj-
kumar Singh were partners in the
firm on behalf of the Hindu undivided
family and there was nothing in law
which prevented two or more copar-
ceners of a Hindu undivided family
representing the family from entering
into a partnership with a stranger or
strangers.

3. At the instance of the Com-
missioner of Income-tax the following
question was referred by the Tribunal:

"Whether in the facts and circum-
stances of the case the firm Hukum-
chand and Mannalal Company could
be granted registration under S. 26A
of the Act?"

The High Court answered the question
in the affirmative. The Commissioner
of Income-tax has appealed to this
Court with certificate granted by the
High Court.

4. In Ram Laxman Sugar Mills
v. Commr. of Income-tax, U. P., (1967)
66 ITR 613 (SC) this Court observed:

"A Hindu undivided family is a
"person" within the meaning of the
Indian Income-tax Act: it is however
not a juristic person for all purposes,
and cannot enter into an agreement of
partnership with either another undi-
vided family or individual. It is open
to the manager of a joint Hindu fami-
ly as representing the family to agree
to become a partner with another per-
son. The partnership agreement in
that case is between the manager and
the other person, and by the partner-
ship agreement no member of the
family except the manager acquires a
right or interest in the partnership.
The junior members of the family
may make a claim against the mana-
ger for treating the income or profits
received from the partnership as a
joint family asset, but they cannot
claim to exercise the rights of part-
ners nor be liable as partners."

This position in law was not disputed
on behalf of the Commissioner. But it
was urged that since two members of
a coparcenary represented in the firm
the same beneficial interest of a Hindu
undivided family, and since they were
incompetent to enter into a contract
inter se, the partnership agreement
could not be registered. There is no
substance in that contention. In Pich-
appa Chettiar v. Chokalingam Pillai,
AIR 1934 PC 192 the Judicial Com-
mittee observed approving the obser-
vations made in Mayne's Hindu Law
(9th Edn.) at p. 398 to the following
effect:

"Where a managing member of a
joint family enters into a partnership
with a stranger the other members of
the family do not ipso facto become
partners in the business so as to clothe
them with all the rights and obliga-
tions of a partner as defined by the
Indian Contract Act, in such a case the
family as a unit does not become a

partner, but only such of its members as in fact enter into a contractual relationship with the stranger: the partnership will be governed by the Act."

It is clearly enunciated that one or more members of a Hindu undivided family may enter into a contractual relationship in the nature of a partnership with a stranger and they qua the stranger become partners. The view expressed by the Judicial Committee was approved by this Court in *Charandas Haridas v. Commr. of Income-tax, Bombay North, Kutch and Saurashtra, Ahmedabad*, 39 ITR 202 = (AIR 1960 SC 910).

5. The Indian Contract Act imposes no disability upon members of a Hindu undivided family in the matter of entering into a contract inter se or with a stranger. A member of a Hindu undivided family has the same liberty of contract as any other individual: it is restricted only in the manner and to the extent provided by the Indian Contract Act. Partnership is under Section 4 of the Partnership Act the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all: if such a relation exists, it will not be invalid merely because two or more of the persons who have so agreed are members of a Hindu undivided family. It is now settled law that in considering an application for registration of a firm, the Income-tax Officer is not concerned to determine in whom the beneficial interest in the share in the partnership vests, *Commr. of Income-tax v. A. Abdul Rahim & Co.*, 55 ITR 651 = (AIR 1965 SC 1703); *Commr. of Income-tax, Madras v. Bagyalakashmi & Co.*, 55 ITR 660 = (AIR 1965 SC 1708).

6. In our judgment, the High Court was right in answering the question in the affirmative.

7. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 385
(V 58 C 96)

(From: Bombay)

M. HIDAYATULLAH, C. J., J. M. SHELAT, G. K. MITTER, C. A. VAIDIALINGAM AND A. N. RAY, JJ.

Adi Pherozshah Gandhi, Appellant v. H. M. Seervai, Advocate General of Maharashtra, Bombay, Respondent.

Civil Appeal No. 2259 of 1969, D/-21-8-1970.

(A) Advocates Act (1961), Sec. 37 (1) — "Person aggrieved" — Advocate General appearing in pursuance of notice under Section 35 (2) is not a person aggrieved — (Decision of Bar Council of India, Reversed) — (Per majority; Vaidialingam and Ray JJ. contra).

(Per majority; Vaidialingam and Ray, JJ. Contra). The Advocate-General of a State who appears before the disciplinary committee of a State Bar Council in pursuance of a notice given to him under Section 35 (2) is not a "person aggrieved" within the meaning of the words used in Section 37 because the State Bar Council takes the view, whatever be its reasoning, that an advocate on its roll has not been guilty of any misconduct. The entertaining of complaints, the inquiry into them and the punishment to be meted out to the advocate are all concerns of the Bar Council. The Advocate-General no doubt is entitled to a hearing if the complaint is not rejected summarily. It is only when he feels that a case requires a careful investigation and proper elucidation of the facts or the exposition of the law on the subject that he is called upon to render all assistance in the proceedings. When he chooses to do so, he does his duty by appearing at the hearing and putting before the disciplinary committee the facts in their proper perspective and advancing the proper inference to be drawn therefrom. Once he does so there is an end of the matter so far as he is concerned. Neither is he interested in prosecuting the matter further if he takes the view that the punishment meted is not commensurate with the misconduct of the advocate. A decision by the disciplinary committee

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cannot necessarily be said to raise a point of public interest merely because the Advocate-General feels that it is erroneous or that he himself would have arrived at a different conclusion. An Advocate-General in India is not the guardian angel of the Bar, nor is he champion of public interest in any matter save as specified in a statute. Case law discussed.

Decision of Bar Council of India, Reversed. Observations in AIR 1955 SC 223 that in an appeal arising out of proceedings under the Bar Councils Act the Advocate-General is the appropriate party held not correct.

(Paras 53, 58 62 and 64)

(B) Civil P. C. (1908), Section 11
— Res judicata — In a civil proceeding the decision of a criminal Court is not res judicata — Per Hidayatullah, C. J. (Para 35)

Cases Referred: Chronological Paras

- (1970) Civil Appeal No. 1716 of 1967, D/- 1-8-1970 = 1970 SCD 298, Municipal Corporation of the City of Bombay v. Chandulal Shamaldas Patel 25, 96
(1968) Civil Appeal No. 877 of 1963, D/- 8-10-1968 = 1969 SCD 268, B. M. Madani v. Commr. of Workmen's Compensation Bombay 23, 86, 130
(1961) 1961 AC 617 = 1961-2 All ER 504, Attorney General of the Gambia v. Pierre Saar N'Jie 13, 59, 72, 83, 98, 120, 126
(1959) 1959-1 QB 384 = 1959-1 All ER 286, Ealing Corporation v. Jones 8, 12, 52, 76, 90, 95
(1955) AIR 1955 SC 223 (V 42) = (1955) 1 SCR 1055, Bhataraju Nageshwara Rao v. Hon'ble Judges of the Madras High Court 24, 62, 122, 123
(1951) 1951-2 KB 508 = 1951-1 All ER 1032, Rex v. London Quarter Sessions; Ex parte Westminster Corporation 49, 95
(1943) 1943 Ch 177 = 1943-2 All ER 662, In re Baron Ex parte Debtor v. Official Receiver 9
(1940) 1940 AC 206 = (1939) 4 All ER 464, Jennings v. Kelly 10
(1935) AIR 1935 PC 168 (V 22) = 37 Bom LR 722 = 62 Ind App 235, Advocate General of Bombay v. Phiroz Rustomji Bharucha 22, 60, 94, 122
(1929) 1929-2 KB 440 = 98 LJ KB 537, Sevan Oaks Urban

Council v. Twynam 12, 50, 89, 116, 118

- (1928) 1928 AC 344 = 139 LT 314, Macauley v. Judges of the Supreme Court of Sierra Leone 15
(1925) AIR 1925 PC 155 (V 12) = 23 All LJ 555, Sevak Jeranchod Bhogilal v. Dakore Temple Committee 22
(1911) 1911-2 KB 109 = 80 LJ KB 1147, In re Kitson Ex parte Sugden (Thomas) and Sons Ltd. 9
(1894) 1894-2 QB 805 = 64 LJ QB 667, In re Lamb, Ex parte Board of Trade 9
(1890) 25 QBD 357, R. v. London County Keepers of the Peace and Justices 9, 49, 95, 119
(1887) 19 QBD 174 = 56 LJ QB 447, Ex parte Official Receiver, In re Reed Bowen and Co. 48, 95, 116
(1886) 18 QBD 154 = 56 LJ QB 625, In re Payne Ex parte Castle Mail Packets Co. 23
(1884) 26 Ch D 48 = 53 LJ Ch 578, In re Riviere's Trade Mark 10
(1881) 1881-7 QBD 465 = 50 LJ QB 561, Robinson v. Currey 11, 47
(1880) 14 Ch D 458 = 42 LT 783, In re Sidebotham, Ex parte Sidebotham 8, 17, 47, 95, 116, 117, 119
(1879) 40 LT 297, In re Woods; Ex parte Ditton 9
(1876) 1876-2 Ch 797 = 34 LT 705, Ellis, Ex parte Ellis 9
Following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: I agree with the judgment delivered by my brother Mitter but in view of the importance of the question and the difference between my brethren I have chosen to express myself separately.

2. We heard this appeal on a preliminary point raised by the appellant that the appeal of the Advocate-General of Maharashtra filed before the Bar Council of India was incompetent as the Advocate-General did not fall within the expression a 'person aggrieved' to whom alone is given the right of appeal under Section 37 of the Advocates Act of 1961, against the orders of the Disciplinary Committee of the Bar Council of the State.

3. The facts necessary to bring out the controversy may be briefly stated. The appellant is an advocate from Maharashtra. The Bar Council

of the State of Maharashtra had called upon him suo motu to show cause why he should not be held guilty of misconduct. It appears that the appellant was convicted before a Summary Court in London on a charge of pilfering some articles from departmental stores and sentenced to a fine. The record of the proceedings in London was not before the Bar Council of the State and action was taken on the basis of a brief report of the incident in a newspaper. The appellant explained before the disciplinary committee of the Bar Council of the State that he was the victim of a misunderstanding but as he had no means of defending himself effectively he was found guilty and received a light sentence of fine. He explained how he had fallen into this unfortunate predicament and did not know how to extricate himself. The order of the Summary Court was not a speaking order and the proceedings were summary. The disciplinary committee were satisfied that there was no reason to hold him guilty of professional or other misconduct. They, therefore, ordered that proceedings be filed.

4. The Advocate-General of the State, who was sent a notice of the proceedings, as is required by the second sub-section of Section 35, and had appeared before the committee, purporting to act under Section 37 of the Act filed an appeal before the Bar Council of India. It was heard by the disciplinary committee of the Bar Council of India. The advocate objected that the Advocate-General had no locus standi to file the appeal. The objection was overruled and the appeal was accepted. The advocate was held guilty of misconduct and suspended for a year from practice. The advocate now appeals under Section 33 of the Act to this Court. His appeal raises questions of merit but he contends at the threshold that the Advocate-General was not competent to file the appeal under Section 37 of the Act.

5. The point in controversy before the disciplinary committee of the Bar Council of India and now before us, is a short one. It is: whether the Advocate-General can be said to be a 'person aggrieved' by the order of the disciplinary committee of the Bar Council of the State? Having heard this point in detail we took time

to consider. I am of the opinion that it must be held in favour of the advocate and the order of the disciplinary committee of the Bar Council of India, now under appeal before us, must be set aside on this short ground without going into the merits of the case.

6. Section 37 of the Advocates Act, 1961 reads:

"37. Appeal to the Bar Council of India. (1) Any person aggrieved by an order of the disciplinary committee of a State Bar Council made under Section 35 may, within sixty days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India.

(2) Every such appeal shall be heard by the disciplinary committee of the Bar Council of India which may pass such order thereon as it deems fit".

7. The expression a 'person aggrieved' is not new, nor has it occurred for the first time in the Advocates' Act. In fact it occurs in several Indian Acts and in British Statutes for more than a hundred years. In the latter a right of appeal to a 'person aggrieved' is conferred in diverse contexts. It occurs in the Ale House Act, the Bankruptcy Acts, Copyright Act, Highway Act, Licensing Acts, Milk and Dairies (Amendment) Act, Rating and Valuation Act, Summary Jurisdiction Act, Union Committee Act, Local Acts, in certiorari proceedings and the Defence of Realm Regulations to mention only a few. The list of Indian Acts is equally long.

8. As a result of the frequent use of this rather vague phrase, which practice, as Lord Parker pointed out in *Ealing Corporation v. Jones*, 1959-1 QB 384 has not been avoided, in spite of the confusion it causes, selections from the observations of Judges expounding the phrase in the context of these varied statutes were cited before us for our acceptance. The observations often conflict since they were made in different contexts and involved the special standing of the party claiming the right of appeal. Yet these definitions are not entirely without value for they disclose a certain unanimity on the essential features of this phrase, even in the diversity of the contexts. The font and origo of the discussion is the well-known de-

definition of the phrase by James L. J. in *In Re Sidebotham Ex p. Sidebotham*, (1880) 14 Ch D 458. It was observed that the words 'person aggrieved' in Section 71 of the Bankruptcy Act of 1869 meant:

"not really a person who is disappointed of a benefit which he might have received if some order had been made. A 'person aggrieved' must be a man who had suffered a legal grievance, a man against whom a decision has been pronounced which had wrongfully deprived him of something, or wrongfully refused him something or wrongfully affected his title to something".

The important words in this definition are "a benefit which he might have received" and "a legal grievance" against the decision which "wrongfully deprives him of something" or affects "his title to something".

9. The definition was held in later cases to be not exhaustive and several other features of the phrase were pointed out. Thus under the Bankruptcy Acts, where the Board of Trade summoned to support the validity of the appointment of a trustee, went before the Judge, and failed, it was considered a person aggrieved on the principle that a person who is brought before the Court to submit to its decision, but not a person who is heard in a dispute between others must be treated as a person aggrieved (see *In Re Lamb, Ex p. Board of Trade*, (1894) 2 QB 805 at p. 812 per Lord Esher). Here again the words to notice are 'brought before the Court to submit to its decision', that is to say, a person who is in the nature of a party as contradistinguished from a person who is next described as 'a person who is heard in a dispute between others.' To distinguish between these two positions I may refer to a few more decisions. In *In Re Kitson; Ex p. Sugden (Thomas) and Sons Ltd.*, (1911) 2 KB 109 at pp. 112-114, it was further explained that

"the mere fact that an order is wrongly made does not of itself give a grievance to a person not otherwise aggrieved". (per Philimore, J.) It was added that a person deprived of the fruits of litigation which he had instituted in the hope for them, is a person aggrieved. Similarly, a credi-

tor who did not wish an adjudication order to be made was held not to be a 'person aggrieved' — See *In Re Baron Ex p. Debtor v. Official Receiver*, 1943 Ch 177. The utmost that this series of cases goes is to be found in the observations of James, L. J. in *Ellis Ex p. Ellis*, (1876) 2 Ch 797 that even a person not bound by the order of adjudication must be treated as a 'person aggrieved' if the order embarrasses him. In a later case *In Re Woods; Ex p. Ditton*, (1879) 40 LT 297 Cotton L. J. held that even so the person must be aggrieved by the very order and not by any of the consequences that ensue. This was clarified in *R. v. London County Keepers of the Peace and Justices*, (1890) 25 QBD 357 at p. 361 by Lord Coleridge, C. J. while dealing with the Highway Act, denying the right of appeal in these words:

"Is a person who cannot succeed in getting a conviction against another a 'person aggrieved'? He may be annoyed at finding that what he thought was a breach of the law is not a breach of law; but is he aggrieved because some one is held not to have done wrong? It is difficult to see that the section meant anything of the kind. The section does not give an appeal to anybody but a person who is by the direct act of the Magistrate 'aggrieved' — that is who has had something done or determined against him by the Magistrate".

These observations again show that the person must himself suffer a grievance, or must be aggrieved by the very order because it affects him.

10. Two cases which may usefully be seen in the same context may next be mentioned. In *Jennings v. Kelly*, (1940) AC 206 in relation to the Government of Ireland Act, 1920, Lord Wright did say that if a person was treated in certiorari proceedings as a competent party and notice was served on him as being a proper party he would be a person aggrieved. The point to bear in mind is that the person must be treated as a party. However the force of the observation was considerably weakened because the party there was ordered to pay costs and the right of appeal was held to be available on that limited ground. Further qualification is to be found in *In Re Riviere's Trade Mark*, (1884)

26 Ch D 48 where Lord Selborne observed:

"..... it must be a legal grievance it must not be a *stet pro ratione voluntas*; the applicant must not come merely saying 'I do not like this thing to be done', it must be shown that it tends to his injury, or to his damage, in the legal sense of the word".

The locus standi of the person aggrieved must be found from his position in the first proceeding and his grievance must arise from that standing taken with the effect of the order on him.

11. These cases are of course far removed from the one before me and as Bramwell L. J. observed in *Robinson v. Currey*, (1881) 7 QBD 465 at p. 470, the expression is nowhere defined and, therefore, must be construed by reference to the context of the enactment in which it appears and all the circumstances. He pointed out that 'the words are ordinary English words, which are to have the ordinary meaning put upon them'.

12. From these cases it is apparent that any person who feels disappointed with the result of the case is not a 'person aggrieved'. He must be disappointed of a benefit which he would have received if the order had gone the other way. The order must cause him a legal grievance by wrongfully depriving him of something. It is no doubt a legal grievance and not a grievance about material matters but his legal grievance must be a tendency to injure him. That the order is wrong or that it acquits some one who he thinks ought to be convicted does not by itself give rise to a legal grievance. These principles are gathered from the cases cited and do not, as I shall show later, do violence to the context in which the phrase occurs in the Advocates' Act. Although I am aware that in *Seven Oaks Urban District Council v. Twynam*, 1929-2 KB 440 at p. 443, Lord Hewart C. J. uttered words of caution, again emphasised by Lord Parker C. J. in 1959-1 QB 384 (supra), in applying too readily the definitions given in relation to other statutes but I do not think I am going beyond what Lord Hewart, C. J. said and what Lord Parker C. J. did in the case. Lord Parker observed:

"..... As Lord Hewart C. J. pointed out in 1929-2 KB 440: 'But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted *alio intuitu*. The problem with which we are concerned is not, what is the meaning of the expression 'aggrieved' in any one of a dozen other statutes, but what is its meaning in this part of this statute?' Accordingly, I only look at the cases to which we have been referred to see if there are general principles which can be extracted which will guide the Court in approaching the question as to what the words "person aggrieved" mean in any particular statute".

If I may say respectfully I fully endorse this approach. I am now in a position to examine the Advocates' Act but before I do so I must refer to a case near in point to this case, than any case considered before.

13. The case is reported in *Attorney General of the Gambia v. Pierre Saar N'Jie*, 1961 AC 617. A legal practitioner was held guilty of professional misconduct but was acquitted on appeal and an appeal was taken to the Judicial Committee against the decision of the West African Court of Appeal. This involved consideration of whether the Attorney General could be said to be a 'person aggrieved'. The facts need to be stated a little fully as both sides rely upon the observations of Lord Denning and they need to be explained carefully.

14. A barrister (a member of the English Bar) and also a Solicitor (the two professions appear to be united in the Gambia) practising in the Supreme Court of the Gambia was charged with professional misconduct and an order was made, September 22, 1958, by the Deputy Judge (Abbot J) striking off his name from the roll of that Court, and directing that the matter be reported to the Masters of the Bench of his Inn. On June 5, 1959 the West African Court of Appeal (Bairamian, Ag. P. Hurley Ag. J. A. and Ames Ag. J. A.) set aside the order on the ground that the Deputy Judge had no jurisdiction. The Attorney General of the Gambia thereupon

sought leave to appeal to Her Majesty in Council but this was refused. Then a petition was made for special leave. Special leave was granted subject to the preliminary objection by the respondent that no appeal lay at the instance of the Attorney General. The preliminary objection was rejected.

15. Section 31 of the West African (Appeal to Privy Council) Order in Council 1949 under which special leave was asked reads:

"Nothing in this order contained shall be deemed to interfere with the right of His Majesty upon the humble petition of any person aggrieved by any judgment of the Court, to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose".

In the Gambia disciplinary jurisdiction over barristers and solicitors is embodied in Rules of the Supreme Court, 1928. Under those rules the 'Supreme Court' Judge (and there is only one) admits and enrolls barristers and solicitors of the Court, and Sch. I, Order 9, Rule 7 says that:—

"The Judge shall have power, for reasonable cause, to suspend any barrister or solicitor from practising within the jurisdiction of the Court for any specified period, or order his name to be struck off the roll of Court".

Then there is the West African Court of Appeal and it hears appeals from the 'Supreme Court' in civil and criminal matters. In an earlier case in which a certain Mr. Macauley was struck off the roll of the Supreme Court of Sierra Leone and Mr. Macauley sought to appeal to the Full Court of West Africa it was ruled by the Full Court that the decision of the Chief Justice was not a decision of the 'Supreme Court' and was, therefore, not appealable and that the only remedy was to obtain special leave to appeal to the Privy Council (see *Macauley v. Judges of the Supreme Court of Sierra Leone*, 1928 AC 344). The legislature then added Section 14 which provided:

"An appeal shall lie to the Court of Appeal from any order of the Judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the roll, and for the purposes of any such appeal any such order shall be deemed to be an order of the Supreme Court".

The words of the section show that the legislature did not regard a decision in disciplinary matters as a judgment of a Court but only deemed it to be so.

16. The Full Court on the appeal of N'Jie from the order of the Deputy Judge held that a Deputy Judge could not deal with any matter which was not a proceeding in the Court in the exercise of judicial power. The Judicial Committee held that this was exercise of judicial power. Then the preliminary objection was considered. The objection was that the Attorney General had no locus standi not being a 'person aggrieved'. This was overruled by the Judicial Committee.

17. Lord Denning referred to the definition of James L. J. in (1880) 14 Ch. D. 458 (supra) and said that if the definition were to be regarded as exhaustive and were held applicable, an 'aggrieved person' would be only a person who was a party to a lis, a controversy inter partes and had a decision given against him. The Attorney General would not come within this restricted definition as there was no suit between two parties when disciplinary proceedings were started ex mero motu by the Court or at the instance of the Attorney General or some one against a legal practitioner. But the definition of James L. J. was not exhaustive and the words 'person aggrieved' were of wide import and should not be subjected to a restricted interpretation. They included not a busy body but certainly one who had a genuine grievance because an order had been made which prejudicially affected his interests. Posing the question 'did the Attorney General have a sufficient interest', the Judicial Committee answered he had. The Attorney General in a Colony represented the Crown as the guardian of public interest and it was his duty to bring before the Judge a case of misconduct to warrant action. Then Lord Denning proceeded to distinguish two kinds of cases to determine if the Attorney General would be a 'person aggrieved'. The first was a case where the Judge acquitted the practitioner. In such a case no appeal was open to the Attorney General under the Supreme Court Ordinance, and Lord Denning added "He has done his duty and is not

aggrieved". In other words, he did not come within the words of the 31st section of the Order in Council. The Attorney General could not, therefore, ask for special leave as a 'person aggrieved'. But the case was different if the Judge found the practitioner guilty and a Court of Appeal reversed the decision on a ground which went to the root of the jurisdiction of the Judge or was otherwise a point in which the public interest was involved. In that case the Attorney General was a 'person aggrieved'.

18. The observations of Lord Denning clearly meant that the Attorney General could not pose as a 'person aggrieved' to seek to bring a simple case of acquittal for reversal by the Judicial Committee under the 31st section of the Order in Council for he could not be regarded as a 'person aggrieved'. The remark was made perhaps to repel an argument that every case of acquittal would make the Attorney General an 'aggrieved person'. Lord Denning said that this was not the true position. The Attorney General could only move the Judge and there his duty ended. The law gave him no express right of appeal and he could not claim to be a 'person aggrieved'. He could only invoke the 31st section if he could make out his grievance and it was found to be as a person representing the Crown and the guardian of public interest seeking to get reversed a decision which struck at the root of the jurisdiction of the disciplinary Judge, by denying that the Deputy Judge was exercising judicial power under Section 7 of the Supreme Court Ordinance. The Crown was aggrieved by this decision and the Attorney General representing the Crown was an 'aggrieved person'.

19. The scheme of the law under which the disciplinary action was taken and the appeal to the Privy Council was brought gave the true connotation of the expression 'person aggrieved'. In those cases in which no question of public interest was involved the Attorney General even if he had moved the Judge and got an adverse decision could not be regarded as aggrieved but in a case in which, apart from the merits of the case against the practitioner, some grave

question of public importance was involved, the Attorney General representing the Crown could be regarded as a 'person aggrieved'.

19A. It was presumably after reading this case and understanding it as I have done, that the Advocate-General set about making out a question of public importance. He did not seem only to get the decision overturned on facts. This is what he said:

"The appellant has filed this appeal as the Advocate-General of Maharashtra. Under the Advocates Act, 1961, (as under the Indian Bar Councils Act, 1926), the Advocate General represents the public interest in every disciplinary inquiry. Under Section 35 of the Advocates Act, 1961, the Advocate General is entitled to notice in respect of every disciplinary inquiry, is entitled to have an opportunity of being heard before the disciplinary committee passes any order. This appeal raises very important questions of principle as regards the effect of a conviction of an Indian Advocate of an offence recognised by all civilised countries as an offence involving moral turpitude. The question raised also related to the requirements of natural justice in a criminal Court, and the effect of the judgments of the Supreme Court on the subject. It raises the further question whether an Indian Advocate convicted of an offence involving moral turpitude by a Court outside India is immune from disciplinary action because of minor differences of procedure in such countries where such trial has been held in complete accord with principles of natural justice. The profession of an advocate is an honourable profession and the disciplinary provisions of the Advocate Act are designed to secure that persons guilty of offences involving moral turpitude are subject to appropriate disciplinary action".

20. It is obvious that the Advocate-General has attempted to use the observations of Lord Denning in the Gambia case and wishes to plead that he enjoys a special position in the Bar and under the Advocates Act and therefore is entitled to appeal as a 'person aggrieved'. This was the line adopted by Mr. M. C. Setalvad, counsel for the Bar Council of India. On the other hand, Mr. V. S. Desai ap-

pearing for the Advocate General argued that the Advocate-General having notice of disciplinary proceedings, in any event, must be treated as a 'person aggrieved' within Sections 35 and 38 of the Advocates' Act. I shall consider the narrow question presented by Mr. Setalvad later. I shall first take up for consideration the larger question and the more general application of the expression 'person aggrieved'.

21. In support of his contention Mr. V. S. Desai cited three cases from this Court, one from the Judicial Committee and one from the Bombay High Court. They all relate to disciplinary proceedings and I may begin by considering them.

22. The case of the Privy Council reported in Advocate General of Bombay v. Phiroz Rustamji Bharucha, 37 Bom LR 722 = (AIR 1935 PC 168) was next cited. It was an application for special leave by the Advocate General of Bombay in a proceeding relating to professional misconduct of an advocate. The standing of the Advocate General was questioned. The report in the Bombay Law Reporter Series, 37 Bom LR 722 = (AIR 1935 PC 168) reproduces more fully the arguments than the official report and we were referred to the arguments. The point was not debated and there does not appear to be a pronouncement on this point either during the course of argument or in the judgment since special leave was refused on another ground. Mr. Desai says that if the Judicial Committee had found substance in this objection they would have ruled out the Advocate General on this ground alone. There is no reason to think that the objection was considered at all. I cannot derive any assistance from this ruling because the prerogative of the Crown to grant special leave as of grace in any case was always there irrespective of the standing of the Advocate General. The Privy Council often granted special leave and even heard appeals on certificates wrongly granted. (See *Sevak Jeranchod Bhogilal v. Dakore Temple Committee*, AIR 1925 PC 155 and the cases collected in Halsbury Laws of England (3rd Edn) Vol. 9 p. 380 paragraph 886 note (h)). This prerogative the Judicial Committee has exercised on behalf

of the Crown particularly in cases of general interest (see *ibid* p. 379 S. 885 note (s)). The provisions of the former Section 112 of the Code of Civil Procedure show the extent of the prerogative. Therefore because the Privy Council refused special leave on one ground rather than another cannot import a rejection of the objection as to the standing of the Advocate General.

23. Next we have an unreported decision of a Division Bench of this Court reported in *B. M. Madani v. Commissioner of Workmen's Compensation Bombay*, Civil Appeal No. 877 of 1968, D/- 8-10-1968 (SC). In that case the appeal was taken by the Commissioner for enhancement of penalties against the delinquent advocate and the penalty was in fact increased. This Court held that he was entitled to do so as a 'person aggrieved'. The particular misconduct was committed in relation to a claimant before the Commissioner. The Advocate had pocketed the travelling allowance granted by the Commissioner to the widow of a deceased workman. There may be some doubt whether the Commissioner was a 'person aggrieved' by the penalty imposed in the first instance but I do not pursue this matter. The case can be justified on the dictum in some cases that a party which moves the Court or a person brought before the Court to be bound by its order may be a 'person aggrieved'. See for example the case of the Official Receiver in *Re Payne Ex. p. Castle Mail Packets Co.*, (1886) 18 QBD 154 and *In Re Lamb Ex p. Board of Trade* already considered by me. Madani's case, C. A. No. 877 of 1968, D/- 8-10-1968 (SC) does not help to resolve the dispute centering round the Advocate-General.

24. The next case is reported in *Bhataraju Nageshwara Rao v. Hon'ble Judges of the Madras High Court*, 1955-1 SCR 1055 = (AIR 1955 SC 223). That case arose under the Bar Councils Act, 1926 when the Judges exercised disciplinary power. In the case before the Supreme Court the Judges of the Madras High Court were shown as respondents. This Court observed at page 1064 (of SCR) = (at p. 227 of AIR) as follows:

"Before parting with this appeal we desire to say that it appears to us

that it was wholly wrong and inappropriate for the appellant to have made the Honourable Judges of the Madras High Court respondents to this appeal. It appears that in some cases involving contempt of Court the Honourable Judges have been made parties. It is not necessary for us to express any opinion on this occasion as to the propriety of that procedure in contempt cases but we are clearly of the opinion that in an appeal arising out of a proceeding under the Bar Councils Act the appropriate parties should be the advocate concerned, the complainant, if any, the Bar Council or the secretary thereof and the Advocate-General of the State concerned to whom notices have to be issued under Section 12 (3) of the Indian Bar Councils Act".

This does not advance the case of the Advocate-General of Maharashtra any further.

25. The last case of this Court is Municipal Corporation of the City of Bombay v. Chandulal Shamaldas Patel, Civil Appeal No. 1716 of 1967, D/- 1-8-1970 (SC). In land acquisition cases started for the benefit of the Municipal Corporation certain notifications issued under the Land Acquisition Act were set aside by the High Court, and the Municipal Corporation sought to appeal. It was held not to be a 'person aggrieved'. This case, even if I were to accept it as correctly decided, does not assist us in relation to our Act passed with a different intent and purpose and using the words in another context.

26. The last case is from Bombay but it did not discuss the point and cannot be held to have laid down a precedent. It is useless to refer to it.

27. I now proceed to examine the larger question whether by reason of the provisions of the Advocates Act the Advocate-General of the State enjoys such position that he must necessarily be treated as a 'person aggrieved' entitling him to file an appeal. For this purpose we have to examine critically the provisions of the Act to discover if the claim can be entertained.

28. The Advocates Act was passed to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All India Bar. It re-

placed the earlier Acts governing the legal profession particularly the Indian Bar Councils Act, 1926. Prior to the passing of the Advocates Act, the enrolment and discipline of legal practitioners was in the hands of the Courts and in the case of the advocates the High Court entertained and determined cases of misconduct against them. Now this jurisdiction is completely transferred to the Bar Councils of the States and the Bar Council of India. In the Bar Councils of the States (except Delhi) the Advocate-General of the State is an ex officio member. In Delhi the Additional Solicitor-General takes the place of the Advocate-General. Other members are elected. In the Bar Council of India, the Attorney-General and the Solicitor-General are ex officio members and the other members are elected one each by the State Bar Councils. In the Union Territory of Delhi the Additional Solicitor-General is ex officio member. The functions of the Advocate-General are not different from those of the other members in so far as the affairs of the Bar Council are concerned. The only matters where the Advocate-General, the Attorney-General and the Solicitor-General and the Additional Solicitor-General are mentioned are these. The Act gives a right of pre-audience over other advocates to the Attorney-General, the Solicitor-General, the Additional Solicitor-General and the Advocate-General. The right of pre-audience gives them a standing for hearing of cases but does not confer on them any other rights. The magniloquent phrases such as Leader of the Bar, Keeper of the Conscience of the Bar have no meaning neither now, nor before under the Bar Councils Act of 1926. They are just honorific titles given by courtesy but are not grounded on law. Indeed the Keepers of the Conscience of the Bar are the Bar Councils and the Leader of the Bar may be someone who may even have refused to accept Advocate-Generalship.

29. The functions of the Bar Councils of the States and the Bar Council of India throw some light on the remaining functions of the Advocate-General and may first be seen. Section 6 of the Act lays down the functions of the State Bar Council and

Section 7 those of the Bar Council of India. Apart from certain administrative functions which these councils, which are bodies corporate, perform, their functions in relation to the Bar are somewhat different. Both have their own rolls and they prepare and maintain the rolls. The State Bar Council entertains and determines cases of misconduct of advocates on its roll and safeguards the rights, privileges and interests of advocates on its roll. The Bar Council of India lays down the standards of professional conduct and etiquette of advocates, the procedure to be followed by its disciplinary committee and the disciplinary committee of each of the State Bar Councils. The Bar Council of India also safeguards the rights and privileges and interests of advocates and exercises general supervision and control over State Bar Councils. It also deals with and disposes of any matter arising under the Advocates Act which may be referred to it by a State Bar Council. There are other functions which relate to the education etc., of those who wish to join the legal profession. The Bar Council of India maintains a common roll of advocates. The Bar Councils also decide in relation to their rolls all questions of seniority. The State Bar Councils and the Bar Council of India constitute one or more disciplinary committees and under Chapter V questions of the conduct of advocates on their respective rolls are referred to them. The disciplinary committee of the Bar Council of India exercises superior powers inasmuch as it hears appeals from the orders of the disciplinary committees of the State Bar Councils and may even of its own motion withdraw for inquiry before itself for disposal, any proceedings for disciplinary action against an advocate pending before the disciplinary committee of any State Bar Council.

30. The disciplinary proceedings commence both before the State Bar Council and the Bar Council of India on a complaint or otherwise made respectively to the State Bar Council or the Bar Council of India. The Bar Councils in either case refer them for disposal to their respective disciplinary committees. The disciplinary committee in each case can reject the complaint summarily, but if it

proceeds to hear the matter further it causes a notice thereof to be sent to the advocate concerned and to the Advocate-General of the State or the Attorney-General of India, as the case may be. The disciplinary committee after giving the advocate concerned and the Advocate-General or the Attorney-General, as the case may be, an opportunity to be heard, makes an order either dismissing the complaint or where the proceedings are found to be not fit for consideration and are started at the instance of the Bar Council, ordering that they may be filed. The committee may, if the advocate is found guilty, reprimand him or suspend him from practice for such period as it deems fit, or may remove him altogether from the roll of advocates. The Advocate-General or the Attorney-General, as the case may be, need not appear personally but may appear through an advocate.

31. From the decision of the disciplinary committee of the State Bar Council an appeal lies to the Bar Council of India which is heard by the disciplinary committee of the Bar Council of India which may pass such orders thereon as it deems fit. From the decision of the disciplinary committee of the Bar Council of India an appeal lies to this Court. The appeals can be taken by a 'person aggrieved' by the order of the disciplinary committee of the State Bar Council or the Bar Council of India, as the case may be. It is in this context that we have to determine whether the Advocate-General can be regarded as a 'person aggrieved.'

32. In view of the common roll maintained by the Bar Council of India it appears to me that if anybody represents the Bar it would be the Bar Council of India and in the case of the States, the Bar Council of the State. The Advocate-General has no right to speak on behalf of the body of the advocates as if he represented them and their interests. Neither is this privilege expressly conferred on him, nor can it be implied from any of the provisions of the Act. The question, therefore, arises: in what capacity does the Advocate General appear before a disciplinary committee? It is obvious that he is not a prosecutor on behalf of the Bar Council because if he was one, his presence would be more necessary at the stage at which

the disciplinary committee considers in limine to decide whether the matter should be proceeded with at all. The next question is: why is he summoned at all? In my opinion, the Advocate-General is not noticed and brought before the court because he is a prosecutor or is to be bound by the order of the disciplinary committee. He represents no interest there and is heard merely because he is the chief counsel of the State and therefore his assistance at the hearing is useful. The fact that he need not appear by himself and may appear through an advocate renders his position a little weaker in the matter of his grievance. If he is to be treated as a 'person aggrieved' he must argue the case himself. The fact that he appears through a counsel shows that the intention is merely to have the opinion of a person who is neither siding with the complainant nor with the advocate and who will thus have unbiased and impartial approach to the case. The Advocate-General is generally a lawyer of some standing having made a mark in the profession and his contribution to the deliberations of the disciplinary committee is welcome because thus the disciplinary committee is helped to reach a proper conclusion.

33. If he is not a person summoned to be bound by the order but a person who is heard in a dispute between others merely to be of assistance in reaching the right conclusion he can hardly have a grievance. The Advocate-General must after he has done his duty leave the matter to the complainant and the advocate or the Bar Council to take the matter further if they choose. In no event the Advocate-General is in the nature of a party having independent rights which he can claim are injured by the decision. The decision does not deny him anything nor does it ask him to do anything. It is thus that Lord Denning says that in these disciplinary proceedings the Attorney-General is not a party as in a lis and after the decision, his duty ends. Lord Denning points this out clearly by saying that the Advocate-General in that case could not have been aggrieved by the order of the Deputy Judge if he had acquitted the delinquent advocate in that case. The Attorney-General's interest was found by Lord Denning in relation to the Crown and the Colony and that

too for the special reason that appeal court had denied that the Deputy Judge possessed jurisdiction to hear the case. In our country the Advocate-General does not represent the Executive or the Legislature or the Judiciary in disciplinary proceedings before the disciplinary committee. His function is advisory and more akin to an *amicus curiae*. He is not to take sides except in so far his arguments lend weight to the case of the one side or that of the other. Beyond that he is not interested in the dispute either in his personal capacity or in his capacity as an Advocate-General. He does not represent the Government in these proceedings. If the Government was interested the notice would have gone to it. In other statutes, where the Central Government is vitally interested, as for example, in the Chartered Accountants' Act, the notice does not go to the Advocate-General but to Government and the government appears through the Advocate-General. The Advocate General under the Act finishes his duty when the hearing is over and he cannot be considered to be a party interested or a 'person aggrieved'. I do not find anything in the Act which indicates that the Advocate-General is to be treated as a 'person aggrieved' by a decision whether in favour of the advocate or against him. Indeed it would have been the easiest thing to give a right of appeal to the Advocate-General *eo nomine* without including him in the compendious phrase a 'person aggrieved'. If he is not noticed, the order would be held to deny him something which the law entitled him to. That is quite different. The larger proposition contended for by Mr. Desai is therefore not acceptable to me.

34. This brings me to the narrow ground on which Mr. Setalvad very properly rested the case of the Bar Council of India. That narrow ground is that in this case there were several points of general public interest which needed to be solved and therefore, if the decision of the disciplinary committee of the State Bar Council was wrong, the Advocate-General in the public interest could take the matter further. I do not think that I can subscribe to this approach either in this case. The Advocate-General presented his views that

a conviction in England showed moral turpitude in the advocate. I do not think that this inference necessarily follows. The advocate explained that he was held guilty in a summary court and received a small fine because he was not in a position to prove his innocence before the Magistrate.

35. Now in disciplinary proceedings the advocate was not estopped from questioning the charge that he was guilty of corrupt practice. In a civil proceeding the decision of a criminal court is not *res judicata*. To give an example, if a person is involved in a traffic offence in which some one is injured he may in the criminal court receive a light sentence but if he is sued in a civil court for heavy damages he can plead and prove that he was not negligent or that accident was due to the contributory negligence of the defendant. The decision of the criminal court would not preclude him from raising this issue before the civil court.

36. The advocate here explained that he was held guilty before the Magistrate in the circumstances in which he was placed. The fact of his conviction, as well as his full statement bearing on his conduct were before the disciplinary committee of the State Bar Council. They had to choose between the two, that is to say, the result of a summary trial without going into merits and proof of the misconduct. Having examined the advocate and seen the record, the disciplinary committee of the State Bar Council chose to accept the plea of the advocate and held that he was not guilty. They were also satisfied that the summary proceedings in the criminal trial in England offended against the principles of natural justice. They were entitled to this view on which much can be said on both sides. If the Advocate-General's view of the case was not accepted by the disciplinary committee he could not have any grievance. He could not make this into his own cause or a cause on behalf of persons he did not represent. He had done his duty and the matter should have rested there. For this reason I am of the view that in this case the Advocate-General was not a 'person aggrieved' within the meaning of S. 37 of the Advocates' Act even on the narrow ground and the

appeal filed by him before the disciplinary committee of the Bar Council of India was incompetent.

37. The conclusion which I have reached does not mean that I have gone into the merits of the advocate's plea. Nor does it indicate that I, sitting as a Judge, would have accepted the plea of the advocate, if I were to decide the case on facts. That is a matter quite beside the point. I refer to the plea because it was raised and was accepted by his peers on the disciplinary committee.

38. I would, therefore, allow the appeal and set aside the order of the disciplinary committee of the Bar Council of India.

MITTER, J.: — 39. (For himself and Shelat J.) On the basis of a news item in the Times of India of August 27, 1966 the Bar Council of Maharashtra in exercise of its powers under S. 35 of the Advocates Act, 1961 issued a notice to the appellant to face an inquiry into his conduct by its disciplinary committee. The said committee exonerated the appellant of the charge levelled against him and held that he was not guilty of any misconduct, professional or otherwise. Relying on the provisions of S. 37 of the said Act the Advocate-General of Maharashtra who had appeared before the said committee preferred an appeal to the Bar Council of India. The Disciplinary Committee of the Bar Council of India disagreed with the finding of the disciplinary committee of the Bar Council of Maharashtra observing that the conduct of the appellant which was investigated into before the State Bar Council was quite undeserving of an advocate and directed his suspension from practice for a period of one year. The appellant has come up in appeal to this Court and has urged a preliminary point that the appeal by the Advocate-General to the Bar Council of India was incompetent and the finding and order of the disciplinary committee of the said body ought to be set aside on that ground alone without our going into the facts of the case.

40. Notice of this hearing was given to the Advocate-General and the Bar Councils of all the States as also the Attorney-General of India and we have had the benefit of arguments advanced before us not only on behalf of the Advocate-General for the State

of Maharashtra but also on behalf of the Bar Council of India, the Attorney-General of India and some of the Advocates-General of the States.

41. The determination of this question depends on the interpretation of S. 37 of the Advocates Act, 1961 (hereinafter referred to as the 'Act'):

"(1) Any person aggrieved by an order of the disciplinary committee of a State Bar Council made under section 35 may, within sixty days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India.

(2) Every such appeal shall be heard by the disciplinary committee of the Bar Council of India which may pass such order thereon as it deems fit."

To put the matter in a nut-shell, the question is, "Is the Advocate-General of a State who appears before the disciplinary committee of a State Bar Council in pursuance of a notice given to him under S. 35 (2) of the Act 'a person aggrieved' within the meaning of the words used in S. 37?"

42. To decide this question we have to look into the Act to find out the role of the Advocate-General of a State in proceedings of this kind. The object of the Act is to amend and consolidate the law relating to legal practitioners and to provide for the constitution of Bar Councils and an All-India Bar. All the States and the Union territories are to be under the jurisdiction of named State Bar Councils and there is also to be a Bar Council of India for the territories to which the Act is extended. Generally speaking a State Bar Council is to consist of a number of members including the Advocate-General of the State ex officio, while the Attorney-General of India ex officio is to be a member of the Bar Council of India. The other members of the Bar Councils are to be elected in terms of the Act. Under S. 6 the functions of a State Bar Council are to be inter alia:

(a) to admit persons as advocates on its roll;

(b) to prepare and maintain such roll;

(c) to entertain and determine cases of misconduct against advocates on its roll.

Section 7 lays down the functions of the Bar Council of India which are to be inter alia:

(a) to prepare and maintain a common roll of advocates;

(b) to lay down standards of professional conduct and etiquette for advocates; and

(c) to lay down the procedure to be followed by its disciplinary committee and the disciplinary committee of each State Bar Council.

Under S. 9 a Bar Council has to constitute one or more disciplinary committees each of which is to consist of three persons of whom two are to be persons elected by the Council from amongst its members and the third is to be a person co-opted by the Council from amongst advocates possessing the qualifications specified in the proviso to sub-s. (2) of S. 3 but is not a member of the council. Section 15 empowers Bar Councils to make rules to carry out the purposes of the Act. Chap. III of the Act containing Ss. 16 to 28, provides for admission and enrolment of advocates, the determination of their seniority etc. The right of an advocate to practice is dealt with in Chapter IV. Chapter V which contains Sections 35 to 44 deals with the conduct of advocates. The relevant provisions thereof are set out as under—

"35 (1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

(2) The disciplinary committee of a State Bar Council, if it does not summarily reject the complaint, shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:—

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council direct that the proceedings be filed;

(b) reprimand the advocate;

(c) suspend the advocate from practice for such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

(4) x x x x

(5) Where any notice is issued to the Advocate-General under sub-section (2) the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf.

x x x x

37. supra.

38. Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under section 36 or section 37 may, within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such order thereon as it deems fit."

Section 42 gives the disciplinary committee of a Bar Council the same powers as are vested in a civil Court under the Code of Civil Procedure in respect of various matters including the summoning and enforcing the attendance of any person and examining him on oath, requiring discovery and production of documents etc. and under sub-section (2) all proceedings before a disciplinary committee of a Bar Council are to be deemed judicial proceedings within the meaning of sections 193 and 228 of the Indian Penal Code. Section 43 empowers the disciplinary committee of a Bar Council to make such order as to costs of any proceedings before it as it may deem fit. Section 44 gives the disciplinary committee power to review any order passed by it of its own motion or otherwise.

43. The above provisions of the Act make it clear that subject to a right of appeal to this Court under S. 38 the inquiry into charges of misconduct against an advocate is to be in the exclusive jurisdiction of the Bar Councils. Any complaint against the conduct of an advocate has to be preferred before a State Bar Council and when the council has reason to believe on the strength of such complaint that an advocate on its roll has been guilty of professional or other misconduct, it has to refer the case for disposal to its disciplinary committee. The council can take such a step of its own motion. Section 35 (1) shows that it is not obligatory on the State Bar Council to refer each and every complaint to the disciplinary committee. It

has to be satisfied that there is a prima facie case for investigation. It can throw out a complaint if the same appears to be frivolous. Sub-s. (2) of S. 35 shows that it is not incumbent on the disciplinary committee of a State Bar Council to proceed further with the matter if it takes the view that the complaint is without substance. It is not obliged to call upon the advocate concerned to explain his conduct or to inform the Advocate-General that it has rejected the complaint summarily. It is only when the disciplinary committee is satisfied that the complaint ought not to be rejected out of hand that it has to fix a date for the hearing of the case and give notice thereof to the advocate concerned and to the Advocate-General of the State. It is mandatory on the disciplinary committee to give such a notice to both. Sub-sections (3) and (5) of Section 35 go to show that it is not incumbent on the Advocate-General to appear at the hearing and that it is within his discretion to appear either by himself or through another advocate of his choice and place his viewpoint before the disciplinary committee. He is not a party to the proceedings but he has a right to appear and to make submissions both on questions of fact and questions of law.

44. Section 37 does not in terms lay down who can prefer an appeal from the order of the disciplinary committee of the State Bar Council. There can be no doubt that the advocate against whom an order is made would be a person aggrieved. The State Bar Council cannot be such a person as the order is made by itself acting through its disciplinary committee. A member of the public may make a complaint to the State Bar Council against an advocate on the ground of loss or damage or any serious prejudice caused to him by the advocate, be it negligence or fraud e.g. collusion with the opponent or misappropriation of any moneys belonging to him and there does not seem to be any justifying cause for holding that he is not a person aggrieved by an order which dismisses his complaint.

45. The question arises as to whether the Advocate-General is a person aggrieved because the disciplinary committee does not take the same view of the matter as himself, be it

for or against the advocate. To place the Advocate-General in the category of "persons aggrieved" one must be able to say that the disciplinary committee committed an error which it was his duty to attempt to set right because of some function attributable to him as the Advocate-General or some obligation cast upon him by the Act or the general law of the land to safeguard and maintain standards of conduct of advocates laid down by the Bar Council of India.

46. Generally speaking, a person can be said to be aggrieved by an order which is to his detriment, pecuniary or otherwise or causes him some prejudice in some form or other. A person who is not a party to a litigation has no right to appeal merely because the judgment or order contains some adverse remarks against him. But it has been held in a number of cases that a person who is not a party to suit may prefer an appeal with the leave of the appellate court and such leave would not be refused where the judgment would be binding on him under Explanation 6 to section 11 of the Code of Civil Procedure. We find ourselves unable to take the view that because a person has been given notice of some proceedings wherein he is given a right to appear and make his submissions, he should without more have a right of appeal from an order rejecting his contentions or submissions. An appeal is a creature of statute and if a statute expressly gives a person a right to appeal, the matter rests there.

47. Innumerable statutes both in England and in India give the right of appeal to "a person aggrieved" by an order made and the provisions of such statutes have to be construed in each case to find out whether the person preferring an appeal falls within that expression. As was observed in (1881) 7 Q.B.D. 465 the words "person aggrieved" are "ordinary English words which are to have the ordinary meaning put upon them". According to Halsbury's Laws of England (Third Edn. Vol. 25) page. 293 foot-note "h", "the expression is nowhere defined and must be construed by reference to the context of the enactment in which it appears and all the circumstances."

Attempts have however from time to time been made to define the expres-

sion in various cases. In *Ex parte Sidebotham*; *In re Sidebotham*, (1880) 14 Ch D 458 at p. 465 it was observed by James, L. J.

"But the words "person aggrieved" do not really mean a man who is disappointed of a benefit which he might have received if some other order had been made. A "person aggrieved" must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something."

48. The above definition of James, LJ was described by Esher M. R. in *Ex parte Official Receiver*; *In Re Reed, Bowen & Co.* (1887) 19 QBD 174 at p. 178 as not "an exhaustive definition". His Lordship added:

"It is an affirmative definition of a person who may appeal, and at all events it includes a person who has asked for a decision for which he had a right to ask, and has been wrongfully refused."

49. (1890) 25 QBD 357 at p. 361 was a case of an appeal by an informant against the judgment of a justice of the peace upon the hearing of an information or complaint by the vestry of the parish against a person for unlawfully and wilfully obstructing the free passage of a certain highway. The relevant section provided:

"If any person shall think himself aggrieved by . . . any order, conviction, judgment, or determination made, or by any matter or thing done by any justice or other person in pursuance of this Act . . . such person may appeal to quarter sessions." In holding that an informant had no right of appeal Lord Coleridge C. J. said:

"Is a person who cannot succeed in getting a conviction against another a person aggrieved?" He may be annoyed at finding that what he thought was a breach of law is not a breach of law; but is he "aggrieved" because some one is held not to have done wrong? It is difficult to see that the section meant anything of that kind."

In *Rex v. London Quarter Sessions*; *Ex parte Westminster Corporation*, (1951) 2 KB 508, a borough council whose cancellation of the registration of a street

trader had been reversed by a Magistrate on appeal by the trader concerned under Section 25 of the London County Council (General Powers) Act, 1947 was held not to be a person aggrieved by an order of a court of summary jurisdiction within the meaning of Section 64 of the Act. The argument advanced on behalf of the corporation was that it had a public administrative duty to perform in the regulation of the streets and having been interfered with in the execution of that duty by the decision of the Magistrate, they were persons aggrieved by his order. One of the grounds for refusal of the application by Lord Goddard, C. J. was that the order made did not directly affect the borough council in such a way as to make them "a person aggrieved" within the meaning of the section. According to the learned Chief Justice what the statute did was "to substitute the opinion of the Magistrate for the opinion of a borough council". It was said that the court of summary jurisdiction had to take into account the same matters as the borough council had to take into account, and if the court thinks that the cancellation of the licence is not justified, it can restore the licence to the street trader. If the court of summary jurisdiction refuses to grant a licence, then the street trader is a person aggrieved, because his livelihood is affected, or an order is made directly affecting him.

50. The case of (1929) 2 KB 440 at p. 444 was relied upon by counsel appearing for the Advocate-General of Maharashtra to support his argument that even a person who had not proprietary or pecuniary interest in the subject matter of the litigation might be a person aggrieved so as to give him a right to appeal. The statute in this case was however worded very differently from the statutes which came up for consideration in the cases noted earlier. Section 68 (1) of the Public Health Act, 1926 laid down that:

"Where for the purpose of relieving or preventing congestion of traffic it appears to the local authority to be necessary to provide within their district suitable parking places for vehicles"

then that authority may, subject to certain conditions, provide those park-

ing places and might acquire land suitable for use as a parking place. The proviso to the section however laid down that no such order shall authorise the use of any part of a street so as unreasonably to prevent access to any premises adjoining the street, or the use of the street by any person entitled to the use thereof, or so as to be a nuisance, or be made in respect of any part of a street without the consent of the authority or person responsible for the maintenance of the street. Sub-section (2) of the section provided that where a local authority proposes to acquire land for the purpose of using it as a parking place they are to give notice of the proposal specifying the land and notify the date within which any objection is to be sent to them and the notice is to state that a right of appeal was conferred by the section. Sub-section (3) provided that before carrying into effect any proposal of which notice was required to be given the local authority shall consider any objection which was sent to them in writing. There was no limit there as to the kind of person making the objection or the kind of objection which might be raised. The respondent a rate-payer, duly gave notice under sub-section (3) on various grounds but he did not allege the infringement of any personal legal right and he objected in his capacity as a rate-payer and as a member of the public on grounds common to them all. The urban council considered the objection and informed him of their decision to proceed with the scheme. The respondent appealed to petty sessions which allowed his objection. The appellant appealed to quarter sessions and took the preliminary objection that the respondent was not a person aggrieved because he had alleged no infringement of any legal right personal to him.

51. Referring to the dicta of James, L. J., Esher M. R. and Lopes L. J. in the above cases Lord Hewart, C. J. observed:

"I think this respondent did ask for a decision for which he had a right to ask. He did give notice of an objection of which he was entitled to give notice, ... but the person making the objection is not to have an appeal unless he satisfies two conditions:

(1) that he is the author of the objection, and (2) that he is aggrieved by the refusal in the sense that he has a special and individual right infringed. It seems to me that upon the fair construction of this sub-section, which is by no means a common kind of statutory provision, what is meant is that a person may make an objection and is entitled to a decision upon it, and if the decision is adverse to him, he may, if he thinks fit and subject to the usual consequences, appeal from it to a petty sessional court, and so appealing, may, in consequence of other statutory provisions, appeal, if need be, to the court of quarter sessions." According to Avory J.:

"There is no limit there (in sub-section (3)) of the kind of person or the kind of objection which may be made. It proceeds that after so considering the objection, they are to give notice of their decision to the person by whom the objection was made, and any person who is aggrieved by such decision may appeal. I cannot help thinking that on the plain words of that statute it was intended to give a right of appeal to any person who has made an objection to the proposal and has received notice that that objection has been overruled."

52. In (1959) 1 QB 384 at p. 390, Lord Parker C. J. remarked that it was easier to say what will not constitute a person aggrieved than it was to say what "person aggrieved" included. He observed that a person was not aggrieved when being a public body it had been frustrated in the performance of one of its public duties. He amplified this by saying that:

"If costs have been awarded in a case against a local authority, it is clear on the authorities that the local authority would be an aggrieved person. Equally, if the result of the decision has been to put some legal burden on the public body concerned, that has been held to make it a person aggrieved."

According to Donovan J. in the same case—

"The word 'aggrieved' connotes some legal grievance, for example, a deprivation of something, an adverse effect on the title to something, and so on, and I cannot see that this is so here. The local planning authority has simply been told that it cannot

enforce the discontinuance of the present use of this land by the appellant by means of an enforcement notice under Section 23."

53. If one is to be guided merely by the provisions of the Advocates Act it is difficult to see how the Advocate-General can be a person aggrieved because the State Bar Council takes the view, whatever be its reasoning, that an advocate on its roll has not been guilty of any misconduct. The entertaining of complaints, the inquiry into them and the punishment to be meted out to the advocate are all concerns of the Bar Council. The Advocate-General no doubt is entitled to a hearing if the complaint is not rejected summarily. The statute expects him to take a fair and impartial attitude. He has to render all assistance to the Bar Council so that a proper decision may be arrived at. His role is not that of a prosecutor nor is he a defence counsel on behalf of the advocate. He is not interested in getting the advocate punished any more than he is interested in seeing that the character of a fellow member of the Bar is cleared even if his conduct be unworthy of an advocate. The Act does not make it obligatory on him to take part in the proceedings where he thinks that the facts of the case are so plain that his assistance is not called for. It is only when he feels that a case requires a careful investigation and proper elucidation of the facts or the exposition of the law on the subject that he is called upon to render all assistance in the proceedings. When he chooses to do so he does his duty by appearing at the hearing and putting before the disciplinary committee the facts in their proper perspective and advancing the proper inference to be drawn therefrom. Once he does so there is an end of the matter so far as he is concerned. He cannot have any grievance because the decision of the Bar Council is against his submission or not to his liking.

54. The question then arises as to whether any duty is cast on the Advocate-General by reason of his position to question the decision of the Bar Council if he feels it in the general interest of the members of the Bar or a wider public to do so. Article 165 (2) of the Constitution epitomizes the

functions and duties of the Advocate-General in the following words:

"It shall be the duty of the Advocate-General to give advice to the Government of the State upon such legal matters and to perform such other duties of a legal character, as may from time to time be referred or assigned to him by the Governor and to discharge the functions conferred upon him by or under the Constitution or any other law for the time being in force."

A notable instance of his statutory duties is furnished by Order XXVII-A of the Code of Civil Procedure. By the provisions of Section 91 of the Code of Civil Procedure no suit for a declaration and injunction in the case of a public nuisance can be instituted except by him or with his consent. Similar powers are given and duties cast on him by Section 92, C. P. C. in the case of trusts created for public purposes. Section 526-A of the Code of Criminal Procedure gives an Advocate-General power to apply to the court for the committal or transfer of a case to the High Court where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accused of any of the offences specified therein. It is not open to the Advocate-General to intervene in any suit or legal proceeding apart from the provisions of the Code of Civil Procedure because he thinks public interest is involved in the matter.

55. Treating the matter historically, it may be said that in many respects the position of an Advocate-General before 1950 was very similar to that of the Attorney-General in England. Sections 100 and 111 of a Statute of 1813, 53 George III, C. 155, enabled the Advocates-General to exhibit to the respective Supreme Courts of Judicature at any of the Presidencies or to the Recorder's Court at Bombay any information or informations for breaches of Revenue laws etc. as might be taken by the Attorney-General in the court of Exchequer in England or in the nature of action or actions at law or of a bill or bills in equity as occasion might require against any person or persons residing within such jurisdiction as His Majesty's Attorney-General for the time being was by law authorised to exhibit. The wording of

Section 111 shows that its object was to dispel doubts which had arisen about the competency of the Advocate-General or Principal Law Officer of the East India Company to take such action. Section 114 of the Government of India Act, 1915 empowered the Advocate-General for any Presidency to take on behalf of His Majesty such proceedings as might be taken by His Majesty's Attorney-General in England. Section 65 (2) of the Government of India Act, 1935 laid down that it was the duty of the Advocate-General to give advice to the Provincial Government upon such legal matters and to perform such other duties of a legal character as may from time to time be referred or assigned to him by the Governor.

56. The position of the Attorney-General in England is stated by Hood Phillips on Constitutional and Administrative Law (Fourth Edition) at p. 315 to be as follows:

"The Law Officers consist of the Attorney-General and Solicitor-General for England, and the Lord Advocate and Solicitor-General for Scotland. They are regarded as the heads of the Bar in their respective countries, and as such are referees on points of professional etiquette."

The learned author goes on to note at p. 317:

"The Advocate-General represents the Crown in civil proceedings in which it is specially concerned. His consent is necessary for the prosecution of certain offences, e.g. under the Official Secrets Acts. In criminal proceedings he or the Solicitor-General or their deputies, prosecute in important cases. It is the practice for the Attorney-General to lead in treason and important constitutional cases. He may also file ex officio criminal informations, though this procedure is now rarely used. He may stop the trial of an indictment by entering a nolle prosequi. He may also take over certain proceedings on the relation of private individuals (relator actions) e.g. public nuisance etc. The Attorney-General's procedural privileges include the right to demand a trial at Bar (i.e. now, before a Divisional Court), and the right to choose the venue for any Civil or Criminal proceedings in which the Crown is concerned".

Anson in his treatise on Law and Custom of the Constitution Volume II, Part I (4th Edition, 1935) describes the Attorney-General, the Solicitor-General and the Lord Advocate and the Solicitor-General for Scotland as the chiefs of the legal profession in their respective countries and states that in England and Northern Ireland they represent the Bar when the Bar takes collective action. So far as England is concerned neither the Attorney-General nor the Solicitor-General appears to have had for a very long time any function to discharge or any duty to perform when the conduct of a barrister or a solicitor was called in question. The power of inquiry was delegated by the Judges to the Inns of Court so far as barristers are concerned and as regards solicitors the matter has for some time been delegated to the Law Society.

57. It may not also be out of place to note the history of the legislation in India with regard to enquiries against members of the legal profession prior to the Act of 1961. Under clause 10 of the Letters Patent of the High Court of Calcutta of the year 1865 the High Court was to have power to make rules for the qualification and admission of proper persons to be advocates, vakils and attorneys at law and was to be empowered to remove or suspend them from practice on reasonable cause. The Letters Patents of other High Courts contained provisions. (sic) The Legal Practitioners Act, 1879 appears to have been the earliest Indian Statute on the subject. Under S. 13 of this Act the High Court was empowered after such enquiry as it thought fit, to suspend or dismiss any pleader or muktyar who was guilty of fraudulent or grossly improper conduct in the discharge of his professional duty. The Bar Councils came into existence for the first time under the Bar Councils Act, 1926. But even under this Act the power to reprimand, suspend or remove from practice any advocate of the High Court charged with professional or other misconduct was left with the High Court under S. 10 (1). Section 10 (2) laid down the procedure to be adopted by the High Court when a complaint was made to it by any Court or by the Bar Council or by any other person that an advocate had been guilty of misconduct. The High Court could

summarily reject the complaint or refer the case for enquiry to the Bar Council or after consultation with the Bar Council refer it to the Court of a District Judge and it also might of its own motion refer any case where it had reason to believe that any advocate had been so guilty. Under S. 11 it was the duty of a committee of the Bar Council to inquire into a complaint made under Section 10. Under Section 12 (2) of the Act the finding of a Tribunal on an inquiry referred to the Bar Council was to be forwarded to the High Court through the Bar Council and the finding of a District Court on such inquiry was to be forwarded to the High Court direct with a copy to the Bar Council. Section 12 (3) of the Act contained a provision somewhat similar to S. 35 (3) of the Act of 1961. The hearing was however to take place before the High Court, which had to give notice of the date fixed for the purpose to the advocate concerned, to the Bar Council and to the Advocate-General and to afford them an opportunity of being heard before orders were passed in the case. Under the Act of 1926 the Advocate-General appeared on the scene only after the Bar Council had recorded its finding. The significant departure in the Act of 1961 from the analogous provision of the Act of 1926 is that the Advocate-General is given notice of hearing of the case. By itself this cannot affect any change in his position as regards an inquiry into the conduct of an advocate. It would be reasonable to hold that while passing the Statutes of 1926 and 1961 the Legislature thought that the Advocate-General should be heard inasmuch as he occupied the position of a general referee on points of professional etiquette very much like the Attorney-General in England.

58. However that may be, once he does the duty enjoined upon him by the statute of making such submissions as he thinks proper at the hearing his functions qua the inquiry came to an end. As a referee he has no further interest in the matter. If the disciplinary committee of the Bar Council makes an order against the advocate which the Advocate-General considers harsh and unreasonable in the circumstances of the case, he is not called upon to file an appeal to protect the interests of the advocate. Neither is he

interested in prosecuting the matter further if he takes the view that the punishment meted is not commensurate with the misconduct of the advocate.

59. Elaborate reference was made at the Bar to the decision of the Privy Council in 1961 AC 617 at p. 620. In that case the conduct of the respondent, a member of the English Bar admitted to practice as a barrister and solicitor of the Supreme Court of the Gambia was found to be dishonourable and as such an order striking his name off the roll of the court was made by the deputy Judge with a direction that it should be reported to the Masters of the Bench of the Inn to which he belonged. The Chief Justice of the Supreme Court of the Gambia had criticised the conduct of the barrister severely in the course of a trial held before him and had sent a copy of his judgment to the Attorney-General of the Gambia. The Attorney-General served a notice of motion on the barrister for an enquiry to be made by the Chief Justice but as the Chief Justice was the only Judge of that Court he recommended that some one other than himself should be appointed as a deputy judge to hold the inquiry. The Deputy Judge ordered his name to be struck off the roll. His order was however set aside by the West African Court of Appeal not on merits but on the ground that a deputy judge had only jurisdiction to represent the Chief Justice in the exercise of his judicial powers and according to the Court of Appeal the power to strike the name of a legal practitioner off the roll was not a judicial power. The Attorney-General of the Gambia appealed to Her Majesty in Council. The question of the maintainability of the appeal was also canvassed before the Board. With regard to inquiries into the conduct of barristers and solicitors in the Crown colonies Lord Denning, who delivered the judgment of the Privy Council, said —

"by the common law of England the Judges have the right to determine who shall be admitted to practice as barristers and solicitors, and as incidental thereto the judges have the right to suspend or prohibit from practice. In England this power has for a very long time been delegated,

so far as barristers are concerned, to the Inns of Court; and, for a much shorter time, so far as solicitors are concerned, to the Law Society. In the colonies the Judges have retained the power in their own hands, . . . " His Lordship went on to remark at p. 631:

"When the judges exercise this power to suspend or expel, they do not decide a suit between the parties. There is no prosecutor as in a criminal case, nor any plaintiff as in a civil suit. The judges usually act on their own initiative, *ex mero motu*, on information which has come to their notice, or to the notice of one or other of them in the course of their duties." Further,

"When a legal practitioner is suspended or struck off by the judges of a colony, he has always been at liberty to petition Her Majesty in Council to restore him."

Rejecting the argument that the Attorney-General had no *locus standi* to petition for special leave to appeal as he was not a person aggrieved, the Board referred to S. 31 of the Order in Council, 1949 which gave very wide powers to His Majesty in Council to entertain the petition of any person aggrieved by any judgment of the court and to admit his appeal upon such conditions as His Majesty in Council would think fit to impose. On the facts of the case the Board held that the Attorney-General had a sufficient interest in the matter because the order made by the West African Court of Appeal prejudicially affected his interests.

The reasoning of the Board was as follows:

"The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the Judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that if the judge acquits the petitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the Judge finds the practitioner guilty of professional misconduct and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge, or is otherwise a point in which the public interest is concerned, the Attorney-General is a "person

aggrieved" by the decision and can properly petition Her Majesty for special leave to appeal."

It is clear that Lord Denning considered the denial of jurisdiction of the deputy judge to be a matter of public interest and therefore held the Attorney-General, as the Crown's representative, to be a person sufficiently interested as to be a person aggrieved. That surely is not the position here, nor is an Advocate-General the representative of the Government. Neither the Constitution nor the Advocates Act 1961 holds him as the representative of the Government or as a person representing the public interest. Whatever may be the position of the Attorney-General in a colony as a representative of the Crown, he is not the guardian of the public interest in India in any matter except as provided for in the statutes. He like any other person may draw the attention of the Bar Council to any misconduct of an advocate which according to him merits disciplinary action. The Act of 1961 provides for notice to be given to him of all such proceedings and gives him a right to appear at the hearing but once the hearing is over and a finding recorded he has done his duty and cannot be said to be aggrieved within the meaning of the expression used in S. 37. It is only because the Attorney-General for the Gambia had an interest in seeing that the Court of Appeal did not reverse the decision of the deputy Judge on a ground which went to the jurisdiction of the Judge or was otherwise a point in which the public interest was concerned that the Board held that he was a person aggrieved.

60. Our attention was drawn to a decision of the Judicial Committee in 37 Bom LR 722 = (AIR 1935 FC 168) where the Privy Council entertained an appeal by the Advocate-General of Bombay against an advocate who had been found by the High Court of Bombay to have been guilty of misconduct but against whom no disciplinary action had been taken by the Judges. Although there was a good deal of discussion at the Bar about the maintainability of the appeal which was sought for by special leave, the Board remarked that the circumstances were not such as to justify it in advising His Majesty to grant such special leave principally on the ground that the question was one of

the exercise of statutory discretion by the Judges as to whether the circumstances of the case as established before the High Court called for any disciplinary action and the Board felt that the action of the High Court in exercising their discretion in the way they had done was not such as His Majesty would be advised further to consider.

61. This decision does not help the Advocate-General of Maharashtra because it did not decide the point as to the maintainability of the appeal. It is well known that the Judicial Committee was never chary in granting special leave to appeal when it felt that the justice of the case demanded a further hearing.

62. Mr. Daphtary appearing for the appellant very fairly drew our attention to an observation of this Court in 1955-1 SCR 1055 at p. 1064 = (AIR 1955 SC 223 at p. 227) which was a case of an appeal by special leave from an order of the High Court at Madras under S. 12 of the Indian Bar Councils Act debarring the advocate for a period of five years on charges of misconduct which were held by the High Court as proved. In the ultimate paragraph of the judgment this Court recorded its strong disapproval of the frame of the appeal in that the Judges of the High Court had been made respondents to it. They however went on to observe that:

"in an appeal arising out of a proceeding under the Bar Councils Act the appropriate parties should be the advocate concerned, the complainant, if any, the Bar Council or the Secretary thereof and the Advocate-General of the State concerned to whom notices have to be issued under Section 12 (3) of the Indian Bar Councils Act."

With great respect, we find ourselves unable to concur in the above so far as the Advocate-General is concerned. It does not appear that any argument was advanced about the proper parties to the appeal before this Court and the point as to whether the Advocate-General was a person aggrieved was neither raised nor argued. The only party to appear before this Court was "the Judges of the High Court".

63. It appears that the Advocate-General of Maharashtra felt in this case that the disciplinary committee of the Maharashtra Bar Coun-

cil had gone wrong and that there was a question of principle involved as regards the effect of a conviction of an Indian advocate of an offence recognised by all civilised countries as an offence involving moral turpitude and that the question also related to the requirements of natural justice in a criminal court. Every day courts of law are called upon to decide questions of law inter partes which may be of general importance to the public. The Advocate-General cannot prefer an appeal merely because the question is one of considerable importance to the public inasmuch as he is not a party to it and he has no locus standi to do so even in a case where the statute only gives him an opportunity of appearing at a hearing and making his submissions.

64. A decision by the disciplinary committee cannot necessarily be said to raise a point of public interest merely because the Advocate-General feels that it is erroneous or that he himself would have arrived at a different conclusion. That at best is his personal opinion as regards the conduct of an advocate who has to deal with the public and the non-acceptance thereof does not make him a person aggrieved. An Advocate-General in India is not the guardian angel of the Bar, nor is he the champion of public interest in any matter save as specified in a statute.

65. In conclusion we hold that the appeal by the Advocate-General of Maharashtra to the Bar Council of India was incompetent and this appeal should be allowed and the finding of the Bar Council of India set aside.

66. **VAIDIALINGAM, J.:** With respect, I am not able to agree with the views expressed by My Lord, and Mr. Justice Mitter that the appeal filed by the Advocate-General of Maharashtra before the Bar Council of India was incompetent.

67. The preliminary point that has been argued before us in this appeal relates to the maintainability of the appeal by the Advocate-General of Maharashtra before the Bar Council of India under S. 37 (1) of the Advocates Act 1961 — Act 25 of 1961 (hereinafter referred to as the Act) against the order of the Disciplinary Committee of the Bar Council of Maharashtra (hereinafter referred to as the Committee)

dated October 19, 1968 holding the appellant not guilty of any professional misconduct. It is not necessary to refer to the allegations of professional misconduct made against the appellant as this appeal has yet to be heard on merits.

68. Against the order of the Committee, acquitting the appellant, the Advocate-General of Maharashtra Sri H. M. Seervai filed under S. 37 (1) D. C. Appeal No. 18 of 1968 before the Bar Council of India. The said appeal was heard by the Disciplinary Committee of the Bar Council of India (hereinafter referred to as the Appellate Committee) as required by Section 37 (2) of the Act. A preliminary objection was raised on behalf of the appellant that the Advocate-General was not competent to prefer the appeal as he was not the complainant nor were the proceedings for taking disciplinary action initiated at his instance and he is not "any person aggrieved" under Section 37 (1). The State Bar Council, which initiated the proceedings was apparently satisfied with the decision of its Committee and did not take any further action. In short, according to the appellant, the Advocate-General was not "any person aggrieved", under S. 37 (1) of the Act. The appeal was also contested by the appellant on merits. The Appellate Committee by its order dated October 26, 1969 overruled the preliminary objection and held that the Advocate-General was competent to maintain the appeal under S. 37 (1). By the same order the Appellate Committee disagreed with the findings of the Committee and found the appellant guilty of professional misconduct and ordered his suspension from practice for a period of one year. The appellant was also directed to pay the costs of the proceedings. It is this order of the Appellate Committee that is the subject of the appeal before us.

69. As stated earlier, we have heard arguments only on the question of the maintainability of the appeal at the instance of the Advocate-General of Maharashtra before the Bar Council of India. As the question raised was a fairly important one, notice had been issued to the Attorney-General of India, the Bar Council of India, the Advocates-General and the Bar Councils of the States. Advocates-

General of most of the States were represented by counsel. The Attorney-General of India the Bar Council of India as well as the Bar Council of Maharashtra were also represented by counsel before us.

70. The question posed for our consideration is whether the Advocate-General of a State comes within the expression "any person aggrieved" in S. 37 (1) of the Act.

71. Mr. Daphtary, learned counsel for the appellant, drew our attention to the various provisions of the Act and pointed out that matters concerning the legal profession have now been entrusted to the State Bar Councils and the Bar Council of India and the powers to take disciplinary action have also been vested in them. Whatever may have been the position once occupied by the Advocate-General vis-a-vis, the legal profession, that has now been changed by the Act. His appearance in disciplinary matters is only to assist the Committee and he has no further interest in those proceedings. Whether an Advocate is acquitted or convicted is no concern of the Advocate-General, because he is not interested in the actual decision of the Committee. Hence the Advocate-General cannot be considered to be "any person aggrieved" by any order of the Committee so as to be eligible to file an appeal under S. 37 of the Act. In this connection Mr. Daphtary referred us to several English decisions where the expression 'person aggrieved' has been considered and interpreted with references to the statutes in which those expressions occur. Relying on the principles laid down in those decisions, to which reference will be made later, Mr. Daphtary pointed out that the expression 'person aggrieved' should not be interpreted as covering every person who is disappointed or dissatisfied with a decision rendered by a Committee. On the other hand, the counsel urged, that in order to be considered as a 'person aggrieved' that person must be one who has suffered a legal grievance, a man against whom a decision has been pronounced and which has wrongfully deprived him of something or wrongfully refused him something, or wrongfully affected his title to something. An appeal must be by the party who has endeavoured to maintain the contrary of that which has

taken place. The counsel further pointed out that the Advocate-General is a public officer and cannot be considered to be a party to the proceedings before the Committee. The Advocate-General may be even annoyed with the decision of the Committee acquitting an Advocate, but that will not make him a 'person aggrieved'.

72. Considerable reliance was placed by Mr. Daphtary on the observations of Lord Denning in 1961 AC 617 to the effect that the Attorney-General in a colony represents the Crown as the guardian of the public interest and that it is his duty to bring before the Judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action and that if the Judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General, who has done his duty and is not aggrieved. But if, on the other hand, a Court of Appeal reverses the decision holding a practitioner guilty of professional misconduct, on a ground which goes to the jurisdiction of the Judge or is otherwise a point in which the public interest is concerned, the Attorney-General is a 'person aggrieved' by the decision and can properly petition Her Majesty for special leave to appeal. Drawing support from these observations Mr. Daphtary urged that in this case, the Committee had acquitted the appellant and the Advocate-General having appeared through counsel before the Committee has done his duty, and as such he cannot be considered to be aggrieved. No question of jurisdiction of the Committee or any point in which the public interest is concerned arose for decision in the appeal filed by the Advocate-General, so as to make the appeal competent even within the limited rule laid down by Lord Denning.

73. Mr. V. S. Desai, learned counsel appearing for the Advocate-General of Maharashtra and Mr. M. C. Setalvad, learned counsel appearing for the Bar Council of India have supported the decision of the Appellate Committee holding in favour of the competency of the appeal filed by the Advocate-General as "any person aggrieved" under S. 37 of the Act. The counsel appearing for the Attorney-General, the Bar Council of Maharashtra and the Advocate-General repre-

sented before us have supported this view.

74. Mr. V. S. Desai pointed out that the Act is a self-contained Code, and that the various decisions where the expression 'person aggrieved' has been interpreted must be appreciated in the particular context in which those expressions occur in the statutes which were before the Courts. The reasoning in those decisions may furnish a guide but cannot be applied ipso facto when interpreting S. 37 of the Act. The expression "any person aggrieved" in S. 37 of the Act will have to be understood and interpreted in the context in which it appears, having due regard to the scheme of the Act. The counsel also referred us to certain decisions bearing on this matter, to which we shall refer in due course.

75. Mr. M. C. Setalvad, learned counsel, appearing for the Bar Council of India urged in particular that the Advocate-General is a responsible person and is the highest Law Officer of the State. The legal profession is very closely associated with the administration of justice by the Courts. The Bar, in that context has to come into contact with the public to assist them in legal matters. This responsible position occupied by the legal profession has to be properly safeguarded and that could be done only by insisting that its members are persons of high character and integrity and who observe rules of professional etiquette. The Act has made it obligatory to give notice in the disciplinary proceedings to the Advocate-General and give him an opportunity of being heard. The purpose for which the highest Law Officer of the State, the Advocate-General, is brought in not only in the Act, but also in the Indian Bar Councils Act of 1926 (Act 38 of 1926) (hereinafter referred to as the Bar Councils Act) is to subserve the public interest, namely, of seeing that the integrity and honesty of the legal profession are maintained and that proper decisions are given in disciplinary proceedings. There may be cases of inadequate punishment or even harsh punishment being awarded by the Committee. The Advocate-General in proper cases can bring up such matters before the Bar Council of India. Mr. Setalvad further pointed out that there is no restriction

placed in S. 37 denying the right of the Advocate-General to file an appeal against the orders of the Committee. Having due regard to the scheme of the Act and particularly of Ss. 35 and 37, the Advocate-General comes within "any person aggrieved" and hence he was competent to file the appeal.

76. I have given careful consideration to the various aspects placed before us by all the learned counsel and I am of the view that the decision of the Appellate Committee holding that the appeal filed by the Advocate-General of Maharashtra was competent is correct. I am further of the view that the expression "any person aggrieved" in S. 37 will have to be interpreted in the context in which it appears, having due regard to the provisions of the Act and its scheme. Considered in this manner, it has to be held that the Advocate-General comes within "any person aggrieved" in S. 37. The decisions relied on by Mr. Daphtary have, no doubt, interpreted the expression 'person aggrieved' occurring in the particular statutes which came up for consideration in those decisions, but in my opinion it will not be safe to adopt in toto the interpretation so placed, no doubt on the identical expression occurring in different statutes when construing the said expression in the Act before us. As pointed out by Lord Parker C. J. in 1959-1 QBD 384 cases which have interpreted similar expressions, can be looked into

"to see if there are general principles which can be extracted which will guide the court in approaching the question as to what the words 'person aggrieved' mean in any particular statute."

I will make a brief reference to the decisions cited for the appellant later. But before doing so, it is desirable to refer to some of the provisions of the Act itself, so that the scheme of the Act will become evident, and that will throw considerable light on the interpretation of S. 37.

77. Before I refer to the Act, I think it desirable to advert to some of the provisions of the Bar Councils Act. Even at the outset I may point out that the scheme of the Bar Councils Act was different. In the Bar Councils Act, the disciplinary jurisdiction over Advocates was vested in the

High Court (vide S. 10 (1)). Under S. 10 (2) the High Court, if the complaint is not summarily rejected by it, had to refer the case for inquiry either to the Bar Council or after consultation with the Bar Council, to the Court of a District Judge. When a case is referred for inquiry to the Bar Council under S. 11, the case was to be inquired into by the Committee of the Bar Council, referred to as the Tribunal, and that Tribunal consisted of the particular number of persons mentioned in S. 11 (2) appointed for the purpose, by the Chief Justice. The High Court had power to make rules under S. 12 (1) prescribing the procedure to be followed in the conduct of inquiries. The finding of the inquiry by the Tribunal had to be forwarded to the High Court. On receipt of the finding, the High Court had to fix a date for hearing of the case. Under Section 12 (3) it was obligatory to give notice, amongst other persons, to the Advocate-General of the day fixed for hearing; and it was also further obligatory to give the Advocate-General an opportunity of being heard before orders were passed. Under Section 12 (4) the High Court could pass final orders or refer the case back for further inquiry. Under Sub-section (5) the High Court had also power, when passing final orders to give directions regarding payment of costs. I am only referring to the material provisions of the Bar Councils Act to show that the High Court was then the disciplinary authority and the function of the Committee of the Bar Council was only to submit a finding after conducting an inquiry as directed by the High Court. It is however to be noted that the Advocate-General then was not associated in the inquiry proceedings before the Tribunal of the Bar Council; but he was entitled to be given notice of the date fixed for hearing and also to be heard in the proceedings before the High Court after receipt of the finding submitted by the Committee of the Bar Council. Those provisions clearly establish the important position occupied by the Advocate-General and recognised by the Bar Councils Act.

78. The scheme is slightly different when we come to the Act. The State Bar Councils and the Bar Council of India have been made autonomous units and various functions

regarding the legal profession have been entrusted to them. Taking disciplinary action against the delinquent members of the Bar and conducting inquiries are all part of their functions. Barring a provision of a right to appeal to the Supreme Court under S. 38 of the Act, the Courts are completely out of the picture so far as the legal profession is concerned. The Act was one to amend and consolidate the law relating to legal practitioners and to provide for the constitution of the Bar Councils of the States and the Bar Council of India. Section 3 makes provisions for the State Bar Councils. Under sub-section (2) the Advocate-General of the State is an ex officio member. Similarly the Additional Solicitor General of India is an ex officio member of the State Bar Council of Delhi. Section 6 (1) enumerates the functions of the State Bar Councils. One of the functions under cl. (c) relates to entertaining and determining cases of misconduct against advocates on the roll of the State Bar Council. Section 7 similarly enumerates the functions of the Bar Council of India. Under cl. (c), the Bar Council of India has got the power to lay down the procedure to be followed by its Disciplinary Committee and the Disciplinary Committees of each State Bar Councils. Section 9 deals with the Bar Council constituting one or more Disciplinary Committees in the manner indicated therein. Section 23 gives a right of pre-audience to the Attorney-General of India, the Solicitor General of India, the Additional-Solicitor General of India and the Advocates-General of the States, as mentioned in sub-sections (1) to (4) respectively.

79. Chapter V deals with the "conduct of Advocates" and contains the group of sections 35 to 44. Section 35 deals with the punishment of Advocates for misconduct and is as follows:

"Section 35: Punishment of advocates for misconduct:

(1) Where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its disciplinary committee.

(2) The disciplinary committee of a State Bar Council, if it does not

summarily reject the complaint, shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate-General of the State.

(3) The disciplinary committee of a State Bar Council after giving the advocate concerned and the Advocate-General an opportunity of being heard, may make any of the following orders, namely:

(a) dismiss the complaint or, where the proceedings were initiated at the instance of the State Bar Council, direct that the proceedings be filed;

(b) reprimand the advocate;

(c) suspend the advocate from practice for such period as it may deem fit;

(d) remove the name of the advocate from the State roll of advocates.

(4) Where an advocate is suspended from practice under clause (c) of sub-section (3), he shall, during the period of suspension, be debarred from practising in any court or before any authority or person in India.

(5) Where any notice is issued to the Advocate-General under sub-section (2), the Advocate-General may appear before the disciplinary committee of the State Bar Council either in person or through any advocate appearing on his behalf."

80. Similarly S. 36 (1) deals with the disciplinary powers of the Bar Council of India. Sub-section (2) confers powers on the Appellate Committee of its own motion to withdraw for inquiry for itself any disciplinary action against an advocate pending before the Committee and dispose of the same. Sub-section (3) provides for the Appellate Committee when disposing of a case under Section 36 observing so far as may be the procedure laid down in Section 35. It further provides that references to the Advocate-General in Section 35 are to be construed as references to the Attorney-General of India.

81. Sections 37 and 38 which provide for an appeal to the Bar Council of India and to the Supreme Court respectively, run as follows:

• "Section 37: Appeal to the Bar Council of India.

(1) Any person aggrieved by an order of the disciplinary committee of a State Bar Council (under section 35) may, within sixty days of the date of

the communication of the order to him, prefer an appeal to the Bar Council of India.

(2) Every such appeal shall be heard by the disciplinary committee of the Bar Council of India which may pass such order thereon as it deems fit."

"Section 38. Appeal to the Supreme Court:

Any person aggrieved by an order made by the disciplinary committee of the Bar Council of India under S. 36 or section 37 may, within sixty days of the date on which the order is communicated to him, prefer an appeal to the Supreme Court and the Supreme Court may pass such order thereon as it deems fit."

82. Section 42 (1) deals with the powers of the disciplinary committee of a Bar Council with regard to the various matters provided for in cls. (a) to (f). Section 43 provides for making of orders as to costs by the disciplinary committee of a Bar Council. Section 44 gives powers of review to the disciplinary committee of a Bar Council. Section 48A in Chapter VI deals with the revisional powers of the Bar Council of India.

83. It will be seen from Ss. 3 (2) (a), 23 (4) and 35 that the Advocate-General of the State is given by the Act a very important and responsible position. Some discussion took place before us whether the Advocate-General can be considered to be the person who is charged with the duty of safeguarding the professional integrity of the members of the Bar, when powers and duties in that regard have been conferred under the Act on the State Bar Councils. I do not think it necessary to go into that aspect as I think an inquiry in that regard is not relevant for the present purpose of construing S. 37. Nor can the analogy of the Attorney-General in a colony representing the Crown, being the guardian of public interest, as stated by Lord Denning in 1961 AC 617 (supra) be brought in for interpreting S. 37 of the Act, as we are only concerned to find out the right given to the Advocate-General by the Act. So far as that is concerned I am satisfied that the Act has given due recognition to his status by virtue of his being the highest Law Officer in the State, as the Advocate-General and who may

be trusted to place a disinterested and dispassionate view before the Committee to enable it to come to a proper decision having due regard to the Advocate concerned, as well as the entire legal profession to which he belongs. Apart from his being under Section 3 (2) (a) an ex officio member of the State Bar Council, Section 23 (4) gives him a right of pre-audience over all other advocates.

84. Coming to Section 35 read with Section 37, which has been extracted earlier, the main features that emerge therefrom are as follows

(1) The State Bar Council can suo motu or on receipt of a complaint, when it has reason to believe that an advocate has been guilty of professional or other misconduct refer the case to its committee.

(2) If the Committee does not summarily reject the complaint, it is bound to fix a date for hearing of the case, and it is also further bound to give notice of the date of hearing, apart from the advocate concerned, to the Advocate-General of the State.

(3) The Committee is bound in the inquiry to give an opportunity of being heard both to the advocate concerned and the Advocate-General. After such an inquiry the Committee can pass one or other of the orders enumerated in clauses (a) to (d) of Section 35.

(4) The Advocate-General may appear before the Committee in person or through an advocate appearing on his behalf.

(5) The orders of the Committee have to be communicated to the Advocate-General and the advocate concerned.

(6) Against the orders passed under Section 35, any person aggrieved is entitled to file an appeal under Section 37, to the Bar Council of India.

85. While under the Bar Councils Act, the Advocate-General was associated with the disciplinary proceedings only when the matter was being decided by the High Court, after receipt of the findings submitted by the Tribunal of the Bar Council it is significant to note that under the Act, the Advocate-General is associated with the disciplinary proceedings right from the stage of inquiry by the Committee. Under sub-section (2) of S. 35 the Committee is bound to give notice

of the date of hearing not only to the Advocate concerned but also to the Advocate-General of the State. It will be noted that disciplinary proceedings may have been occasioned because of a complaint made by a third party or may have been initiated suo motu by the State Bar Council. In whatever manner the proceedings may have been initiated, the Advocate-General is entitled to be given notice of the date of hearing. It cannot be a formal and empty notice to the Advocate-General because sub-section (3) clearly indicates that the Advocate-General should be given an opportunity of being heard. It is significant to note that sub-section (3) of S. 35 which deals with the giving of an opportunity of being heard both to the advocate concerned and the Advocate-General does not make any distinction in the opportunity so afforded to both of them. The same opportunity that the Advocate concerned has under sub-s. (3) is also afforded to the Advocate-General. It is not necessary to go to the extent of holding that there is a "lis" before the Committee and that the Advocate-General is a "party" in the sense that expression is ordinarily understood in law. The advocate concerned will be interested in disputing the allegations made or charges levelled against him and he will be entitled to lead evidence in support of his plea. If there is a complainant, he will of course lead evidence to support his case. The Advocate-General, on the other hand, is also entitled to place before the Committee all aspects of the matter including facts that may be in favour of the advocate whose conduct is under inquiry. This is because of the important position occupied by him. It may be that the Advocate-General may not be able to appear personally and participate in all the disciplinary proceedings and that is why provision has been made in S. 35 (5) enabling the Advocate-General to appear either in person or through any advocate appearing on his behalf. Just as the advocate concerned will have an opportunity of examining his witnesses and cross-examining the witnesses produced against him, the Advocate-General or the counsel appearing on his behalf will also have a right of cross-examining the witnesses produced in

the case so as to elicit information about the charge of professional misconduct levelled against the advocate concerned. The Advocate-General need not be vindictive and take sides as a party to a litigation and see that the advocate is found guilty. On the other hand, by virtue of the special and dispassionate role occupied by him, he will be able during the inquiry to place such materials or evidence which will enable the Committee to come to a proper and correct finding, in the interest of both the legal practitioner and the legal profession to which he belongs.

86. It is in this context of the close association of the Advocate-General with the disciplinary proceedings that the expression 'person aggrieved' in S. 37 has to be interpreted. There can be no controversy that an appeal will lie against the various orders that the Committee may pass as enumerated in cls. (a) to (d) of S. 35 (3). The question is at whose instance the appeal will lie. If the complaint is dismissed, the complainant will be a 'person aggrieved' who can file an appeal under S. 37. In fact it has been held by this Court in Civil Appeal No. 877 of 1968, D/- 8-10-1968 (SC) that when proceedings are initiated on a complaint by a party and the Committee after finding the advocate guilty of the charges passed an order reprimanding with a warning, an appeal filed by such a complainant before the Appellate Committee only on the question of sentence imposed, was competent as the complainant was a 'person aggrieved'. Similarly, an order adverse to the advocate concerned, can be the subject of appeal at his instance.

87. There is no controversy that the order passed by the Committee was communicated to the Advocate-General. As already pointed out a series of steps is contemplated under S. 35; reference to the Committee, of a case of professional misconduct, notice of the date of hearing to be given to the Advocate-General; Advocate-General being given an opportunity of being heard at the hearing; the Advocate-General being entitled to appear before the Committee either in person or through an Advocate; his being entitled to be communicated with a copy of the order passed by the Committee. It is in that context and for these purposes that I have considered

the meaning of the expression "any person aggrieved" in S. 37 (1). The fact that the Advocate-General does not allege an infringement of any legal rights of his own is of no consequence. The particular proceeding in which the Advocate-General is given a right to participate relates to an inquiry into the allegations of misconduct against an advocate. Upon a fair construction of Section 37 read with Section 35 of the Act, the Advocate-General, in my opinion is "any person aggrieved" and as such was entitled to file the appeal under Section 37 (1) against the order passed by the Committee. The same reasoning will apply to the Attorney-General of India under Section 38.

88. It may be that in a particular case the Advocate-General may feel that the finding arrived at in favour of the advocate by the Committee is not justified by the evidence and that decision will have to be reconsidered by the Appellate Committee; or it may even be that in a particular case the sentence imposed by the Committee may not be commensurate with the guilt of the advocate; or it may also be that the sentence imposed on an advocate by the Committee is very harsh or the finding of guilt is not correct. Under such and similar circumstances in the interests of the Advocate and the legal profession, the Advocate-General will be competent to bring up the matter before the Appellate Committee so that justice may be done.

89. In this context the observations of Lord Hewart C. J. in (1929) 2 KB 440 are apposite. The question before the Court in that decision was whether an objector to a proposal made by a local authority to acquire land in order to provide parking place for vehicles and whose objections were overruled was a 'person aggrieved' under Section 68 (3) of the Public Health Act 1925 and as such entitled to appeal. It was found that the objector alleged no ground of objections personally to himself. Nevertheless it was held that such an objector was a 'person aggrieved' and entitled to appeal. Lord Hewart C. J. at page 443 states:

"The question therefore is: Is it true to say that in these circumstances and within the meaning of this part of this statute this respondent was a 'per-

son... aggrieved"? Now undoubtedly those words, "a person aggrieved", have very often been considered, and, if one looked at the mere terms apart from their context and apart from the particular circumstances, it would have been quite easy to marshal decisions of contradictory import. But as has been said again and again there is often little utility in seeking to interpret particular expressions in one statute by reference to decisions given upon similar expressions in different statutes which have been enacted ~~also~~ intuitu. The problem with which we are concerned is not, what is the meaning of the expression "aggrieved" in any one of a dozen other statutes, but what is its meaning in this part of this statute? It is a little important to see what this part of this statute is dealing with."

90. The above extract has been quoted with approval by Lord Parker C. J. in (1959) 1 QB 384 (supra).

91. I have already indicated earlier that the problem before us whether the Advocate-General is a 'person aggrieved' under Section 37 of the Act will have to be tackled with reference to the scheme and provisions of the Act and that is exactly what I have done and arrived at the conclusion that he is a person aggrieved.

92. Mr. Daphtary argued that when the Committee consisting of members of the legal profession, has decided in favour of the Advocate, the Advocate-General can have no grievance. This, in my view, is really begging the question. Why did the Legislature then bring in the Advocate-General at all and why has it associated him in disciplinary proceedings from the very beginning of the inquiry? That and other circumstances already pointed out by me, bring him under S. 37 as "any person aggrieved."

93. Mr. Daphtary then urged that if the Advocate-General was expected to safeguard the interest of the Advocate and the legal profession by seeing that proper decisions are given by the Committee, that purpose is not served when powers have been given to the Committee under Section 35 (2) to summarily reject a complaint and the Advocate-General will have no remedy against such rejection. The short answer to this con-

tention is that a right of appeal must be specifically conferred by statute. Section 37 (1) gives a right of appeal against an order passed under S. 35. The orders which could be passed after hearing the case are enumerated in clauses (a) to (d) of Section 35 (3). It is not necessary for me to express any opinion whether an order summarily rejecting a complaint can also be the subject of an appeal under Section 37 (1) as that section is in very wide terms. In any event, Mr. Daphtary's contention will only amount to this viz., that the Advocate-General is not associated at the stage of summary rejection of a complaint. That circumstance does not militate against the view already expressed by me. Probably the Legislature may have felt that if there is any wrongful summary rejection of a complaint it could be set right by the Bar Council of India under Section 48A. But once the Committee decides to hear the case and passes an order under S. 35, the Advocate-General gets a right of appeal under Section 37 (1).

94. Mr. V. S. Desai referred us to the decision of the Judicial Committee in Advocate-General of Bombay v. Pitamberdas Gokuldas Mehta, 62 Ind App 235 = (AIR 1935 PC 168) wherein, according to him, an appeal by the Advocate-General of Bombay against the decision of the High Court of Bombay Pleaders Act was entertained by the Judicial Committee. He has also referred us to the discussion between the Court and counsel in the said decision reported in 37 Bom LR 722 = (AIR 1935 PC 168) which, according to him, will show that though an objection about the locus standi of the Advocate-General to file an appeal under such circumstances was raised, but was not accepted by the Judicial Committee. I have gone through both the reports and there is no indication that the question of maintainability of an appeal by the Advocate-General was decided one way or the other by the Judicial Committee.

95. Mr. Daphtary has referred us to the decisions in (1880) 14 Ch. D 458 in (1887) 19 QBD 174, (1890) 25 QBD 357, (1951) 2 KB 508 and (1959) 1 QB 384 (supra), wherein the expression 'person aggrieved' occurring in different statutes came up for interpretation. The principles that emerge

from those decisions appear to be that a 'person aggrieved' must be a person who has suffered a legal grievance or who has claimed a title to something and his claim has been negatived or who has maintained to the contrary in the proceedings or litigation. It has been further held in some of those decisions that the said expression does not take in any person who may be affected by the order or who may feel disappointed or even annoyed at the decision. In the view that I take that the expression 'person aggrieved' in Section 37 of the Act has to be interpreted in the light of the provisions and scheme of the Act as well as the context in which those expressions appear, I do not think it necessary to consider in great detail those decisions which have been rendered on different statutes.

96. The decision in Civil Appeal No. 1716 of 1967, D/- 1-8-1970 (SC), referred to by Mr. Daphtary, in my opinion, does not assist the appellant. In that decision it was held that when certain notifications issued under the Land Acquisition Act were set aside by the High Court, the Municipal Corporation, on whose behalf the acquisition was being made by the Government, cannot be considered to be a 'person aggrieved' entitled to challenge the order of the High Court. An additional reason has also been given against the competency of the appeal that even an order for costs has not been passed against the Municipal Corporation. That decision was rendered on the scheme of the Land Acquisition Act, and so does not help the appellant.

97. It was urged on behalf of the appellant that if the Advocate-General was really intended to be given a right of appeal under S. 37 (1), the Legislature should have used the expression 'any person including the Advocate-General aggrieved by an order' I am of the view that it was unnecessary to make any such provision because the expression as it stands clearly takes within its fold the Advocate-General also.

98. This leaves me with the decision in 1961 AC 617 (*supra*) which has been very strongly relied on by Mr. Daphtary. One Mr. X a member of the English Bar was admitted to practice as a barrister and solicitor of the Supreme Court of Gambia. The

Deputy Judge made an order striking his name off the roll of that Court. This decision was reversed by the West African Court of Appeal on the ground that the Deputy Judge had no jurisdiction in the matter. The Attorney-General of Gambia sought leave to appeal to Her Majesty in Council; but the West African Court of Appeal declined to grant him leave on the ground that notice had not been given in due time to Mr. X. The Attorney-General then made a petition to Her Majesty for special leave to appeal from the judgment of the West African Court of Appeal, setting aside the order of the Deputy Judge as well as refusing to grant leave to appeal. The Attorney-General's petition was granted; but liberty was reserved to Mr. X to raise the preliminary point that no appeal lay at the instance of the Attorney-General. During the course of arguments the Judicial Committee rejected the preliminary objection.

99. It is to be noticed that against the decision of the Deputy Judge striking his name off the roll, Mr. X filed an appeal to the West African Court of Appeal under Section 14 which was as follows:

"An appeal shall lie to the Court of appeal from any order of the Judge suspending a barrister or solicitor of the Supreme Court from practice or striking his name off the roll and for the purposes of any such appeal any such order shall be deemed to be an order of the Supreme Court."

100. I am particularly referring to this decision because certain observations of Lord Denning on which reliance has been placed by Mr. Daphtary will have to be understood with reference to this provision of law. Exercising jurisdiction under this section, the West African Court of Appeal set aside the order of the Deputy Judge. In the first instance the Attorney-General sought leave to appeal to Her Majesty in Council from the West African Court of Appeal under Section 5 of the West African (Appeal to the Privy Council) Order in Council, 1949, which is as follows:

"Applications to the court for leave to appeal shall be made by motion or petition within 21 days from the date of the judgment to be appealed from, and the applicant shall give

the opposite party notice of his intended application."

101. The West African Court of Appeal declined to grant leave to appeal to the Attorney-General on the ground that notice had not been given within the time mentioned in the above order to Mr. X. The Attorney-General made an application to the Judicial Committee for special leave to appeal from the two orders mentioned above of the West African Court of Appeal. That petition was filed under Section 31 of the West African (Appeal to Privy Council) Order in Council, 1949, which runs as follows:

"Nothing in this order contained shall be deemed to interfere with the right of His Majesty upon the humble petition of any person aggrieved by any judgment of the Court to admit his appeal therefrom upon such conditions as His Majesty in Council shall think fit to impose."

102. The question that arose before their Lordships was whether the Attorney-General was a 'person aggrieved' under the above order.

103. In discussing this question Lord Denning at page 634 observes:

".....The words 'person aggrieved' are of wide import and should not be subjected to a restrictive interpretation. They do not include, of course, a mere busy body who is interfering in things which do not concern him: but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. Has the Attorney-General a sufficient interest for this purpose? Their Lordships think that he has. The Attorney-General in a colony represents the Crown as the guardian of the public interest. It is his duty to bring before the judge any misconduct of a barrister or solicitor which is of sufficient gravity to warrant disciplinary action. True it is that if the judge acquits the practitioner of misconduct, no appeal is open to the Attorney-General. He has done his duty and is not aggrieved. But if the judge finds the practitioner guilty of professional misconduct, and a Court of Appeal reverses the decision on a ground which goes to the jurisdiction of the judge, or is otherwise a point in which the public interest is concerned, the Attorney-

General is a 'person aggrieved' by the decision and can properly petition Her Majesty for special leave to appeal. It was for these reasons that their Lordships rejected the preliminary objection and held that the Attorney-General was a 'person aggrieved' by the decision of the West African Court of Appeal."

104. The observations made in the above extract, in my opinion, have to be related to the particular provision of the order in Council which the Judicial Committee was considering. In the case before the Judicial Committee, the Attorney-General had initiated the disciplinary proceedings against the Barrister. Under S. 14, there was only a very limited right of appeal and that too in favour of the barrister or solicitor in respect of the orders mentioned therein. The Attorney-General, though he may have been the complainant under S. 14 had no right of appeal if the barrister was acquitted. That is why Lord Denning states that it is true that if the Judge acquits the practitioner of misconduct no appeal is open to the Attorney-General. This view, with respect, is correct because Section 14 does not give a right of appeal to the Attorney-General. Lord Denning, no doubt, has further stated that the Judicial Committee has rejected the preliminary objection in view of the fact that it was of the opinion that in the case before it a question of jurisdiction or a point of public interest is involved and 'therefore' the Attorney-General is a 'person aggrieved'.

105. I have already indicated that there are no restrictions or limitations imposed in Section 37 of the Act giving a right of appeal only to the advocate who may have been found guilty. On the other hand, the words "any person aggrieved" in Section 37 are very wide, and as observed by Lord Denning in the opening part of the above extract these words should not be subjected to a restrictive interpretation. In the view that I take that the Advocate-General has an unqualified right of appeal under Section 37 (1) I do not think it necessary either to refer to Article 165 of the Constitution nor do I think it necessary to consider the further question whether the appeal filed by the Advocate-General before the Bar Council of India relates to any question of

jurisdiction or a point of public interest.

106. To conclude, the appeal filed by the Advocate-General of Maharashtra before the Appellate Committee was competent and this point has to be held against the appellant. The result will be that the appeal before us will have to be heard on merits.

RAY, J.:— 107. I agree with Vaidialingam, J. I desire to express my separate opinion in view of the importance of the question raised in this appeal.

108. This is an appeal from the order dated 26 October, 1969 of the Disciplinary Committee of the Bar Council of India suspending the appellant from practice for a period of one year.

109. An appeal to the Disciplinary Committee of the Bar Council of India was preferred by Shri H. M. Seervai, Advocate General of Maharashtra against the order dated 17 October, 1968 of the Bar Council of Maharashtra holding that the appellant was not guilty of professional misconduct or otherwise.

110. Before the Disciplinary Committee of the Bar Council of India a preliminary objection was taken by Adi Pheroaz Shah Gandhi as to the maintainability of the appeal preferred by the Advocate General of Maharashtra.

111. The appellant pressed the same preliminary objection in this Court, namely, that the Advocate General of the State of Maharashtra could not prefer an appeal against an order of the Disciplinary Committee of the State Bar Council.

112. The relevant provision for appeal to the Bar Council of India is to be found in Section 37 of the Advocates Act, 1961 (hereinafter referred to as the Act). There are two sub-sections of Section 37. The first sub-section enacts that any person aggrieved by an order of the Disciplinary Committee of the State Bar Council made under Section 35 may, within sixty days of the date of the communication of the order to him, prefer an appeal to the Bar Council of India. Sub-section (2) of Section 37 states that every such appeal shall be heard by the Disciplinary Committee of the Bar Council of India.

113. The present appeal is under Section 38 of the Act which confers right of appeal to the Supreme Court by any person aggrieved by an order made by the Disciplinary Committee of the Bar Council of India.

114. The entire controversy in this appeal centres on the meaning of the words 'any person aggrieved by an order of the Disciplinary Committee of the State Bar Council' occurring in sub-section (1) of Section 37 of the Act. The same words also occur in section 38 of the Act.

115. Mr. Daphtary on behalf of the appellant contended first that the Advocate General did not represent public interest and could not therefore be said to be a person aggrieved by an order of the Disciplinary Committee. Secondly, that the provisions in section 35 of the Act that the Advocate General was entitled to a notice from the Disciplinary Committee of the date of hearing and the provision that the Advocate General was entitled to be heard by the Disciplinary Committee could not have the effect of making the Advocate General a party and, thirdly, the Advocate General was an impartial person and his duty would end by making submissions, if any, before the Disciplinary Committee and he would not be a person aggrieved either by an order of dismissal of a complaint against the Advocate or by any order passed against the Advocate.

115A. Notices were given to the Attorney General and the Advocate General of different States in view of the importance of the question involved in this appeal. Mr. V. S. Desai on behalf of the Advocate General of Maharashtra, Mr. Setalvad on behalf of the Bar Council of India, Dr. Seyied Muhammad on behalf of the Attorney General, Mr. Datar counsel for the Maharashtra State Bar Council and other counsel appearing for Advocates General of other States all contended that the Advocate General would have the right under the Act to prefer an appeal as a person aggrieved by an order of the Disciplinary Committee of a State Bar Council.

116. Various decisions were cited at the Bar to illustrate the meaning of the words 'person aggrieved'. One group of decisions is based on the locus classicus in (1880) 14 Ch. D. 458.

The other line of decisions is to be found in (1887) 19 Q.B.D. 174 and (1929) 2 K.B. 440. James, L. J. in the case of *Ex parte Sidebotham*, (1880) 14 Ch D. 458 said that "a 'person aggrieved' must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something". Lord Esher, M. R. on the other hand in (1887) 19 Q.B.D. 174 said that the meaning given by James, L. J. to the words 'person aggrieved' would not be an exhaustive definition and the words would include a person who has asked for a decision for which he had a right to ask, and has been wrongfully refused. In the *Sevenoaks* case, 1929-2 K.B. 440 Lord Hewart, C. J. said

"that when a person might make an objection and was entitled to a decision upon it he would, if the decision was adverse to him, be able to appeal".

117. These decisions indicate that the words 'person aggrieved' would have different shades of meaning in accordance with the tenor of the relevant statute. The observations of James, L. J. in the case of *Ex parte Sidebotham* (1880) 14 Ch D 458, turn on the meaning of the words 'person aggrieved' occurring in the English Bankruptcy Act, 1914 which, *inter alia*, provided that the orders of the Court in bankruptcy matters except in cases specially excluded were subject to appeal at the instance of any person aggrieved even if he had not appeared in the Court below. It is in the context of the English Bankruptcy Act that creditors, trustees, administrators of a debtor or bankrupt would have a legal grievance against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something.

118. Lord Hewart, C. J. in *Sevenoaks* case, 1929-2 K.B. 440 said "the problem is not what is the meaning of the expression 'person aggrieved' in one or dozen statutes but what is its meaning in this part of the statute".

In that case the relevant provision of the Public Health Act conferred a power on a local authority to provide

within that district suitable parking place for vehicles. The statute further in that case contemplated a notice of the proposal to acquire land for using it as a parking place and objections, if any, to such proposal. When objections were made, the local authority would have to consider them. In the *Sevenoaks* case, 1929-2 K.B. 440 the Urban Council considered the objection of a ratepayer and thereafter proceeded with the scheme of the parking place. Lord Hewart, C. J. in giving meaning to the words 'person aggrieved' in that case said that first a person was an author of an objection, and, secondly, he was aggrieved by the refusal of his objection. It was held that a special individual right was infringed. In the *Sevenoaks* case, 1929-2 K.B. 440 there was neither a pecuniary nor a proprietary grievance. The action of the local authority in providing a parking place invited objections. It is the refusal of that objection which constituted a grievance and it was a grievance sustainable in law.

119. Mr. Daphtary relied on the observations of James, L. J. in *Re, Sidebotham*, (1880) 14 Ch. D. 458 that 'a disappointed person would not be a person aggrieved' and also on the observations of Lord Coleridge in (1890) 25 Q.B.D. 357 that one would not be an aggrieved person because someone was held not to have done wrong. In other words, it was said that the Advocate General would make submissions or advance contentions and the non-acceptance by the Disciplinary Committee of such submissions would not constitute either a legal grievance or rejection of a remedy asked for.

120. Mr. Daphtary also leaned heavily on the decision of the Judicial Committee in 1961 A.C. 617 in support of two propositions. First, that the Judicial Committee found in the *Gambian* case, 1961 AC 617, that in the colonies the Attorney General represented the Crown and was therefore the guardian of the public interest. Mr. Daphtary submitted that the Advocate General did not represent public interest in our country and therefore could not be said to be a guardian of public interest. Secondly, the Judicial Committee in the *Gambian* case, 1961 AC 617, said that in relation to disciplinary proceedings if a legal practitioner was acquitted of misconduct no

appeal was open to the Attorney General because he had done his duty and was not aggrieved. Extracting that proposition from the *Gambian* case, 1961 AC 617 Mr. Daphtary submitted that similarly the Advocate General could not have any grievance where an Advocate was acquitted.

121. The purpose and the provisions of the Advocates Act, 1961 will determine whether the Advocate General is a person aggrieved within the meaning of the relevant sections in the Act. It may not be out of place to refer to the Bar Councils Act, 1926 which dealt with disciplinary conduct of practitioners. Prior to the Advocates Act the High Court under the Bar Councils Act, 1926 had power to suspend any advocate from practice whom it found guilty of professional or other misconduct. Under the said 1926 Act upon receipt of a complaint made to it by any court or by Bar Council or by any other person that any Advocate had been guilty of misconduct, the High Court if it did not summarily reject the complaint referred the case for enquiry either to the Bar Council or after consultation with the Bar Council to the Court of a District Judge and the High Court might of its own motion refer any case in which it had reason to believe that any such Advocate had been so guilty. If any case was referred under the Bar Councils Act, 1926 for enquiry, the case was to be enquired into by the Committee of the Bar Council which was called the Tribunal. The Tribunal consisted of not less than three and not more than five members of the Bar Council appointed for that purpose by the Chief Justice or Chief Judge of the High Court, and one of the members so appointed was the President of the Tribunal. The finding of a Tribunal was forwarded to the High Court through the Bar Council and the finding of a District Court was to be forwarded direct to the High Court with a copy to the Bar Council. On receipt of the finding the High Court was to fix a date for the hearing of the case and notice of the date so fixed was to be given to the Advocate concerned and to the Bar Council and to the Advocate General. The High Court was also required under the statute to afford the Advocate concerned and the Bar Council and the Advocate General an opportunity of

being heard before orders were passed in that case.

122. Mr. Desai relied on the provisions of the Bar Councils Act, 1926 to show that under the said Act notice was to be given to the Advocate General and that the Advocate General was entitled to be heard and he relied on a decision of the Judicial Committee in 62 Ind App 235 and 37 Bom LR 722 = (AIR 1935 PC 168) and the decision of this Court in (1955) 1 SCR 1055 = (AIR 1955 SC 223) in support of two propositions, namely, that the Advocate General could prefer an appeal and in an appeal preferred by the Advocate concerned, the Advocate General would be a respondent to such an appeal. In *Bharucha's* case, (AIR 1935 PC 168) certain Advocates were members of Associations declared unlawful by Government and they were convicted of offences punishable under section 17 (1) of the Criminal Law Amendment Act, 1908. The High Court did not take any steps against the Advocates on the ground that it did not consider that membership of an unlawful Association would render the Advocates unfit for the exercise of the profession. The Advocate General of Bombay made applications for special leave before the Judicial Committee to appeal against the decision of the High Court. The Judicial Committee did not grant any special leave and agreed with the view of the High Court. No question was raised in the applications before the Judicial Committee as to the maintainability of the applications for special leave. It should be noticed that under the Bar Councils Act there was no provision for any appeal. Mr. Desai rightly relied on the decision of the Judicial Committee not for an actual decision that the Advocate General had a right of appeal but for the purpose of showing that the Advocate General had not only locus standi to make an application for leave but also could be said to have been aggrieved by an order in relation to professional misconduct of an Advocate. The Judicial Committee would not have entered into the merits of the case if the Advocate General had no right to apply for leave to appeal.

123. The decision of this Court in *Bhataraju's* case, (1955) 1 SCR 1055 = (AIR 1955 SC 223) was to the effect that in an appeal preferred to the

Supreme Court by an Advocate against whom an order of suspension was passed by the High Court under section 12 of the Bar Councils Act, the proper respondents would be the complainant, if any, the Bar Council and the Advocate General of the State concerned and not the High Court. The appeal to this Court in Bhataraju's case, (1955) 1 SCR 1055 = (AIR 1955 SC 223) was by special leave. This Court held that the Advocate General, the Bar Council and the complainant would be parties to the appeal on the ground that notices under the Bar Councils Act had been issued to those persons. The decisions of this Court and the Judicial Committee both indicate that the Advocate General under the Bar Councils Act had locus standi in making an application for leave to appeal and being a respondent to an appeal preferred by the Advocate.

124. The position held by the High Court under the Bar Councils Act, 1926 is now occupied by the Bar Council under the Advocates Act. There are State Bar Councils and there is also a Bar Council of India. Every Bar Council is a body corporate. The functions of the State Bar Council are inter alia to admit persons as advocates on its roll; to prepare and maintain such roll; to entertain and determine cases of misconduct against advocates on its roll; to safeguard the rights, privileges and interest of advocates on its roll. The functions of the Bar Council of India are to lay down standards of professional conduct and etiquette for advocates, to lay down the procedure to be followed by the Disciplinary Committee of the Bar Council of India and the Disciplinary Committees of the State Bar Councils, to safeguard the rights, privileges and interests of advocates. A Bar Council is empowered under the Act to constitute one or more Disciplinary Committees.

125. Sections 35 to 44 deal with conduct of Advocates and powers of the Disciplinary Committees of the State Bar Councils as also of the Bar Council of India. Under section 35 of the Act where on receipt of a complaint or otherwise a State Bar Council has reason to believe that any advocate on its roll has been guilty of professional or other misconduct, it shall refer the case for disposal to its Disciplinary Committee. The Disciplinary

Committee of a State Bar Council, if it does not summarily reject the complaint, shall fix a date for the hearing of the case and shall cause a notice thereof to be given to the advocate concerned and to the Advocate General of the State. The Disciplinary Committee of a State Bar Council after giving the advocate concerned and the Advocate General an opportunity of being heard, may dismiss the complaint or reprimand the advocate, suspend the advocate from practice for such period as it may deem fit, or remove the name of the advocate from the State roll of advocates. Where any notice is issued to the Advocate General, the Advocate General may appear before the Disciplinary Committee of the State Bar Council either in person or through any advocate appearing on his behalf. These provisions establish first that the Advocate General is entitled to a notice of the date of hearing, secondly, that no order can be made by the Disciplinary Committee without giving an opportunity to the Advocate General of being heard, and, thirdly, that the Advocate General may appear in person or through any advocate. It cannot be said that the Advocate General is appearing as a friend of the Court. The right of the Advocate General to appear is based on statute. The word 'may' is used to indicate the choice of the Advocate General to appear in person or through any advocate. He may choose not to appear at all. But when the Advocate General does appear, he does so by virtue of the statutory rights and powers conferred on him. It is, therefore, necessary to know as to why notice under the Act is given to the Advocate General and why he is to be heard before an order is made by the Disciplinary Committee.

126. The Judicial Committee in the Gambian case, 1961 AC 617 found that the name of N'Jie was struck off the roll of barristers and solicitors of the Supreme Court of Gambia by an order of Abbott, J., Deputy Judge of the Supreme Court in the Colony of Gambia. The Deputy Judge had jurisdiction to represent the Chief Justice in the exercise of his judicial powers. The power to strike the name of the legal practitioner off the roll was held by the Judicial Committee not to be a

judicial power but an administrative one of the Chief Justice of the Supreme Court of Gambia. Therefore, the order of Abbott, J. was without jurisdiction. The West African Court of Appeal under those circumstances set aside the order of Abbott, J. The Attorney General of Gambia thereupon preferred an appeal to the Judicial Committee. An appeal to the Privy Council lay under section 31 of the West African (Appeal to Privy Council) Order in Council, 1949. Broadly stated, the provision was to the effect that any person aggrieved by any judgment of the Court could prefer an appeal to His Majesty. The Judicial Committee construed the words 'person aggrieved' occurring in section 31 of the West African Order in Council, 1949 not to be subjected to a restrictive interpretation but to include a person who has a genuine grievance because an order has been made which prejudicially affected his interest. The Attorney General of Gambia was found to have sufficient interest for the purpose and the interest was held to be a public one which the Attorney General represented. The Judicial Committee also said that if the Judge found the practitioner guilty of misconduct and the West African Court of Appeal of Gambia reversed the decision which went to the jurisdiction of the Judge, or was otherwise a point in which public interest was concerned, the Attorney General would be a person aggrieved by the decision. The Judicial Committee construed the words 'person aggrieved' to include the Attorney General of Gambia as representing the public interest.

127. The most significant feature in sections 35 and 36 of the Act is that the Disciplinary Committee does not either give any notice to or hear the complainant. On the contrary notice is given under section 36 to the Attorney General and under S. 35 to the Advocate General. The Disciplinary Committee without giving the Attorney General in one case and the Advocate General in another case an opportunity of being heard cannot pass any order against the Advocate concerned. The Attorney General under Article 76 of the Constitution and the Advocate General under Article 165 of the Constitution have to discharge the functions conferred on them by or

under the Constitution or any other law for the time being in force. The Advocates Act concerns the Advocate and it is in the fitness of things that the Attorney General and the Advocate General of a State are heard as persons representing the profession which assists the litigant public and the courts in the administration of justice. The Attorney General and the Advocates General of States are persons of high standing and with long experience in the profession and it is indisputable that they will ever adopt any partisan attitude in proceedings before the Disciplinary Committee. The Advocates Act gives special pre-eminence to the Attorney General and the Advocate General in disciplinary proceedings because it is not an attempt of the Disciplinary Committee to redress the grievance of an individual complainant but to find out whether there is any breach of professional standard and conduct. The high tradition, dignity and purity of the Bar is to be maintained. The Attorney General and the Advocate General are heard because they are heads of their respective Bar and the proceedings affect discipline and dignity of the Bar and touch the professional conduct of an Advocate.

128. They are not parties to a 'lis'. They have no personal or pecuniary or proprietary interest in the matter. It is manifest that their locus standi and interest is based on professional code of conduct and for the purpose of upholding the purity of the Bar and preservation of correct standards and norms in the profession. The Attorney General and the Advocates General will uphold the professional discipline, dignity and decorum and that is why no order is made by the Disciplinary Committee without giving them an opportunity of being heard.

129. The issue before the Disciplinary Committee is whether there has been professional misconduct and the question has to be looked at purely from the point of view of profession. The profession touches the public on the one hand and the Courts on the other. On no other basis could the presence of the Advocate General be explained.

130. In a recent decision of this Court in Civil Appeal No. 877 of 1968, D/- 8-10-1968 (SC), the Commis-

sioner of Workmen's Compensation preferred an appeal for enhancement of penalties against the Advocate concerned. This Court held that the Commissioner was entitled to maintain the appeal as a person aggrieved. Mr. Daphtary at one stage contended that a complainant would not be a person aggrieved within the meaning of the relevant section of the Advocates Act to prefer an appeal. The decision of this Court repels that submission.

131. It may not be out of place to notice that the Act uses the words 'person aggrieved' and not the words 'party aggrieved'. First in disciplinary proceedings there is no party. It is a matter touching the professional conduct of the Advocate. The enquiry is by the Disciplinary Committee. The Advocate is heard. The Attorney General in one case and the Advocates General in other cases are heard. They are heard not because they are parties but because they represent the interest of the profession. They represent the standards to be maintained in the profession. Suppose, the Disciplinary Committee held proceedings without giving notice to the Advocate General or made an order without giving the Advocate General an opportunity of being heard. In either case the Advocate General would be a person aggrieved. Would the participation by the Advocate General in the proceedings before the Disciplinary Committee alter the position? Neither on logic nor on principle could it be said that the Attorney General and the Advocates General who have the right to be heard could not be persons aggrieved by the decision. If they have the right to be heard they may have grievance as to the result of the hearing.

132. The Attorney General and the Advocates General receive notice and are entitled to be heard by virtue of the provisions in the statute. They are performing statutory duties. They are not contemplated in the statute as ordinary counsel. It was not the intention of the statute that they would be merely neutral observers before the Disciplinary Committee and they would have no duty to perform. They would have to express their views one way or the other. It is true that they would be completely free from personal favour or disfavour in these mat-

ters touching the professional conduct. Their presence before the Disciplinary Committee is explicable only on the ground of adhering to the correct professional code. It would therefore be open to the Attorney General and the Advocate General to take the view that in a matter of sufficient gravity a completely inadequate punishment would not be in public interest of the profession. Similarly, if the punishment is severe in a case which did not merit such action, the Attorney General and the Advocate-General would be persons aggrieved to have it corrected.

133. To accede to the contention of Mr. Daphtary that the words 'person aggrieved' refer only to Advocates would be misreading the provisions. The words 'person aggrieved' will be referable to the Advocate concerned, the complainant and the Attorney General or the Advocate General as the case may be. The Attorney General and the Advocate General will be persons aggrieved because they are interested in maintaining the professional rectitude. The Attorney General and the Advocate General have the right of pre-audience. Such right determines that they are leaders of the profession in their respective fields. They will ask for maintaining the proper standards of professional ethics. It is from that point of view that the Attorney General and the Advocate General will be aggrieved persons when they will find that the interest of the Bar, the public interest have not been properly safeguarded by decisions of the Disciplinary Committee of the Bar Council.

134. For these reasons I am of opinion that the Advocate General of the State of Maharashtra is competent to appeal as a person aggrieved under section 37 of the Advocates Act, 1961.

ORDER

135. In accordance with the opinion of the majority, the appeal is allowed and the order of the Bar Council of India is set aside. There shall be no order as to costs.

Appeal allowed.

**AIR 1971 SUPREME COURT 422
(V 58 C 97)**

(From: Calcutta)*

J. C. SHAH AND A. N. GROVER, JJ.Naresh Chandra Sanyal, Appellant
v. The Calcutta Stock Exchange Association Ltd., Respondent.Civil Appeal No. 1626 of 1966, D/-
25-9-1970.**(A) Calcutta Stock Exchange Articles of Association, Art. 24 — Forfeiture of fully paid share of member — Separate resolutions expelling him and declaring him defaulter not required.**

The argument that a member of the Exchange forfeits his share only if a resolution expelling him and a resolution declaring him a defaulter are passed is without substance. The conjunctive "and" between the first two clauses of Art. 24 is used to indicate an alternative, and does not make the two conditions cumulative: (1936) ILR 63 Cal. 531, Approved. (Para 7)

(B) Companies Act (1956), Sch. 1, Table A Reg. 31 — Calcutta Stock Exchange Articles of Association, Arts. 22, 24, 26, 27 & 29 — Fully paid shares, forfeiture of, in certain events, including failure to carry out engagement—Obligation on the part of the Company to re-allot or dispose it of — Articles are intra vires and valid.

Subject to the provisions of the Companies Act, the Company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the Company and define the powers of its officers. They also establish a contract between the Company and the members and between the members inter se. The contract governs the ordinary rights and obligations incidental to membership in the Company. In the absence of any provisions contained in the Companies Act which prohibit a Company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of a Company, which provide that in certain events membership rights of the shareholder including his right to the share will be forfeited, are binding. The Articles of Association

tion of the Calcutta Stock Exchange expressly provide that in the event of the member failing to carry out the engagement and in the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 & 29 of the Calcutta Stock Exchange relating to forfeiture of shares in certain events are, therefore, valid. ILR (1950) 1 Cal 235, Approved; AIR 1964 SC 250, Ref. (Para 15)

Article 27 of the Exchange is in terms mandatory. The share after forfeiture in the hands of the Company is subject to an obligation to dispose it of. On that account there is no reduction of capital by mere forfeiture.

(Para 12)

It is not correct to argue that forfeiture of shares is permissible only in cases expressly contemplated by Table A-Model Article, i.e., for non-payment of calls in respect of a share which is not fully paid up. (Para 14)

(C) Companies Act (1956), Sch. 1, Table A Reg. 31 — Forfeiture of fully paid share — Calcutta Stock Exchange Articles of Association, Arts. 33, 29 — Forfeiture of share of member for failure to carry out engagement — Balance remaining on hand after satisfying liabilities and engagements of defaulting shareholder to Exchange and its members in the hands of Exchange, must be returned to defaulting shareholder — Article 29 of Exchange is to be read subject to Art. 33 — Article giving power to company to appropriate balance in hand would be contrary to intentment of S. 74, Contract Act — Forfeiture of share is in the nature of imposition of penalty.

Granting that Art. 33 deals with those cases in which lien alone is enforced and not in cases where forfeiture is levied, and the obligation of the defaulting shareholder is determined by Art. 29, on the principle underlying S. 74 of the Contract Act the Exchange had no right to hold, out of the sale proceeds of the share, any amount in excess of the amount due to it or its member. AIR 1963 SC 1405, Ref.

(Paras 18, 19, 20, 21)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 250 (V 51)=

(1964) 3 SCR 698, Sri Gopal

Jalan and Co. v. Calcutta Stock

Exchange Association Ltd. 11, 13

(1963) AIR 1963 SC 1405 (V 50)=

(1964) 1 SCR 515, Fateh Chand

v. Balkishandas

20

*(A.F.O.D. No 143 of 1960, D/- 8-7-1964 — Cal.)

(1950) ILR. (1950) 1 Cal 235,
Calcutta Stock Exchange Association Ltd. v. S. N. Nundy & Co. 10, 11, 13

(1936) ILR 63 Cal 531, Surajmal Mohta v. Ballabhdas Mohta 7

Mr. R. B. Datar, Advocate, amicus curiae, for Appellant; Mr. B. Sen, Sr. Advocate, (M/s. N. R. Khaitan and B. P. Maheshwari, Advocates, with him), for Respondent.

Judgment of the Court was delivered by

SHAH, J.: Naresh Chandra Sanyal was the holder of a fully paid-up share of the Calcutta Stock Exchange Association Ltd. hereinafter called 'the Exchange'. As a member of the Exchange he was authorised to carry on business as a broker in shares, stocks and securities in the hall of the Exchange. In December 1941 Sanyal purchased one hundred shares of the Indian Iron & Steel Company Ltd. from Johurmull Daga & Company, but did not arrange to take delivery of the shares on the due date. Johurmull Daga and Company sold the shares pursuant to the authority given to them by the Sub-Committee of the Exchange. The transaction resulted in a loss of Rupees 438/10/-. The Sub-Committee directed Sanyal to pay the amount due by him, but he failed to carry out that direction.

2. On January 7, 1942 the complaint of Johurmull Daga & Company was referred to the Full Committee of the Exchange. Sanyal failed to pay the amount directed to be paid by him and he was by resolution dated February 19, 1942 declared a defaulter. On September 1, 1942, at a meeting at which Sanyal was present, the Full Committee resolved that the share standing in his name be forfeited to the Exchange with effect from September 1, 1942 and that Sanyal be expelled from the membership of the Exchange.

3. Sanyal then instituted an action in the High Court of Calcutta on its original side, claiming a declaration that the articles of the Exchange providing for "forfeiture of a fully paid up share were ultra vires and illegal" and that "particularly Arts. 21, 22 and 24 were invalid"; that the share held by him had not been "properly forfeited" by the Exchange and that forfeiture of the share was "irregular, void and inoperative and was not binding upon him." He also claimed an

order that he be restored to the membership of the Exchange and that the share register be rectified accordingly. In the alternative Sanyal claimed a decree for Rs. 55,000/- being the value of the share, or in any event to the surplus of the sale proceeds after "liquidating the debts due by him to the Exchange." The suit was resisted by the Exchange. The Trial Court dismissed the suit. In appeal under the Letters Patent the decree was confirmed. With special leave Sanyal has appealed to this Court in forma pauperis.

4. The relevant Articles of Association of the Exchange are these:

Art. 21. "The Committee shall have power to expel or suspend any member or if being firm any member or authorised assistant of the firm in any of the events following:

x x x x x

(6) If the member or if being a firm any member or authorised assistant of the firm refuses to abide by the decision of the Committee in any matter which under these articles or under the Bye-Laws for the time being in force is made the subject of a reference to the Committee.

x x x x x

Provided always that in every case arising under the provisions of sub-sections (5), (6), (7) and (8) of this Article no resolution for the expulsion of a member or if being a firm any member or authorised assistant of the firm shall be valid unless passed by a majority consisting of not less than two-thirds of the members of the Committee at a meeting specially convened for the purpose and at which meeting not less than two-thirds of the members of the Committee at a meeting specially convened for the purpose and at which meeting not less than seven members of the Committee shall be present."

Art. 22. "Any member who has been declared a defaulter by reason of his failure to fulfil any engagement between himself and any other member or members and who "fails to fulfil such engagements within six months from the date upon which he has been so declared a defaulter shall at the expiration of such period of six calendar months automatically cease to be a member."

Art. 24. "Upon any member ceasing to be a member under the provi-

sions of article 22 hereof and upon any resolution being passed by the Committee expelling any member under the provisions of Article 21 hereof or upon any member being adjudicated insolvent the share held by such member shall ipso facto be forfeited."

Art. 27. "Any share so forfeited shall be deemed to be the property of the Association, and the Committee shall sell, re-allot, and otherwise dispose of the same in such manner to the best advantage for the satisfaction of all debts which may then be due and owing either to the Association or any of its members arising out of transactions or dealings in stocks and shares."

Art. 28. "Any member whose share has been so forfeited shall notwithstanding be liable to pay and shall forthwith pay to the Association all moneys owing by the member to the Association at the time of the forfeiture together with interest thereon, from the time of forfeiture until payment at 12 per cent per annum and the committee may enforce the payment thereof, without any deduction or allowance for the value of the share at the time of forfeiture."

Art. 29. "The forfeiture of a share shall involve the extinction of all interest in and also of all claims and demands against the Association in respect of the share, and all other rights incidental to the share, except only such of those rights as by these Articles expressly saved."

Art. 31. "The Association shall have a first and paramount lien upon the share registered in the name of each member and upon the proceeds of sale thereof for his debts, liabilities and engagements. x x x"

Art. 32. "For the purpose of enforcing such lien the Association may sell the share subject thereto in such manner as they think fit. x x x"

Art. 33. "The net proceeds of any such sale shall be applied in or towards satisfaction of the debts, liabilities, or engagements, residue (if any) paid to such member, his executors, administrators, committee curator or other representatives."

4A. The relevant bye-laws of the Exchange are:

"Settlement of Disputes. — All disputes, complaints and claims between by and against members shall, on the application of either party, be decided by the Committee or by a

Standing or Special Sub-Committee appointed by the Committee for the purposes. In the event of the matter being decided by the Committee the decision shall be final and binding upon all members concerned but any member aggrieved with the decision of the Standing or Special Sub-Committee may, within seven days of such decision being given, appeal to the Committee whose decision shall be final. In the event of any member or members refusing, neglecting or failing to observe, carry out or comply with any decision of the Committee, or if no appeal is preferred, with the decision of the Standing or Special Sub-Committee, such member or members so in default shall be dealt with by the Committee under the rules, regulations and/or bye-laws of the Association for the time being in force."

Bye-law 13 — "Defaulters. — Any member who shall fail to pay any subscription or other moneys due by him to the Association on due date, or who shall fail to fulfil any engagement between himself and another member or members may be declared a "defaulter" by the Committee and on such declaration his name shall be posted as a "defaulter" on the notice board of the Association and so long as his name remains so posted he shall not be at liberty to exercise any of the privileges of membership."

5. Under the scheme of the Articles of Association of the Exchange, the Committee is authorised to expel or suspend a member on the ground, inter alia, that he refuses to abide by the decision of the Committee in any matter which is under the Articles or under the Bye-laws referred to the Committee. A person declared a "defaulter" because he fails to fulfil any engagement between himself and any other member or members within six months from the date on which he has been declared a defaulter, ceases to be a member of the Exchange and his share also stands forfeited. The share so forfeited is deemed to be the property of the Exchange. But the Committee must sell, re-allot or otherwise dispose of the share for satisfaction of the debts which may then be due and owing by the defaulter to the Exchange or to any of its members arising out of transactions or dealings in stocks and shares. Forfeiture of a

share involves extinction of all interest in and also of all claims and demands against the Exchange in respect of the share and all other rights incidental to the share, but not the liability of the erstwhile member to discharge his liabilities to the Exchange. The Exchange has a first lien upon the share of a member and upon the proceeds of sale thereof for his debts and liabilities and in enforcement of the lien, the Exchange may sell the share. The net proceeds of the share subject to the lien if sold will be applied in or towards satisfaction of the debts, liabilities or engagements of the shareholder and the residue, if any, paid to such member his executors, administrators, committee, curator or other representatives.

6. In this appeal counsel for Sanyal contended, that under the Indian Companies Act, 1913, a fully paid up share cannot be forfeited for failure to carry out any engagement by the shareholder other than an engagement to pay a call made by the Company to pay unpaid capital; that the procedure followed by the Sub-Committee of the Exchange was irregular in that Sanyal had no notice of the meeting of the Committee to declare him a defaulter; that a Committee had no authority under the Articles of Association to direct sale of the share; and that in any event Sanyal was entitled to the balance remaining on hand with the Exchange after satisfying his debts, liabilities and engagements under the Articles of Association.

7. For failure to abide by the decision of the Committee in respect of his liability to pay the amount of loss due to Johurmull Daga & Company Sanyal was declared a defaulter, and when he continued to remain a defaulter for six months he was by resolution of the Full Committee expelled from the membership of the Exchange. The Full Committee also resolved to forfeit his share. The Exchange thereafter disposed of the share for Rs. 55,000/-. The argument raised by counsel for Sanyal that a member of the Exchange forfeits his share only if a resolution expelling him and a resolution declaring him a defaulter are passed is without substance. The conjunctive "and" between the first two clauses of Art. 24 is used

to indicate an alternative, and does not make the two conditions cumulative. We agree with the observations of Panckridge, J., in *Surajmall Mohta v. Ballabhdas Mohta* (1936) ILR 63 Cal 531, that

"Art. 24 is carelessly drawn, because, on its literal application, before his share could be forfeited, a member would both have to be expelled by the Committee under Art. 21 and automatically cease to be a member under Article 22. Clearly this cannot be the intention of the article and it is obvious that by a slip, "and" has been substituted for "or","

8. In any event the Full Committee passed on February 19, 1942 a resolution declaring the appellant a defaulter. The appellant did not carry out his engagements for a period of six months thereafter. By resolution dated September 1, 1942 at a meeting of the Full Committee the appellant was expelled from the membership of the Exchange and it was resolved that his share shall stand forfeited.

9. There is no provision in the Indian Companies Act, 1913, which restricts the exercise of the right of the Exchange to forfeit shares, for non-payment of a call only. The Indian Companies Act, 1913, made no provision relating to forfeiture of shares. By S. 17 (2) of the Act, a company could adopt the regulations contained in Table A in the First Schedule but the Company was not bound to do so. Regulations 24 to 30 of Table A dealt with the power and the procedure relating to forfeiture of shares. Regulation 24, it is true, provided for exercise of the power to forfeit a share when there was default in paying calls, but no inference follows therefrom that the share of a member could be forfeited only for non-payment of a call made in respect of the shares which were not fully paid up.

10. In *The Calcutta Stock Exchange Association Ltd. v. S. N. Nundy & Co.*, ILR (1950) 1 Cal 235, Harries C. J. after examining the provisions of the Companies Act 1913 in great detail reviewed the decisions of the Courts in England and of the High Court of Calcutta and observed that the Indian Companies Act as well as the English Companies Act contemplate, recognize and sanction forfeiture generally and not for non-payment of calls only; that a company

may by its Articles lawfully provide for grounds of forfeiture other than non-payment of call, subject to the qualification that the Articles relating to forfeiture do not offend against the general law of the land and in particular the Companies Act, and public policy; and that the forfeiture contemplated does not entail or effect a reduction in capital or involve or amount to purchase by the Company of its own shares nor does it amount to trafficking in its own shares. The Court in that case was concerned to determine the true effect of the Articles of the Exchange which fall to be interpreted in this case.

11. This Court in *Sri Gopal Jalan and Co. v. Calcutta Stock Exchange Association Ltd.* (1964) 3 SCR 698 = (AIR 1964 SC 250) also considered whether forfeiture of shares resulted in reduction of capital contrary to the provisions of the Companies Act where power of forfeiture was given by the Articles for failure to carry out an undertaking or satisfy an obligation of the member. The Court in that case was interpreting the Articles which fall to be interpreted in this appeal. The Court held that the Exchange was not liable to file any return of the forfeited shares under Section 75 (1) of the Indian Companies Act, 1956 when the shares were reissued. The Court observed that when a share is forfeited and reissued, there is no allotment, in the sense of appropriation of shares out of the authorised and unappropriated capital, and approved the observations of Harries, C. J. in *S. N. Nundy's case* ILR (1950) 1 Cal 235 that "On such forfeiture all that happened was that the right of the particular shareholder disappeared but the share considered as a unit of issued capital continued to exist and was kept in suspense until another shareholder was found for it". In the view of this Court, the shares so forfeited may not be "allotted" in the sense in which that word is understood in the Companies Act. The Court also pointed out that reissue of forfeited shares is not allotment of the shares but only a sale, for, if it were not so the forfeiture even for non-payment of call would be invalid as involving an illegal reduction of capital.

12. Article 27 of the Exchange [it may be recalled is in terms manda-

tory. The share forfeited to the Exchange must be reallocated or otherwise disposed of; it cannot be retained by the Exchange. The share after forfeiture in the hands of the Company is subject to an obligation to dispose it of. On that account there is no reduction of capital by mere forfeiture.

13. Mr. Datar appearing for the appellant however contended that in *Sri Gopal Jalan & Company's case*, (1964) 3 SCR 698 = (AIR 1964 SC 250) the parties argued the case on the footing that Articles of Association of the Exchange were not invalid, whereas in the present case the validity of the Articles is challenged. But the Court in citing with approval the observations of Harries C. J. in *S. N. Nundy's case*, ILR (1950) 1 Cal 235 did in effect pronounce upon the validity of the Articles.

14. A forfeited share is, therefore, merely a share available to the Company for sale and remains vested in the Company for that purpose only. By forfeiting a share pursuant to the authority of the Articles of Association, no reduction of capital is achieved. We are unable to agree with counsel for Sanyal that forfeiture of shares is permissible only in cases expressly contemplated by Table A—Model Articles i.e., for non-payment of calls in respect of a share which is not fully paid up.

15. Subject to the provisions of the Companies Act the Company and the members are bound by the provisions contained in the Articles of Association. The Articles regulate the internal management of the Company and define the powers of its officers. They also establish a contract between the Company and the members and between the members inter se. The contract governs the ordinary rights and obligations incidental to membership in the Company. In the absence of any provisions contained in the Indian Companies Act which prohibit a Company from forfeiting a share for failure on the part of the member to carry out an undertaking or an engagement the Articles of a Company which provide that in certain events membership rights of the shareholder including his right to the share will be forfeited are binding. The articles of Association of the Exchange expressly provide that in the event of the mem-

ber failing to carry out the engagement and in the conditions specified therein his share shall stand forfeited. Articles 22, 24, 26, 27 and 29 of the Exchange relating to forfeiture of shares in certain events are therefore valid.

16. There is in our judgment nothing in the procedure followed by the Sub-Committee and the Full Committee which rendered the forfeiture of Sanyal's share illegal. It is not in dispute that Sanyal incurred liability in favour of one of the members of the Exchange to pay Rs. 438-10-0 in the transaction relating to the sale of Indian Iron & Steel Company's shares and he failed to discharge that liability. He continued to remain in default for six months even after the resolution of the full Committee, and on that account he ceased to be a member and his share was forfeited. The High Court has found that the copies of the letters dated 9th, 10th, 16th, 17th and 20th December, 1941, and of 8th January, 11th & 19th February, 1942, were sent to Sanyal and the usual notices relating to the complaints placed before the Sub-Committee or the Full Committee were served upon Sanyal, that such notices were posted on the notice board of the Exchange that the appellant had opportunities at all stages of the proceedings to come before the Exchange and refute the charges made against him and that at no stage of the proceeding until September 1, 1942, did Sanyal appear before the Sub-Committee or the Full Committee. The High Court was of the view that the order had not been made against Sanyal contrary to the rules of natural justice. It is true that Johurmull Daga complained about the default committed by Sanyal on December 9, 1941 and the meeting of the Sub-Committee was held on December 10, 1941. Granting that the letter of the Sub-Committee enclosing a copy of the complaint dated December 9, 1941, sent by post to Sanyal may not have reached him because he had left Calcutta, he had still ample notice of the proceeding of the Sub-Committee because intimation was given to him by the notice posted on the board of the Exchange. Sanyal raised no contention at any stage before the Sub-Committee or before the Full Committee that he had not received the notices of the meetings

dated December 10, 1941, December 17, 1941, January 7, 1942 of the Sub-Committee and of the meeting dated February 19, 1942 of the Full Committee. Regularity of the proceedings of the Committees at the various meetings is not challenged before us. We are unable to agree with the contention raised by counsel for Sanyal that the rules of natural justice were not complied with when the Sub-Committee and the Full Committee passed the impugned resolutions against Sanyal.

17. There is no substance in the plea that the Committee had no jurisdiction to order sale of the share forfeited. Article 27 declares that the forfeited share is the property of the Exchange and that the Committee of the Exchange shall sell, re-allot or otherwise dispose of the share, for satisfaction of all debts due by the member to the Association or its members out of transactions in shares and stocks. Under its articles the Exchange has authority to sell the share and to appropriate the sale proceeds towards satisfaction of the debts, liabilities or engagements.

18. But are we unable to agree with the view taken by the High Court that the balance of the amount remaining due after satisfying the liabilities of Sanyal remained the property of the Exchange and that Sanyal had no right thereto. Under the stipulations contained in Arts. 21, 22, 24, the share of the defaulters of expelled member stands forfeited for failure to fulfil his obligation. The share of Sanyal by express resolution was forfeited. After applying the amount realised on sale of the share towards satisfaction of the debts, liabilities and engagements of Sanyal to the Exchange and its members, the balance remaining in the hands of the Exchange had to be held for and on behalf of the appellant. That is expressly provided in Art. 33. The expression used in Art. 29. "The forfeiture x x shall involve the extinction of all interest" is subject to those rights as by the Articles are saved, and Art. 33 saves to the defaulting shareholder whose share is forfeited the right to the balance remaining with the Exchange. Even assuming that Articles 24 & 31 reserve to the Exchange two distinct powers the power to forfeit and the power to ex-

ercise a lien, and that Art. 33 only applies to sale in enforcement of a lien, and not to a sale under Art. 27, we are of the view that the balance on hand after satisfying the liability of the defaulter must still be returned to the defaulting shareholder. The power to forfeit does not imply authority to appropriate the balance remaining in hand after satisfying the liabilities and obligations of the defaulter to the Exchange and its members. Any such implication would be contrary to the intent of S. 74 of the Contract Act.

19. The power of the Exchange to forfeit the shares arises out of the Articles and its source is in contract. Forfeiture of share is in the nature of imposition of a penalty. Section 74 of the Indian Contract Act provides:

"When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

x x x"

20. In *Fateh Chand v. Balkishan Das*, (1964) 1 SCR 515 = (AIR 1963 SC 1405) this Court in dealing with a case in which a claim for damages for breach of contract to sell a lien of immovable property arose, pronounced that the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money, or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by S. 74 of the Indian Contract Act. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of a contract which expressly provides for forfeiture the Court has jurisdiction to award such sum only as it considers reasonable, but not exceeding the amount

specified in the contract as liable to forfeiture. The same principles, in our judgment, would apply in the case in which there is a stipulation in the contract by way of a penalty, and the damages awarded to the party complaining of the breach will not in any case exceed the loss suffered by the complainant party. It was observed at p. 526 (of SCR) = (at pp. 1410-1411 of AIR) in *Fateh Chand's case*, (1964) 1 SCR 515 = (AIR 1963 SC 1405):

"The section (S. 74) is clearly an attempt to eliminate the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine pre-estimate of damages by mutual agreement is regarded as a stipulation naming liquidated damages and binding between the parties: a stipulation in a contract in terrorem is a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to across the web of rules and presumptions under the English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty."

The Court also observed at p. 530 (of SCR) = (at p. 1412 of AIR):

"Section 74 declares the law as to liability upon breach of contract where compensation is by agreement of the parties pre-determined, or where there is a stipulation by way of penalty. But the application of the enactment is not restricted to cases where the aggrieved party claims relief as a plaintiff. The section does not confer a special benefit upon any party; it merely declares the law that notwithstanding any term in the contract predetermining damages or providing for forfeiture of any property by way of penalty, the Court will award to the party aggrieved only reasonable compensation not exceeding the amount named or penalty stipulated."

Granting that Art. 33 deals with those cases in which lien alone is enforced and not in cases where forfeiture is levied, and the obligation of the defaulting shareholder is determined by Art. 29, in our judgment, on the prin-

principle underlying S. 74 of the Contract Act the Exchange had no right to hold out of the sale proceeds of the share any amount in excess of the amount due to it or its member.

21. The Exchange may not purchase its own shares. If it does so, it amounts to reduction of capital. The legal theory of forfeiture is that a share forfeited is only taken over by the Company with the objection of disposing it of to satisfy its claim to enforce which the share was forfeited and all other obligations arising against him out of his membership. The Company is given this right to recover the loss suffered by it by reason of the breach of contract committed by the shareholder. If the Company is permitted to retain the balance of the amount after satisfying the debts, liabilities and engagements of the shareholder, the transaction would not be different from one purchasing the share of the defaulting shareholder for a value equal to the amount of his obligations. That would be plainly illegal. We are therefore unable to agree with the High Court that the Exchange was entitled to retain the balance after satisfying the debts, liabilities and engagements of the appellant to the other members or to the Exchange.

22. The decree passed by the High Court is set aside and the case remanded to the High Court for determining the extent of the liabilities of the appellant to the Exchange not only in respect of the transactions with Johurmull Daga but in respect of all other outstanding liabilities of the appellant to other members of the Exchange and to the Exchange which are enforceable under the Articles. The appellant is entitled to receive from the Exchange the balance remaining due after deducting the aggregate amount or value of the obligations. He will be entitled to interest on the balance at the rate of 6% per annum from the date of the institution of the suit. Parties will bear their own costs throughout.

23. This appeal was filed in forma pauperis. The appellant will pay the Court-fee payable on the memorandum of appeal if he had not been permitted to appeal in forma pauperis. Case remanded.

AIR 1971 SUPREME COURT 429
(V 58 C 98)

(From: Allahabad)

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.

Bhagwan Swarup, Appellant v. The State of U. P., Respondent.

Criminal Appeal No. 251 of 1969,
D/- 18-8-1970.

Penal Code (1860), S. 302—Charge against accused under S. 302 — Accused's death sentence confirmed by High Court after believing evidence— Failure of accused to show grounds for interference in appeal arising out of special leave — Supreme Court refused to interfere. (Para 6)

The following Judgment of the Court was delivered by

SIKRI, J.: In this case we gave special leave because in the petition filed by the appellant through jail it was alleged that his advocate was not heard in the case because he was busy in another case in another court and arrived too late to argue the murder reference and the appeal before the High Court. We had issued Notice to the Government to show cause why special leave should not be given but the Government did not inform us about the true state of affairs. Now, the learned Advocate for the State of U. P. has read to us a letter from the Government Advocate who argued the appeal and murder reference before the High Court, stating that the facts as stated in the petition are not true. But in order to avoid delay resulting from an enquiry into this matter we decided to hear the case on merits. We had appointed a counsel amicus curiae and he was ready to assist us.

2. He has taken us through the evidence and he has urged certain submissions which we will presently notice. It has not been shown to us by the learned advocate that there is any case for disturbing the concurrent findings of the learned Sessions Judge and the High Court.

3. The prosecution story which has been accepted by the learned Sessions Judge and the High Court is as follows:

4. On 25th of December, 1967, at about mid-day, the appellant Bhagwan Swarup, and Babu Lal, who has

IN/IN/D969/70/RGC/B

been convicted by the High Court under Ss. 326/34/394 of the Indian Penal Code, were going on a bicycle on the service road on the bank of the canal minor in village Dabha. Dhan Singh deceased was going ahead on a new bicycle. When Dhan Singh reached the grove of Jagdish Prasad Sharma, Bhagwan Swarup and Babu Lal dragged Dhan Singh into the grove with the object of robbing him of his new bicycle. When Dhan Singh raised an alarm, Bhagwan Swarup whipped out a knife and stabbed Dhan Singh in the neck. On hearing the alarm raised by Dhan Singh, Ravindra Kumar (P.W. 1), Roshan Lal (P.W. 2) and Gajendra Pal Singh, who were passing on the service road, rushed to the grove and saw the incident. On seeing these witnesses, the two accused picked up the old bicycle as well as the new bicycle of Dhan Singh and ran away—Bhagwan Swarup riding the old bicycle and Babu Lal the new bicycle. They were chased by the aforesaid three witnesses shouting, Kamlu (P.W. 3) who was coming with a bundle of pulas on his head from the opposite side obstructed Bhagwan Swarup and Babu Lal by throwing his bundle in their way. Immediately Roshan Lal and others reached there and after beating them arrested both Bhagwan Swarup and Babu Lal. They were taken along with the bicycle into the grove where Dhan Singh was lying with injuries, bleeding profusely. The report was recorded at the police station at 2 p.m. the same day and the investigation was undertaken by K. C. Tyagi (P.W. 7), who immediately went to the scene of occurrence and seized the knife which was lying near the body of Dhan Singh deceased.

5. The prosecution story is supported by Ravindra Kumar (P.W. 1), Roshan Lal (P. W. 2) and Kamlu (P. W. 3). Dr. D. N. Tewari, Medical Officer, who conducted the post mortem examination on 26-12-1967 at 4.35 p.m. found one incised wound on the left side of the neck and one punctured wound below the aforesaid wound and one more punctured wound on the right side of the neck of the deceased. The last two wounds, according to him, may have been caused by one blow. It has been found that neither Ravindra Kumar nor Roshan Lal knew the two appellants before and they had no reason to falsely implicate the appel-

lants. The High Court disbelieved the case of Bhagwan Swarup that there had been a marpit between Roshan Lal and Durjan Kadhera, a cousin of Bhagwan Swarup, and it is because of this fact Roshan Lal had falsely implicated Bhagwan Swarup. It is stated in the judgment of the High Court that the High Court sent for the records, if any, to ascertain if a report was made in connection with the marpit and also for the medical evidence about the injuries suffered by Roshan Lal and Durjan Kadhera and they were informed that the records had been weeded out, and even if a report had been made, it was no longer available. It was however found from the report of the Civil Surgeon that Roshan Lal was treated from 9th October, 1959 to 8th November, 1959 as an indoor-patient and although there was no evidence of the treatment of Durjan Kadhera the record showed that he was X-rayed on the 23rd October, 1959. The High Court further found that no such plea was taken by Bhagwan Swarup before the Committing Magistrate and it was made out for the first time before the Sessions Judge. The High Court carefully analysed the evidence of Ravindra Kumar and Roshan Lal and they saw no reason to disbelieve either of them. Kamlu (P.W. 3) was also believed by the High Court even though he was examined by the Investigating Officer 19 days after the occurrence. The reason given was that Kamlu went away to consult a doctor as he was suffering from asthma and could be examined only during the next visit of the Investigating Officer of Dhaha village, and his name was mentioned in the First Information Report.

6. Learned Counsel for the appellant, Mr. K. L. Mehta, has urged before us a number of points. His first point is that Bhagwan Swarup had his own cycle and even after the incident he rode on his own cycle and it must have been the other accused who wanted to steal the cycle. Be that as it may, it was not Babu Lal but Bhagwan Swarup who inflicted the injuries. The second point is that Bhagwan Swarup and the deceased Dhan Singh resided in the same village while the other accused Babu Lal resided at Khurrampur village, which is about 20 miles away and it is

not probable that Bhagwan Swarup would kill a resident of his own village in the company of a person coming from a village 20 miles away. We see no force in this point. There is no doubt that Bhagwan Swarup and Babu Lal were going together on a cycle and they were captured together. The third point, the learned Counsel for the appellant, raised was that all the eye-witnesses are relations among themselves. This has no relevance unless it is established that there was previous enmity between Bhagwan Swarup and the eye-witnesses. The fourth point raised was that the eye-witnesses were inimical to the appellant but we have already noticed that the High Court did not find any substance in this point. We may add that the incident on which the enmity is alleged to have been founded took place as long ago as 1959 and there are no particulars of the actual incident which are available. The appellant was then 8 years old and it is unlikely that he would be the subject-matter of vengeance. The last point raised by the learned Counsel for the appellant was about the sentence. He said that the appellant was 18 years old at the time of the incident, but the learned Sessions Judge and the High Court have considered that point and awarded the extreme penalty. The learned Sessions Judge said that from his appearance Bhagwan Swarup does not appear more than 19 years of age but age alone could not be taken as sufficient judicial ground for awarding lesser punishment, though it may be taken into consideration in a mercy petition. He added that it is unfortunate that these teenagers have indulged in such heinous and violent crime, so as to commit the murder of an innocent person who had not given them any offence. The High Court said that the sentence of death awarded to Bhagwan Swarup under section 302 of the Indian Penal Code was proper. No ground has been shown for us to interfere in an appeal arising out of the special leave granted by us. In the result, the appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 431
(V 58 C 99)

(From: Madras)*

M. HIDAYATULLAH, C. J., J. M. SHELAT, G. K. MITTER, A. N. RAY
AND I. D. DUA, JJ.

K. A. Natarajan etc. Petitioners
v. M. Naina Mohammed and others,
Respondents.

Petns. for Spl. Leave to Appeal
(Civil) Nos. 2430, 2431, 2436, to 2438,
2442, 2443, 2445, 2446, 2472 and 2480
of 1969 and 3 of 1970, D/- 3-2-1970.

Constitution of India, Art. 136 —
Petition for special leave to appeal
against interlocutory order of Letters
Patent Bench — Letters Patent Bench
only giving effect to order of single
judge restricting grant of permit to
grantee of Regional Transport Authority
pending disposal of Letters Patent
Appeal — Supreme Court cannot be
invited to interfere into the matter
under Art. 136 at the stage when ap-
peal itself is pending and High Court
has not passed any special orders of
its own. (Para 3)

The following Order of the Court
was delivered by

HIDAYATULLAH, C. J.: These
are petitions for special leave against
the orders of the Division Bench of the
High Court of Madras by which the
High Court has ordered that the per-
mits granted by the Regional Trans-
port Authority will operate and not
those which the State Transport Ap-
pellate Tribunal in appeal granted.

2. The facts may be stated,
taking as a sample, Special Leave Peti-
tion No. 2430 of 1969. The original
grantee of the permit by the Regional
Transport Authority may be described
as 'A'. The date of the grant was
November 20, 1966. On appeal by the
respondent who may be described as
'B', the State Transport Appellate Tri-
bunal cancelled the grant made to A
by the Regional Transport Authority.
This was on July 18, 1967. A writ
petition was thereupon filed by A and
it was allowed by the learned single
Judge on November 4, 1969 and the

*(Civil Misc. Petns. Nos. 15375 of 1969
etc., in Writ Appeals Nos. 519 of 1969,
etc., D/- 8-12-1969 — Mad.)

order of the State Transport Appellate Tribunal was quashed. When the matter went before the Letters Patent Bench, it was observed that in view of the fact that only the grantee of the Regional Transport Authority had a valid permit, it was not possible to grant any permit to B who was recognised by the State Transport Appellate Tribunal. They followed an earlier ruling of the court and restricted the grant pending disposal of the Letters Patent appeal to the grantee of the Regional Transport Authority who alone was permitted to operate on the route. It appears that only one operator could be allowed on this route, because of a Section 47 (3) determination.

3. In these petitions for special leave which are ex facie against the orders made in interlocutory proceedings, the attempt is to get the permits restored to B. It is claimed that this involves a question of jurisdiction and that question is whether the High Court could recognise A the grantee of the Regional Transport Authority when his permit had been cancelled by the State Transport Appellate Tribunal. We think that these are matters into which this Court cannot be invited to go under Art. 136 of the Constitution, because the appeal itself is pending before the High Court and what the High Court has done is to give effect to the order of the learned single Judge. In other words, the Letters Patent Bench has not attempted to pass any special order of its own staying the operation of the decision of the learned single Judge. We think it would be wrong for us to interfere at this stage. It may be that the question may come up in some other form before us when the appeals from the Letters Patent decision are brought before this Court. If and when this happens, we may find it convenient to express our opinion on the question of jurisdiction of the High Court to go into such matters in appeal or in original writ petitions. Beyond this, we do not wish to express any opinion, one way or the other, at this stage. We accordingly order the dismissal of these special leave petitions, reserving to the petitioners the right to raise such questions as may legitimately be raised when they choose to file appeals against the decision of the Letters Pa-

tent Bench. Stay granted by this Court is vacated.

Order accordingly.

AIR 1971 SUPREME COURT 432
(V 58 C 100)

(From Bombay: ILR (1966) Bom. 745)

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

The Union of India, Appellant v.
M/s. Sohanlal Sampatlal, Respondent.

Civil Appeal No. 2223 of 1966, D/-
27-10-1970.

(A) Post Office Act (1898), Ss. 6, 33,
74 — Post Office Rules (1933) Rr. 81,
83 — Post parcel containing gold coin,
or bullion or currency notes — Market
value — Declaration of — Innocent or
insignificant misstatement by insured
— He does not become disentitled to
receive compensation.

The provisions of the Act and Rules made thereunder ensure that the insured should not make a declaration in excess of the market value so as to avoid fraudulent dealings. Nor can the insured get more compensation than the market value. But this does not and cannot mean that any innocent and insignificant misstatement by the insured of the actual value which has to be the market value on a particular date and at the place of posting can lead to the startling result that he becomes wholly disentitled to receive any compensation. It is well known that the market in articles like gold and bullion exists only in large towns and the value fluctuates from day to day and from hour to hour. It may be sometimes impossible for any person sending gold or bullion by post after getting it insured to ascertain the exact value on a particular date. He cannot in the very nature of things be absolutely precise and accurate about the market value prevailing at the material time. This does not, however, mean that he is completely absolved from the responsibility of ascertaining it but if he gives some value which is approximately the same as the market value the insurer cannot take up the position that owing to an insignificant difference the insured cannot recover the compensation.

(Para 5)

Insured purchasing gold for Rs. 2465/- and sending it by insured post for Rs. 2500/- held, could not be deprived of compensation for loss on ground that he had made wrong declaration of market value. (Para 6)

(B) Post Office Act (1898), S. 6 — Plea that policy is not subsisting or there is breach of conditions of policy — Burden lies on insurer — Provisions of Act and Rules do not displace this general principle — (Evidence Act (1872), Sections 101 to 104). (Para 6)

Dr. L. M. Singhvi, Sr. Advocate, (M/s. Ram Panjwani and S. P. Nayar, Advocates, with him), for Appellant; G. L. Sanghi, Advocate and Janendra Lal, Advocates of M/s. Gagrati and Co., for Respondent.

The Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Bombay High Court made in exercise of its revisional jurisdiction.

2. On June 15, 1955 the respondent firm purchased gold coins for an aggregate price of Rs. 2465-14-0 as commission agents for transmission and delivery to their constituents at Bixaner. On the following day the parcel containing the gold coins was handed in at Ramwadi Post Office, Bombay for transmission to the addressee. The parcel was insured for Rs. 2500/-. It was lost in the course of transit. The respondents filed a suit for recovery of about Rs. 2475/- as compensation under the insurance effected by the Union of India, the present appellant, represented by its postal department. The appellant denied its liability for the claim on the ground that under section 6 of the Indian Post Office Act, 1898, hereinafter called the "Act", read with Rule 81 (g) of the rules framed thereunder, its liability could arise only if the plaintiff had declared the actual value of the contents on the date of the insurance. As a wrong declaration had been made there was no valid and enforceable contract. The case of the plaintiffs' evidence, however, was that in addition to the price paid for the gold coins a sum of Rupees 9-1-6 had been spent as postal charges and the cost of insurance, packing, commission and brokerage. Profit was added to this at 1% and the total value came to Rs. 2499-11-6 and it was for

that reason that the parcel was got insured for Rs. 2500/-. A learned single judge of the Small Causes dismissed the suit. The matter was taken before the Full Court of Small Causes by the respondent firm. While conceding that the difference in the actual value and the value declared was small the Full Court held that the rules had not been complied with properly and upheld the dismissal of the suit. After examining all the relevant provisions of the Act and the rules the High Court was of the view that it was for the insurer to prove that it had been discharged from the liability because of fraud, misrepresentation, mistake or incorrect statements made by the insured and the burden had to be strictly discharged by the insurer. As it had not been proved by the Union of India that the value declared by the plaintiffs on June 16, 1955 was not the actual market value of the gold delivered by the plaintiffs for transmission by means of a postal parcel the plaintiffs were entitled to a decree for Rs. 2474-15-6 with interest at 6% per annum from the date of the suit.

3. Section 6 of the Act provides that the Government shall not incur any liability by reason of the loss, misdelivery etc. of any article in the course of transmission by post except in so far as such liability may in express terms be undertaken by the Government. Section 30 provides for insurance of postal articles. Section 33 is in the following terms:

"Subject to such conditions and restrictions as the Central Government may, by rule, prescribe the Central Government shall be liable to pay compensation, not exceeding the amount for which a postal article has been insured, to the sender thereof for the loss of the postal article or its contents, or for any damage caused to it in course of transmission by post:

Provided that the compensation so payable shall in no case exceed the value of the article lost or the amount of the damage caused."

The relevant rules may also be referred to. According to rule 44 (1) gold coin or bullion of value exceeding Rs. 2500/- shall not be transmitted by post. The value for the purpose of this sub-rule, the second proviso to

rule 72 clause (g), the second proviso to rule 81 and rule 83-A shall be the market value on the date and at the place of posting. Part IV of the rules deals with insurance of postal articles. The second proviso to rule 72 (1) lays down that articles containing government currency notes or gold coin or bullion shall be insured for the actual value of the contents. Rule 74 gives the additional fee chargeable for the insurance. Under rule 81 the compensation payable to the sender of an insured article shall not exceed the amount for which the article has been insured for the loss of the postal article or any of its contents. According to the first proviso the compensation shall in no case exceed the value of the article or any of its contents lost. Clause (g) of the second proviso is to the effect that no compensation shall be payable where the insured article contains gold coins or both and has not been insured for the actual value of the contents. Rule 83A makes it obligatory for the sender to declare on the article the value of the contents where gold coin, bullion etc., is despatched. Thus under the rules whenever gold coin or bullion is sent by parcel post it must be insured for the actual value of the contents. If the articles are lost the amount of compensation cannot exceed the amount for which the articles have been insured and no compensation shall be payable where the articles have not been insured for the actual value. By reference to rule 41 the value has to be the market value on the date and at the place of posting.

4. The argument which has been raised on behalf of the Union of India is that the respondent firm had purchased the gold coin for Rupees 2465-14-0 on June 15, 1955. Its actual market value, therefore, on respondent's own admission was not Rupees 2500/-. It has, further, been pointed out that in para 2 of the plaint it has been stated that on or about June 16, 1955 the plaintiffs despatched 26 tolas gold valued at Rs. 2474-15-6 under insured parcel which was lost in transit and even the decree was claimed for that amount and not for Rs. 2500/-. As there was a discrepancy between the value declared and the actual or market value the respondent firm was not entitled to any compensation. The plea

in defence substantially was that the respondent ought to have declared the actual value of the contents on the date of insurance, namely, June 16, 1955 which it failed to do and therefore there was no contract of insurance between the parties.

5. Now the statutory provisions of the Act and the rules have to be construed and read in a reasonable manner. If the interpretation sought to be placed on behalf of the appellant is accepted it would mean that where a person declares a value which varies even by one paisa from the market value on the date and at the place of posting the insured would be deprived of the compensation for the loss of the article. That could never have been in the contemplation of the legislature and the rule making authority. The rules seem to ensure that the insured should not make a declaration in excess of the market value so as to avoid fraudulent dealings. Nor can the insured get more compensation than the market value. But this does not and cannot mean that any innocent and insignificant misstatement by the insured of the actual value which has to be the market value on a particular date and at the place of posting can lead to the startling result that he becomes wholly disentitled to receive any compensation. It is well known that the market in articles like gold and bullion exists only in large towns and the value fluctuates from day to day and from hour to hour. It may be sometimes impossible for any person sending gold or bullion by post after getting it insured to ascertain the exact value on a particular date. Take for instance the case of a person who is illiterate and has to despatch gold from a place in the vicinity of which there is no market from where the market value can be ascertained. He cannot in the very nature of things be absolutely precise and accurate about the market value prevailing at the material time. This does not, however, mean that he is completely absolved from the responsibility of ascertaining it but if he gives some value which is approximately the same as the market value the insurer cannot take up the position that owing to an insignificant difference the insured cannot recover the compensation.

6. The High Court referred to Article 429 in Halsbury's Laws of England III Edition, Vol. 22, at page 227 and to certain other text books on the law of insurance according to which the burden is on the insurer of showing that the policy is no longer subsisting or that there had been a breach of such a condition which relieves the insurer from liability. It has not been shown that these general principles will not be applicable when an insurance has been effected under the provisions of the Act and the rules. The finding of the High Court was that there was no evidence of any kind regarding the market rate of gold prevailing on June 16, 1955 on the record. It was for the insurer to lead evidence on that point and show that according to the market rate prevailing on that date the value could not be Rs. 2500/-. The mere fact that the respondent was under the impression or had stated in the plaint that the value of the gold was less than Rs. 2500/- was not sufficient to absolve the insurer from the responsibility of proving that the value which was declared i.e. Rs. 2500/- was not the market value on the date and at the place of posting.

7. There is no merit in this appeal which fails and is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 435
(V 58 C 101)**

(From: Bombay)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Bhagwant Pundlik etc., Appellants v. Kishan Ganpat Bharasakal and others, (In both the Appeals), Respondents.

Civil Appeals Nos. 1409 and 1721 of 1966, D/- 19-10-1970.

(A) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958), Ss. 36 and 20 — Landlord representing that he desired to cultivate lands personal-

*(Spl. Civil Appns. Nos. 746 and 747 of 1964, D/- 15-11-1965 Bom. at Nagpur).

KN/KN/F93/70/YPB/T

ly taking possession from tenant — Possession having been obtained without complying with provisions of Sections 20 and 36 (2) is invalid — Tenant under S. 36 (1) is entitled to be restored to possession.

Where a landlord obtained possession of the lands from tenant representing that he desired to cultivate the lands personally, but without complying with the provisions of Ss. 20 and 36 (2) then even assuming that the tenant delivered possession voluntarily the landlord's possession was not lawful. The tenant was entitled, therefore, under S. 36 (1) to be restored to possession. Spl. Civil Appns. Nos. 746 and 747 of 1964 D/- 15-11-1965 (Bom.-Nagpur Bench), Affirmed.

(Para 3)

It cannot be said that since S. 36 (2) does not commence with the expression with which S. 19 does, it may, on that account, reasonably be inferred that the Legislature intended that only those tenants shall be deemed to be entitled to possession within meaning of S. 36 (1) who were dispossessed by fraud, coercion or misrepresentation and not the tenant who had voluntarily parted with the possession of the lands. Section 19 provides that notwithstanding any agreement, usage, decree or order of a Court of Law tenancy of any landlord held by a tenant shall not be terminated except in the cases specified therein. Thereby it was intended to make the provisions of S. 19 paramount. In S. 20 which deals with surrender, it is expressly enacted that surrender shall be in writing and shall be verified in the prescribed manner. Surrender of tenancy, granting that the tenant in the case had delivered the land voluntarily, which does not comply with the requirements of S. 20 is ineffective. Again, S. 36 (2) imposes a disability upon the landlord from obtaining possession of any land occupied by a tenant except under an order of the Tahsildar. The terms of S. 36 (2) are explicit, they are not subject to any implication that the possession obtained with the consent of the tenant but without an order of the Tahsildar is valid.

(Para 4)

(B) Tenancy Laws — Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act (99 of 1958) S. 36 (1) — Whether mere verification by the

Tahsildar without an order of Tahsildar authorising the landlord to obtain possession disentitles the tenant to claim possession under S. 36 (1)? (Quaere). (Para 5)

Cases Referred: Chronological Paras
(1969) Spl. Civil Appln. No. 206
of 1967, D/- 12-9-1969 (Bom),
Madho v. Maharashtra Revenue Tribunal 5

M/s. S. K. Mehta and K. L. Mehta Advocates, for Appellants (in both appeals); Mr. M. S. Gupta, Advocate, for Respondents Nos. 1 and 2 (in C. A. No. 1409 of 1966); Mr. S. S. Khanduja, Advocate, for Respondent No. 3 (in both appeals).

The Judgment of the Court was delivered by

SHAH, J.: Badridas son of Ramgopal was the owner of fields Survey Nos. 2 and 9/2 of village Dhamberi, taluq Akot, District Akola. On February 26, 1958, Badridas granted a lease for cultivation of the land to two brothers Kishan and Manik. At the end of the agricultural year 1958-59 Badridas took possession of the lands from Kishan and Manik representing that he desired to cultivate the lands personally. Badridas cultivated the lands during the agricultural years 1959-60 and 1960-61, and thereafter on January 18, 1961 he granted a lease of the lands for four years to Bhagwant son of Pundalik. Kishan and Manik then applied on June 30, 1961 under S. 36 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, for an order restoring them to possession alleging that their eviction from the lands was illegal. The Additional Tahsildar dismissed the application, but in appeal the order was reversed. In the view of the appellate authority Kishan and Manik were in 1958-59 tenants of the lands and they were evicted otherwise than in accordance with the law, and that they were entitled to be restored to possession under S. 36 (1) of the Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958. In a petition by Bhagwant the Revenue Tribunal reversed the order of the appellate authority. The Tribunal held that since Kishan and Manik had given up possession of the lands voluntarily and had allowed Badridas to cultivate the lands for the following two years, they

had no right to be reinstated into possession of the lands, especially after the lands were let out by Badridas to Bhagwant. Kishan and Manik then moved in the High Court of Bombay at Nagpur, two Special Civil Applications Nos. 746 and 747 of 1964 in respect of the two fields Survey Nos. 2 and 9/2 separately. The High Court set aside the order of the Revenue Tribunal and directed that an order for possession be made in favour of Kishan and Manik in respect of the two lands. With special leave, these appeals have been preferred by Bhagwant.

2. The Bombay Tenancy and Agricultural Lands (Vidarbha Region) Act, 1958, was brought into force on December 30, 1958. Section 20 provides:

"A tenant may terminate the tenancy at any time by surrendering his interest of a tenant in favour of the landlord.

Provided that such surrender shall be in writing and shall be verified before the Tahsildar in the prescribed manner."

Section 36 of the Act provides:

(1) A tenant x x x entitled to possession of any land x x x under any of the provisions of this Act or as a result of eviction in contravention of sub-section (2) may apply in writing for such possession to the Tahsildar. x x x x

(2) No landlord shall obtain possession of any land, x x x held by a tenant except under an order of the Tahsildar. For obtaining such order he shall make an application in the prescribed form and within a period of two years from the date on which the right to obtain possession of the land, x x is deemed to have accrued to him:

x x x x

3. For the agricultural year 1958-59 Kishan and Manik were tenants in respect of the lands in question. Badridas took possession of the lands at the end of that year. Granting that Kishan and Manik delivered the lands voluntarily, there could not under S. 20 of the Act be a valid surrender, unless the surrender was in writing and verified before the Tahsildar and in the prescribed manner. Possession obtained by Badridas was not lawful, for Badridas obtained possession of the land from the tenants

without complying with the requirements of S. 20 and of sub-s. (2) of S. 36. Sub-section (2) of S. 36 prohibits the landlord from obtaining possession of any land held by a tenant except under an order of the Tahsildar. Delivery of possession voluntarily by Kishan and Manik did not render the possession of Badridas valid. Under S. 36 (1) a tenant who has been evicted in contravention of sub-s. (2) may apply in writing to the Tahsildar for such possession.

4. Counsel for the appellant contended that S. 36 (2) does not commence with the expression "Notwithstanding any agreement, usage, decree or order of a court of law" as S. 19 of the Act does, and on that account it may reasonably be inferred that the Legislature intended that only those tenants shall be deemed entitled to possession within the meaning of S. 36 (1) who were dispossessed by fraud, coercion or misrepresentation, and not tenant who had voluntarily parted with possession of the lands. We are unable to agree with that contention. Section 19 provides that notwithstanding any agreement, usage, decree or order of a court of law tenancy of any land held by a tenant shall not be terminated except in the cases specified therein. Thereby it was intended to make the provisions of S. 19 paramount. In S. 20 of the Act which deals with surrender it is expressly enacted that surrender shall be in writing and shall be verified in the prescribed manner. Surrender of tenancy which does not comply with the requirements of S. 20 is ineffective. Again, sub-section (2) of S. 36 imposes a disability upon the landlord from obtaining possession of any land occupied by a tenant except under an order of the Tahsildar. The terms of sub-s. (2) of S. 36 are explicit, they are not subject to any implication that possession obtained with the consent of the tenant, but without an order of the Tahsildar is valid.

5. In a recent judgment *Madhao v. The Maharashtra Revenue Tribunal*, Spl. Civil Appln. No. 203 of 1967, D/- 12-9-1969 (Bom) the High Court of Bombay held that S. 36 (2) is plenary and controls S. 20 of the Act. In the present case there is no surrender of tenancy in writing and no verification of surrender by the Tah-

sildar. We need express no opinion on the question whether mere verification by the Tahsildar without an order of the Tahsildar authorising the landlord to obtain possession disentitles the tenant to claim possession under S. 36 (1).

6. The appeals fail and are dismissed. Having regard to all the circumstances, however, we think, there should be no order as to costs in this Court.

7. Counsel for the appellant Bhagwant submitted that there are crops standing on the lands, and prayed that the appellant may be allowed to reap them. One month's time from the date of this judgment is given to the appellant to deliver possession of the lands.

Appeals dismissed.

AIR 1971 SUPREME COURT 437 (V 58 C 102)

(From: Calcutta)*

J. C. SHAH, K. S. HEGDE
AND A. N. GROVER, JJ.

K. L. Selected Coal Concern,
Appellant v. S. K. Khanson & Co.,
Respondent.

Civil Appeal No. 2169 of 1966,
D/- 20-10-1970.

(A) Constitution of India, Art. 133
— New plea — Pleas regarding validity of decree neither taken in executing Court nor before High Court — Pleas not raising pure questions of law — Supreme Court refused to allow them. (Para 8)

(B) Registration Act (1908), Ss. 2 (6) and 17 (2) (vi) — Executability of compromise decree creating charge on machinery challenged on ground of its non-registration — Finding by High Court that machinery was movable property — It is a finding of fact — Judgment debtor failing to show that machinery was permanently embedded to earth — Held that as machinery was not immovable property compromise decree comprising it was executable. (Para 7)

M/s. S. C. Majumder, R. K. Jain
and Miss Krishna Sen, Advocates, for

*(A.F.O.O. No. 518 of 1964, D/- 21-1-1965 — Cal.)

KN/KN/F/118/70/GKC/G

Appellant; M. C. Chagla, Senior Advocate, (S. S. Shukla, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

HEGDE, J.: This appeal by certificate arises from an execution proceeding. The judgment debtor is the appellant and the respondent is the decree-holder. The decree under execution is a compromise decree passed by the High Court of Calcutta on its original side in Suit No. 309 of 1960.

2. The judgment debtor had objected to the execution of the decree primarily on the ground that the decree includes properties which were not included in the suit and the decree having not been registered, it is not executable. Both the trial court and the High Court in appeal have rejected the contention of the appellant.

3. Now coming to the decree under execution clause (1) therein provides:

"There will be a decree in favour of the plaintiff for Rs. 2,50,000/- on account of advance and other sums in-

(Contd. on Col. 2)

cluding Commission payable upto date in full and final satisfaction of the plaintiff's claim as aforesaid."

4. Sub-clauses (a) to (g) of cl. (2) of the decree create certain selling agencies with which we are not concerned in this case. Sub-cl. (k) of cl. (2) of the decree is relevant for our present purpose and that sub-clause reads:

"For the payment of the aforesaid decretal amount and other sums payable to the plaintiff the defendant hypothecates as a first hypothecation the following machineries of the said Chalbulpore Colliery. Besides the above, the defendants have deposited with the plaintiff title deeds of their Khudika Property at Salanpore District Burdwan with intent to create equitable mortgage thereon for securing repayment of the amount which is now due and which might hereafter be due, the defendants having declared the said Khudika Property to be free from all encumbrances excepting the claim for royalty in the suit which is pending against the defendant in the High Court of Calcutta.

LIST OF MACHINERIES AT CHALBALPUR COLLIERY :

Item No.	Particulars
1. 5(five)	verticle boilers Nos. 9207, 4613, 9259, 6017 and 6019.
2. 1(one)	Haulage Engine 12 x 24.
3. 1(one)	Winding Engine 12 x 24.
4. 1(one)	Endless Haulage 10 x 8.
5. 1(one)	Electric Haulage 32 H. P.
6. 1(one)	Electric Haulage 15 H. P.
7. 1(one)	Headgear complete with pulley cage, cape 35 ft.
8. 1(one)	Electric Pump 62 H. P. English.
9. 1(one)	Transformer 200 K. V. A.
10. 1(one)	H. J. Main Switchgear.
11. 6(six)	L. J. Switchgears.
12.	Tramlines 50,000 ft.
13.	4 Steam Pump. 6 x 12.
14.	Pipes of different sizes 12, 500 ft.
15.	Coal Tubes 200 (two hundred)."

5. The judgment debtor having failed to pay the amount mentioned in the decree, the decree-holder levied execution claiming Rs. 2,50,000/- mentioned in paragraph (1) of the decree with costs. The relief asked for in the execution petition reads:

"The Judgment-debtor not having acted in terms of the decree and not having allowed the Decree-Holder to sell any coal of Colliery nor having paid any sum, the Decree-Holder prays for realisation of the decretal amount and costs of this execution case by

sale of the charged properties mentioned in the schedule below. The Decree-Holder reserves the right to proceed on the Equitable Mortgage upon Khudika Colliery."

6. As mentioned earlier the objection is as to the validity of the decree on the ground that as it includes immovable properties which were not the subject matter of the suit and as such the decree-holder was required to register the decree; the same having not been registered it is not executable.

7. The trial court did not decide the question whether the properties charged under the decree are immovable properties or not. It opined that that question has to be decided at the time the properties are brought to sale. But in appeal the High Court came to the conclusion that from the tenor of the compromise decree, it is clear that those properties are movable properties and therefore there was no need to register the decree. This is essentially a finding of fact. Unless it is shown that the items of machinery mentioned in the decree over which a charge had been created had been permanently embedded to earth, it is not possible to come to the conclusion that those items of machinery are immovable properties. If they are not immovable properties as held by the High Court, then there was no need to register the decree. It was for the judgment-debtor to show that the decree was invalid for the reasons mentioned by him. He has failed to establish that fact.

8. The appellant tried to assail the validity of the decree by taking up certain new pleas in this Court but those pleas do not raise pure questions of law. Those pleas had not been taken either before the executing court or before the High Court. Hence we did not allow him to advance those pleas.

9. In the result this appeal fails and the same is dismissed with costs.
Appeal dismissed.

AIR 1971 SUPREME COURT 439
(V 58 C 103)

(From Allahabad: 1968 All W. R.
(H. C.) 438)

S. M. SIKRI, V. BHARGAVA
AND I. D. DUA, JJ.

Municipal Board, Nainital and another, Appellants v. Brij Mohan Chandra and another, Respondents.

Criminal Appeal No. 134 of 1968,
D/- 26-10-1970.

(A) Municipalities — U. P. Municipalities Act (2 of 1916), S. 128 (1) (vii) — Imposition of tax on passengers carried by vehicles — Validity.

Is incompetent under the clause—
Clause which in unambiguous terms

KN/KN/F311/70/MKS/B

speaks of toll only on vehicles and other conveyances, animals and laden coolies does not take within its ambit tax on passengers. (Para 4)

Toll-tax on passengers neither imposed on passengers by municipality nor such imposition intended — Toll imposed on vehicles expressly made by the rules payable by the person-in-charge of the vehicle and no liability fixed on the passengers for payment of the tax — Passengers entering municipality cannot be legally called upon by the municipal authorities to pay the tax imposed on the vehicles.

(Para 5)

(B) Municipalities — U. P. Municipalities Act (2 of 1916), S. 164 — Prosecution for non-payment of tax — Power of High Court to quash proceedings.

Levy, ultra vires taxing power of municipal Board — Section cannot operate in bar of High Court's jurisdiction to entertain petition under S. 561-A and quashing the criminal proceedings on the ground that the impugned assessment and liability of accused is unauthorised and illegal. (Para 6)

Mr. Yogeshwar Prasad, Advocate, for Appellants; Mr. O. P. Rana, Advocate, for Respondent No. 2.

The Judgment of the Court was delivered by

DUA, J.: The short point requiring determination in this appeal on certificate of fitness granted by the Allahabad High Court under Art. 134 (1) (c) of the Constitution is whether toll-tax on laden motor vehicles levied under S. 128 (1) (vii) of the U. P. Municipalities Act II of 1916 (hereinafter described as the Act) on their entry within the limits of Nainital Municipality can be realised from the passengers carried by them.

2. The relevant facts which lie within a narrow compass may now be briefly stated. Brij Mohan Chandra, Vice-President of the Notified Area Committee, Bhowali, District Nainital (respondent no. 1 in this Court) travelled in U. P. Government Roadways Bus from Bhowali to Nainital on 17th, 26th and 29th May, 1967. At Kaila Khan Municipal toll barrier one and a half mile from Nainital on the Bhowali-Nainital Road, toll-tax was demanded from him but he declined to pay. The Executive Officer, Municipal Board, Nainital, thereupon filed a com-

plaint against him under S. 190 (1) (c) of the Code of Criminal Procedure on the allegation that he had by entering the municipal limits of Nainital without paying the toll dues committed breach of R. (1) of the Rules made under S. 153 (a) of the Act for the assessment and collection of tolls within the municipality of Nainital. Brij Mohan Chandra's contention in reply was that the levy of toll-tax by the Municipal Board on passengers was ultra vires the taxing power of the Board. During the pendency of the proceedings in the court of Sub-Divisional Magistrate, Nainital, Brij Mohan Chandra applied to the High Court of Judicature at Allahabad under S. 561A, Cr. P. C. for quashing those proceedings. The High Court (S. D. Singh J.) on April 16, 1968 quashed the proceedings by the impugned order holding that cl. (vii) of S. 128 (1) of the Act did not authorise levy of toll-tax on passengers and that the relevant notification also levied tax only on vehicles and not on passengers. The rules imposing an obligation on the passengers to pay the toll was, therefore struck down as ultra vires.

3. In this Court Shri Yogeshwar Prasad, learned counsel for the appellants (the Municipal Board, Nainital and the Executive Officer of the Board) at the outset attempted obliquely to seek support for the validity of the levy on passengers from cl. (xiv) of S. 128 (1) as pleaded in the memorandum of appeal lodged in this Court under O. 21, R. 12 of the Supreme Court Rules. But this attempt was soon abandoned and Shri Yogeshwar Prasad felt constrained to concede that in view of the clear and precise position taken on behalf of the Board in the High Court that it had never been intended to impose toll-tax on passengers, it was not open to him in this Court to rely on cl. (xiv). Shri O. P. Rana, the learned counsel for the respondent State of U. P. supporting the appeal, also did not rely on clause (xiv). We, therefore, do not propose to express any opinion on the question whether or not a toll-tax on passengers would be permissible under cl. (xiv).

4. The only point seriously pressed on behalf of the appellants as also by Shri O. P. Rana on behalf of the State of U. P. was that the toll imposed on the vehicle entering the

municipality could legally be realised from the passengers carried by it because of their nexus with the entry of the vehicle. Before examining this contention we may in passing turn to cl. (vii) of S. 128 (1) of the Act which reads:

"128 (1) Subject to any general rules or special orders of the State Government, in this behalf, the taxes which a board may impose in the whole or part of a municipality are—

x x x

(vii) a toll on vehicles and other conveyances, animals, and laden coolies entering the municipality;

x x x
x x x"

This clause in clear and unambiguous terms speaks of a toll on vehicles and other conveyances, animals and laden coolies entering the municipality. It does not take within its fold the passengers carried by vehicles to be taxed, with the result that imposition of tax on passengers by the Municipal Board would be incompetent under this clause. And this in fact was not disputed at the Bar.

5. The argument of nexus was also raised in the High Court; but it was repelled by that Court which observed as follows:

"It was urged that when a tax on conveyance is levied, some provision has to be made for the assessment and collection of that tax and some provision made about the persons from whom that tax may be recovered and that if there is any reasonable or rational nexus between the levy of the tax and the persons from whom that tax may be recovered, the Municipal Board would be within its rights to realise the tax from the persons so named. It is difficult, however, to apply the nexus theory in a manner so as to enable the Municipal Board to recover the toll-tax from the passengers travelling in a bus otherwise there will be no distinction left between a vehicle-tax and a passenger tax. When a toll-tax is levied on a vehicle, it is levied at the point of its entry within the municipal limits. It is obviously, therefore, the person, who is in charge of the vehicle or who makes an attempt to take the vehicle inside the municipal limits, who takes upon himself the responsibility for the payment of the

toll-tax. There is no question of there being any nexus between the levy of the tax on the vehicle and the persons sitting inside the same. In the case of vehicles plying on hire the driver or conductor of the vehicle can, of course, charge the amount of tax which has to be paid, from the passengers in addition to the fare which is normally charged from them."

The same argument was repeated before us. The submission seems to be based largely on the policy of the law to ensure the collection of taxes by preventing fraudulent evasion. In order to appreciate its cogency we may appropriately advert to the Rules made by the State Government in 1922 under Section 296 read with section 153 (a) of the Act, with respect to the assessment and collection of tolls in the Nainital Municipality. So far as relevant for the purposes of this appeal, according to Rule (1), no person can bring within the limits of the Nainital Municipality any vehicle in respect of which the toll-tax imposed under Section 128 (1) (vii) of the Act is leviable until the toll due in respect thereof has been paid to such muharrir and at such barrier as the Board may from time to time appoint. Under Rule 2 (a), in the case of laden motor vehicles the load recorded in the chalan or invoice accompanying the vehicle has to be accepted by the muharrir for purposes of assessing the toll. If no chalan or invoice accompanies the vehicle the load is to be assumed for the purposes of assessment to exceed three maunds unless it is ascertained to be less by weighment undertaken at the request of the person-in-charge of the vehicle. The toll on a laden motor vehicle has to be paid by the person-in-charge of the vehicle and toll on a passenger is to be paid by the passenger. Rule 2 (b) provides that when any person-in-charge of a laden vehicle enters the Municipal limits such person shall pay the toll to the muharrir at the barrier and the muharrir shall tender a face value ticket with coupon attached for the amount to the person paying the toll. This face value ticket can be examined by the official appointed for the purpose and the person bringing the vehicle within the Municipal limits is bound under Rule 3 to permit such examination. Under Rule 2 (c), every

driver of a motor lorry or other vehicle plying for hire and every driver of a private motor car or vehicle carrying passengers or goods has to stop his lorry or vehicle at the toll barrier for a reasonable time to enable the toll staff to recover proper toll tax from passengers and on the goods loaded therein. The provision contained in Rule 2 (a) that the toll on a passenger shall be paid by the passenger, on which reliance has principally been placed, is of no assistance to the appellants because it postulates imposition of toll on passengers and, therefore, unless a toll has been imposed on passengers none can be demanded from them under this clause. Similarly the notification (No. 1450/XI-476-E), dated 19th August, 1921, according to which toll-tax under Section 128 (1) (vii) of the Act sanctioned by the U. P. State Government under Section 135 (2) of the Act is levied on motor vehicles other than cars at the rate of Re. 1/- per passenger carried by them and at the rate of Rs. 2/- per vehicle is unhelpful to the appellants. As already observed by us no toll-tax has been imposed on passengers and indeed it was conceded on behalf of the appellants both here and in the High Court that the Board had never intended to impose a tax on passengers. It is also noteworthy that the toll imposed on the laden vehicles is expressly made payable by the person-in-charge of such vehicles and according to the scheme of the rules which provide the procedure for collecting such tolls, the person bringing the vehicle within the municipal limits (who is supposed to be the person-in-charge) is enjoined to permit examination of the face value ticket when demanded after the vehicle's entry into those limits. No liability has been fixed on the passengers for payment of the tax imposed on the vehicles carrying them and entering the Nainital Municipality. The liability for the payment of such tax having been fixed only on the person-in-charge of the vehicle and not on the passengers it is difficult to appreciate how the authorities entrusted with the duty of realising the same can demand it from the passengers. Our attention was not invited to any provision of law under which the passengers can be held

liable to pay the toll-tax imposed on the vehicles. Neither any precedent nor any principle was cited at the Bar in support of the submission that merely because the passengers were carried by the vehicles the toll-tax imposed on the entry of the vehicles into the Municipal limits could be demanded from them. On the facts and circumstances of this case and on the arguments addressed we are, therefore, unable to hold that the passengers carried by the vehicles entering the municipality of Nainital can be legally called upon to pay the tax imposed on the vehicles.

6. As a last resort a faint attempt was made by the appellant's counsel to rely on Section 164 of the Act in bar of the jurisdiction of the High Court in entertaining the petition under Section 561-A, Criminal P. C. and in holding the impugned assessment and liability of the passengers to be unauthorised and illegal. This argument ignores the vital point that if the impugned levy is outside the Act then this section cannot operate and the jurisdiction of the High Court to quash the proceedings relating to the levy which is ultra vires the taxing power of the Board under the Act cannot be taken away to the prejudice of the aggrieved citizen. This submission is accordingly repelled.

7. In the final result this appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 442 (V 58 C 104)

(From Mysore: (1966) 8 Law Rep 625)
G. K. MITTER AND A. N. RAY, JJ.

Gangappa Gurupadappa Gugwad,
Appellant v. Rachawwa and others,
Respondents.

Civil Appeal No. 1732 of 1966, D/-
23-10-1970.

(A) Civil P. C. (1908), Section 11 — Res judicata — Court basing its final decision on more than one points — Decision on each point operates as res judicata in subsequent suit between same parties.

It is open to a Court not to decide all the issues which may arise on the

KN/KN/F261/70/DVT/G

pleadings before it if it finds that the plaint on the face of it is barred by any law. If, however, final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point — each of which by itself would be sufficient for the ultimate decision — the decision on each of these points operates as res judicata between the parties. (Paras 10, 13)

Where in an earlier suit based on will the Court decided after elaborately going into the question that the defendant acquired absolute right in the property left under the will and also that the suit was prematurely filed, the decision on becoming final operates as regards both issues as res judicata between the parties in any subsequent suit filed on basis of that will. The finding that the suit was prematurely filed does not make it a decision on a preliminary issue so as to render the finding on the other issue mere obiter or surplusage. AIR 1950 PC 80, Explained; AIR 1963 SC 385, Rel. on; (1966) 8 Law Rep 625 (Mys), Affirmed. (Paras 12, 13)

(B) Civil P. C. (1908), Sections 11, 80 — Res judicata — Suit against Government — Decision based on applicability of Section 80 as well as on merits — When operates as res judicata in respect of all issues raised.

Where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 claiming relief was served in terms of the said section, it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. But, where the plaint on the face of it does not show that any relief envisaged by Section 80 is being claimed, it is the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice under Section 80 was necessary. If the Court decides the various issues raised on the pleadings, the adjudication of the rights of the parties, apart from the question as to the applicability of Section 80 of the

Code and absence of notice thereunder operates as res judicata in a subsequent suit where the identical questions arise for determination between the same parties. AIR 1950 PC 80, Explained. (Para 10)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 335 (V 50)
= 1963-2 SCR 285, Vithal
Yeshwant Jathar v. Shikandar
Khan Makhtum Khan Sardesai 13
(1950) AIR 1950 PC 80 (V 37),
Shankarlal v. Hiralal 6

Mr. M. C. Chagla, Sr. Advocate, (Mr. P. N. Tiwari, Advocate, and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. A. K. Sen, Sr. Advocate, (M/s. S. S. Javali and M. Veerappa, Advocates, with him), for Respondents Nos. 1 and 2.

The Judgment of the Court was delivered by

MITTER, J. — One Rudrappa Murigeppa Gugwad died leaving a will dated February 2, 1919. It is claimed by the appellant that he also left a codicil dated August 10, 1919. After reciting in Clause 1 of the will that he had brought up Lochanappa Gugwad, son of Irappa Sidlingappa Gugwad, and that though he had wished to take the said Lochanappa in adoption but had not been able to do so up till then and even if the adoption ceremony did not take place in the future, Lochanappa alone would be the owner of his properties he proceeded to state in Clause 2 of his will that:

"Even though I have hereby transferred the ownership of my immovable and movable properties to Lochanappa Irappa Gugwad, Lochanappa should act under the supervision of the trustees, namely, Lingappa Senganshanappa Tyapi and Gurulingappa Gangappa Gugwad. If both the trustees find that my property will fall out of use on account of Lochanappa's taking to bad ways, both the trustees should take possession of the property and safeguard it by appointing my extremely faithful clerks Veerabhadrapa Mallappa Sulizavi and Basappa Nurangappa Tuppad. If Lochanappa gets a male issue, the property should be in the possession of

both the trustees till that son attains majority".

In Clause 3 he laid down that:

"In case Lochanappa Irappa dies without leaving male issue, I fully authorise the said trustees to transfer the ownership of the movable and immovable property of my family to the son of Gurupadappa Gangappa Gugwad, resident of Bijapur, and to deliver the entire property into his possession".

The original will was deposited with the Collector. After having executed the will the testator appeared to have proceeded to Benaras and from there addressed a letter to Lochanappa Irappa Gugwad on 10th August 1919. By that he directed some money to be advanced to Gurubasappa Basappa Gugwad to start him on a business and commended the welfare of the said Gurubasappa to the care of Lochanappa adding:

"The main thing is that you should pay full attention to him, I have mentioned in the will that in case male children are not born to you, you should take in adoption in your own name any of the sons of Gurupadappa Gangappa Gugwad of Bijapur and that if you die without taking in adoption, they alone will be the owner of the movable and immovable properties. But two sons are born to him. As early as possible, that is to say, when one boy becomes five years old or after my death you should execute this work of adoption and you should mention that the property should go to him after your death".

The last statement appears to be incorrect inasmuch as the testator had not by his will directed Lochanappa to make such an adoption.

2. Probate of the will was duly taken and Lochanappa entered into possession of all the properties left by the testator. According to the judgment of the High Court appealed from, the letter was not a formal document as a codicil should be, nor was it referred to in the probate proceedings. In the year 1935, Gangappa Gurupadappa Gugwad, the appellant herein, filed a suit in the Court of the First Class Subordinate Judge at Bijapur against Lochanappa and the said two trustees for a declaration that Lochanappa had only a life

interest in respect of the properties described in the schedule to the plaint as per the will and codicil executed by the testator, that certain improvident transactions put through by Lochanappa in contravention of the directions given in the will were not binding on the plaintiff or the properties left by the deceased and that the said Lochanappa having acted contrary to the directions given in the will and codicil and having mismanaged the said properties an injunction should be issued against the trustees directing them to give Lochanappa only maintenance in terms of the will.

3. The Subordinate Judge who heard the suit framed several issues of which the important ones were as follows:—

(1) Whether the plaintiff is entitled to sue?

(2) Whether Lochanappa, defendant No. 1 got only a limited interest in the estate of the testator, Rudrappa Gugwad, under the will?

(3) Whether acts of mismanagement by Lochanappa contrary to the directions of the will had been proved?

(4) Whether an injunction could be validly given to the trustees to take over the management from Lochanappa and give him only maintenance?

Before the Subordinate Judge evidence both oral and documentary were let in. He construed the will to arrive at the finding that Lochanappa had been made the malik or owner of the properties covered by the will and that it was the will of the testator which recited that the estate given to Lochanappa was to be heritable. With regard to the further directions given in the will, he came to the conclusion that "Lochanappa having been made an owner under the will further expression of such intention cannot be properly allowed to control or qualify that ownership". As regards the direction in the letter styled a codicil advising Lochanappa to take one of the sons of Gurupadappa Gangappa Gugwad in adoption, he held that:

"In fact, there is no such direction in the original will. Even assuming that it is so, only means that Gurupadappa's sons are to be the owners in case Lochanappa dies without male issue and without adopting one of the sons of Gurupadappa; Lochanappa is still alive and it is yet

to be seen whether he adopts plaintiff or not or whether a son will be born to him or not. Plaintiff has at the most a contingent right and no vested interest, and therefore it is a question whether he is entitled to a simple declaration."

The suit out of which this appeal arises was filed by Gangappa Gugwad after the death of Lochanappa in 1957 against the widow of Lochanappa, one Chanabasappa Gurubasappa Gugwad who was undisputedly taken in adoption by Lochanappa as his son in the year 1951 and Gurlingappa Gungappa Gugwad, the surviving trustee under the will of Rudrappa pleading inter alia that "Rudrappa did not confer an absolute estate on Lochanappa in respect of his property, that the bequest made in his favour conferred upon him only a restricted life estate and that even assuming Lochanappa was an absolute owner he was entitled to it only during his lifetime and after his demise it was to revert to the plaintiff by virtue of the will and codicil". The plaintiff appellant went on to add that it was incumbent on Lochanappa to adopt him alone and none else and any adoption in contravention of the direction in the will of Rudrappa Muri-gappa Gugwad was invalid and even assuming that the said direction was not mandatory, defendant No. 2 could not acquire the status of a son begotten by Lochanappa so as to claim any interest in the property of the deceased testator. The suit was contested by the widow and the adopted son, defendant No. 2 who pleaded the bar of res judicata on the strength of the judgment in the suit of 1935. The Subordinate Judge held against the defendant on that issue. He also found that the appellant was the rightful heir to the properties of the deceased testator under the will and codicil of Rudrappa after the death of Lochanappa.

4. The High Court examined the will and the letter described as codicil over again and came to the conclusion that the letter described as codicil was only an informal communication from one relation to another, that the testator had only a vague recollection of the contents of the will at the time of writing the letter from Benaras and that the order in the pro-

bate proceedings did not refer to the letter. On the basis of the will the High Court held that Lochanappa was an absolute owner of the property. The High Court further held that the decree in the suit of 1935 operated as res judicata in the subsequent suit. Referring to the first two issues framed in the suit of 1935 the High Court held that there was a clear finding in the judgment in that suit that the appellant had obtained no interest under the will of Rudrappa and therefore he was not entitled to sue.

5. Before us learned counsel for the appellant contended that in spite of the observations made by the learned Subordinate Judge in the judgment in the suit of 1935 about Lochanappa's rights under the will and the document styled as codicil, the decision on the first issue went to show that the appellant's suit was premature and as such it was not necessary for the Subordinate Judge to go into the other question and his findings on issues other than the first should be treated as obiter.

6. In support of the above contention counsel for the appellant relied on the decision of the Privy Council in Shankarlal v. Hiralal, AIR 1950 PC 80. The head note in that case to which our attention was drawn reading

"Court holding that suit is not maintainable by reason of failure to comply with Section 80 — Findings given on merits are obiter and do not support plea of res judicata either in favour of or against party"

seems to be misleading inasmuch as the judgment of the Board does not bear out the above proposition of law. At best the head note only records a finding by an appellate Bench of the Calcutta High Court which the Board by its own judgment did not expressly reject or uphold.

7. The appeal to the Privy Council arose out of a suit filed by one Mangtupal Bagaria for royalties due under a lease of collieries by one Popat Velji Rajdeo of which the said Mangtupal was appointed manager by the Court. The defendants were the lessees under the lease or their representatives and were respondents in the appeal to the Board. There the defence of the lessees was that the lease

had been surrendered in July 1933. The plaintiff's challenged the surrender and also pleaded that the point was covered by res judicata. Ameer Ali, J. before whom the suit came on for hearing on the original side of the Calcutta High Court framed several issues in two groups. The first issue in Group A related to a plea of res judicata. The second issue in that group raised a question whether there was any defence apart from surrender. Group B raised questions as to the fact and validity of the alleged surrender. The plea of res judicata was based on a judgment of the Subordinate Judge of Dhanbad wherein the lessees had sued Mangtupal and some others for a declaration that the lease had been validly surrendered in 1933. The Subordinate Judge held that the suit did not lie inasmuch as notice had not been served on Mangtupal under Section 80, Civil Procedure Code. He however purported to decide other issues in the suit including one as to the sufficiency of the surrender. An appeal from the decree of the Subordinate Judge was taken to the High Court at Patna but was withdrawn against Mangtupal and the brother of the lessor and a consent decree was obtained against the two widows upholding the surrender. Ameer Ali, J. went into the question of res judicata as a preliminary issue and expressed the view

"that the decision of the Dhanbad Court had decided the same issue which had to be decided in his own Court and between the same persons and parties".

In appeal from his judgment the learned Judges held that

"Inasmuch as the Subordinate Judge in the Dhanbad suit had held that the suit did not lie by reason of the failure to comply with Section 80, Civil P. C., he was bound to dismiss the suit under Order 7, Rule 11 of the Code and the findings of the Court on the merits were obiter and could not support a plea of res judicata".

They held further that Ameer Ali, J. had decided nothing but the issue of res judicata. Accordingly they allowed the appeal and remanded the case to the Court of first instance for trial of issues other than issue 1.

8. The judgment of the Judicial Committee shows that before the

Board it was conceded on behalf of the appellant that the appellate Court was right in the view which it took as to the effect of the Dhanbad decree. The Board proceeded to observe:

"Their Lordships have no doubt that the decision in the Dhanbad suit could not support a plea of *res judicata* on the merits, either in favour of or against Mangtula."

The Board rejected the contention of the appellant that Ameer Ali, J. had decided not only the issue of *res judicata* but also that the alleged surrender of the lease was invalid. According to the Board the judgment of Ameer Ali, J. was to some extent obscure and there were passages in it which suggested that he thought the surrender invalid but "it was clear that he did not purport to decide anything beyond the issue of *res judicata*" and he expressly stated that he was not deciding the issues in the second group. Accordingly the Board saw no reason to differ from the view of the appellate Judges that the issues as to surrender were not decided by the trial Judge and did not feel inclined to interfere with the direction given by the appellate Court regarding the remand of the trial of the issues in the Court of first instance.

9. On the strength of the dictum of the appellate Bench of the Calcutta High Court forming a part of the headnote to the above decision it was contended before us that once the Subordinate Judge of Bijapur recorded a finding on the first issue against the appellant in the suit of 1935 his construction of the will and the effect thereof were obiter and they would not be binding on the appellant in the second suit. This was sought to be fortified by the observations in the concluding portion of the judgment in the suit of 1935 which we have quoted above that the plaintiff had at the most a contingent right and no vested interest. It was argued that the learned Subordinate Judge's view that the suit was premature was sufficient to dispose of the case before him without his going into the other questions and the issues raised.

10. No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the

plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaintiff does not show that notice under Section 80 of the Code of Civil Procedure claiming relief was served in terms of the said Section it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action. But, where the plaint on the face of it does not show that any relief envisaged by Section 80 of the Code is being claimed, it would be the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice under Section 80 was necessary. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of Section 80 of the Code and absence of notice thereunder should not operate as *res judicata* in a subsequent suit where the identical questions arise for determination between the same parties.

11. In our view the High Court was right in deciding the issue as to *res judicata* against the appellant. The High Court rightly pointed out that the Subordinate Judge had in clear terms decided that the appellant had obtained no interest under the will of Rudrappa and therefore he was not entitled to sue. The Subordinate Judge had further held that the estate obtained by Lochanappa under the will was an absolute estate.

12. With respect, we concur with the view expressed by the High Court. There was no question of the trial of any preliminary issue in the suit of 1935 the decision of which would obviate the necessity of examining the other pleas raised and coming to a finding thereon. The nature of the right acquired by Lochanappa under the will of the testator was directly in question and the Subordinate Judge went elaborately into it to take the view that Lochanappa had become absolutely entitled to the

properties left by the testator. The observation referred to in the concluding portion of the judgment of the Subordinate Judge is, not to be taken as the decision on a preliminary issue so as to render the finding on the other issues mere obiter or surplusage.

13. In our view the High Court rightly relied on the observations of this Court in *Vithal Yeshwant Jathar v. Shikandarkhan Makhtumkhan Sardesai*, 1963-2 SCR 285 at p. 290 = (AIR 1963 SC 385 at p. 388) that if the final decision in any matter at issue between the parties is based by a Court on its decisions on more than one point—each of which by itself would be sufficient for the ultimate decision—the decision on each of these points operates as res judicata between the parties. The question as to the nature of the estate taken by Lochanappa under the will and the document called codicil to the will of the testator, Rudrappa having been in issue in the suit of 1935 and it having been decided that Lochanappa had obtained an absolute estate to the property, the decision would bind the appellant in any subsequent litigation to which the claim is based on the will and codicil. We accordingly dismiss the appeal on the ground that the decision in the suit of 1935 was a bar to the institution of the second suit of 1957. The respondent will be entitled to costs throughout.

Appeal dismissed.

AIR 1971 SUPREME COURT 447
(V 58 C 105)

(From: Madras)*

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.

The State of Madras, Appellant v.
C. V. Parekh and another, Respondents.

Criminal Appeal No. 32 of 1968,
D/- 28-10-1970.

**Essential Commodities Act (1955),
Section 10 — Iron and Steel Control
Order (1956), Clause (5) — Sale of pig
iron in contravention of clause by**

*(Criminal Appeal No. 138 of 1965, D/-
10-2-1967 — Mad.)

KN/KN/F325/70/CWM/G

godown clerk of company in conspiracy with representative of another Firm — Manager and Managing Director of Company also prosecuted — No evidence from which it could be inferred that manager or director had any knowledge of sale manoeuvred by clerk and other conspirator, that they took part in the negotiations for sale or in the sale itself — Mere circumstance that they were in de facto management of affairs of company and were aware of arrival of goods which were subsequently sold by clerk, could only create suspicion, but not proof against them — Manager and director held could not be convicted — Conviction cannot be fastened on them by applying Section 10 as liability of persons in charge can arise under that section only when contravention is by company itself. (Paras 2 and 3)

Mr. R. N. Sachthy, Advocate, for Appellant; Mr. P. Ram Reddy, Sr. Advocate, (Mr. A. V. V. Nair, Advocate with him), for Respondents.

The Judgment of the Court was delivered by

BHARGAVA, J. — This appeal by special leave is directed against two respondents, C. V. Parekh and A. C. Parekh, who have been acquitted by the High Court of Madras of the charge under Section 120-B of the Indian Penal Code read with Sections 7 and 8 of the Essential Commodities Act, 1955 and Clause (5) of the Iron and Steel Control Order after applying Section 10 of the Essential Commodities Act. The first respondent, C. V. Parekh, was the Manager of Microtee Castings (Private) Ltd., while the second respondent, his son, A. C. Parekh, was the Managing Director of that Company. They were also partners of a Firm known as Messrs. C. V. Parekh and Company. Both the Company and the Firm had offices in the same premises. Respondent No. 2 was in charge of the general management of the business and affairs of the Company, so that he was empowered to make all purchases and sales, and to enter into all contracts and do all other acts on behalf of the Company. Respondent No. 1 was also an active participant in the management of the Company, so that the two respondents were in de facto charge of the management of the affairs of the company. The Firm had two plots of land at

the Royapuram Goods Yard for clearing of the goods, and one Dhansuklal alias Kamdar was the godown clerk of the Company at the Yard. He is the brother of respondent No. 1. One Vallabhadas Thacker was the representative of another firm G. Ramji and Co. who had plots allotted to them in Royapuram Goods Yard adjacent to the plots of the Firm. The case for the prosecution was that 48,350 tons of pig iron were supplied to the Company by Bhilai Steel Plants against an allotment order passed by the Iron and Steel Controller. The price of pig iron was fixed at Rs. 250 per ton by the Iron and Steel Controller under the Iron and Steel Control Order, 1956. The goods were received at the Yard on 6th July, 1963 and were unloaded in the plots assigned to the Firm. Kamdar took delivery of the goods on behalf of the Company after paying the freight and other incidental charges due to the Railway. They were cleared from the plots on 17th July, 1963 by Kamdar on behalf of the Company. These goods were sold to various persons at rates varying between Rs. 300/- and Rs. 350/- per ton. These rates were higher than the controlled price fixed by the Iron and Steel Controller which was Rs. 250/- per ton. The sale, according to the prosecution, was the result of a conspiracy between the two respondents, Kamdar and Vallabhadas Thacker; and, in pursuance of this conspiracy, the offence committed was breach of Clause (5) of the Iron and Steel Control Order, 1956. All these four persons were, consequently, prosecuted and were convicted under Section 120-B of the Indian Penal Code read with Sections 7 and 8 of the Essential Commodities Act and with Clause (5) of the Iron and Steel Control Order. In convicting the two respondents, the Magistrate also relied on Section 10 of the Essential Commodities Act, 1955. On appeal, the High Court acquitted the two respondents, so that the State of Madras has come up to this Court in appeal against that order of acquittal.

2. We have been taken through the judgments of the High Court and the Magistrate by learned counsel for the appellant and we find that the findings of fact recorded do not justify any interference with the

order of acquittal passed by the High Court. The trial Magistrate held that the pig iron was bought by the Company, that its delivery was taken from the Railway by Kamdar on behalf of the Company; that the two respondents were in de facto management of the affairs of the Company and knew of the arrival of the goods, and that the goods were disposed of at a price higher than the controlled price by Vallabhadas Thacker with the aid of Kamdar. There was no finding that, in the sale itself, either of these two respondents took any active part. He, however, recorded the conviction because he found that the goods had been lying in the plots of the Firm, M/s. C. V. Parekh and Co., for more than a week, that the two respondents were partners of the Firm, that the sale had been negotiated by Vallabhadas Thacker even prior to the time when the delivery of the goods was taken by Kamdar. On these facts, the Magistrate held that the negotiations for sale could not have taken place without the knowledge of the two respondents. That was the main basis of the conviction of the two respondents recorded by the Magistrate. The High Court set aside this order of conviction on the ground that there was no material on the basis of which a finding could be recorded that the respondents knew about the disposal of pig iron by Kamdar and Vallabhadas Thacker. The circumstance that the two respondents were in management of the affairs of the Company and the Firm and were aware of the arrival of the goods could create suspicion against the respondents; but that suspicion could not take the place of proof. In order to justify conviction of the respondents, evidence was needed to show that they knew of the sale or were parties to it. No such evidence was available. On this ground, the High Court set aside the conviction of the two respondents. The order of the High Court is obviously correct. No evidence on the record has been pointed out from which it could be inferred that the two respondents had any knowledge of the sale which was manoeuvred by Kamdar and Vallabhadas Thacker, nor is there evidence to show that they took any part in the negotiations for sale, or in the sale itself. Conse-

quently, it is clear that their conviction was not justified.

3. Learned counsel for the appellant, however, sought conviction of the two respondents on the basis of Section 10 of the Essential Commodities Act under which, if the person contravening an order made under Section 3 (which covers an order under the Iron and Steel Control Order, 1956) is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the Company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. It was urged that the two respondents were in charge of, and were responsible to, the company for the conduct of the business of the company and, consequently, they must be held responsible for the sale and for thus contravening the provisions of clause 5 of the Iron and Steel (Control) Order. This argument cannot be accepted, because it ignores the first condition for the applicability of S. 10 to the effect that the person contravening the order must be a company itself. In the present case, there is no finding either by the Magistrate or by the High Court that the sale in contravention of clause 5 of the Iron & Steel (Control) Order was made by the Company. In fact, the Company was not charged with the offence at all. The liability of the persons in charge of the Company only arises when the contravention is by the Company itself. Since, in this case, there is no evidence and no finding that the Company contravened Cl. 5 of the Iron & Steel (Control) Order, the two respondents could not be held responsible. The actual contravention was by Kamdar and Villabhadras Thacker and any contravention by them would not fasten responsibility on the respondents. The acquittal of the respondents is, therefore, fully justified. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 449 (V 58 C 106)

(From Andhra Pradesh: AIR 1964 Andh Pra 236 (FB))

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

Joint Family of Mukundas Raja Bhagwandas & Sons and others, Appellants v. The State Bank of Hyderabad, etc., Respondents.

Civil Appeals Nos. 1138 to 1140 of 1966, D/- 10-9-1970.

(A) Debt Laws — Hyderabad Jagirdars Debt Settlement Act (12 of 1952), Section 25 (1) — Transfer of pending suits, appeals and execution proceedings to Board — Requisites.

The expression "pending" in S. 25 (1) must relate to proceedings which were pending on the date notified under S. 11 for settlement of debts due by the Jagirdar and could not take in any proceedings which came to be instituted after such date. The other condition for the applicability of S. 25 is that the suit or other proceedings must be in respect of a debt with regard to which a Jagirdar or the Creditor could make an application to the Board on or before the date which the Government had notified for settlement of debt due by the Jagirdar. Thus the material date would be the one notified by the Government under Section 11 and only those debts which were due on or before that date from a debtor or in respect of which any proceedings were pending in a Court or before the Board could be the subject-matter of settlement by the Board. AIR 1954 Bom 282, Approved; AIR 1964 Andh Pra 236 (FB), Affirmed. (Para 5)

(B) Contract Act (1872), S. 43 — Suit by Bank on basis of promissory note — Liability of defendants joint and several — Decree directing execution against one of the defendants in the first instance and to proceed against other defendant only afterwards for balance amount which remained unrealized, held bad — No equitable principle or statutory provision justified such decree — Decree in C. C. C. Appeals Nos. 63 and 66 of 1959, D/- 1-2-1963 (Andh Pra), Modified. (Para 7)

IN/IN/E241/70/CWM/T

Cases Referred: Chronological Paras

(1954) AIR 1954 Bom 282 (V 41)=

ILR (1954) Bom 535, Babibai

Thakuji v. Fazluddin Usman-
bhai

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Mr. M. C. Chagla, Senior Advocate, (Mr. K. R. Chaudhuri, Advocate, with him), for Appellants (In Civil Appeals Nos. 1138 and 1139 of 1966) and Respondents (In Civil Appeal 1140 of 1966), Mr. B. V. Subrahmanyam, Senior Advocate, (Mr. A. V. Rangam, Advocate with him), for Respondent (In Civil Appeal No. 1138 of 1966), Respondent No. 1 (In Civil Appeal No. 1139 of 1966) and Appellant (In Civil Appeal No. 1140 of 1966).

The following Judgment of the Court was delivered by

GROVER, J.: These appeals arise out of two different litigations although some of the parties are the same. Civil Appeal No. 1138 of 1966 is directed against the judgment of the Andhra Pradesh High Court dated February 8, 1963 in a revision petition. The other two cross appeals i.e. 1139 of 1966 and 1140 of 1966 arise out of the judgment dated February 1, 1963 passed by the same High Court in a suit which had been filed by the State Bank of Hyderabad on the basis of a promissory note dated November 27, 1953 for recovery of Rs. 70,000/-. We shall dispose of Civil Appeal No. 1138 of 1966 first. The Hyderabad State Bank had filed a suit in July 1956 against the joint family business known as Mukund Das Raja Bhagwandas & Sons and the four sons of Raja Bhagwan Das who had died, the sons having been impleaded as defendants 2 to 5. There was a sixth defendant also Srikishen Sookhdev Malani. According to the claim of the Bank defendants 2 to 5 were members of a joint undivided family defendant No. 2 being the Head Karta and Manager. On February 2, 1951 defendant No. 2 in his above capacity requested the Bank to grant what is called a "clean cash credit" limit of Rs. 1,00,000/- against the guarantee of defendant No. 6. Defendant No. 2 was allowed to withdraw a sum of Rs. 99,500/- by three cheques from Feb. 8, 1951 to February 12, 1951. After the confirmation of the cash credit limit by the Committee of the Board of Directors of the Bank on

February 22, 1951, defendant No. 2 executed a pronote in favour of defendant No. 6 for the sanctioned limit of Rs. 1,00,000/-. This pronote was endorsed in favour of the Bank and thereafter the sum of Rs. 99,500/- which had been withdrawn pending the sanction of the Committee was debited to the cash credit account opened in the name of defendant No. 1 and credited to the personal account of defendant No. 2. It was averred that defendant No. 2—Karta, Head and Manager—was drawing monies from time to time in the cash credit account of defendant No. 1. The drawing limit was reduced subsequently to Rupees 50,000. On September 3, 1952 defendant No. 2 as Kartha and Manager of joint family business of defendant No. 1 executed a fresh pronote for the reduced limit of Rs. 50,000/- in favour of defendant No. 6 which was endorsed by him in favour of the Bank. Defendant No. 6 also executed a fresh letter of guarantee. On December 28, 1953 there was a balance of Rs. 36,201-9-8 in the cash credit account of defendant No. 1 and as collateral security for the same defendant No. 2 executed a fresh pronote in favour of defendant No. 1 the guarantor for Rupees 35,000/- which was endorsed in favour of the Bank. Defendant No. 6 further executed a fresh letter of guarantee in favour of the Bank. Defendant No. 2 had confirmed the amount due under the cash credit account in his letter dated July 7, 1954. On account of this cash credit account a sum of Rupees 40,869-1-10 was due from defendants 1 to 5 as principal debtors and defendant No. 6 as guarantor together with interest. Defendant No. 2 filed a written statement taking up various pleas contesting the claim of the Bank but no objection was raised on the basis of the provisions of the Hyderabad Jagirdars Debt Settlement Act, 1952 which was published in the Official Gazette on March 13, 1952, hereinafter called the "Act". Defendants 3 to 5 and defendant No. 6 also filed their written statements contesting the claim but no plea was raised on the basis of the provisions of the Act. As many as 10 issues were framed by the learned Fourth Additional Judge, City Civil Court, Hyderabad.

2. The suit was decreed by the trial court personally against the 2nd

and the 6th defendant and against joint family assets of defendants 2 to 5. In view of the fact that the 6th defendant did not raise any serious contest to the claim it was directed that the plaintiff could proceed in the first instance against the joint family assets of defendants 2 to 5 and person of the second defendant and if the entire sum was not realized then it could levy execution against the sixth defendant. Future interest was awarded at the rate of $5\frac{1}{2}\%$ per annum. No appeal was filed against the aforesaid decree. In December 1959 the Bank filed an execution petition in the court of the Fourth Additional Judge. On March 10, 1960 the learned Judge passed an order transferring the execution petition to the Jagirdar Debt Settlement Board under S. 25 (1) of the Act. The Bank challenged the order of transfer before the High Court on the revisional side. The learned single Judge, who heard the revision petition, referred three questions of law for consideration by a larger bench. The questions referred were as follows:

"1. Whether on a true construction of S. 25 (1) of the Act, it has application to suits, appeals and applications for execution and proceedings other than revisional in respect of debts not existing on or before the notified date under Sec. 11 of the Act, pending in any civil or revenue court involving the questions as set out in that section?

2. Whether in execution proceedings relating to decrees obtained in suits filed after the notified date, the Court could go behind the decrees passed and trace the history of the transactions which resulted in the liability under the decree?

3. If the answer to question (1) is in the affirmative, whether section 25 (1) of the Act has to be struck down as violating Articles 14 and 19 (1) (f) of the Constitution?"

The first question was answered by the Full Bench in the negative. The second question has also similarly answered and it was held that the executing court was not competent to reopen the case by tracing the history of the transaction which resulted in the liability under the decree. Question No. 3 was not answered. In accordance with

the opinion of the Full Bench and on a further consideration of the facts the learned single Judge disposed of the revision petition holding that S. 25 (1) of the Act was not applicable and the order of transfer was liable to be set aside. The executing court was directed to proceed and deal with the execution application in accordance with law.

3. It is necessary to notice the historical background and the relevant provisions of the Act in order to decide the questions which fall for determination. By the Hyderabad (Abolition of Jagirs) Regulation passed on August 15, 1949 the jagirs were abolished. The jagirdars were declared entitled to a share in the jagir net income which was inalienable except with the previous sanction of the Government. On January 25, 1950, another Regulation called the Hyderabad Jagir (Commutation) Regulation, 1359F was enacted. It provided, inter alia, for the method of calculating the commutation in respect of jagirs. As pointed out by the High Court the enactment of the Regulation affected the jagirdars in a large measure. Their former resources were not available to them to pay their debts. The creditors were also faced with a difficult situation which affected their prospects of recovering the loans fully. It was in this background that the Act was passed. Its provisions were mainly borrowed from the Bombay Agricultural Debtors' Relief Act, 1947. Debt was defined by S. 2 (e) to mean any liability in cash or kind whether secure or unsecured due from a jagirdar whether payable under a decree or order of a civil court or otherwise. Section 3 provided exceptions in cases of five categories of debts which were not liable to be scaled down. One of those was the debt due to a scheduled bank.

4. Chapter II containing Ss. 4 to 10 dealt with the constitution and powers of the Board for the settlement of debts. Section 11 provided that any jagirdar or his creditor could make an application to the Board on or before such date as the Government might notify for settlement of debts due by a jagirdar. Under Section 12 notwithstanding the fact that no application had been filed under S. 11 every creditor on being required to do so by

any of his debtors had to file a correct statement before the Board of his claims against such a debtor and similarly every debtor on being so required by any of his creditors had to file a correct statement. According to Section 15 if any debtor and any or all of his creditors arrive at a settlement in respect of any debt due by the debtor to the creditor the debtor or any of the creditors could make an application and the Board could proceed to record that settlement in accordance with the procedure prescribed by the section. Under S. 22 all debts in respect of which no application for adjustment or settlement was made in accordance with the provisions of the Act were to stand extinguished. Under Section 24 on the date fixed for a hearing from application made under S. 11 the Board was to decide as preliminary issues whether a person for the settlement of whose debt an application had been made was a debtor and whether the total amount of debts due from such person on the date of the application exceeded the sum of Rs. 5,000/-. If the Board found that such a person was not a debtor or that the amount was less than Rs. 5,000/- the application was to be dismissed. Section 25 provided for transfer of pending suits, appeals, applications and proceedings to the Board. This section may be reproduced in extenso:

"S. 25. (1) All suits, appeals applications for execution and proceedings other than revisional in respect of any debt pending in any civil or revenue court shall, if they involve the questions whether the person from whom such debt is due is a debtor and whether the total amount of debts from him on the date of the application is less than Rs. 5,000 be transferred to the Board.

(2) When an application for adjustment of debts made to a Board under S. 11 or a statement submitted to a Board under section 21 includes a debt in respect of which a suit, appeal, application for execution or proceeding other than revisional is pending before a civil or revenue court, the Board shall give notice thereof to such other court. On receipt of such notice, such other court shall transfer the suit, appeal, application or proceeding, as the case may be, to the Board.

(3) When any suit, appeal, application or proceeding is transferred to the Board under sub-s. (1) or sub-s. (2), the Board shall proceed as if an application under section 11 had been made to it.

(4) If the Board, to which any suit, appeal, application or proceeding is transferred under sub-s. (1) or sub-section (2), decides the preliminary issues mentioned in clause (a) of sub-section (1) of sec. 24 in the negative or those mentioned in Clause (b) of the said sub-section (1) in the negative, it shall retransfer the suit, appeal, application or proceeding to the Court from which it had been transferred to itself after the disposal and subject to the result of the appeal, where an appeal is filed, and after the expiry of the period prescribed for an appeal where no appeal is filed.

(5) When any suit, appeal, application or proceeding is retransferred to the Court under sub-section (4) the said Court shall proceed with the same."

Section 28 dealt with the mode of taking accounts and Section 35 provided for the scaling down of the debts payable by debtors in accordance with their paying capacity in the manner indicated therein. An award was to be made according to Section 36 and further scaling down of debts could be done under Section 37. In terms of S. 11 the Government notified June 30, 1953 as the last day for settlement of debts due by jagirdars. The Full Bench of the High Court quite rightly observed that S. 11 was the basic provision enabling the creditor or the debtor to move the Board under the Act for settlement of debts. The Act also recognised other modes which would be tantamount to the making of such an application to the Board so as to confer jurisdiction on it to settle debts in accordance with the procedure prescribed by the Act. Section 25 embodied one of these modes. If a suit or appeal or execution proceeding etc. was pending in relation to such debt in any court it had to be transferred to the Board. The Board would proceed to deal with it as though an application under S. 11 had been made. The suit or other proceedings had to relate to a debt in respect of which an application under S. 11 could have been made to the

Board. It was also necessary that the proceedings should be pending in the court on the date notified. This would follow from the provisions of S. 11. There could be no difficulty about proceedings which were taken in a court subsequent to an application made to the Board under S. 11. That proceeding had necessarily to be transferred on the notice given by the Board. The point which was canvassed before the Full Bench of the High Court was that the expression "pending" occurring in S. 25 was of wider amplitude and covered all cases of debts whether incurred before or subsequent to the notified date. The High Court, after an exhaustive discussion of the various provisions of the Act, came to the conclusion that there were clear indications in them that the debts to be determined and scaled down by the Board were only such debts as were existing on the date of the application provided for by S. 11. This is what was finally observed:

"Thus the entire scheme of the Act makes it abundantly clear that matters concerned with the debts prior to the date of application alone (which date of course cannot extend beyond the notified date under section 11) are within the cognizance and competence of the Board. It follows that only cases relating to such debts and no other debts are liable to be transferred to it under Section 25 (1)."

5. In our judgment the High Court came to the correct conclusion that the expression "pending" in Section 25 (1) must relate to proceedings which were pending on the notified date and could not take in any proceedings which came to be instituted after such date. The other condition for the applicability of S. 25 was that the suit or other proceedings must be in respect of a debt with regard to which a jagirdar or the creditor could make an application to the Board on or before the date which the Government had notified for settlement of debts due by the jagirdar. A close examination of S. 22 puts the matter beyond controversy. If no application had been made under S. 11 within the period specified therein or for recording a settlement made under S. 15 every debt due by the debtor was to stand extinguished. In a case of the

present kind a debt would have stood extinguished if no application had been made under S. 11 within the specified period. Thus the material date would be the one notified by the Government under S. 11 and only those debts which were due on or before that date from a debtor or in respect of which any proceedings were pending in a court or before the Board could be the subject-matter of settlement by the Board. It may be mentioned that in *Babibai Thakuji v. Fazluddin Usmanbhai*, ILR (1954) Bom 535 = (AIR 1954 Bom 282) a similar provision of the Bombay Agricultural Debtors' Relief Act on which the provisions of the Act were modelled came up for consideration and it was said with reference to Section 19 (1) of that Act that only those suits were liable to be transferred which were pending on the date when an application for adjustment of debts could have been made under S. 4 (which corresponded to S. 11 of the Act). In other words, if a suit was filed after the time to make an application for adjustment of debts had expired such a suit was not liable to be transferred. Since both the conditions for the applicability of S. 25 of the Act were not satisfied in the present case the decision of the High Court must be upheld and the appeal (C. A. 1138/66) dismissed. In order to avoid further proceedings which will entail needless expense learned counsel for the parties have agreed that the judgment-debtors will pay the decretal amount in four equal annual instalments. The first instalment which will represent 1/4th of the decretal amount shall be deposited in the executing Court on or before the first January 1971. The subsequent instalments each year shall be similarly deposited on or before first January. In case of failure on the part of the judgment-debtors to make the deposit of anyone of the instalments in time the entire amount due shall become recoverable at once. As and when the said deposit is made the decree-holder will be entitled to withdraw the same. An order is directed to be made in terms of this settlement between the parties.

6. Civil Appeals Nos. 1139 & 1140/66 arise out of the decree in C.C.A. Nos. 63 & 66 of 1959 dated February 1, 1963 in O.S. No. 37 of

1958. So far as the appeal against the Bank is concerned there is no merit in it because it has been proved and that finding could not be successfully assailed before us that the debt in question was a post-notification debt. In other words it came into existence after June 30, 1953 which was the date notified by the Government as the last date for settlement of debts due by jagirdars by an application made under S. 11 of the Act. In view of our decision in the connected appeal (C. A. 1138/66) S. 25 (1) of the Act was not applicable to the suit filed for the recovery of such a debt. Civil Appeal No. 1139 of 1966, therefore, has no merit and is hereby dismissed.

7. Civil Appeal No. 1140 of 1966 which has been preferred by the Bank involves a very short point. According to the decree of the High Court the plaintiff, namely, the Bank was to proceed and execute the decree against the second defendant in the first instance and was to proceed against the first defendant only afterwards for such balance amount which could not be realized from the second defendant. It is not disputed that the liability of the first and the second defendant was joint and several and the decree of the High Court proceeded on the basis of some equitable relief which was sought for and granted to the first defendant. We are unable to hold and no such principle or statutory provision has been pointed out to us that any such equitable relief could be granted in a suit of the nature filed by the Bank against the two defendants. We would, accordingly, allow this appeal to the extent of deleting clause (2) of the decree and adding in clause (1) the following words:

"Both the defendants shall be jointly and severally liable for the payment of the decretal amount."

8. In view of the entire circumstances the parties in all the appeals are left to bear their own costs in this Court.

Order accordingly.

AIR 1971 SUPREME COURT 454
(V 58 C 107)

(From: Allahabad)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

New Central Jute Mills Co. Ltd., Appellant v. The Asst. Collector of Central Excise, Allahabad and others, Respondents.

Civil Appeal No. 460 of 1970, D/- 8-9-1970.

(A) Central Excises and Salt Act (1944), S. 12 — Notification applying provisions of Ss. 105 (1), 110 (3) of Customs Act, 1962 in matters relating to search of premises — No change is effected by notification within meaning of alterations in S. 12 — Question of delegation of essential legislative functions to Central Government does not arise — Notification is valid. AIR 1951 SC 332, Ref. (Para 6)

(B) Central Excises and Salt Act (1944), S. 12 — Section does not incorporate provisions of Sea Customs Act as integral part of that Act — On repeal of Sea Customs Act — Provisions of Customs Act, 1962 can be read in its place by virtue of S. 8 (1) of General Clauses Act (1897) — Fresh notification applying provisions of that Act is valid. AIR 1962 SC 316, Rel. on; AIR 1968 SC 13, Dist. (Paras 7, 8)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 13 (V 55) =

1968-1 SCR 82, Collector of Customs and Excise, Cochin v. A. S. Bawa 8

(1962) AIR 1962 SC 316 (V 49) = (1962) 3 SCR 786, Collector of Customs, Madras v. Nathella Sampathu Chetty 7

(1951) AIR 1951 SC 332 (V 38) = 1951 SCR 747, In re, Delhi Laws Act, 1912 6

(1931) AIR 1931 PC 149 (V 18) = 58 Ind App 259, Secy. of State for India in Council v. Hindustan Co-op. Insurance Society Ltd. 7

Mr. M. C. Chagla, Sr. Advocate, (Mr. R. Gopalakrishnan, Advocate with him), for Appellant; Dr. V. A. Seyid Muhammad, Sr. Advocate, (M/s. P. C. Chandi, B. D. Sharma and S. P. Nayar, Advocates with him), for Respondents.

*(Spl. Appeal No. 1177 of 1968, D/- 20-5-1969 — All.)

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by special leave from a judgment of the Allahabad High Court dismissing a writ petition by which the appellant challenged the validity of a warrant issued by the Assistant Collector, Central Excise, Allahabad, authorising the Superintendent, Central Excise, Varanasi, to enter certain premises, search the same and seize the documents therefrom.

2. The appellant, which is a public limited company having its registered office at Calcutta, owns and runs a factory known as Sahu Chemicals and Fertilisers at Varanasi where chemicals such as ammonia and soda ash are manufactured. In February 1962 excise duty was fixed on manufacture of ammonia for the purpose of fertilizers at Rs. 25/- per metric ton, the rate being Rs. 125/- per metric ton if it was used for other purposes. The notification by which the aforesaid duty was payable was later withdrawn by means of another notification dated March 1, 1964 and thereafter no excise duty was required to be paid on the manufacture of ammonia. For the period from May 1962 to the beginning of March 1964 the appellant had paid duty at the rate of Rs. 25/- per metric ton on the ground that ammonia had been utilised for the purpose of manufacture of chemical fertiliser. The Central Excise authorities, however, had received information that part of the ammonia had been utilised for purposes other than the manufacture of fertilizers on which higher duty of Rs. 125/- per metric ton was payable. It was considered that there had been evasion of duty. On May 11, 1963, the Assistant Collector issued a warrant for the search and seizure of goods and documents pursuant to which the premises of the factory at Varanasi were searched on May 11, 12 and 13, 1963 and various documents were seized.

3. The writ petition was heard in the first instance by the learned single Judge who dismissed it. In appeal his judgment was upheld by the Division Bench. Three contentions were raised before the Division Bench; the first was that Section 12 of the Central Excises and Salt Act, 1944, hereinafter called the "Act" was void

as the powers delegated to the Central Government by the legislature were excessive and beyond permissible limits. The second point was that the Sea Customs Act, 1878 having been repealed it was not open to the Central Government under Section 12 of the Act to apply Section 105 (1) of the Customs Act, 1962 to the Act and the notification dated May 4, 1963 by which this was done was illegal and ultra vires. The third was that the search and seizure made by the respondents under the impugned authorisation dated August 11, 1968 and the authorisation itself were not in accordance with the provisions of Section 105 of the Customs Act, 1962.

4. Section 12 of the Act is in the following terms:

"Section 12. Application of the provisions of Act VIII of 1878 to Central Excise Duties. The Central Government may, by notification in the official Gazette declare that any of the provisions of the Sea Customs Act, 1878, relating to the levy on and exemption from customs duties, drawback of duty, warehousing offences and penalties, confiscation, and procedure relating to offences and appeals, shall, with such modifications and alterations as it may consider necessary or desirable to adapt them to the circumstances, be applicable in regard to like matters in respect of the duties imposed by Section 3".

When the Act was enacted Section 172 of the Sea Customs Act, 1878 which could be applied to the Act under Section 12 provided:

Section 172. "Any Magistrate may, on application by a Customs Collector, stating his belief that dutiable or prohibited goods (or any documents relating to such goods) are secreted in any place within the local limits of the jurisdiction of such Magistrate, issue a warrant to search for such goods.

Such warrant shall be executed in the same way and shall have the same effect, as a search warrant issued under the law relating to Criminal Procedure".

It may be mentioned that the words "or documents" were inserted by the Sea Customs Amendment Act, 1955. After the enactment of the Customs Act, 1962 by the notification dated May 4, 1963 as amended by the Notifi-

cation dated February 6, 1965 amongst other provisions of the Customs Act, 1962, sub-section (1) of Section 105 and Section 110 were made applicable with certain modifications of a minor nature under Section 12 of the Act. The material parts of these sections are reproduced below:—

"Section 105 (1). Power to search premises. (1) If the Assistant Collector of Customs, or in any area adjoining the land frontier or the coast of India an officer of Customs specially empowered by name in this behalf by the Board, has reason to believe that any goods liable to confiscation or any documents or things which in his opinion will be useful for or relevant to any proceeding under this Act are secreted in any place, he may authorise any officer of customs to search or may himself search for such goods, documents or things".

"Section 110 (3). The proper officer may seize any document or things which, in his opinion, will be useful for, or relevant to, any proceeding under this Act".

5. On the first point it has been urged on behalf of the appellant that Section 12 of the Act gave unrestricted and unlimited power to the Central Government to modify or alter the provisions of the Sea Customs Act 1878 and to apply the provisions of that Act with such modifications and alterations as the Central Government might consider appropriate. Modification, it has been pointed out, may be permissible and may not fall within the vice of excessive delegation because the basic structure is not changed but altered, it is suggested, has a much wider connotation and it embraces even the changing of the essential pattern of a thing or object. Such a power inherently involves the making of changes even in regard to matters pertaining to legislative policy.

6. In our opinion the above contention is purely of academic interest in the present case. In the notifications which were issued applying, inter alia, Section 105 (1) and Section 110 of the Customs Act, 1962 no such changes have been made as can possibly fall within the meaning of the word "alterations". It has been pointed out in the previous decisions of this Court that the power to restrict and modify does not import the power

to make essential changes. It is confined to alterations of a minor character and no change in principle is involved. See *In re, Delhi Laws Act, 1912*, 1951 SCR 747 = (AIR 1951 SC 332). It was conceded before the High Court and has not been urged before us that the word "modifications" could not be taken as conferring on the Central Government any legislative power which was in excess of the permissible limits. Objection was taken only with regard to the word "alterations" but that word must be understood in the sense in which it was open to the legislature to employ it legitimately and in a constitutional manner. No question is thus involved of delegation either of any essential legislative functions or any change of legislative policy.

7. The second contention has hardly any merit. Section 8 (1) of the General Clauses Act provides that where any Central Act, repeals and re-enacts with or without modification, any provision of a former enactment, then references in any such enactment or in any instrument to the provision so repealed shall, unless a different intention appears, be construed as references to the provision so re-enacted. By virtue of this provision it cannot be disputed that in Section 12 of the Act the Customs Act, 1962 can be read in place of the Sea Customs Act, 1878. An attempt has been made to argue that Section 12 of the Act empowers incorporation of the provisions of Sea Customs Act, 1878 in the Act itself and whenever a notification is issued under it such provisions of the Sea Customs Act as have been applied become incorporated as an integral part of the Act. Section 8 of the General Clauses Act would not be applicable to a case of such incorporation and it can only apply if Section 12 can be regarded as containing only a reference to the provisions of the Sea Customs Act. In *Secy. of State for India in Council v. Hindusthan Co-operative Insurance Society Ltd.*, 58 Ind App 259 = AIR 1931 PC 149 it was accepted as a settled rule of construction that where a statute is incorporated by reference into a second statute the repeal of the first statute does not affect the second. The law laid down by the Privy Council can have no applicability to the

present case. Section 12 of the Act did not bodily lift, as it were, certain provisions of the Sea Customs Act, 1878 and incorporate them as an integral part of the Act. It only empowered the Central Government to apply the provisions of the Sea Customs Act, 1878 with such modifications and alterations as might be considered necessary or desirable by the Central Government for the purpose of implementation and enforcement of Section 3 of the Act. No exception could be taken to the view of the High Court that Section 12 contained a provision delegating limited powers to the Central Government to draw upon the provisions of the Sea Customs Act, 1878 for the purpose of implementing Section 3 of the Act. In *Collector of Customs, Madras v. Nathella Sampathu Chetty*, 1962-3 SCR 786 = (AIR 1962 SC 316), this Court examined at length the meaning and effect of incorporation by reference of one statute into another and dismissed the Privy Council case referred to before in detail. Section 8 (1) of the General Clauses Act, it was pointed out, dealt with reference or citation of one enactment in another without incorporation. The usual or recognised formulae generally employed to effect incorporation were considered; for instance the words used in Section 20 of 53 and 54 Vict. Ch. 70 — Housing of the Working Classes Act, 1890, the words used were

"shall, for that purpose, be deemed to form part of this Act in the same manner as if they were enacted in the body thereof".

In 54 and 55 Vict. Ch. 19, Section 1 (3), the language employed was:

"The provisions of Section 134 of the said Act (set out in the schedule) shall apply as if they were herein enacted".

It is unnecessary to mention the other provisions because a comparison of the recognised formulae with the text of Section 12 of the Act shows that the provisions of the Sea Customs Act, 1878 were not meant to be incorporated in the Act and were only to be applicable to the extent notified by the Central Government for the purpose of the duty leviable under Section 3.

8. Another aspect which has been presented under the second con-

tention is that the impugned notification is bad and stands vitiated because under the previous notification which applied Section 172 of the Sea Customs Act, 1878 it was a Magistrate who had to bring his judicial mind to bear on the expediency or desirability of issuing a warrant for search whereas under the present notification after the enactment of the Customs Act, 1962, it is the Assistant Collector of Customs who performs executive functions and who has been empowered to issue the warrant for search and seizure. The decision of this Court in *Collector of Customs and Excise, Cochin v. A. S. Bava*, 1968-1 SCR 82 = (AIR 1968 SC 13) has been sought to be pressed into service in support of the argument that extension of Section 105 (1) is illegal. In that case the provisions of Section 129 of the Sea Customs Act, 1878 had been applied under Section 12 of the Act. Section 129 dealt with the procedure relating to appeals and required an appellant to deposit pending the appeal the duty or penalty imposed and empowered the appellate authority, in its discretion to dispense with such deposit pending the appeal in any particular case. There was a provision in the Act itself, Section 35, which gave an unfettered right of appeal to a person aggrieved by any decision or order made under the Act. It was in these circumstances that it was held that Section 129 of the Sea Customs Act, 1878 could not be made applicable so as to whittle down the substantive right of appeal conferred by Section 35 of the Act. The ratio of that decision can afford no assistance to the appellant in the present case. By the notification issued under Section 12 of the Act after the enactment of Customs Act, 1962, the previous notification under the Sea Customs Act, 1878 stood superseded and no question survives with regard to the validity of the notification issued in 1963 and amended in 1965.

9. On the third point an attempt was made to argue that the Assistant Collector, while issuing the warrant for search and seizure did not apply his mind to the relevant and necessary facts. Our attention has been invited to the warrant itself in which the documents have not been particularised or specified but the

words "certain documents" have been used. The learned single Judge dealt with this matter fully and repelled the contention that there was no relevant material before the authority upon which the belief could be founded in terms of Section 105 (1) of the Customs Act, 1962 by the Assistant Collector. We find no merit in this contention.

10. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 458

(V 58 C 108)

(From: Patna)*

S. M. SIKRI AND I. D. DUA, JJ.

Gopal Prasad Sinha, Appellant v. The State of Bihar, Respondent.

Criminal Appeal No. 212 of 1967 with Spl. Leave Petn. (Criminal) No. 1048 of 1969, D/- 16-10-1970.

Evidence Act (1872), Section 115 — Issue estoppel — Rule of — Rule applies when same issue of fact and law have been determined in previous litigation — Prosecution of appellant for defalcation committed by him in his capacity as cashier — Acquittal of appellant in earlier case of defalcation by High Court on finding that he was not in charge of cash — Finding held would not operate as issue estoppel in subsequent case when subsequent defalcation related to an altogether different period. (Para 8)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 771 (V 57)

= 1970 Cri LJ 759, State of Andhra Pradesh v. Kokkiligada Meeraiah

(1970) AIR 1970 SC 962 (V 57)

= 1970 Cri LJ 885, Asst. Collector of Customs v. L. R. Melwani

(1965) AIR 1965 SC 87 (V 52) =

1964-7 SCR 123 = 1965 (1) Cri LJ 120, Manipur Administration v. Thockchom Bira Singh

(1956) AIR 1956 SC 415 (V 43)

= 1956 Cri LJ 805, Pritam Singh v. State of Punjab

*(Criminal Appeal No. 389 of 1965 and Criminal Misc. No. 411 of 1969, D/- 3-8-1967 and 14-7-1969, respectively — Pat.)

KN/KN/F88/70/GKC/T

Mr. S. N. Prasad, Advocate, for Appellant; Mr. B. P. Jha, Advocate, for Respondent.

The Judgment of the Court was delivered by

SIKRI, J. — This appeal by special leave raises the question of the applicability of the rule of issue estoppel. The appellant, Gopal Prasad Sinha, was tried on a charge under Section 409, I. P. C., for having committed criminal breach of trust of Rs. 27,800/- during the period between January 31, 1960 and November 30, 1960, while acting as a cashier of the Public Works Department, East Division, Gaya. The Assistant Sessions Judge framed three points for determination:

"1. If the accused Gopal Prasad Sinha was a Public servant and was working as cashier in the office of the Executive Engineer, P. W. D., Gaya East Division, during the period between 31-1-60 to 30-11-60?"

2. Whether charge amount namely Rs. 27,800/- was entrusted to the accused or he had dominion over it in his capacity as a public servant?

3. Whether the accused committed criminal breach of trust in respect of this charge amount?"

2. The learned Assistant Sessions Judge, after going through the oral and documentary evidence, answered the first point in the affirmative and held that the accused was handling the cash in the office during the aforesaid period as a cashier.

3. On point No. 2 the learned Assistant Sessions Judge, after considering the oral and documentary evidence, held:

"It is proved that the accused was in charge of one key of one of the locks of the door of the iron chest of the office of the Executive Engineer, P. W. D., Gaya East Division. It is also proved that the accused was dealing with the cash of the Division and he was receiving and disbursing money of the Division. I accordingly hold that the charge money was entrusted to the accused and the accused had dominion over the charge amount of Rs. 27,800/- while acting as cashier of P. W. D., Gaya East Division".

4. On point No. 3 he held that "the accused made entries in the

cash book showing remittance of the charge amount to sub-divisions Nos. 2 and 3 but the same were not actually remitted by the accused nor they were received in sub-divisions Nos. 2 and 3.

5. The point of issue estoppel was raised before him, the point being that the accused was put up on trial in a previous case under Section 409, I. P. C., for having committed criminal breach of trust with respect to certain amounts during the period December 8, 1960 to August 17, 1961, and in that case the High Court had acquitted the accused holding that he was not in charge of the cash. The learned Assistant Sessions Judge held that the aforesaid finding of the High Court could not operate as a res judicata.

6. The High Court, on appeal in the present case, upheld the findings of fact of the learned Assistant Sessions Judge. The High Court also repelled the argument regarding rule of issue estoppel thus:

"In the earlier case out of which criminal appeal 40 of 1963 arose, the defalcation in question were alleged to have been committed by the present appellant in his capacity as a cashier during the period 8-12-60 to 17-8-61. As such, the point in issue in that case was whether the accused, that is, the present appellant, was the cashier and was in charge of the cash during the aforesaid period. In the present case, however, the defalcations in question are alleged to have been committed during an altogether different period, namely, 31-1-60 to 30-11-60 and the point in issue in the present case is whether the appellant was the cashier of the division and was in charge of the cash during this particular period. The finding of fact as given in the aforesaid appeal that the appellant was not a cashier and was not in charge of the cash must be held as being operative for the period 8-12-60 to 17-8-61 during which the defalcations forming the subject-matter of the aforesaid appeal were alleged to have been committed and, as such, those findings cannot in any way operate under the principle of issue estoppel to preclude the prosecution from adducing evidence in the subsequent case, that is, in the present case, to show that the appellant was the cashier of the division and was in

charge of the cash during the period 31-1-60 to 30-11-60".

7. The learned counsel for the appellant contends that substantially it was the same issue that was tried during the earlier trial, and if the accused was not the cashier from December 8, 1960 to August 17, 1961, he could not be held to be a cashier from January 31, 1960 to November 30, 1960. He said that the defence in both the cases was identical and the evidence also almost the same.

8. In our opinion, the High Court came to the correct conclusion. The basic principle underlying the rule of issue estoppel is that the same issue of fact and law must have been determined in the previous litigation. The question then arises: Was it the same issue of fact which was determined in the earlier case? A person may be acting as a cashier at one period and may not be acting as a cashier at another period, especially as in this case it was found that the appellant had never been appointed as a cashier. He was a temporary senior accounts clerk who was alleged to be doing the work of a cashier. If there is any likelihood of facts or conditions changing during the two periods which are under consideration then it is difficult to say that the prosecution would be bound by the finding in a previous trial on a similar issue of fact. It seems to us that the later finding must necessarily be in contradiction of the previous determination. There can be no such contradiction if the periods are different and the facts relating to the carrying on of the duties of a cashier are different.

9. The learned counsel has referred to a number of cases of this Court where the rule of issue estoppel has been approved: e. g. *Pritam Singh v. State of Punjab*, AIR 1956 SC 415; *Manipur Administration v. Thockchom Bira Singh*, 1964-7 SCR 123 = (AIR 1965 SC 87), *State of Andhra Pradesh v. Kokkiligada Meeraiah*, AIR 1970 SC 771 and *Assistant Collector of Customs v. L. R. Melwani*, AIR 1970 SC 962 but these cases do not support the contention of the learned counsel for the appellant.

10. It appears that the appellant surrendered on December 1, 1961, and in Sessions Trial No. 90 of 1962

he was sentenced to five years' rigorous imprisonment. He started serving his sentence on November 15, 1962. His appeal to the High Court was allowed on October 5, 1964, and thereafter he remained in prison as an under-trial prisoner. In the present case he was sentenced to six years' rigorous imprisonment and a fine of Rs. 25,000/- or in default to undergo further imprisonment for 18 months.

11. In the circumstances given above we consider the sentence of six years in the present case as excessive and reduce it to rigorous imprisonment for three years, and a fine of Rs. 25,000/- or in default further imprisonment for 18 months.

12. In the result the appeal is partly allowed in the matter of sentence, as stated above. Special Leave Petition (Criminal) No. 1048 of 1969 is accordingly dismissed.

Order accordingly.

**AIR 1971 SUPREME COURT 460
(V 58 C 109)**

(From: Andhra Pradesh)*

S. M. SIKRI AND K. S. HEGDE, JJ.

Ramabhupala Reddy and others,
Appellants v. The State of Andhra Pradesh, Respondent.

Criminal Appeal No. 227 of 1967,
D/- 28-9-1970.

(A) Criminal P. C. (1898), Section 423 — Appeal against acquittal — Examination of evidence — Scope and extent of powers of appellate Court.

The scope of an appeal against an order of acquittal, is now settled by the decision of the Supreme Court in AIR 1961 SC 715. The legal position is: 1. an appellate Court has full powers to review the evidence upon which the order of acquittal is founded; 2. the principles laid down in Sheo Swarup's case, AIR 1934 PC 227 (2) afforded a correct guide for the appellate Court's approach to a case disposing of such an appeal; 3. the different phraseology used in the judgments of the Supreme Court such as: (a) "substantial and compelling reasons"; (b) "good and sufficiently

*(Criminal Appeal No. 446 of 1965, D/- 1-9-1967 — A. P.)

JN/JN/E371/70/VBB/P

cogent reasons"; (c) "strong reasons" are not intended to curtail the undoubted power of an appellate Court in an appeal against acquittal to review the entire evidence and to come to its own conclusion, but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the Court below in support of its order of acquittal but should express the reasons in its judgment which led it to hold that the acquittal was not justified. (Para 13)

To these tests may be added that the appellate Court should also bear in mind the fact that the trial Court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal. If two reasonable conclusions can be reached on the basis of the evidence on record, the appellate Court should not disturb the findings of the trial Court.

(Para 14)

(B) Constitution of India, Article 136 — Interference with findings of fact — Murder case — Appeal by special leave against conviction passed by High Court in appeal against acquittal — Held, on consideration of findings of fact by High Court, that there was no reason for interference.

Although the powers of the Supreme Court under Article 136 are very wide, the Supreme Court, following the practice adopted by the Judicial Committee, has prescribed limits on its own power and in criminal appeals, except under exceptional circumstances, it does not interfere with the findings of fact reached by the High Court unless it is of the opinion that the High Court had disregarded the forms of legal process or had violated the principles of natural justice or otherwise substantial and grave injustice has resulted. The Supreme Court does not ordinarily reappraise the evidence if the High Court has approached the case before it in accordance with the guidelines laid down by the Supreme Court unless some basic error on the part of the High Court is brought to the notice of the Supreme Court. It is best to bear in mind that except in certain special cases, the High Court is the final court of appeal and

the Supreme Court is only a Court of special jurisdiction. (Para 14)

Every one of the points taken into consideration by the trial Court to arrive at the verdict of acquittal was considered by the High Court and it gave reasons for differing from the conclusions reached by the trial Court. There was nothing basically wrong in the approach adopted by the High Court. It considered the evidence on record on the basis of human probabilities and tested the evidence given by the witnesses by various methods known to law. After doing so it came to the conclusion that the evidence of some of the eye witnesses was acceptable. In appeal against conviction to the Supreme Court by Special leave,

Held, that as the final judges of fact, the Supreme Court saw no reason to interfere with the conclusions of the High Court. (Para 24)

(C) Evidence — Appreciation of — Interested witnesses.

It is not the law that the evidence of interested witnesses is not entitled to any weight. Their evidence has got to be scrutinized with care. (Para 23)

Cases Referred: Chronological Paras
(1961) AIR 1961 SC 715 (V 48)

= (1961) 3 SCR 120 = 1961 (1)

Cri LJ 766, Sanwant Singh v.

State of Rajasthan

13

(1934) AIR 1934 PC 227 (2) (V 21)

= 61 Ind App 398 = 36 Cri LJ

786, Sheo Swarup v. Emperor

13

M/s. Nur-ud-din Ahmed, G. Somi Reddy and G. S. Rama Rao, Advccates, for Appellants; P. Ram Reddy, Sr. Advocate (Mr. A. V. V. Nair, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

HEGDE, J.: The appellants and one Boya Ranudu were charged with the murders of Boya Thimmiah and Boya Sanjeevu as well as some other lesser offences at about 8 a.m. on September 8, 1964 near mile stone No. 81/2 on the Dharmavaram-Kalyandurg road. They were tried by the learned District Judge, Anantapur for those offences. The learned District Judge disbelieving the witnesses who spoke to the incident viz. P. Ws. 1 to 3 acquitted all the accused. As against that decision of the learned District

Judge, the State went up in appeal to the High Court of Andhra Pradesh. The High Court accepted the appeal so far as the appellants (Accused 1 to 5) are concerned and convicted them under various charges including one under S. 302/149, I.P.C. for which offence all of them were sentenced for imprisonment for life. It is not necessary to refer to the other charges because those charges are interwoven with the offence of murder. No arguments were addressed to us about those charges separately. The question for decision is whether the incident spoken to by the P. Ws. 1 to 3 is true? If we accept the evidence regarding the incident, there is no doubt that the accused are guilty of the offences held to have been proved against them by the High Court. If on the other hand, we are unable to accept that evidence then they are entitled to be acquitted of all the charges. This appeal against the decision of the High Court was brought after obtaining special leave from this Court.

2. It was alleged on behalf of the prosecution and not denied on behalf of the accused that from a very long time there were two factions in Thogarakunta village in Dharmavaram Taluk. One of the factions was known as Kapu faction though in that faction there were a sprinkling of Boyas. The other faction was known as Boya faction. In that faction there were some Kapus. Between these factions there was bitter enmity. There were cases and counter cases between the two factions. On the date of the occurrence the deceased and some of their partymen had to appear in a criminal case pending against them in the Court of First Class Magistrate, Dharmavaram.

3. The prosecution case is that some of the accused in that case had gone to Dharmavaram on the evening of the 7th itself. But the two deceased persons left for Dharmavaram on the early morning of September 8, 1964. On the way at a coffee hotel they met P.Ws. 1 and 2 who were also going to Dharmavaram. The four joined together and proceeded to Dharmavaram after taking some coffee at the hotel of P.W. 5. P.W. 3, a relation of the deceased persons also left for Dharmavaram that morning carrying

a bag of cold rice for the accused in the case. It is said that he was going at some distance behind the four persons referred to earlier. Meanwhile accused 5 Boya Chinna Polappa came from behind and went past them briskly. When the aforementioned four persons proceeded a little further all the accused armed with pistols and other weapons emerged out of a dried up deep water channel and surrounded the two deceased persons. At that time accused 1 and 2 had revolvers in their hands, accused 3 had a dagger. Accused 1 fired revolver shots at the deceased Boya Thimmiah twice or thrice. At the same time accused 3 stabbed him below his armpit with a dagger. When Thimmiah fell down, accused 4 picked up a big stone (of the size of pumpkin) from near the road and dropped it on the head of Thimmiah. When the accused were attacking Thimmiah, Sanjeevu began to run from that place but accused 2 and 5 chased him and accused 2 fired at him twice from behind. On receiving these shots Sanjeevu fell down with his back to the sky. Then accused 5 picked up a big stone and violently threw it on the head of Sanjeevu. Meanwhile seeing P.W. 3 coming that way the accused gave him a chase but he ran for his life. They were not able to overtake him. At this stage one of the accused threw a stone which hit him on the right calf muscle but yet he ran away and his pursuers were not able to catch him.

4. After the aforesaid events, it is said that the accused came and threatened P.W. 1 not to disclose the offence to anyone and if he did disclose he would meet the fate that befell the deceased persons. They asked him to take an oath that he would not divulge the matter to anyone. He did so. Thereafter they took away with them P.W. 2. After the accused and P.W. 2 left the place P.W. 1 went to Kanganapalli and there caught a bus for Dharamavaram where he cashed his pay cheque for which purpose he went to Dharamavaram that day. From Dharamavaram he went to Chennakothapalli where he had some work. When he was returning to his village next day, at the place where the murders had taken place he saw a large number of persons including some police officers. The Sub Inspector ask-

ed him to remain there. Later on he was examined at the inquest.

5. P.W. 2's version is that from the place of occurrence the accused took him to Thopudurthi. There he was kept in the house of the elder brother of accused 1. During the time he was with the accused he was repeatedly warned not to divulge the matter to anyone and beware of the likely consequences if he dared to disregard their warnings. Thereafter in the evening they took him to Anantapur and left him there. That night he went to his house and stayed with his family.

6. P.W. 3 supported the version given by P.Ws. 1 and 2 as regards the occurrence. His further case is that when he took to his heels from the scene of occurrence accused 6 threw a stone at him and that caused an injury on his right calf but yet he continued running, out of fear for his life and reached his sister's place at Bathalapuram which is about $2\frac{1}{2}$ miles from the scene of occurrence. There he informed his sister about the occurrence but he was not bold enough to get out of the house and consequently he could not inform the authorities. He also stated that he returned to his village on the next morning and at the scene he found large number of people gathered. The police had arrived at the scene by that time. He stayed at the scene till the evening and he was examined at the inquest.

7. According to the prosecution sometime after the occurrence P.W. 8, a postal runner happened to pass through the scene of occurrence and he saw two dead bodies there. He went and informed that matter to the village Munsiff of Kanganapalli who recorded his statement (Ex. P-7) and thereafter sent the same with his report Ex. P-8. Further, the prosecution evidence discloses that somewhere about the noon of the day of occurrence P.W. 9, a relation of the deceased persons came to know from a young boy that dead bodies of two persons are lying at Kanganapalli. As he knew that his relations had gone that way that morning, he became suspicious that they might have been done to death and hence he proceeded towards the scene of occurrence but he was not bold enough to go to the scene. Therefore he first sent P.W. 7 to go

and see whether the dead bodies were those of his relations. P.W. 7 accordingly proceeded to the scene and he came and told him that they were the dead bodies of Thimmiah and Sanjeevu. Thereafter he (P.W. 9) himself went to the scene and saw the dead bodies of the deceased persons and came back and reported the matter to the village Munsiff of Thogarakunta. That report is marked Ex. P-9. In his report P. W. 9 cast suspicion on some of the members of the opposite faction including the appellants.

8. The evidence of P.Ws. 1 to 3 relating to the occurrence is fully corroborated by P.W. 14 who conducted post mortem examination on the dead bodies of the deceased persons and also P.W. 15, the Fire-arms expert. The evidence of P.Ws. 1 to 3 also gets corroboration from the testimony of P.W. 7 who claims to have seen P.Ws. 1, 2 and the two deceased persons going towards Kanganapalli on the morning of September 8, 1964.

9. The appellants denied that they had any hand in the murder of the deceased persons. They pleaded that the case had been foisted against them because of enmity. They did not deny the existence of two factions in the village and the further fact that there was serious hostility between the two factions. In fact their case is that the present case has been foisted against them because of that hostility. On their behalf they examined D.W. 1, the Professor of Forensic Medicine, Madras to establish that the injuries found on the back of Sanjeevu could not have been caused by revolver shots. By that evidence they sought to show that the evidence given by the occurrence witnesses is not true.

10. The trial judge rejecting the testimony of P.W. 14 and relying on the evidence of D.W. 1, came to the conclusion that the injuries found on the back of the deceased Sanjeevu could not have been caused in the manner deposed to by P.Ws. 1 to 3. He opined that they could not have been caused by revolver shots. He also came to the conclusion that P.Ws. 1 to 3 were partisan witnesses and that their evidence is unnatural and unreliable. As a result of those conclusions he acquitted the appellants as well as Boya Ranudu. The acquittal of Ranudu was confirmed by the High Court on

the ground that there is no satisfactory evidence to show that he participated in the incident. The appellate court concurring with the trial court came to the conclusion that P.W. 2 is not a reliable witness. Both the courts held that he was a partisan witness and that his evidence is bristling with contradictions. His evidence has not been commended for our acceptance. Therefore we need not refer to the same. But it is necessary to state at this stage that the High Court did not come to the conclusion that P.W. 2 was not present at the scene when the occurrence took place. Hence the fact that his evidence was found to be unreliable cannot throw any doubt on the testimony of P.Ws. 1 and 3.

11. P.Ws. 5 and 6 have turned hostile to the prosecution. The trial judge had recorded in the deposition of P. W. 6 that his behaviour in the witness box was anything but satisfactory. He was hesitating while giving answers. In the circumstances of the case we have to exclude from consideration the testimony of P. Ws. 5 and 6.

12. The appellate Court had fully relied on the testimony of P. Ws. 1 and 3. It also accepted the testimony of P. Ws. 14 and 15 and rejected that of D. W. 1.

13. The scope of an appeal against an order of acquittal has been the subject of some controversy in Courts for a long time. But that controversy is now settled by the decision of this Court in *Sanwant Singh v. State of Rajasthan*, (1961) 3 SCR 120 = (AIR 1961 SC 715). In that decision this Court summarised the legal position thus:

1. an appellate Court has full powers to review the evidence upon which the order of acquittal is founded;

2. the principles laid down in *Sheo Swarup's case*, 61 Ind App 398 = (AIR 1934 PC 227 (2)) afforded a correct guide for the appellate court's approach to a case disposing of such an appeal;

3. the different phraseology used in the judgments of this court such as:

(a) "substantial and compelling reasons";

(b) "good and sufficiently cogent reasons";

(c) "strong reasons" are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion, but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal but should express the reasons in its judgment which led it to hold that the acquittal was not justified.

14. To these tests we may add, as laid down by this Court in several decisions that the appellate court should also bear in mind the fact that the trial court had the benefit of seeing the witnesses in the witness box and the presumption of innocence is not weakened by the order of acquittal. If two reasonable conclusions can be reached on the basis of the evidence on record, the appellate court should not disturb the findings of the trial court. We shall presently proceed to consider whether the appellate court adhered to those principles in the examination of the evidence in this case. But before doing so we must remind ourselves that this appeal was brought under Art. 136 of the Constitution. Although the powers of this Court under that Article are very wide, this Court, following the practice adopted by the Judicial Committee, has prescribed limits on its own power and in criminal appeals, except under exceptional circumstances it does not interfere with the findings of fact reached by the High Court unless it is of the opinion that the High Court had disregarded the forms of legal process or had violated the principles of natural justice or otherwise substantial and grave injustice has resulted. This Court does not ordinarily reappraise the evidence if the High Court has approached the case before it in accordance with the guidelines laid down by this Court unless some basic error on the part of the High Court is brought to the notice of this Court. It is best to bear in mind that except in certain special cases, the High Court is the final court of appeal and this Court is only a court of special jurisdiction. (The judgment after considering the evidence in Paras 15 to 22, proceeded:)

23. This takes us to the evidence of P.W. 3. He is undoubtedly an

interested witness. He is a relation of the deceased persons and he belongs to their faction. His evidence that it was accused 6, who threw the stone at him was not accepted by the trial court as well as by the High Court. But his claim that he had witnessed the occurrence is supported by P.W. 1. His evidence on that aspect receives corroboration from the evidence of P.W. 7 as well as from the medical evidence. According to him he had sustained an injury because of the stone throw. P.W. 14 who examined him was of the opinion that the injury found on his right calf could have been caused by a stone throw. It is not the law that the evidence of interested witnesses is not entitled to any weight. Their evidence has got to be scrutinized with care. The further point made against this witness is that after going to his sister's place he did not inform the authorities about the occurrence nor did he go to Dharamavaram to inform his relatives about the occurrence and therefore his evidence is not believable. His explanation is that he was mortally afraid of the accused and as such he dared not get out of his sister's house. The trial court did not accept this explanation but the High Court accepted it. Different individuals react differently under the same circumstances. Here is a member of a faction who had seen the brutal murders of two of his relations. He himself was chased and he escaped death very narrowly. There is nothing surprising that such a person being afraid of getting out of his sister's house for a whole day. At any rate the High Court thought that there is nothing improbable about it.

24. Every one of the points taken into consideration by the trial court to arrive at the verdict of acquittal has been considered by the High Court and it has given reasons for differing from the conclusions reached by the trial court. There is nothing basically wrong in the approach adopted by the High Court. It considered the evidence on record on the basis of human probabilities and tested the evidence given by the witnesses by various methods known to law. After doing so it came to the conclusion that the evidence of P.Ws. 1 and 3 is acceptable. As mentioned earlier they are the final judges of fact. We see

no reason to interfere with their conclusions.

25. For the reasons mentioned above this appeal fails and the same is dismissed.

Appeal dismissed.

**AIR 1971 SUPREME COURT 465
(V 58 C 110)**

(From: Calcutta)*

**J. C. SHAH, K. S. HEGDE
AND A. N. GROVER, JJ.**

Mathura Prosad Rajgharia and others, Appellants v. State of West Bengal, Respondent.

Civil Appeal No. 2194 of 1966, D/- 27-10-1970.

(A) Calcutta Improvement Act (5 of 1911), Schedule, Rule 9 — "Disposition of the land at the date of the publication of the declaration relating thereto under Section 6" — Meaning of.

Whether within the meaning of Rule 9 disposition of the land at the date of the publication of the declaration relating thereto under Section 6 of the Land Acquisition Act justifies the Court in taking into account the potentialities of the land. (Quaere).

(Para 23)

(B) Calcutta Improvement Act (5 of 1911), Sch., Rule 9 — Market value — How to be determined stated — F. A. No. 232 of 1955, D/- 26-5-1964 (Cal), Reversed.

The market value for compulsory acquisition of land under the Act has to be ascertained in the manner provided in Section 23 of the Land Acquisition Act, 1894, as modified by the Calcutta Improvement Act, 1911. The modifications which have a bearing are (1) that the market value of the land is to be deemed the market value according to the disposition of the land at the date of the publication of the declaration relating thereto under Section 6 of the Land Acquisition Act, 1894 and (2) that an appeal lies against the order of the Tribunal only on questions mentioned in Section 77-A of the Calcutta Improvement Act, 1911.

*(First Appeal No. 232 of 1955, D/- 26-5-1964 — Cal.)

Where a large area of land in an urban locality is sought to be acquired in determining the market value, the "method of belting" is appropriate. It is common knowledge that lands having frontage on the main roads in urban areas are always more attractive than the lands which have no such frontage. In Calcutta the period between the years 1941 and 1947 was abnormal. Appreciation in the price level in localities served by the Schemes of the Calcutta Improvement Trust and localities not served by the Schemes cannot be assumed to be uniform. If in respect of the localities not covered by the improvement schemes there was a rise of 80%, for the lands served by the schemes the rise would be appreciably higher because of the better amenities available as a result of those schemes. F. A. No. 232 of 1955, D/- 26-5-1964 (Cal), Reversed. (Paras 11, 12, 14, 15)

(C) Calcutta Improvement Act (5 of 1911), Sections 72, 77-A — Valuation by Tribunal — Interference by Appellate Court.

The Tribunal is a statutory body consisting of an expert in valuation with whom are associated assessors. In determining the value of the lands, inter-play of various factors has to be taken into account. An Appellate Court may be justified in interfering with the valuation of land made by the Tribunal if it be shown that the Tribunal made an error of principle, or has ignored or misconceived important evidence which substantially affected the valuation or that its conclusion was vitiated because of substantial error or defect of procedure. (Para 17)

(D) Land Acquisition Act (1894), Section 11 — Award of compensation by Collector — Agreement between parties can be treated as good evidence of market value — F. A. No. 232 of 1955, D/- 26-5-1964 (Cal), Reversed.

The Land Acquisition Officer in awarding the amount of compensation under Section 11 is performing a statutory duty, and in assessing compensation is bound to exercise his judgment as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested. But even if an order made by the Collector valuing land with the consent of the acquiring

authority and the claimant may not strictly be regarded as an award made on a consideration of all the relevant materials, the agreement formally reached between the acquiring authority and the claimant agreeing to a certain amount to be paid as compensation for the land acquired is good evidence of the market value of the land. AIR 1946 PC 75, Rel. on; F. A. No. 232 of 1955, D/- 26-5-1964 (Cal), Reversed. (Para 18)

Cases Referred: Chronological Paras
(1946) AIR 1946 PC 75 (V 33)

= 73 Ind App 44, Samiullah

v. Collector of Aligarh 18

Mr. M. C. Chagla, Senior Advocate (Mr. D. N. Mukherjee, Advocate with him), for Appellants; Mr. S. V. Gupte, Senior Advocate, (Mr. S. C. Majumdar, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, J. — An area of land known as "premises No. 104", Narkeldanga Main Road, in the town of Calcutta admeasuring 39 bighas and 19 cottahs (63980 sq. yards) was notified for acquisition under Section 4 of the Land Acquisition Act, 1894, by a notification published on August 1, 1946. The notification under Section 6 of the Land Acquisition Act was published on June 12, 1947. The land was situated at the junction of Narkeldanga Main Road and Kankurgachi Road and had a frontage on the Narkeldanga Main Road of 675 feet and on the Kankurgachi Road of 629 feet.

2. Before the Collector the appellants claimed Rs. 27,00,000/- as compensation for the land. The Collector by his award under Section 11 of the Land Acquisition Act awarded Rs. 10,38,700/- as compensation for the land, and Rs. 800/- for trees. The amount of compensation awarded (inclusive of the statutory solatium of 15% under Section 23 (2) of the Land Acquisition Act) was Rs. 11,95,425/-.

3. The appellants applied for a reference under Section 18 of the Land Acquisition Act as amended by the Calcutta Improvement Act, 1911. The reference was heard by the Calcutta Improvement Tribunal. The Tribunal enhanced the amount of compensation by Rs. 2,54,240/- and 15% solatium thereon.

4. The appellants and the State of West Bengal appealed to the High Court of Calcutta. The appeal filed by the appellants was dismissed and the appeal of the State was partly allowed. The High Court awarded to the appellants Rs. 11,59,430/- as compensation and statutory solatium of 15% in addition thereto. Against the award made by the High Court, this appeal has been preferred by the appellants, with certificate granted by the High Court.

5. Compensation for the land was determined under the Land Acquisition Act, 1894, as modified by the Calcutta Improvement Act, 1911. By the Calcutta Improvement Act, certain modifications are made in the Land Acquisition Act, 1894. Section 69 of the Calcutta Improvement Act, 1911, provides:

"The Board (Improvement Trust Board) may, with the previous sanction of the State Government acquire land under the provisions of the Land Acquisition Act, 1894, for carrying out any of the purposes of this Act".

Section 70 provides:

"A Tribunal shall be constituted, as provided in Section 72, for the purpose of performing the functions of the Court in reference to the acquisition of land for the Board under the Land Acquisition Act, 1894".

Section 71 provides:

"For the purpose of acquiring land under the said Act for the Board,—

(a) The Tribunal shall (except for the purposes of Section 54 of that Act) be deemed to be the Court, and the President of the Tribunal shall be deemed to be the Judge, under the said Act;

(b) the said Act shall be subject to the further modifications indicated in the Schedule;

(c) x x x x x x

(d) the award of the Tribunal shall be deemed to be the award of the Court under the said Land Acquisition Act, 1894, and shall, subject to the provisions of Section 77-A, be final".

Section 72 provides for the constitution of a Tribunal. The Tribunal consists of the President and two assessors. The section further provides for the qualifications of the President and

the two assessors. Section 77-A provides:

"An appeal shall lie to the High Court from an award under this Chapter (Chapter IV), in any of the following cases, namely:—

(a) x x x x x x

(b) Where the decision is that of the Tribunal, and—

(i) the President of the Tribunal grants a certificate that the case is a fit one for appeal, or

(ii) the High Court grants special leave to appeal:

Provided x x x x

(2) An appeal under Clause (b) of sub-section (1) shall only lie on (one or more of) the following grounds, namely:—

(i) the decision being contrary to law or to some usage having the force of law;

(ii) the decision having failed to determine some material issue of law or usage having the force of law;

(iii) a substantial error or defect in the procedure provided by the said Act which may possibly have produced error or defect in the decision of the case upon the merits.

x x x x x x

The Schedule to the Act sets out the modifications in the Land Acquisition Act, 1894. At the relevant time, by Rule 9 of the Schedule, it was provided:

"At the end of Section 23 of the Land Acquisition Act, the following shall be deemed to be added, namely:—

'(3) For the purpose of Clause 1 of sub-section (1) of this section:—

(4) The market value of the land shall be deemed to be the market value according to the disposition of the land at the date of the publication of the declaration relating thereto under Section 6'."

There were six other sub-clauses which are not relevant to this appeal.

6. The land of the appellants was notified for acquisition to ensure improved facilities in respect of the area covered by Improvement Scheme No. VI (Manicktola) of the Calcutta Improvement Trust. For improving the area contiguous to the area sought to be acquired in these proceedings, Scheme No. IV-M was undertaken in 1941 by the Improvement Trust. The boundary of Scheme No. IV-M included a portion of premises No. 104,

Narkeldanga Main Road. For the purpose of that scheme some lands covered by the scheme were notified for acquisition. No part of premises No. 104 was included in the notification. The acquisition of premises No. 104 was undertaken under Scheme No. VI-M in 1947.

7. In determining the market value of premises No. 104 the Tribunal followed, what is called 'the belting method'. The Tribunal laid out belts parallel to the two frontages. Along the Narkeldanga Main Road the first belt was of a depth of 100 feet and the second belt of a depth of 150 feet. Similarly parallel to the Kankurgachi Road the first belt was of a depth of 100 feet, and the second belt was of a depth of 150 feet. The remaining area was taken as the third belt of the land having frontage on the Narkeldanga Main Road. The land was accordingly laid out into five belts — three out of the land on the Narkeldanga Main Road, and two out of land on the Kankurgachi Road. According to the accepted practice, the price of the second belt was taken at 75% of the price per cottah of the land in the first belt, and the land of the third belt at 50 % of the price per cottah of the value for the first belt of land.

8. The land on the Narkeldanga Main Road and the two interior belts was valued by the Tribunal on the basis of an award made in respect of premises No. 43J which had its main frontage on the Rajendra Lal Mitter Road and a second frontage on the Narkeldanga Main Road. The area of premises No. 43J was 12 cottahs 2 chattaks, and was valued at Rs. 1,500/- per cottah in respect of the belt abutting the Narkeldanga Main Road. Relying upon that evidence the Tribunal held that the market value of the first belt on the Narkeldanga Main Road was Rs. 1,500/- per cottah in September 1941, and that there was, between the years 1941 and 1947, 80% appreciation in the value of the land. The Tribunal also held that since Scheme No. IV-M had been in operation in the vicinity of "premises No. 104" and that two supplementary schemes Nos. IV-M1 and IV-M2 had come into operation, an additional allowance of 25% over the value of the land which had not the benefit of the Schemes

should be taken into account. Thus the value of per cottah of the first belt on the Narkeldanga Main Road was computed at Rs. 3,375/-. The Tribunal allowed an additional 1% "on account of vista", and determined the value of the land in the first belt on the Narkeldanga Main Road at Rs. 3,400/- per cottah.

9. In determining the market value of the front belt on the Kankurgachi Road, the Tribunal relied upon Ext. 42 — which is an award made by the Collector in a land acquisition proceeding in respect of land premises No. 31, Kankurgachi Road, and on that basis valued the land of the front belt at Rs. 2,703/-. Premises No. 31 was within Scheme No. VI-M and was notified for acquisition under Section 4 of the Land Acquisition Act, on August 1, 1946. The date of the declaration under Section 6 was June 12, 1947. The Collector allowed in respect of premises No. 31, compensation at Rs. 2,703/- per cottah. The Tribunal regarded the award for acquisition of premises No. 31 as furnishing good evidence of the market value of the land in the first belt on the Kankurgachi Road. No allowance for the benefit of underground drainage connections and other amenities was made in regard to that land. In respect of the second belt on the Kankurgachi Road the price was taken at 75% per cottah of the value of the land per cottah in the front belt. The total amount determined for the Kankurgachi belts was Rs. 2,87,000/-, and adding thereto the price of the front belt on Narkeldanga Main Road at Rs. 3,400/- and the rear belts at 75% and 50% which worked out at Rupees 11,80,750/-, the total amount determined by the Tribunal was Rs. 14,77,650/-, but since a very large area of land was acquired, the Tribunal was of the view that a deduction of 12½% of the aggregate value should be made. Accordingly the Tribunal determined the compensation at Rs. 12,92,940/- for the land under acquisition.

10. In the appeal filed by the State of West Bengal, three contentions were urged before the High Court: (1) that in respect of Kankurgachi Road belts the Tribunal was in error in determining the market value of the land on the basis of Ext. 42. It was

urged that Ext. 42 was not an index of the market value of the lands, since the award was made by consent of the claimant and the Improvement Trust Board and not on any decision given by the Collector; (2) that the Tribunal adopted an "artificial method" of determining the value of the land having a frontage on the Narkeldanga Main Road by first adding 80% to the value prevailing in 1941 and then adding to the value so determined an additional 25% in consequence of the operation of Schemes Nos. IV-M1 and IV-M2, and then adding thereto 1% for "vista"; and (3) that the valuation under the Calcutta Improvement Act, 1911, is to be made according to the "disposition" of the land at the date of the publication of the declaration under Section 6 and in so doing the Tribunal was not entitled to take into consideration the potentialities of the land at the date of the declaration under Section 6 of the Land Acquisition Act. The High Court rejected the first contention, and accepted the remaining two contentions.

11. The market value for compulsory acquisition of land under the Calcutta Improvement Act, 1911, has to be ascertained in the manner provided in Section 23 of the Land Acquisition Act, 1894, as modified by the Calcutta Improvement Act, 1911. The modifications which have a bearing are — (1) that the market value of the land is to be deemed the market value according to the disposition of the land at the date of the publication of the declaration relating thereto under Section 6 of the Land Acquisition Act, 1894; and (2) that an appeal lies against the order of the Tribunal only on questions mentioned in Section 77A of the Calcutta Improvement Act, 1911. In the view of the High Court the expression "disposition" of the land at the date of the publication of the declaration relating thereto under Section 6, means the market value without taking into consideration the potentialities of the land. The High Court observed:

"The Act does not allow the Land Acquisition Officer to take into consideration the potentialities of the land, nor does it allow the Land Acquisition Officer to consider the possible betterment fees. It provided for granting compensation not on the basis

of what the value actually is but on the basis of what the value must be deemed to be and in considering that we have to take into account the disposition of the land. The word 'disposition' means how the land could be disposed of at that time. It does not mean the existing use of the lands but mean its disposing power 'with the arrangement as it was on that date.' The expression "market value according to the disposition of the land" apparently means the value of the land in a hypothetical market which a willing purchaser may in the prevailing conditions pay for the land to a willing vendor, taking into consideration its situation and advantages. In determining the "disposition" the hypothetical purchaser would normally take into consideration the advantages of the situation and the potentialities of the land, for the market value of land, especially in urban areas, depends upon its situation, special adaptability, advantages and inherent potentiality in the light of the demand for land. We, however, do not think it necessary to dilate upon this question further, because, in our view, the award made by the High Court reducing the amount awarded by the Tribunal cannot be justified on the evidence on the record, and the law applicable thereto. We accede to the request of Mr. Gupte appearing on behalf of the State of West Bengal not to express our opinion on the meaning of the expression "disposition of the land" as used in Rule 9 of the Schedule to the Calcutta Improvement Act, 1911, as it stood at the date when the land was declared to be needed by the Calcutta Improvement Trust under S. 6 of the Land Acquisition Act, 1894.

12. Where a large area of land in an urban locality is sought to be acquired in determining the market value, "the method of belting" is appropriate. It is common knowledge that lands having frontage on the main roads in urban areas are always more attractive than the lands which have no such frontage. No objection was raised before us against the adoption of "the method of belting". It was also accepted that of the land under acquisition the front belt would be 100 feet deep; the second belt 150 ft. deep and the rest may be included in the third belt. No objection was again raised to

the opinion of the Tribunal that the price of the second belt should be taken at 75% per cottah of the value of the land per cottah in the first belt; and the price per cottah of the third belt should be taken at 50% of the value of the land per cottah in the first belt.

13. The Tribunal determined the value of the Narkeldanga Main Road land on the basis of the market value in 1941 of premises No. 43J at Rs. 1,500/- per cottah and estimated the rise in the ruling price since 1941 at 80% of the basic price. In the view of the High Court the rise of 80% in the price of the land between 1941 and 1947 was due to "all the factors acting together" including the operation of the two Schemes IV-M1 and IV-M2, and the Tribunal was in error in considering separately the effect of "different factors" which contributed towards the rise. On that hypothesis the High Court held that in determining the market value of the Narkeldanga Main Road belts the additional 25% awarded for the application of Schemes Nos. IV-M1 and IV-M2 should be disallowed,

"for that addition was based on no legal principle, but on speculation without any basis for such speculation".

14. It is common ground that in Calcutta the period between the years 1941 and 1947 was abnormal. During this period first there was bombing of some parts of the town by the Japanese Air Force. This resulted in a large exodus from the town. After the migrant returned, there were communal riots which were followed by the partition of the Province of Bengal. Notwithstanding these abnormal events, in the price level of the land there was an upward trend which was accentuated by the influx of refugees from East Pakistan. It was found by the Tribunal that as a result of the inter-action of these events there was between 1941 and 1947 a rise of 80% in the value of the land. This, the High Court called, the increase in the price of the land on account of the "time factor". This 80% increase was not restricted to the area which was served by the improvement schemes. In the view of the Tribunal there was a general rise in

the price level of the land all over the town, and with that view the High Court agreed. But the High Court still held that in respect of the land benefited by schemes Nos. IV-M1 and IV-M2 the rise in land values should be taken to be 80% above the 1941 level.

15. In our judgment, the High Court was in error in so holding. Appreciation in the price level in localities served by the Schemes and localities not served by the Schemes cannot be assumed to be uniform. If in respect of the localities not covered by the improvement schemes there was a rise of 80%, for the lands served by the supplementary schemes the rise would be appreciably higher because of the better amenities available as a result of those two schemes. The finding of the Tribunal that the rise of 80% in the value of the lands in the town of Calcutta between 1941 and 1947 was a finding on a question of fact, was accepted by the High Court, as it was bound to accept in an appeal under the Act. The High Court was also bound to accept the finding of the Tribunal that the additional 25% was attributable to the two schemes. That conclusion was not without evidence. In determining the value of land at the date of declaration on the basis of value at an earlier date, it would often be difficult to determine the operation of different factors contributing to the increase in the value of the land, and the valuer may generally take into account the overall rise due to the various factors operating upon the land in determining the market value of the land compulsorily acquired. It would certainly have been more consonant with principle if the Tribunal had instead of bifurcating the appreciation into 80% on account of the general conditions and 25% on the aggregate on account of the special conditions adopted a composite increase. But we are unable to agree that the valuation of the improvements resulting from Schemes Nos. IV-M1 and IV-M2 was "completely artificial and speculative". We do not again agree with the High Court that the valuation was not based on "correct principles of valuation". Nor are we able to hold that because the Tribunal did not determine a composite increase resulting from the inter-play of all factors, and determin-

ed the appreciation from the "time factor" and the additional amenities separately, the conclusion is open to any serious challenge.

16. The Calcutta Improvement Act, 1911, was enacted to

"make provision for the improvement and the expansion of Calcutta by opening up congested areas, laying out or altering streets, providing open spaces of ventilation or recreation, demolishing or constructing buildings, clearing bustees, executing housing schemes and schemes for the rehousing of persons displaced by the execution of improvement schemes".

The object of the Act was to secure improvement of the town by opening up congested areas and making available amenities such as wider roads, underground drainage, parks and other urban facilities. The locality of the Narkeldanga Main Road and Kankurgachi Road was a congested locality. It had not the benefit of underground drainage. The land was uneven and at several places water used to accumulate. In 1941 a scheme for providing better amenities for the entire area was laid out, and a part of the land covered by the scheme was notified for acquisition. Provision for better amenities inevitably reflects in the upward trend in the price of the land in the locality covered by the scheme and the adjacent areas. The High Court recorded no reasons for assuming that the increase in the price of lands served by the improvement schemes and not served by the schemes will be the same. In effect the High Court discarded, without assigning any reasons, the appreciation resulting from the application of the improvement schemes.

17. The Tribunal is a statutory body consisting of an expert in valuation with whom are associated assessors. In determining the value of the lands, inter-play of various factors has to be taken into account. An Appellate Court may be justified in interfering with the valuation of land made by the Tribunal if it be shown that the Tribunal made an error of principle, or has ignored or misconceived important evidence which substantially affected the valuation that its conclusion was vitiated because of substantial error or defect of procedure. We are unable to hold that the judgment of the Tribunal is open to challenge on the

ground of error of principle or other infirmity which justified the High Court in interfering with the conclusion of the Tribunal. The valuation of the land by the Tribunal on the basis that the front belt on the Narkeldanga Main Road should be valued at Rupees 3,400/- and adjustments should be made in respect of the rear two belts, and the overall value should be reduced by 12½% on the ground that a large area of land was acquired, must be accepted as correct.

18. The first belt of the land on the Kankurgachi Road was valued on the basis of Ext. 42 which was an award of the Collector for acquiring premises No. 31. The sole criticism made against the adoption of Ext. 42 as the basis of valuation is that though called an award it was in reality an order of the Collector without considering the evidence, and on the consent of the claimant and the Improvement Trust Board. The Collector, acting under the Land Acquisition Act, is, it is true, not a judicial authority: his proceedings are administrative. As observed by the Judicial Committee in *Samiullah v. Collector of Aligarh*, 73 Ind App 44 = (AIR 1946 PC 75) the Land Acquisition Officer in awarding the amount of compensation under S. 11 of the Land Acquisition Act, 1894, is performing a statutory duty, and in assessing compensation he is bound to exercise his judgment as to the correct basis of valuation, and his judgment cannot be controlled by an agreement between the parties interested. It appears, however, that in Ext. 42 the Collector was not guided solely by the agreement between the claimant and the Improvement Trust Board: he had determined the value of the structures, the value of the fixtures, the value of the machinery, the value of the land, and had made an award for the value determined by him. The valuation of the land was based on the agreement between the claimant and the Improvement Trust Board. The Collector accepted the agreement, which, he was not bound to but could accept and made an award on the basis of the agreed figure. The award had some evidentiary value. The land was being acquired for the Improvement Trust. The Improvement Trust is a statutory body, exercise of the power of which is con-

trolled by the provisions of the Act. Even granting that the order made by the Collector pursuant to the agreement between the Board and the claimant be not regarded as an award, the order made by consent furnished good and cogent evidence of an agreement to purchase property at its market value at the date of the declaration under S. 6 of the Land Acquisition Act. Even if an order made by the Collector valuing land with the consent of the acquiring authority and the claimant may not strictly be regarded as an award made on a consideration of all the relevant materials, the agreement formally reached between the acquiring authority and the claimant agreeing to a certain amount to be paid as compensation for the land acquired is good evidence of the market value of the land. The Tribunal relied upon Ext. 42 as furnishing good evidence of the market value at the relevant time of the land under acquisition. The Tribunal was of the view that a completed contract between the claimant and the Board was a good and sufficient evidence of the price of land. The Collector accepted the agreement and made an award on the basis thereof. It would require strong and cogent reasons to displace the value of the evidence furnished by the order. The award cannot be said to be "null and void". The Tribunal accepted the award and on the basis of that award determined the value of the adjacent land which was also sought to be acquired under the same notification. The Tribunal did not on that account commit any error of law which would justify the High Court in interfering with the conclusion recorded by the Tribunal.

19. The Tribunal also relied upon Ext. 35 which furnished some evidence of the value of the land. The Tribunal accepted Exts. 42 and 35 as forming the basis for calculating the market value of the land under acquisition. Sitting in appeal under Section 77A of the Calcutta Improvement Act, the High Court could not set aside the conclusion reached by the Tribunal on a matter of valuation.

20. The valuation of the Kankurgachi belt made by the Tribunal and affirmed by the High Court must therefore be accepted.

21. No argument was advanced in regard to the additional 1% for "vista". The valuation of the land abutting on the Narkeldanga Main Road first belt at Rs. 3,400/- and adjusting the value in respect of the two rear belts, therefore, must be accepted as correct.

22. The Tribunal reduced the price determined on the valuation made by it on the basis of Ext. 42 and the value of premises No. 43J by 12½% in the aggregate. On this part of the case no argument has been advanced before us by either side.

23. On the view taken by us, without expressing any opinion on the question whether within the meaning of R. 9 of the Schedule to the Calcutta Improvement Act, 1911, disposition of the land at the date of the publication of the declaration relating thereto under S. 6 of the Land Acquisition Act justifies the Court in taking into account the potentialities of the land, we are of the view that the conclusion of the Tribunal was not vitiated by any such error as would attract the jurisdiction of the High Court under S. 77A of the Calcutta Improvement Act, 1911.

24. The appeal filed by the appellants is therefore allowed. The order passed by the High Court is set aside and the order of the Tribunal restored. The appellants will be entitled to their costs in this Court. The order of costs passed by the High Court directing each party to bear its own costs is maintained.

Appeal allowed.

**AIR 1971 SUPREME COURT 472
(V 58 C 111)**

(From: Punjab)*

J. C. SHAH, G. K. MITTER, K. S. HEGDE AND A. N. RAY, JJ.

Delhi Administration, Appellant
v. Mohammad Iqbal, Respondent.

Criminal Appeal No 147 of 1966,
D/- 30-11-1970.

Foreigners Order (1948), R. 7 (2)
— Person leaving India for Pakistan
in 1947 and returning India on Pakis-

*(Criminal Revn. No. 89-D of 1965,
D/-2-8-1965 — Punj.)

LN/LN/F738/70/RGC/G

tani Passport and overstaying in India without obtaining residential permit—Held his conviction under S. 14 of Foreigners Act (1946) was proper — Criminal Revn. No. 89-D of 1965, D/-2-8-1965 (Punj), Reversed. (Para 9)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 1614 (V 53)=

(1966) 3 SCR 706 = 1966 Cri

LJ 1217, Kulathial Mammuv,

State of Kerala

(1961) AIR 1961 SC 58 (V 48)=

(1961) 1 SCR 576, Shanno Devi

v. Mangal Sain

2, 7, 8

Mr. H. R. Khanna, Advocate and
Mr. R. N. Sachthey, Advocate for Mr.
R. H. Dhebar, Advocate, for Appellant;
M/s. Frank Anthony, O. P. Soni, S. R.
Agrawal and E. C. Agrawala, Advoca-
tes, for Respondent.

The Judgment of the Court was deli-
vered by

RAY, J.:—This appeal is by certi-
ficate under Article 132 (1) and Arti-
cle 134 (1) (c) of the Constitution
against the judgment dated 2 August,
1965 of the Circuit Bench of the Pun-
jab High Court at Delhi. The certifi-
cate was given on the principal ground
whether the respondent had migrated
to Pakistan or was a citizen of India.

2. The respondent Mohd. Iqbal
was convicted by the Sub-Divisional
Magistrate, Delhi on 22 July, 1964
under section 14 of the Foreigners Act
and sentenced to undergo six months'
rigorous imprisonment. The order was
upheld on appeal by the Additional
Sessions Judge on 15 April, 1965. The
Circuit Bench of the Punjab High
Court set aside the conviction and rely-
ing on the decision of this Court in
Shanno Devi v. Mangal Sain, AIR 1961
SC 58 held that Mohd. Iqbal had not
migrated from India.

3. The respondent being treat-
ed as a foreigner and a Pakistani
national was charged with having en-
tered India on the authority of a Pakis-
tani passport on 31 May, 1956 and hav-
ing subsequently obtained extension of
stay in India upto 30 November, 1956
from the Delhi Administration and
thereafter not having returned to
Pakistan and continued unauthorised
stay in India in contravention of R. 7
(2) of the Foreigners Order, 1948
whereby the respondent was required
to obtain a residential permit on or
before 5 January, 1960 from the Regis-

tration Officer, Delhi and in contravention of that the respondent continued staying in Delhi without obtaining the requisite residential permit on or before 5 January, 1960 and was apprehended on 5 October, 1961 without possessing any residential permit from the Registration Officer, Delhi and thereby the respondent contravened the provisions of section 7 (2) of the Foreigners Act.

4. The prosecution case was that the respondent left India in 1947 and came to India with a Pakistani passport dated 27 March, 1954. The Pakistani passport was valid upto 26 March, 1959. On 27 April, 1954, the respondent obtained visa at Lahore for entry into India and on 2 May, 1954 he applied for extension of the visa upto 2 April, 1955. On 25 March, 1955 he left India for Pakistan. He came to India for the second time on 14 May, 1955 and obtained extension of visa upto 21 May, 1956. He went back to Pakistan. He came to India for the third time on 31 May, 1956 after having obtained a visa on 25 May, 1956. That visa was extended upto 30 November, 1956. The Delhi Administration returned his Pakistani passport to him in order to enable him to return to Pakistan. He did not leave India. On 11 July, 1957 he was arrested for violation of Rules 3 and 6 of the Indian Passport Rules, 1950 for the offence that he had entered India from Pakistan without a passport. On 31 July, 1957 he was acquitted. Thereafter he remained in India.

5. The charge in the present case was framed in the year 1960 and it was on the ground that he was required to obtain the residential permit on or before 5 January, 1960 and that in contravention thereof he continued to stay at Delhi without obtaining the requisite residential permit on or before 5 January, 1960 and was apprehended on 5 October, 1960 without possessing any residential permit. It may be stated here that in 1959 an amendment was made in paragraph 7 (2) of the Foreigners Order of 1948 whereby all foreigners were required to obtain residential permits by 5 January, 1960.

6. Counsel for the appellant contended that the respondent came to India on a Pakistani passport in

which he was described as a Pakistani national and he overstayed after the expiry of visa and in spite of being required to obtain residential permit from the Registration Officer, Delhi, he continued to stay in this country and thereby contravened the provisions of Section 7 (2) of the Foreigners Act.

7. The respondent on the other hand contended that there was no mens rea and when he was arrested on 5 October, 1961 there was no offence on the authority of the decision of this Court in AIR 1961 SC 58 (supra), because the respondent had not migrated from India, and, finally, that the evidence was overwhelming that he left India in 1953 and therefore there was renunciation of citizenship.

8. This Court in *Kulathil Mammu v. State of Kerala*, (1966) 3 SCR 706 = (AIR 1966 SC 1614) held that in *Shanno Devi's case*, AIR 1961 SC 58 (supra) the word 'migrated' had received the narrow connotation of going from one place to another with the intention of residing permanently in the latter place, but in its wider connotation it meant going from one place to another whether or not with the intention of permanent residence in the latter place. This Court gave the word 'migrated' in Article 7 of the Constitution that wider connotation and referred to migration to Pakistan after 1 March, 1947 in that case.

9. The present case falls within a short compass. The charge is that by failing to obtain a residential permit the respondent contravened the provisions of Rule 7 (2) of the Foreigners Order. His failure to obtain the residential permit as well as his contravention of the Foreigners Act suffices to hold that not only he had mens rea but he was guilty of an offence in contravention of Rule 7 (2) of the Foreigners Order, 1948 and Section 7 (2) of the Foreigners Act.

10. Counsel for the respondent invited this Court to re-assess the facts and to come to the conclusion that he was in India upto 1953 and therefore he merely renounced the citizenship and that when he returned to India, his citizenship revived. We are unable to hold so on the facts.

11. The Magistrate's Court correctly held on the facts that the respondent had migrated to Pakistan.

12. The appeal is therefore, allowed. The judgment of the High Court is set aside. The decision of the Additional Sessions Judge upholding the conviction is restored. The respondent will surrender to his bail, if any.
Appeal allowed.

AIR 1971 SUPREME COURT 474
(V 58 C 112)

(From: Andhra Pradesh)*

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

(In W. P. No. 212 of 1969)

Chinta Lingam and others, Petitioners v. The Govt. of India and others, Respondents.

(In Civil Appeals Nos. 1802 to 1805 of 1969).

M/s. Guggila Ramaiah Etc., Appellants v. Union of India and others, Respondents.

Writ Petn. No. 212 of 1969 and Civil Appeals Nos. 1802 to 1805 of 1969, D/- 30-11-1970.

(A) Constitution of India, Art. 19 (1) (g) — Control Orders issued under S. 3 (2) (d) of Essential Commodities Act (1955) imposing restrictions on movement of rice and paddy — Power to grant or refuse permits conferred on fairly high rank officers such as District Collector or Deputy Commissioner of Civil Supplies — Abuse of power by such Officers cannot be easily assumed — Hence fact that no appeal or revision lies against order of refusal does not lead to inference that power is arbitrary. AIR 1954 SC 224, Distinguished; AIR 1968 SC 303 and AIR 1957 SC 397, Rel. on. (Para 6)

(B) Constitution of India, Art. 245 — Essential Commodities Act (1955), S. 3 (2) (d) — Section does not suffer from vice of excessive delegation. AIR 1960 SC 475, Followed. (Para 7)
Cases Referred: Chronological Paras (1968) AIR 1968 SC 303 (V 55) = 1968-1 SCR 274, K. L. Gupta v. Bombay Municipal Corpn. of Greater Bombay 6
(1960) AIR 1960 SC 475 (V 47) = 1960-2 SCR 627, Union of India

*(Writ Petns. Nos. 3657 and 3658 of 1967 and 8 and 48 of 1968, D/- 16-4-1968—A. P.)

LN/LN/F739/70/GDR/T

v. M/s. Bhanamal Gulzari Mal Ltd. 7
(1957) AIR 1957 SC 397 (V 44) = 1957 SCR 233, M/s. Panna Lal Binjraj v. Union of India 6
(1954) AIR 1954 SC 224 (V 41) = 1954 SCR 803, Dwarka Prasad Laxmi Narain v. State of U. P. 6

Mrs. Shyamla Pappu, Miss Bindra Thakur and Mr. Vineet Kumar, Advocates, for Petitioners and Appellants; Mr. Jagdish Swarup, Solicitor-General of India, (Mr. R. N. Sachthey, Advocate, with him), for Respondent No. 1. (In all the matters); Mr. P. Ram Reddy, Sr. Advocate, (Mr. A. V. V. Nair, Advocate, with him), for Respondents.

The Judgment of the Court was delivered by

GROVER: J. The points involved in the writ petition and the appeals by special leave relate to the constitutionality and validity of the provisions of three Control Orders issued under S. 3 (2) (d) of the Essential Commodities Act, 1955 (Act 10 of 1955), hereinafter called the "Act". The validity of S. 3 (2) (d) of the Act itself has also been assailed.

2. The Control Orders which were promulgated under S. 3 (2) (d) of the Act were the following:

(i) The Rice (Southern Zone) Movement Control Order, 1957.

(ii) The Southern States (Regulation of Exports of Rice) Order, 1964; and

(iii) The Andhra Pradesh Rice and Paddy (Restriction of Movement) Order, 1965.

In the appeals the appellants had moved the High Court of Andhra Pradesh under Art. 226 of the Constitution. There the petitioners were dealers in rice and rice products such as puffed, parched and beaten rice (beaten rice is known as 'powa' while, parched and puffed rice is known as 'Murmura'). Some of the petitioners had applied for permits to export powa, murmura and idlirava from the State of Andhra Pradesh to other States while others had applied for permits to transport one or other of the rice products to some places within Andhra Pradesh. The applications for permits were either rejected or were not disposed of by the authorities concerned. In the writ petitions the High Court examined all the contentions

raised exhaustively and repelled the attack on the constitutionality of S. 3 (2) (d) of the Act as also the relevant clauses of the control orders.

3. Section 3 of the Act provides:

(1) If the Central Government is of opinion that it is necessary or expedient so to do for maintaining or increasing supplies of any essential commodity or for securing their equitable distribution and availability at fair prices or for securing any essential commodity for the defence of India or the efficient conduct of military operations it may, by order, provide for regulating or prohibiting the production, supply and distribution thereof and trade and commerce therein.

(2) Without prejudice to the generality of the powers conferred by subsection (1) an order made thereunder may provide—

(a)

(b)

(c)

(d) for regulating by licences, permits or otherwise the storage, transport, distribution, disposal, acquisition, use or consumption of, any essential commodity;

The 1957 Control Order extends to the States of Andhra Pradesh, Kerala, Madras, Mysore and Pondicherry which has been called the Southern Zone. According to cl. 3 (1) no person can export or attempt to export or abet the export of rice from any place within the Southern Zone except under and in accordance with a permit issued by the State Government concerned or any officer authorised in this behalf by that Government subject to the condition that such export shall be regulated in accordance with the export quotas fixed by the Central Government. Now this Control Order made a division into Southern Zone or regions in the matter of export of rice. By the Control Order of 1964 the Southern Zone or regions were further divided into four specified areas i.e. States of Andhra Pradesh, Kerala, Madras and Mysore. Clause 3 of this Order prohibited the export by any person of rice from any place within a specified area to a place outside that area except under and in accordance with the permit issued by the State Government or an officer authorised by that Government in that behalf. The rice was

defined by cl. 2 (b) to include broken rice and paddy as also broken rice and paddy products other than bran or husk. The Control Order of 1965 imposed further restrictions on the movement of rice and paddy. By clause 3 restrictions were placed on the movement of these commodities from any place in any block to any place outside that block even within the State of Andhra Pradesh.

4. Mrs. Shyamla Pappu on behalf of the writ petitioners and the appellants before us made an attempt to raise the following contentions in respect of the Control Orders:

1. All the three Control Orders offended Art. 303 of the Constitution. They suffered from the vice of discrimination between one State and another and of preference to one State over another.

2. These orders were in the nature of executive instructions and did not fall within the meaning of subordinate legislation.

3. Even if the Control Orders could be regarded as subordinate legislation they were not saved by Art. 303 (2) in the absence of the declaration contemplated thereby.

4. The requisite opinion of the Central Government within S. 3 (1) of the Act was not to be found in any of the Orders.

5. The Control Orders imposed unreasonable restrictions on the right of the petitioners to carry on trade as arbitrary powers had been conferred in the matter of issuing or withholding permits and there were no provisions for appeal or revision against refusal to grant a permit.

5. Article 301 in Part XIII of the Constitution declares that subject to the other provisions of this Part trade, commerce and intercourse throughout the territory of India shall be free. Under Article 302 Parliament may by law impose such restrictions on freedom of trade, commerce or intercourse between one State and another or within any part of the territory of India as may be required in the public interest. Article 303 reads:

"(1) Notwithstanding anything in Art. 302, neither Parliament nor the Legislature of a State shall have power to make any law giving or authorising the giving of, any preference to one State over another, or making, or au-

thorise the making of, any discrimination between one State and another, by virtue of any entry relating to trade and commerce in any of the Lists in the Seventh Schedule.

(2) Nothing in clause (1) shall prevent Parliament from making any law giving, or authorising the giving of, any preference or making, or authorising the making of, any discrimination if it is declared by such law that it is necessary to do so for the purpose of dealing with a situation arising from scarcity of goods in any part of the territory of India."

Now the Control Orders were made under section 3 of the Act. The object essentially was to regulate the export and movement of rice and of rice and paddy products from the Southern States. These Control Orders were laid before both Houses of Parliament as required by sub-s. (6) of section 3 of the Act. It has not been shown how this form of legislation would be mere executive instruction and would not constitute law made by Parliament within the meaning of Art. 302. No foundation was laid in the pleadings either before the High Court or in the writ petition before us as to how the restrictions which were imposed by the Control Orders were not in the public interest. It is significant that even on the point of preference to one State over another or discrimination between one State and another State there is complete absence of pleading in the writ petition filed before us. The High Court adverted to the matter but we have not been shown that any proper or firm foundation was laid in the writ petitions before the High Court on the question of preference or discrimination within Art. 303 (1). No argument, therefore, can be entertained on these matters. We are unable to see the necessity of reciting the requisite opinion within S. 3 (1) of the Act in the Control Orders. It is implicit in the recital in the Control Orders that they were being made under S. 3 of the Act that the Central Government had formed the requisite opinion within sub-s. (1) of that section. This disposes of the first four contentions.

6. As regards the 5th point it is noteworthy that the permit is to be issued by the State Government concerned or any officer authorised in this

behalf by that Government. It is common ground that the officers authorised by the State Government are the District Collector and the Deputy Commissioner of Civil Supplies. These officers cannot but be regarded as fairly high rank who are expected to discharge their duties in a responsible and reasonable manner. In *M/s. Dwarka Prasad Laxmi Narain v. State of Uttar Pradesh*, 1954 SCR 803 = (AIR 1954 SC 224) in which the provisions of cl. 4 (3) of the U. P. Coal Control Order 1953 which gave the licensing authority absolute power to grant or refuse to grant any licence were struck down on the ground that a law which confers arbitrary and uncontrolled power upon the executive in the matter of regulating trade or business in normally available commodities must be held to be unreasonable. There the power could be exercised by any person to whom the State Coal Controller might choose to delegate the same. The matter which has been stressed before us relates generally to the absence of any provision relating to appeal or revision in the Control Orders if the District Collector or the Deputy Commissioner of Civil Supplies refuses to grant a permit under clause 3 of the Order. In *Dwarka Prasad's case*, 1954 SCR 803 = (AIR 1954 SC 224) the delegation could be made to any one which was certainly a relevant factor in judging the reasonableness of the impugned provision. But in the cases before us the permit is to be granted either by the State Government or by responsible officers of the rank of the District Collector or the Deputy Commissioner of Civil Supplies. Indeed, Mrs. Pappu quite properly agreed that if the State Government alone had the power to issue the permits the challenge on the ground of unreasonableness of the restrictions would not be available. We consider that there is no bar to any of the aggrieved parties approaching the State Government by means of a representation for a final decision even if the matter has been dealt with by the District Collector or the Deputy Commissioner of Civil Supplies in the first instance and the permit has been refused or wrongly withheld by those officers. In these circumstances the absence of a provision for appeal or revision can be of no consequence. At any rate it has

been pointed out in more than one decision of this court that when the power had to be exercised by one of the highest officers the fact that no appeal has been provided for is a matter of no moment; (See K. L. Gupta v. Bombay Municipal Corporation, 1968-1 SCR 274 at p. 297 = (AIR 1968 SC 303 at p. 316). It may also be remembered that emphasis was laid in Pannalal Binjraj v. Union of India, 1957 SCR 233 at p. 257 = (AIR 1957 SC 397 at p. 418) on the power being vested not in any minor official but in top-ranking authority. It was said that though the power was discretionary but it was not necessarily discriminatory and abuse of power could not be easily assumed. There was moreover a presumption that public officials would discharge their duties honestly and in accordance with rules of law.

7. Lastly an effort was made to agitate the point that S. 3 (2) (d) of the Act suffers from the vice of excessive delegation. This question is no longer at large. In Union of India v. M/s. Bhana Mal Gulzari Mal, 1961-2 SCR 627 = (AIR 1960 SC 475) the attack on S. 3 of the Essential Supplies (Temporary Powers) Act 1946 which was similar in terms to S. 3 of the Act on the ground of excessive delegation was repelled. It was held that the Central Government had been given sufficient and proper guidance for exercising its powers in effectuating the policy of the statute.

8. In the result the writ petition and the appeals fail and they are dismissed with costs. One set of hearing fee.

Writ petition and appeals dismissed.

AIR 1971 SUPREME COURT 477 (V 58 C 113)

(From Patna: AIR 1967 Pat 53)

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

The State of Bihar and another, Appellants v. Tata Engineering & Locomotive Co. Ltd. Respondent.

Civil Appeal No. 2402 of 1966, D/-27-11-1970.

Constitution of India, Art. 286 (2) (prior to amendment in 1956) — Sale in course of inter-State trade — When

LN/LN/F736/70/SSG/T

effected — Contract of sale requiring buyer to remove goods from State in which goods are purchased to another State — Goods so removed — Such sale must be considered as sale in the course of inter-State trade — (1970) 25 STC 528 (SC), Explained; Case Law discussed. AIR 1967 Pat 53, Approved. (Paras 14, 16, 17)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 1281 (V 57) =

1970-1 SCC 622, Tata Engineering and Locomotive Co. Ltd. v. The Asst. Commr. of Commercial Taxes

12

(1970) 25 STC 528 = 1970-2 SCA 457, Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras

15, 16, 17

(1966) AIR 1966 SC 1216 (V 53) =

(1966) 17 STC 473, K. G. Khosla and Co. (P) Ltd. v. Deputy Commr. of Commercial Taxes, Madras

11

(1964) AIR 1964 SC 1752 (V 51) =

(1964) 7 SCR 706, Ben Gorm Nilgiri Plantations Co., Conoor v. Sales Tax Officer, Special Circle, Ernakulam

10

(1963) AIR 1963 SC 980 (V 50) = (1963) 14 STC 175, Cement Marketing Co. of India (Pvt.) Ltd. v. State of Mysore

9

(1961) AIR 1961 SC 65 (V 48) =

(1961) 1 SCR 379, Tata Iron and Steel Co. Ltd. v. S. R. Sarkar

8

(1961) AIR 1961 SC 1344 (V 48) =

(1962) 1 SCR 314, Narasimham and Son v. State of Orissa

2

(1955) AIR 1955 SC 661 (V 42) =

(1955) 2 SCR 603, Bengal Immunity Co. Ltd. v. State of Bihar

6

(1953) AIR 1953 SC 333 (V 40) =

1954 SCR 53, State of Travancore Cochin v. Shanmugha Vilas Cashew Nut Factory

5

(1952) AIR 1952 SC 366 (V 39) =

1952 SCR 1112, State of Travancore Cochin v. Bombay Co. Ltd.

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Mr. A. K. Sen, Senior Advocate, (Mr. U. P. Singh, Advocate, with him), for Appellants; Mr. N. S. Palkhivala, Senior Advocate, (M/s. S. B. Mehta and B. Datta, Advocates, and M/s. J. B. Dadachanji and Co., Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

HEGDE, J.: This is an appeal by special leave. It arises from the judg-

ment of the High Court of Patna in a Reference under S. 25 (3) of the Bihar Sales Tax Act, 1947. That reference was called for by the High Court at the instance of the assessee company (the respondent herein). The questions referred for the opinion of the High Court by the Board of Revenue were:

"(1). With regard to the sales which took place in the period from 1st of April, 1955, to the 6th September 1955, whether the assessee is entitled, upon the facts found by the Board of Revenue with regard to these categories of sales, to exemption from liability under the Bihar Sales Tax Act because of the provision of Article 286 (1) (a) of the Constitution as it stood at the relevant date read with the explanation to that article.

(2) With regard to the sales which took place in the period from 7th September, 1955 to 31st March, 1956 whether the assessee is entitled, upon the facts found by the Board of Revenue with regard to these categories of sales, to exemption from liability under the Bihar Sales Tax Act on the ground that the sales took place in the course of inter-State trade or commerce under Art. 286 (2) of the Constitution as it stood at the relevant period."

2. The High Court answered the first question in the negative and against the assessee. It answered the second question in the affirmative and in favour of the assessee. The assessee has not come up in appeal. This appeal has been brought by the State of Bihar contesting the correctness of the opinion given by the High Court on the second of the two questions referred to earlier.

3. The assessee is a Public Limited Co., incorporated under the Indian Companies Act, 1913. It carries on business of manufacturing and selling inter alia trucks and bus chassis and spare parts thereof to their appointed dealers, State Transport Organizations and individual buyers throughout India. The registered office of the assessee is at Bombay but its factory where manufacturing process is being carried on is at Jamshedpur in Bihar. The assessee has appointed several dealers all over India for the sale of its trucks, bus chassis and

spare parts. Those dealers are appointed under agreements entered into between them and the assessee. The turn-over in dispute relates to the sales made by the assessee to its dealers of trucks, bus chassis, of spare parts for being sold in the territories assigned to them under the dealership agreements. The agreements between the assessee and its dealers appear to be similar. Under the agreements, each dealer is assigned a territory in which alone he can sell the trucks, bus-chassis and other spare parts purchased by him from the assessee company. He is forbidden from selling any one of those articles to any purchaser outside his territory. As per the agreements, dealers will have to place their indents, pay the price of the goods to be purchased and obtain delivery orders from the Bombay office of the assessee. In pursuance of those delivery orders, trucks, bus chassis and other spare parts were delivered in Bihar to be taken over to the territories assigned to them. Under the contracts of sale, the dealers were required to remove the trucks, bus chassis and the spare parts delivered to them in the State of Bihar to places outside Bihar. These are facts found by the Board of Revenue and affirmed by the High Court. On the basis of these facts, we have to decide whether the sales with which we are concerned in this appeal are sales that took place in the course of inter-State trade and commerce as contemplated by Article 286 (2) of the Constitution as it stood at the relevant time. In other words the question for decision is whether the sales in question were sales for the purpose of inter-State trade or commerce or whether they were sales in the course of inter-State trade or commerce. As seen earlier, the High Court has held that those sales took place in the course of inter-State trade or commerce.

4. The expression "in the course of" appearing in Art. 286 (1) (b) came up for consideration in *State of Travancore Cochin v. Bombay Co. Ltd.*, 1952 SCR 1112 = (AIR 1952 SC 366). Therein this Court held that whatever else may or may not fall within Article 286 (1) (b) of the Constitution, sales and purchases which themselves occasion the export or import of the goods as the case may be out of or into, the

territory of India come within the exemption. In that case this Court further observed that a sale by export involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated and the sale and the resultant export form parts of a single transaction. Of these two integrated activities which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other. Even in cases where the property in the goods passed to the foreign buyers and the sales were thus completed, within the State before the goods commenced their journey from the State, the sales must be regarded as having taken place in the course of the export and therefore exempt under Art. 286 (1) (b). The same exposition of the law is true of cl. (2) of Art. 286 as it stood prior to its amendment on September 11, 1956.

5. The next decision in which Art. 286 (1) (a), (1) (b) and (2) came to be considered by this Court is *State of Travancore Cochin v. Shanmugha Vilas Cashew Nut Factory*, 1954 SCR 53 = (AIR 1953 SC 333). Therein this Court observed that the word "course" etymologically denotes movement from one point to another and the expression "in the course of" in Art. 286 (1) (b) not only implies a period of time during which the movement is in progress but postulates also a connected relation. Consequently, a sale in the course of export out of the country should be understood in the context of Art. 286 (1) (b) as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country, but also as part of or connected with such activities. But a purchase of goods for the purpose of export is only an act preparatory to their export and not an act done in the course of the export of the goods.

6. In *Bengal Immunity Co. Ltd. v. State of Bihar*, 1955-2 SCR 603 = (AIR 1955 SC 661); Venkatarama Ayyar J. observed that a sale could be a sale in the course of inter-

State trade only if two conditions concur: (1) a sale of goods and (2) a transport of those goods from one State to another under the contract of sale.

7. In *Narasimham and Son v. State of Orissa*, (1962) 1 SCR 314 = (AIR 1961 SC 1344) this Court held that in order that a sale or purchase might be inter-State, it is essential that there must be a transport of goods from one State to another under the contract of sale or purchase. A purchase made inside a State, for sale outside the State cannot itself be held to be in the course of inter-State and the imposition of tax thereon is not repugnant to Art. 286 (2) of the Constitution.

8. In *Tata Iron and Steel Co. Ltd. v. S. R. Sarkar*, (1961) 1 SCR 379 = (AIR 1961 SC 65) this Court held that within cl. (b) of S. 3 of the Central Sales Tax Act, 1956, are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto and also covers sales in which movement of goods from one State to another is the result of a covenant or incident of the contract of sale and property in the goods passes in either State. Clause (b) of S. 3 of the Central Sales Tax Act, 1956 says:

"That no law of a State shall impose or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place in the course of the import of goods into, or export of the goods out of, the territory of India."

9. In *Cement Marketing Co. of India (Private) Ltd. v. State of Mysore*, (1963) 14 STC 175 = (AIR 1963 SC 980), this Court held that where the goods were transported outside the State as required by the contract of sale, they are inter-State sales and hence exempt from sales-tax. On the facts of that case it was held that the sales transactions themselves involved movement of goods across the border.

10. In *Ben Gorm Nilgiri Plantations Co., Conoor v. Sales Tax Officer, Special Circle, Ernakulam*, (1964) 7 SCR 706 = (AIR 1964 SC 1752), this Court had to consider what sales are sales in the course of export and what sales are for the purpose of export. In the course of the judgment Shah J. (one of us) observed:

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there must be an intention on the part of both the buyer and the seller to export, there must be obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export."

11. In *K. G. Khosla and Co. (P) Ltd. v. Deputy Commr. of Commercial Taxes, Madras*, (1966) 17 STC 473 = (AIR 1966 SC 1216), this Court held that before a sale could be said to have occasioned the import, the movement of goods must have been incidental to the contract or in pursuance of the conditions of the contract and there should be no possibility of the goods being diverted by the assessee for any other purpose, meaning thereby that there should be no possibility of diversion according to law or contract and not in breach of them.

12. In *Tata Engineering and Locomotive Co. Ltd. v. The Asst. Commr. of Commercial Taxes*, (1970) 1 SCC 622 = (AIR 1970 SC 1281) this Court after referring to the earlier decisions observed:

"It has been laid down that the sale in the course of export predicated connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted without a breach of the contract or the compulsion arising from the nature of the transaction. To occasion export there must exist such a bond between the contract of sale and the actual exportation that each link is inextricably connected with the one immediately

preceding it. The principle thus admits of no doubt, according to the decisions of this Court, that the sales to be exigible to tax under the Act (Central Sales Tax Act, 1956) must be shown to have occasioned the movement of the goods or articles from one State to another. The movement must be the result of a covenant or incident of the contract of sale."

13. If we apply the principles enunciated by this Court in the decisions referred to above to the facts of this case, it is obvious that the sales with which we are concerned in this case are sales in the course of inter-State trade. The dealers were required to move the trucks, bus chassis and other spare parts purchased by them from the State of Bihar to places outside Bihar. They are so required by the terms of the contracts entered into by them with the assessee. They would have committed breach of their contracts and incurred the penalty prescribed in their dealership agreements, if they had failed to abide by the term requiring them to move the goods outside the State of Bihar.

14. The decided cases establish that sales will be considered as sales in the course of export or import or sales in the course of inter-State trade and commerce under the following circumstances:

(1) When goods which are in export or import stream are sold;

(2) When the contract of sale or law under which goods are sold require those goods to be exported or imported to a foreign country or from a foreign country as the case may be or are required to be transported to a State other than the State in which the delivery of goods takes place; and

(3) Where as a necessary incidence of the contract of sale goods sold are required to be exported or imported or transported out of the State in which the delivery of goods takes place.

15. But Mr. A. K. Sen, learned Counsel for the State of Bihar contended that this Court has taken a different view of the law in *Coffee Board, Bangalore v. Joint Commercial Tax Officer, Madras*, (1970) 25 STC 528 (SC). According to him the ratio of that decision is that whenever goods are delivered in a State in pursuance of

a contract of sale, the sale in question becomes exigible to tax in the State in which the goods are delivered unless they are taken out of the State for purposes of consumption and not resale, or the same is taken out of the State in pursuance of an already existing agreement to resell in the State to which it is taken. The decision in Coffee Board's case, (1970) 25 STC 528 (SC) (supra) does not, in our opinion, afford any basis for these contentions.

16. We have earlier noticed that this Court in a series of decisions has pronounced in unambiguous terms that where under the terms of a contract of sale, the buyer is required to remove the goods from the State in which he purchased those goods to another State and when the goods are so moved, the sale in question must be considered as a sale in the course of inter-State trade or commerce. This is a well-established position in law. In the Coffee Board's case, (1970) 25 STC 528 (SC) this Court did not deviate from this position nor could it deviate as the earlier decisions were binding on it. Further in the course of his judgment, the learned Chief Justice who spoke for the Court referred with approval to the earlier decisions of this Court where distinction between the sales in the course of inter-State trade or commerce and sales for the purpose of inter-State trade and commerce were explained. On the basis of the facts in that case, his Lordship came to the conclusion that the export of the coffee in question was not integrated with the sales with which the Court was concerned and that there was no direct bond between the export and the sales. In the course of his judgment his Lordship observed:

"Here there are two independent sales involved in the export programme. The first is a sale between the Coffee Board as seller to the export promoter. Then there is the sale by the export promoter to a foreign buyer. Of the latter sale, the Coffee Board does not have any inkling when the first sale takes place. The Coffee Board's sale is not in any way related to the second sale. Therefore the first sale has no connection with the second sale which is in the course of export, that is to say, movement of goods between an exporter and an importer."

17. This finding clearly brings out the distinction between the facts of the Coffee Board's case, (1970) 25 STC 528 (SC) (supra) and the facts of the cases wherein this Court held that the sales in question were sales in the course of export or import. In the Coffee Board's case, (1970) 25 STC 528 (SC) this Court found that what was insisted on by the Coffee Board was that the coffee set apart for the purpose of the export must be exported: it was not incumbent for the purchasers at the auction to export that coffee themselves; they may do it themselves or they may sell it to somebody who may export it outside India. On that basis, this Court came to the conclusion that the sales effected by the Coffee Board are not sales in the course of export; they are only sales for the purpose of export. The ratio of that decision does not bear on the facts before us. Herein, under the terms of the contracts of sale, the purchasers were required to remove the goods from the State of Bihar to other States. Hence the sales with which we are concerned in this case must be held to be sales in the course of inter-State trade or commerce.

18. For the reasons mentioned above, we agree with the findings of the High Court. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 481
(V 58 C 114)**

M. HIDAYATULLAH, C. J., J. M. SHELAT, G. K. MITTER, C. A. VAIDIALINGAM AND A. N. RAY, JJ.

K. A. Abbas, Petitioner v. The Union of India & another, Respondents.

Writ Petition No. 491 of 1969, D/- 24-9-1970.

(A) Constitution of India, Art. 14 — Cinematograph Act (1952), S. 5-B
(2) — Treatment of motion picture on different footing from other forms of art and expression is valid classification.

The treatment of motion pictures must be different from that of other forms of art and expression. This

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arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. Therefore, classification of films into two categories of 'U' films and 'A' films is a reasonable classification. The treatment of motion picture on a different footing is a valid classification. (Para 22)

(B) Constitution of India, Art. 19 (1) (a), (2) — Cinematograph Act (1952), Section 5-B (2) — Validity — Censorship justified by Constitution — General principles in directions by Central Government cannot be said to be vague — There is however absence of direction for preserving art — Some procedural safeguards are also needed — (Cinematograph Act (1952), S. 5-B (2)).

Censorship in India (from which pre-censorship is not different in quality) has full justification in the field of the exhibition of Cinema films and is justified under the Constitution. (Para 43)

Section 5-B (2) authorises the Central Government to issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition. The Central Government in dealing with the problem of Censorship will have to bear in mind the principles stated in sub-section (1). The Central Government's regulations are there for consideration in the light of the guaranteed freedom and if they offend substantially against that freedom, they may be struck down. But as they stand they cannot be challenged on the ground that any recondite theory of law-making or a critical approach to the separation of powers is infringed. The general principles which are stated in the directions seek to do no more than restate the permissible restrictions as stated in Art. 19 (2) and Section 5-B (1) of the Act. They cannot be said to be vague at all. The items mentioned in the directions are not by themselves defective.

The real flaw in the scheme of the directions is total absence of any direction which would tend to preserve art and promote it. Such directions need to be included. Whether this is done by Parliament or by the Central Government it hardly matters. The whole of the law and regulations under it will have always to be considered and if the further tests laid down in AIR 1965 SC 881 are followed, the system of censorship with the procedural safeguards, that there must be a reasonable time-limit fixed for the decision of the authorities censoring the film, and that the appeal should lie to a Court or to an independent tribunal and not to the Central Government will make censorship accord with our fundamental law. Case law discussed. (Paras 44, 45, 49, 53, 54)

(C) Constitution of India, Art. 19 — Law uncertain and prima facie taking away guaranteed freedom — Law offends Constitution.

If a law is vague or appears to be so, the Court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it must be in accordance with the intention of the legislature. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom the law must be held to offend the Constitution. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases. AIR 1961 SC 293, Rel. on; AIR 1969 SC 1100, Explained. (Para 48)

Cases Referred: Chronological Paras

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1971 K. A. Abbas v. Union of India (Hidayatullah C. J.) [Prs. 1-3] S. C. 433

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M/s. R. K. Garg, D. P. Singh and S. C. Agarwala, Advocates of M/s. Ramamurthi and Co. and M/s. R. K.

Jain, V. J. Francis and Miss. S. Chakravarti, Advocates, for Petitioner, Mr. Niren De, Attorney-General, for India and Mr. Jagadish Swarup, Solicitor-General of India, (M/s. J. M. Mukhi, R. N. Sachthey, and B. D. Sharma, Advocates, with them), for Respondents.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: — This petition seeks a declaration against the Union of India and the Chairman Central Board of Film Censors that the provisions of Part II of the Cinematograph Act, 1952 together with the rules prescribed by the Central Government, February 6, 1960, in the purported exercise of its powers under Section 5-B of the Act are unconstitutional and void. As a consequence the petitioner asks for a writ of mandamus or any other appropriate writ, direction or order quashing the directions contained in a letter (Annexure X) dated July 3, 1969 for deletion of certain shots from a documentary film entitled 'A Tale of Four Cities', produced by him for unrestricted public exhibition.

2. The petitioner is a journalist, play-wright and writer of short stories. He is also a producer and director of cinematograph films. He was a member of the Enquiry Committee on Film Censorship (1968) and is a member of the Children's Film Committee. He has produced and/or directed many films some of which have been well-received here and abroad and even won awards and prizes.

3. The petitioner produced in 1968 a documentary film in 2 reels (running time 16 minutes) called a Tale of Four Cities. In this film he purported to contrast the luxurious life of the rich in the four cities of Calcutta, Bombay, Madras and Delhi, with the squalor and poverty of the poor, particularly those whose hands and labour help to build beautiful cities, factories and other industrial complexes. The film is in black and white and is silent except for a song which the labourers sing while doing work and some background music and sounds for stage effect. The film in motion sequences or still shots, shows contrasting scenes of palatial buildings, hotels and factories — evidence

of the prosperity of a few, and shanties, huts and slums — evidence of poverty of the masses. These scenes alternate and in between are other scenes showing sweating labourers working to build the former and those showing the squalid private life of these labourers. Some shots mix people riding in lush motor cars with rickshaw and handcart pullers of Calcutta and Madras. In one scene a fat and prosperous customer is shown riding a rickshaw which a decrepit man pulls, sweating and panting hard. In a contrasting scene the same rickshaw puller is shown sitting in the rickshaw pulled by his former customer. This scene is the epitomisation of the theme of the film and on view are the statues of the leaders of Indian Freedom Movement looking impotently from their high pedestals in front of palatial buildings, on the poverty of the masses. On the boulevards, the rich drive past in limousines while the poor pull rickshaws or handcarts or stumble along.

4. There is included also a scanning shot of a very short duration, much blurred by the movement of the photographer's camera, in which the red light district of Bombay is shown with the inmates of the brothels waiting at the doors or windows. Some of them wear abbreviated skirts showing bare legs up to the knees and sometimes a short way above them. This scene was perhaps shot from a moving car because the picture is unsteady on the screen and under exposed. Sometimes the inmates, becoming aware of the photographer, quickly withdraw themselves. The whole scene barely lasts a minute. Then we see one of the inmates shutting a window and afterwards we see the hands of a woman holding some currency notes and a male hand plucking away most of them leaving only a very few in the hands of the female. The two actors are not shown. The suggestion in the first scene is that a customer is being entertained behind closed shutters and in the next sequence that the amount received is being shared between the pimp and the prostitute, the former taking almost the whole of the money. The sequence continues and for the first time the woman who shut the window is again seen. She

sits at the dressing table, combs her hair, glances at two love-birds in a cage and looks around the room as if it were a cage. Then she goes behind a screen and emerges in other clothes and prepares for bed. She sleeps and dreams of her life before she took the present path. The film then passes on to its previous theme of contrasts mentioned above, often repeating the earlier shots in juxtaposition as stills. There is nothing else in the film to be noticed either by us or by the public for which it is intended.

5. The petitioner applied to the Board of Film Censors for a 'U' certificate for unrestricted exhibition of the film. He received a letter (December 30, 1969) by which the Regional officer informed him that the Examining Committee and the Board had provisionally come to the conclusion that the film was not suitable for unrestricted public exhibition but was suitable for exhibition restricted to adults. He was given a chance to make representations against the tentative decision within 14 days. Later he was informed that the Revising Committee had reached the same conclusion. He represented by letter (February 18, 1969) explaining the purpose of the film as exposing the exploitation of man (or woman) by man and the contrast between the very rich few and the very poor masses. He claimed that there was no obscenity in the film. He was informed by a letter (February 26, 1969) that the Board did not see any reason to alter its decision and the petitioner could appeal within 30 days to the Central Government. The petitioner appealed the very next day. On July 3, 1969, the Central Government decided to give a 'U' certificate provided the following cuts were made in the film:

"Shorten the scene of women in the red light district, deleting specially the shot showing the closing of the window by the lady, the suggestive shots of bare knees and the passing of the currency notes". Dir. IC (iii) (b) (c); IV".

The mystery of the code numbers at the end was explained by a letter on July 23, 1969 to mean this:

"I. It is not desirable that a film shall be certified as suitable for public exhibition, either unrestricted or restricted to adults which

x x x x x x
C (iii) (b) and (c) deals with the relations between the sexes in such a manner as to depict immoral traffic in women and soliciting, prostitution or procuration.

IV. It is undesirable that a certificate for unrestricted public exhibition shall be granted in respect of a film depicting a story, or containing incidents unsuitable for young persons".

The petitioner then filed this petition claiming that his fundamental right of free speech and expression was denied by the order of the Central Government. He claimed a 'U' certificate for the film as of right.

6. Before the hearing commenced the film was specially screened for us. The lawyers of both sides (including the Attorney General) and the petitioner were also present. The case was then set down for hearing. The Solicitor-General (who had not viewed the film) appeared at the hearing. We found it difficult to question him about the film and at our suggestion the Attorney-General appeared but stated that Government had decided to grant a 'U' certificate to the film without the cuts previously ordered.

7. The petitioner then asked to be allowed to amend the petition so as to be able to challenge pre-censorship itself as offensive to freedom of speech and expression and alternatively the provisions of the Act and the rules, orders and directions under the Act, as vague, arbitrary and indefinite. We allowed the application for amendment, for the petitioner was right in contending that a person who invests his capital in promoting or producing a film must have clear guidance in advance in the matter of censorship of films even if the law of pre-censorship be not violative of the fundamental right.

8. When the matter came up for hearing the petitioner raised four points: (a) that pre-censorship itself cannot be tolerated under the freedom of speech and expression, (b) that even if it were a legitimate restraint on the freedom, it must be exercised on very definite principles which leave no room for arbitrary action, (c) that there must be a reasonable time-limit fixed for the decision of the authorities

censoring the film, and (d) that the appeal should lie to a Court or to an independent tribunal and not the Central Government.

9. The Solicitor-General conceded (c) and (d) and stated that Government would set on foot legislation to effectuate them at the earliest possible opportunity. Since the petitioner felt satisfied with this assurance we did not go into the matter. But we must place on record that the respondents exhibited charts showing the time taken in the censorship of films during the last one year or so and we were satisfied that except in very rare cases the time taken could not be said to be unreasonable. We express our satisfaction that the Central Government will cease to perform curial functions through one of its Secretaries in this sensitive field involving the fundamental right of speech and expression. Experts sitting as a Tribunal and deciding matters quasi-judicially inspire more confidence than a Secretary and therefore it is better that the appeal should lie to a Court or tribunal.

10. This brings us to the remaining two questions. We take up first for consideration: whether pre-censorship by itself offends the freedom of speech and expression. Article 19 (1) (a) and (2) of the Constitution contain the guarantee of the right and the restraints that may be put upon that right by a law to be made by Parliament. They may be read here:

"19. Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right—

(a) to freedom of speech and expression;

x x x x x"

(2) Nothing in sub-clause (a) of Clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause, in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence". The argument is that the freedom is

absolute and pre-censorship is not permissible under the Constitution. It is submitted that pre-censorship is inconsistent with the right guaranteed. Now it is clear that some restraint is contemplated by the second clause and in the matter of censorship only two ways are open to Parliament to impose restrictions. One is to lay down in advance the standards for the observance of film producers and then to test each film produced against those standards by a preview of the film. The other is to let the producer observe those standards and make the infraction an offence and punish a producer who does not keep within the standards. The petitioner claims that the former offends the guaranteed freedom but reluctantly concedes the latter and relies upon the minority view expressed in the United States Supreme Court from time to time. The petitioner reinforces this argument by contending that there are other forms of speech and expression besides the films and none of them is subject to any prior restraint in the form of pre-censorship and claims equality of treatment with such other forms. He claims that there is no justification for a differential treatment. He contends next that even the standards laid down are unconstitutional for many reasons which we shall state in proper place.

11. This is the first case in which the censorship of films in general and precensorship in particular have been challenged in this Court and before we say anything about the arguments, it is necessary to set down a few facts relating to censorship of films and how it works in India. The Government of India appointed a Committee on March 28, 1968 to enquire into the working of the existing procedures for certification of cinematograph films for public exhibition in India and allied matters, under the Chairmanship of Mr. G. D. Khosla, former Chief Justice of the Punjab High Court. The report of the Committee has since been published and contains a valuable summary of the law of censorship not only in India but also in foreign countries. It is hardly helpful to the determination of this case to go into this history but it may be mentioned here that it is the opinion of experts on the subject that Indian film censorship since our independence has become one of strictest

in the world: See Film Censors and the Law by Neville March Hunnings p. 227 and Filmrecht: ein Handbuch of Rerthold and von Hartleib (1957) p. 215 quoted by Hunnings. In 1966 Mr. Raj Bahadur (who succeeded Mrs. Indira Gandhi as Minister for Information and Broadcastings) said that Government would 'continue a liberal censorship' and was considering certain expert opinion on the subject. He also suggested to the film industry that it should formulate a code which would be the best from all standards so that Government may be guided by it in formulating directives to the censors'. See Journal of Film Industry, February 25, 1966 also quoted by Hunnings at page 18 of his book. This suggestion came to nothing for obvious reasons. Film industry in India is not even oligopolistic in character and it is useless to expect it to classify films according to their suitability, as is done in the United States by the Motion Picture Association of America (MPAA) founded in October, 1968. There the film industry is controlled by eight major producers and the private control of film-making is possible with the assistance of the National Association of Theatre Owners and Film Importers and Distributors of America. Having no such organisation for private censorship or even a private body like the British Board of Film Censors in England, the task must be done by Government if censorship is at all to be imposed. Films began to be exhibited in India at the turn of the last century and film censorship took birth in 1918 when the Cinematograph Act, 1918 (2 of 1918) was passed. Two matters alone were then dealt with: (a) the licensing of cinema houses, and (b) the certifying of films for public exhibition. The censors had a wide discretion and no standards for their action were indicated. Boards of Film Censors came into existence in the three Presidency towns and Rangoon. The Bombay Board drew up some instructions for Inspectors of Films and it copied the 43 rules formulated by T. P. O'Connor in England. These are more or less continued even today.

12. We do not wish to trace here the history of the development of film censorship in India. That task has been admirably performed by the Khosla Committee. Legislation in the

shape of amendments of the Act of 1918 and a Production Code were the highlights of the progress. In 1952 a fresh consolidating Act was passed and it is Act 37 of 1952 (amended in 1959 by Act 3 of 1959) and that is the present statutory provision on the subject. It established a Board of Film Censors and provided for Advisory Panels at Regional Centres. Every person desiring to exhibit any film has to apply for a certificate and the Board after examining the film or having the film examined deals with it by

(a) sanctioning the film for unrestricted public exhibition;

(b) sanctioning the film for public exhibition restricted to adults;

(c) directing such excisions and modifications as it thinks fit, before sanctioning the film for unrestricted public exhibition or for public exhibition restricted to adults, as the case may be;

or (d) refusing to sanction the film for public exhibition.

The film producer is allowed to represent his views before action under (b) (c) and (d) is taken. The sanction under (a) is by granting a 'U' certificate and under (b) by an 'A' certificate and the certificates are valid for ten years.

13. The Act then lays down the principles for guidance and for appeals in Sections 5-B and 5-C respectively. These sections may be read here:

"5B. Principles for guidance in certifying films.

(1) A film shall not be certified for public exhibition if, in the opinion of the authority competent to grant the certificate, the film or any part of it, is against the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or involves defamation or contempt of Court or is likely to incite the commission of any offence.

(2) Subject to the provisions contained in sub-section (1), the Central Government may issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under this Act in sanctioning films for public exhibition".

"5C. Appeals.

Any person applying for a certificate in respect of a film who is aggrieved by any order of the Board—

(a) refusing to grant a certificate; or

(b) granting only an "A" certificate; or

(c) directing the applicant to carry out any excisions or modifications;

may, within thirty days from the date of such order, appeal to the Central Government, and the Central Government may, after such inquiry into the matter as it considers necessary and after giving the appellant an opportunity for representing his views in the matter, make such order in relation thereto as it thinks fit".

By Section 6, the Central Government has reserved a general revising power which may be exercised during the pendency of a film before the Board and even after it is certified. Under the latter part of this power the Central Government may cancel a certificate already granted or change the 'U' certificate into an 'A' certificate or may suspend for 2 months the exhibition of any film.

14. The above is the general scheme of the legislation on the subject omitting allied matters in which we are not interested in this case. It will be noticed that Section 5-B (1) really reproduces Clause (2) of Article 19 as it was before its amendment by the First Amendment. This fact has led to an argument which we shall notice presently. The second sub-section of Section 5-B enables the Central Government to state the principles to guide the censoring authority, by issuing directions. In furtherance of this power the Central Government has given directions to the Board of Film Censors. They are divided into General Principles, three in number, followed by directions for their application in what are called 'rules'. The part dealing with the application of the principles is divided into Four Sections and each section contains matters which may not be the subject of portrayal in films. We may quote the General Principles here:

"1. No picture shall be certified for public exhibition which will lower the moral standards of those who see it.

Hence, the sympathy of the audience shall not be thrown on the side of crime, wrong-doing, evil or sin.

2. Standards of life, having regard to the standards of the country and the people to which the story relates, shall not be so portrayed as to deprave the morality of the audience.

3. The prevailing laws shall not be so ridiculed as to create sympathy for violation of such laws".

The application of the General Principles is indicated in the four sections of the rules that follow so that a uniform standard may be applied by the different regional panels and Boards. The first section deals with films which are considered unsuitable for public exhibition. This section is divided into Clauses A to F. Clause A deals with the delineation of crime, B with that of vice or immorality, C with that of relations between sexes, D with the exhibition of human form, E with the bringing into contempt of armed forces, or the public authorities entrusted with the administration of law and order and F with the protection of the susceptibilities of foreign nations and religious communities, with fomenting social unrest or discontent to such an extent as to incite people to crime and promoting disorder, violence, a breach of the law or disaffection or resistance to Government.

15. Clauses E and F are further explained by stating what is unsuitable and what is objectionable in relation to the topics under those clauses.

16. Section II then enumerates subjects which may be objectionable in a context in which either they amount to indecency, immorality, illegality or incitement to commit a breach of the law.

17. Section III then provides:

"It is not proposed that certification of a film should be refused altogether, or that it should be certified as suitable for adult audiences only, where the deletion of a part or parts, will render it suitable for unrestricted public exhibition or for exhibition restricted to adults, and such deletion is made, unless the film is such as to deprave the majority of the audience and even excisions will not cure the defects."

18. Section IV deals with the protection of young persons and en-

joins refusal of a certificate for unrestricted public exhibition in respect of a film depicting a story or containing incidents unsuitable for young persons. Emphasis in this connection is laid in particular upon—

(i) anything which may strike terror in a young person, e. g., scenes depicting ghosts, brutality, mutilations, torture, cruelty, etc.;

(ii) anything tending to disrupt domestic harmony or the confidence of a child in its parents e. g., scenes depicting parents quarrelling violently, or one of them striking the other or one or both of them behaving immorally,

(iii) anything tending to make a person of tender years insensitive to cruelty to others or to animals.

19. In dealing with crime under Section I, Clause A, the glorification or extenuation of crime, depicting the modus operandi of criminals, enlisting admiration or sympathy for criminals, holding up to contempt the forces of law against crime etc., are indicated as making the film unsuitable for exhibition. In Clause B similar directions are given with regard to vice and immoral acts and vicious and immoral persons. In Clause C the unsuitability arises from lowering the sacredness of the institution of marriage and depicting rape, seduction and criminal assaults on women, immoral traffic in women soliciting, prostitution or procuration, illicit sexual relations, excessively passionate love scenes, indelicate sexual situations and scenes suggestive of immorality. In Clause D the exhibition of human form in nakedness or indecorously or suggestively dressed and indecorous and sensuous postures are condemned. In Section II are mentioned confinements, details of surgical operations, venereal diseases and loathsome diseases like leprosy and sores, suicide or genocide, female under clothing, indecorous dancing, importunation of women, cruelty to children, torture of adults, brutal fighting, gruesome murders or scenes of strangulation, executions, mutilations and bleeding cruelty to animals, drunkenness or drinking not essential to the theme of the story, traffic and use of drugs, class hatred, horrors of war, horror as a predominant element, scenes likely to afford information to the enemy in time of war, exploitation of tragic incidents of war, blackmail

associated with immorality, intimate biological studies, crippled limbs or malformations, gross travesties of administration of justice and defamation of any living person.

20. We have covered almost the entire range of instructions. It will be noticed that the control is both thematic and episodic. If the theme offends the rules and either with or without excision of the offending parts, the film remains still offensive, the certificate is refused. If the excisions can remove its offensiveness, the film is granted a certificate. Certifiable films are classified according to their suitability for adults or young people. This is the essential working of censorship of motion pictures in our country.

21. The first question is whether films need censorship at all? Pre-censorship is but an aspect of censorship and bears the same relationship in quality to the material as censorship after the motion picture has had a run. The only difference is one of the stage at which the State interposes its regulations between the individual and his freedom. Beyond this there is no vital difference. That censorship is prevalent all the world over in some form or other and pre-censorship also plays a part where motion pictures are involved, shows the desirability of censorship in this field. The Khosla Committee has given a description generally of the regulations for censorship (including pre-censorship) obtaining in other countries and Hunning's book deals with these topics in detail separately for each country. The method changes, the rules are different and censorship is more strict in some places than in others, but censorship is universal. Indeed the petitioner himself pronounced strongly in favour of it in a paper entitled 'Creative Expression' written by him. This is what he said:

"But even if we believe that a novelist or a painter or a musician should be free to write, paint and compose music without the interference of the State machinery, I doubt if anyone will advocate the same freedom to be extended to the commercial exploitation of a powerful medium of expression and entertainment like the cinema. One can imagine the results if an unbridled commercial cinema is

allowed to cater to the lowest common denominator of popular taste, specially in a country which, after two centuries of political and cultural domination, is still suffering from a confusion and debasement of cultural values.

Freedom of expression cannot and should not, be interpreted as a licence for the cinemagnates to make money by pandering to, and thereby propagating, shoddy and vulgar taste."

22. Further it has been almost universally recognised that the treatment of motion pictures must be different from that of other forms of art and expression. This arises from the instant appeal of the motion picture, its versatility, realism (often surrealism), and its co-ordination of the visual and aural senses. The art of the cameraman, with trick photography, vista-vision and three dimensional representation thrown in, has made the cinema picture more true to life than even the theatre or indeed any other form of representative art. The motion picture is able to stir up emotions more deeply than any other product of art. Its effect particularly on children and adolescents is very great since their immaturity makes them more willingly suspend their disbelief than mature men and women. They also remember the action in the picture and try to emulate or imitate what they have seen. Therefore, classification of films into two categories of 'U' films and 'A' films is a reasonable classification. It is also for this reason that motion pictures must be regarded differently from other forms of speech and expression. A person reading a book or other writing or hearing a speech or viewing a painting or sculpture is not so deeply stirred as by seeing a motion picture. Therefore the treatment of the latter on a different footing is also a valid classification.

23. The petitioner pressed for acceptance of the minority views expressed from time to time in the Supreme Court of the United States and it is, therefore, necessary to say a few words about censorship of motion pictures in America and the impact of the First Amendment guaranteeing freedom of speech and expression in that country. The leading cases in the United States are really very few but they are followed in a very large number of per curiam decisions in which,

while concurring with the earlier opinion of the Court, there is sometimes a restatement with a difference. As early as 1914 in *Mutual Film Corp. v. Industrial Commission of Ohio*, (1915) 236 US 230, Mr. Justice McKenna, speaking for the full Court, said that legislative power is not delegated unlawfully when a board of censors is set up to examine and censor, as a condition precedent to exhibition, motion picture films, to be publicly exhibited and displayed, with a view to passing and approving only such of them as are in the judgment of the board, moral, educational or amusing and forbidding those that are not. Speaking of the criteria stated in general words, it was said that general terms get "precision from the sense and experience of men and become certain and useful guides in reasoning and conduct". The first notice of change came in 1925 in *Gitlow v. New York*, (1925) 268 US 652, when it was said that censorship had to pass the scrutiny of the First Amendment through the Fourteenth Amendment before speech and expression could be abridged by State laws. To this was added, in 1919 the test of 'clear and present danger' propounded by Justice Holmes as the only basis for curtailing the freedom of speech and expression, see *Schenck v. United States*, (1919) 249 US 47, and Justice Brandeis in *Witney v. California*, (1927) 247 US 357, laid down three components of the test:

"(a) There must be a clear and present danger that speech would produce a substantial evil that the State has power to prevent. This is not to say that it is enough if there is 'fear', there must be reasonable grounds to fear that serious evil would result from the exercise of speech and expression;

(b) There must be a 'present' or 'imminent' danger and for this there must be reasonable grounds to hold this opinion and that no reasonable opportunity was available to avert the consequences; and

(c) The substantive evil to be prevented must be 'serious' before there can be a prohibition on freedom of speech and expression for the police power of the State could not be exercised to take away the guarantee to avert a relatively trivial harm to society".

24. In 1931 in *Near v. Minnesota*, (1931) 283 US 697 immunity of press from pre-censorship was denied but pre-censorship (as it is termed previous restraint) was not to be unlimited. A major purpose of the First Amendment was to prevent prior restraint. The protection was not unlimited but put on the State the burden of showing that the limitation challenged in the case was exceptional.

25. In 1941 the Court handed down in *Chaplinsky v. New Hampshire*, (1941) 315 US 567 the opinion that free speech was not absolute at all times and in all circumstances, that there existed certain

"well-defined and narrowly limited classes of speech, the prevention and punishment of which had never been thought to raise any constitutional problem".

26. This state of affairs continued also in respect of motion pictures and the regulation of their public exhibition. Real attention was focussed on censorship after 1951. The effect of World War II on American Society was the real cause because peoples' notions of right and wrong from a social point of view drastically altered. Added to this were the inroads made by Justices Douglas and Black in *Dennis v. United States*, (1951) 341 US 494 in the previously accepted propositions which according to them made the First Amendment no more than an admonition to Congress. In *Beauharnais v. Illinois*, (1952) 343 US 250 Justice Douglas claimed for the freedom of speech, a preferred position because the provision was in absolute terms, an opinion which has since not been shared by the majority of the Court.

27. In 1951 there came the leading decision *Burstyn v. Wilson*, (1951) 343 US 495. This case firmly established that motion pictures were within the protection of the First Amendment through the Fourteenth. While recognising that there was no absolute freedom to exhibit every motion picture of every kind at all times and places, and that constitutional protection even against a prior restraint was not absolutely unlimited, limitation was said to be only in exceptional cases. It however laid down that censorship on free speech

and expression was ordinarily to be condemned but the precise rules governing other methods of expression were not necessarily applicable.

28. The application of the 14th Amendment has now enabled the Court to interfere in all cases of State restrictions where censorship fails to follow due process. The result has led to a serious conflict in the accepted legal opinion. The Supreme Court has had to deal with numerous cases in which censorship was questioned.

29. The divergence of opinion in recent years has been very deep. Censorship of press, art and literature is on the verge of extinction except in the ever shrinking area of obscenity. In the field of censorship of the motion picture there has been a tendency to apply the 'void for vagueness' doctrine evolved under the due process clause. Thus regulations containing such words as 'obscene', 'indecent', 'immoral', 'prejudicial to the best interests of people', 'tending to corrupt morals', 'harmful' were considered vague criteria. In *Kingsley International Pictures Corp. v. Regents*, (1959) 360 US 684, where the film *Lady Chatterley's Lover* was in question, certain opinions were expressed. These opinions formed the basis of the arguments on behalf of the petitioner. Justice Black considered that the Court was the worst of Board Censors because they possessed no special expertise. Justice Frankfurter was of the opinion that

'legislation must not be so vague, the language so loose, as to leave to those who have to apply it too wide a discretion for sweeping within its condemnation what was permissible expression as well as what society might permissibly prohibit, always remembering that the widest scope for freedom was to be given to the adventurous and imaginative exercise of human spirit

Justice Douglas considered prior restraint as unconstitutional. According to him if a movie violated a valid law, the exhibitor could be prosecuted.

30. The only test that seemed to prevail was that of obscenity as propounded in *Roth v. United States*, (1957) 354 US 476. In that three tests were laid down:

(a) that the dominant theme taken as a whole appeals to prurient

interests according to the contemporary standards of the average man;

(b) that the motion picture is not saved by any redeeming social value; and

(c) that it is patently offensive because it is opposed to contemporary standards.

The *Hicklin* test in *Regira v. Hicklin*, (1868) 3 QB 360 was not accepted.

31. Side by side procedural safeguards were also considered. The leading case is *Freedmen v. Maryland*, (1965) 380 US 51 where the Court listed the following requirements for a valid film statute:

1. The burden of proving that the film is obscene rests on the censor.

2. Final restraint (denial of licence) may only occur after judicial determination of the obscenity of the material.

3. The censor will either issue the license or go into Court himself for a restraining order.

4. There must be only a 'brief period' between the censor's first consideration of film and final judicial determination. (As summarized by Martin Shapiro *Freedom of Speech: The Supreme Court and Judicial Review*).

These were further strengthened recently in *Teitel Film Corp. v. Cusack*, (1968) 390 US 139 (a per curiam decision) by saying that a non-criminal process which required the prior submission of a film to a censor avoided constitutional infirmity only if censorship took place under procedural safeguards. The censorship system should therefore, have a time limit. The censor must either pass the film or go to Court to restrain the showing of the film and the Court also must give a prompt decision. A delay of 50-57 days was considered too much. The statute in question there had meticulously laid down the time for each stage of examination but had not fixed any time limit for prompt judicial determination and this proved fatal.

32. The fight against censorship was finally lost in the *Times Film Corporation v. Chicago*, (1961) 365 US 43 but only by the slender majority of one. Chief Justice Warren and Justices Black, Douglas and Brennan dissented. The views of these Judges were pressed upon us. Chief Justice Warren thought that there ought to be first an exhibition of an allegedly

'obscene film' because Government could not forbid the exhibition of a film in advance. Thus prior restraint was said to be impermissible. Justice Douglas went further and said that censorship of movies was unconstitutional. Justice Clark, on the other hand, speaking for the majority, said:

".....It has never been held that liberty of speech is absolute. Nor has it been suggested that all previous restraints on speech are invalid.

x x x x x x

It is not for this Court to limit the State in its selection of the remedy it deems most effective to cope with such a problem, absent, of course, a showing of unreasonable strictures on individual liberty resulting from its application in particular circumstances".

The argument that exhibition of moving pictures ought in the first instance to be free and only a criminal prosecution should be the mode of restraint when found offensive was rejected. The pre-censorship involved was held to be no ground for striking down a law of censorship. The minority was of the opinion that a person producing a film must know what he was to do or not to do. For, if he were not sure he might avoid even the permissible.

33. In *Interstate Circuit Inc. v. Dallas*, (1968) 390 US 676 certain expressions were considered vague including 'crime delinquency' 'sexual promiscuity' 'not suitable for young persons'. According to the Court the statute must state narrowly drawn, reasonably definite, standards for the Board to follow. Justice Harlan, however, observed that the Courts had not found any more precise expressions and more could not be demanded from the legislature than could be said by the Court. However precision of regulation was to be the touchstone of censorship and while admitting that censorship was admissible, it was said that too wide a discretion should not be left to the censors.

34. Meanwhile in *Jacobellis v. Ohio*, (1964) 378 US 184 it was held that laws could legitimately aim specifically at preventing distribution of objectionable material to children and thus it approved of the system of age-classification. (1968) 390 US 676, (supra) and *Ginsberg v. New York*

(1968) 390 US 629 set the seal on validity of age-classification as constitutionally valid.

35. There are two cases which seem to lie outside the main-stream. Recently in *Stanley v. Georgia*, (1969) 394 US 557 the Court seems to have gone back on the Roth case, (1957) 354 US 476 (supra) and held that the right to receive information and ideas, regardless of their social worth, is also fundamental to society. Another exception can only be understood on the basis of the recognition of the needs of a permissive society. Thus *Mishkin v. New York*, (1966) 383 US 502, removes the test of the average person by saying that if the material is designed for a deviant sexual group, the material can only be censored if taken as a whole, it appeals to the prurient interest in sex of the members of that group. This is known as the selective-audience obscenity test and even children are in a special class. See (1968) 390 US 629, (supra). On the whole, however, there is in this last case a return to the Hicklin test in that obscenity is considered even from isolated passages.

36. To summarize. The attitude of the Supreme Court of the United States is not as uniform as one could wish. It may be taken as settled that motion picture is considered a form of expression and entitled to protection of First Amendment. The view that it is only commercial and business and, therefore, not entitled to the protection as was said in *Mutual Film Corpn.*, (1915) 236 US 230, (supra) is not now accepted. It is also settled that freedom of speech and expression admits of extremely narrow restraints in cases of clear and present danger, but included in the restraints are prior as well as subsequent restraints. The censorship should be based on precise statement of what may not be subject-matter of film-making and this should allow full liberty to the growth of art and literature. Age-classification is permissible and suitability for special audiences is not to depend on whether the average man would have considered the film suitable. Procedural safeguards as laid down in *Freedmen case*, (1965) 380 US 51 (supra) must also be observed. The film can only be censored if it offends in the manner set out in Roth's case.

37. The petitioner put before us all these dicta for our acceptance and added to them the rejection of censorship, particularly prior censorship by Chief Justice Warren and Justices Black and Douglas. He pointed out that in England too the censorship of the theatre has been abolished by the Theatres Act, 1968 (1968 C 54) and submitted that this is the trend in advanced countries. He also brought to our notice the provisions of the Obscene Publications Act, 1959 (7 and 8 Eliz. 2 C. 66), where the test of obscenity is stated thus:

"1. Test of obscenity.

(1) For the purposes of this Act an article shall be deemed to be obscene if its effect or (where the article comprises two or more distinct items) the effect of any one of its items is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

"x x x x x x",
and the defence of public good is stated thus:

"4. Defence of public good.

(1) A person shall not be convicted of an offence against section two of this Act, and an order for forfeiture shall not be made under the foregoing section, if it is proved that publication of the article in question is justified as being for the public good on the ground that it is in the interests of science, literature, art or learning, or of other objects of general concern.

(2) It is hereby declared that the opinion of experts as to the literary, artistic, scientific or other merits of an article may be admitted in any proceedings under this Act either to establish or to negative the said ground". He contended that we must follow the above provisions.

38 We may now consider the English practice. In England there was little freedom of speech to start with. The Common Law made no provision for it. The two constitutional documents — the Petition of Right (1628) and the Bill of Rights (1689) — do not mention it. By the time of Queen Elizabeth I presses were controlled through licences and although they were granted, no book could be issued without the sanction of

Government. The Star Chamber tried several cases of censorship and it even continued in the days of Cromwell. Milton was the first to attack censorship in his *Areopagitica* and that had profound effect on the freedom of speech. We find quotations from his writings in the opinions of Chief Justice Warren and Justice Douglas. Freedom of speech came to be recognised by slow stages and it was Blackstone who wrote in his *Commentaries* (Book IV p. 1517)—

"The liberty of the Press is indeed essential to the nature of a free State, but this consists in laying no previous restraints upon publications". But censorship of theatres continued and no theatre could be licensed or a play performed without the sanction of the Lord Chamberlain. By the Theatres Act, 1843 the Lord Chamberlain was given statutory control over the theatres. He could forbid the production of a play for the preservation of good manners, decorum or the public peace. There was ordinarily no censorship of the press in England. When cinematograph came into being the Cinematograph Act, 1909 was passed to control cinemas. It has now been amended by the Cinematograph Act of 1952. Restrictions were placed on the exhibition of films to children (Section 4) and on the admission of children to certain types of film. Today censorship of films is through the British Board of Film Censors which is an independent body not subject to control by the State. An elaborate inquiry is already on foot to consider whether State control is needed or not. Censorship of films is run on the lines set by T. P. O'Connor in 1918. These directions, as we said earlier, have had a great influence upon our laws and our directions issued by the Central Government, follow closely the 43 points of T. P. O'Connor. It is wrong to imagine that there is no censorship in England. The Khosla Committee (p. 32) has given examples of the cuts ordered and also a list of films which were found unsuitable. The Board has never worked to a Code although the directions are followed. By 1950 three general principles were evolved. They are

1. Was the story, incident or dialogue likely to impair the moral

standards of the public by extenuating vice or crime or depreciating moral standards?

2. Was it likely to give offence to reasonably minded cinema audiences?

3. What effect would it have on the minds of children?

39. We have digressed into the practice of the United States and the United Kingdom because analogies from these two countries were mainly relied upon by the petitioner and they serve as a very appropriate background from which to begin discussion on the question of censorship and the extent to which it may be carried.

40. To begin with our fundamental law allows freedom of speech and expression to be restricted as Clause (2) itself shows. It was observed in *Ranjit D. Udeshi v. State of Maharashtra*, (1965) 1 SCR 65 at p. 70 = (AIR 1965 SC 881).

"Speaking in terms of the Constitution it can hardly be claimed that obscenity which is offensive to modesty or decency is within the constitutional protection given to free speech or expression, because the article dealing with the right itself excludes it. That cherished right on which our democracy rests is meant for the expression of free opinions to change political or social conditions, or for the advancement of human knowledge. This freedom is subject to reasonable restrictions which may be thought necessary in the interest of the general public and one such is the interest of public decency and morality. Section 292, Indian Penal Code, manifestly embodies such a restriction because the law against obscenity, of course, correctly understood and applied, seeks no more than to promote public decency and morality."

We adhere to this statement and indeed it is applicable to the other spheres where control is tolerated under our fundamental law. The argument that Section 5-B of the Cinematograph Act does not reproduce the full effect of the second clause of Article 19 need not detain us. It appears that the draftsman used a copy of the Constitution as it was before the First Amendment and fell into the error of copying the obsolete clause. That, however, does not make any difference. The Constitution has to be

read first and the section next. The latter can neither take away nor add to what the Constitution has said on the subject. The word 'reasonable' is not to be found in Section 5-B but it cannot mean that the restrictions can be unreasonable. Not only the sense of the matter but the existence of the constitutional provision in *pari materia* must have due share and reading the provisions of the Constitution we can approach the problem without having to adopt a too liberal construction of Section 5-B.

41. It, therefore, follows that the American and the British precedents cannot be decisive and certainly not the minority view expressed by some of the Judges of the Supreme Court of the former. The American Constitution stated the guarantee in absolute terms without any qualification. The Judges try to give full effect to the guarantee by every argument they can validly use. But the strongest proponent of the freedom (Justice Douglas) himself recognised in the *Kingsley* case that there must be a vital difference in approach. This is what he said:

"If we had a provision in our Constitution for 'reasonable' regulation of the press such as India has included in hers, there would be room for argument that censorship in the interests of morality would be permissible".

In spite of the absence of such a provision Judges in America have tried to read the words 'reasonable restrictions' into the First Amendment and thus to make the rights it grants subject to reasonable regulation. The American cases in their majority opinions, therefore, clearly support a case of censorship.

42. It would appear from this that censorship of films, their classification according to age groups and their suitability for unrestricted exhibition with or without excisions is regarded as a valid exercise of power in the interests of public morality, decency etc. This is not to be construed as necessarily offending the freedom of speech and expression. This has, however, happened in the United States and therefore decisions, as Justice Douglas said in his *Tagore Law Lectures* (1939), have the flavour of due process rather than what was

conceived as the purpose of the First Amendment. This is because social interests of the people override individual freedom. Whether we regard the state as the *paren patriae* or as guardian and promotor of general welfare, we have to concede, that these restraints on liberty may be justified by their absolute necessity and clear purpose. Social interests take in not only the interests of the community but also individual interests which cannot be ignored. A balance has therefore to be struck between the rival claims by reconciling them. The larger interests of the community require the formulation of policies and regulations to combat dishonesty, corruption, gambling, vice and other things of immoral tendency and things which affect the security of the State and the preservation of public order and tranquillity. As Ahrens said the question calls for a good philosophical compass and strict logical methods.

43. With this preliminary discussion we say that censorship in India (and pre-censorship is not different in quality) has full justification in the field of the exhibition of cinema films. We need not generalize about other forms of speech and expression here for each such fundamental right has a different content and importance. The censorship imposed on the making and exhibition of films is in the interests of society. If the regulations venture into something which goes beyond this legitimate opening to restrictions, they can be questioned on the ground that a legitimate power is being abused. We hold, therefore, that censorship of films including prior restraint is justified under our Constitution.

44. This brings us to the next questions: How far can these restrictions go? and how are they to be imposed? This leads to an examination of the provisions contained in S. 5B (2). That provision authorises the Central Government to issue such directions as it may think fit setting out the principles which shall guide the authority competent to grant certificates under the Act in sanctioning films for public exhibition.

45. The first question raised before us is that the legislature has not indicated any guidance to the

Central Government. We do not think that this is a fair reading of the section as a whole. The first sub-section states the principles and read with the second clause of the nineteenth article it is quite clearly indicated that the topics of films or their content should not offend certain matters there set down. The Central Government in dealing with the problem of censorship will have to bear in mind those principles and they will be the philosophical compass and the logical methods of Ahrens. Of course, Parliament can adopt the directions and put them in schedule to the Act (and that may still be done), it cannot be said that there is any delegation of legislative function. If Parliament made a law giving power to close certain roads for certain vehicular traffic at stated times to be determined by the Executive authorities and they made regulations in the exercise of that power, it cannot for a moment be argued that this is insufficient to take away the right of locomotion. Of course, everything may be done by legislation but it is not necessary to do so if the policy underlying regulations is clearly indicated. The Central Government's regulations are there for consideration in the light of the guaranteed freedom and if they offend substantially against that freedom, they may be struck down. But as they stand they cannot be challenged on the ground that any recondite theory of law making or a critical approach to the separation of powers is infringed. We are accordingly of the opinion that Section 5B (2) cannot be challenged on this ground.

46. This brings us to the manner of the exercise of control and restriction by the directions. Here the argument is that most of the regulations are vague and further that they leave no scope for the exercise of creative genius in the field of art. This poses the first question before us whether the 'void for vagueness' doctrine is applicable. Reliance in this connection is placed on *Municipal Committee Amritsar v. State of Punjab* AIR 1969 SC 1100. In that case a Division Bench of this Court lays down that an Indian Act cannot be declared invalid on the ground that it violates the due process clause or that it is vague. Shah J., speaking for the Division Bench, observes:

"... The rule that an Act of a competent legislature may be 'struck down' by the Courts on the ground of vagueness is alien to our constitutional system. The Legislature of the State of Punjab was competent to enact legislation in respect of 'fairs': vide Entry 28 of List II of the 7th Schedule to the Constitution. A law may be declared invalid by the superior Courts in India if the legislature has no power to enact the law or that the law violates any of the fundamental rights guaranteed in Part III of the Constitution or is inconsistent with any constitutional provision, but not on the ground that it is vague".

The learned Judge refers to the practice of the Supreme Court of the United States in *Claude C. Connally v. General Construction Co.* (1926) 70 Law Ed 322 where it was observed:

"A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law."

The learned Judge observes in relation to this as follows:

"But the rule enunciated by the American Courts has no application under our constitutional set up. This rule is regarded as an essential of the 'due process clause' incorporated in the American Constitution by the 5th and 14th Amendments. The Courts in India have no authority to declare a statute invalid on the ground that it violates 'the due process of law'. Under our Constitution, the test of due process of law cannot be applied to the statutes enacted by the Parliament or the State Legislature."

Relying on the observations of Kania C. J. in *A. K. Gopalan v. State of Madras*, 1950 SCR 88 = (AIR 1950 SC 27) to the effect that a law cannot be declared void because it is opposed to the spirit supposed to pervade the Constitution but not expressed in words, the conclusion above set out is reiterated. The learned Judge, however, adds that the words 'cattle fair' in Act there considered, are sufficiently clear and there is no vagueness.

47. These observations which are clearly obiter are apt to be too generally applied and need to be explained. While it is true that the

principles evolved by the Supreme Court of the United States of America in the application of the Fourteenth Amendment were eschewed in our Constitution and instead the limits of restrictions on each fundamental right were indicated in the clauses that follow the first clause of the nineteenth article, it cannot be said as an absolute principle that no law will be considered bad for sheer vagueness. There is ample authority for the proposition that a law affecting fundamental rights may be so considered. A very pertinent example is to be found in *State of Madhya Pradesh v. Baldeo Prasad*, (1961) 1 SCR 970 at p. 979 = (AIR 1961 SC 293) where the Central Provinces and Berar Goondas Act, 1946 was declared void for uncertainty. The condition for the application of Sections 4 and 4-A was that the person sought to be proceeded against must be a goonda but the definition of goonda in the Act indicated no tests for deciding which person fell within the definition. The provisions were therefore, held to be uncertain and vague.

48. The real rule is that if a law is vague or appears to be so, the Court must try to construe it, as far as may be, and language permitting, the construction sought to be placed on it, must be in accordance with the intention of the legislature. Thus if the law is open to diverse construction, that construction which accords best with the intention of the legislature and advances the purpose of legislation, is to be preferred. Where however the law admits of no such construction and the persons applying it are in a boundless sea of uncertainty and the law prima facie takes away a guaranteed freedom, the law must be held to offend the Constitution as was done in the case of the Goonda Act. This is not application of the doctrine of due process. The invalidity arises from the probability of the misuse of the law to the detriment of the individual. If possible, the Court instead of striking down the law may itself draw the line of demarcation where possible but this effort should be sparingly made and only in the clearest of cases.

49. Judging the directions from this angle, we find that there are general principles regarding the films

as a whole and specific instances of what may be considered as offending the public interest as disclosed in the clause that follows the enunciation of the freedoms in Article 19 (1) (a). The general principles which are stated in the directions seek to do no more than restate the permissible restrictions as stated in Clause (2) of Article 19 and Section 5-B (1) of the Act. They cannot be said to be vague at all. Similarly, the principles in Section IV of the directions in relation to children and young persons are quite specific and also salutary and no exception can be taken. It is only the instances which are given in Section I, Clauses A to D which need to be considered. Read individually they give ample direction as to what may not be included. It is argued on the basis of some American cases already noticed by us that these expressions are vague. We do not agree. The words used are within the common understanding of the average man. For example the word 'rape' indicates what the word is, ordinarily, understood to mean. It is hardly to be expected or necessary that the definition of rape in the Penal Code must be set down to further expose the meaning. The same may be said about almost all the terms used in the directions and discussed before us. We do not propose to deal with each topic for that is really a profitless venture. Fundamental rights are to be judged in a broad way. It is not a question of semantics but of the substance of the matter. It is significant that Justice Douglas who is in favour of a very liberal and absolute application of the First Amendment in America is of the view that 'sexual promiscuity' was not vague, while those in favour of prior restraints thought that it was. We have referred earlier to the case. We are quite clear that expressions like 'seduction', 'immoral traffic in women', 'soliciting, prostitution or procurement', 'indelicate sexual situation' and 'scenes suggestive of immorality', 'traffic and use of drugs', 'class hatred', 'blackmail associated with immorality' are within the understanding of the average man and more so of persons who are likely to be the panel for purposes of censorship. Any more definiteness is not only not expected but is not possible. Indeed if we were required

to draw up a list we would also follow the same general pattern.

50. But what appears to us to be the real flaw in the scheme of the directions is a total absence of any direction which would tend to preserve art and promote it. The artistic appeal or presentation of an episode robs it of its vulgarity and harm and this appears to be completely forgotten. Artistic as well as inartistic presentations are treated alike and also what may be socially good and useful and what may not. In *Ranjit D. Udeshi's* case, (1965) 1 SCR 65 = (AIR 1965 SC 881), this Court laid down certain principles on which the obscenity of a book was to be considered with a view to deciding whether the book should be allowed to circulate or withdrawn. Those principles apply mutatis mutandis to films and also other areas besides obscenity. The Khosla Committee also adopted them and recommended them for the guidance of the film censors. We may reproduce them here as summarized by the Khosla Committee:

"The Supreme Court laid down the following principles which must be carefully studied and applied by our censors when they have to deal with a film said to be objectionable on the ground of indecency or immorality:

(1) Treating with sex and nudity in art and literature cannot be regarded as evidence of obscenity without something more.

(2) Comparison of one book with another to find the extent of permissible action is not necessary.

(3) The delicate task of deciding what is artistic and what is obscene has to be performed by Courts and in the last resort, by the Supreme Court and so, oral evidence of men of literature or others on the question of obscenity is not relevant.

(4) An overall view of the obscene matter in the setting of the whole work would of course be necessary but the obscene matter must be considered by itself and separately to find out whether it is so gross and its obscenity is so decided that it is likely to deprave or corrupt those whose minds are open to influence of this sort and into whose hands the book is likely to fall.

(5) The interests of contemporary society and particularly the influence

of the book etc., on it must not be overlooked.

(6) Where obscenity and art are mixed, art must be so preponderating as to throw obscenity into shadow or render the obscenity so trivial and insignificant that it can have no effect and can be overlooked.

(7) Treating with sex in a manner offensive to public decency or morality which are the words of our Fundamental Law judged by our national standards and considered likely to pander to lascivious, prurient or sexually precocious minds must determine the result.

(8) When there is propagation of ideas, opinions and informations or public interest or profits, the interests of society may tilt the scales in favour of free speech and expression. This books on medical science with intimate illustrations and photographs though in a sense immodest, are not to be considered obscene, but the same illustrations and photographs collected in a book from without the medical text would certainly be considered to be obscene.

(9) Obscenity without a preponderating social purposes or profit cannot have the constitutional protection of free speech or expression. Obscenity is treating with sex in a manner appearing to the carnal side of human nature or having that tendency. Such a treating with sex is offensive to modesty and decency.

(10) Knowledge is not a part of the guilty act. The offender's knowledge of the obscenity of the book is not required under the law and it is a case of strict liability".

Application of these principles does not seek to whittle down the fundamental right of free speech and expression beyond the limits permissible under our Constitution for however high or cherished that right it does not go to pervert or harm society and the line has to be drawn somewhere. As was observed in the same case:

"..... The test which we evolve must obviously be of a general character but it must admit of a just application from case to case by indicating a line of demarcation not necessarily sharp but sufficiently distinct to distinguish between that which is obscene and that which is not". A similar line has to be drawn in the

case of every topic in films considered unsuitable for public exhibition or specially to children.

51. We may now illustrate our meaning how even the items mentioned in the directions may figure in films subject either to their artistic merit or their social value over-weighing their offending character. The task of the censor is extremely delicate and his duties cannot be the subject of an exhaustive set of commands established by prior ratiocination. But direction is necessary to him so that he does not sweep within the terms of the directions vast areas of thought, speech and expression of artistic quality and social purpose and interest. Our standards must be so framed that we are not reduced to a level where the protection of the least capable and the most depraved amongst us determines what the morally healthy cannot view or read. The standards that we set for our censors must make a substantial allowance in favour of freedom thus leaving a vast area for creative art to interpret life and society with some of its foibles along with what is good. We must not look upon such human relationships as banned in toto and for ever from human thought and must give scope for talent to put them before society. The requirements of art and literature include within themselves a comprehensive view of social life and not only in its ideal form and the line is to be drawn where the average man or moral man begins to feel embarrassed or disgusted at a naked portrayal of life without the redeeming touch of art or genius or social value. If the depraved begins to see in these things more than what an average person would, in much the same way, as it is wrongly said, a Frenchman sees a woman's legs in everything, it cannot be helped. In our scheme of things ideas having redeeming social or artistic value must also have importance and protection for their growth. Sex and obscenity are not always synonymous and it is wrong to classify sex as essentially obscene or even indecent or immoral. It should be our concern, however, to prevent the use of sex designed to play a commercial role by making its own appeal. This draws in the censors' scissors. Thus audi-

ences in India can be expected to view with equanimity the story of Oedipus son of Laius who committed patricide and incest with his mother. When the seer Tiresias exposed him, his sister Jocasta committed suicide by hanging herself and Oedipus put out his own eyes. No one after viewing these episodes would think that patricide or incest with one's own mother is permissible or suicide in such circumstances or tearing out one's own eyes is a natural consequence. And yet if one goes by the letter of the directions the film cannot be shown. Similarly scenes depicting leprosy as a theme in a story or in a documentary are not necessarily outside the protection. If that were so Verrier Elwyn's *Phunat of the Hills* or the same episode in Henryson's *Testament of Cressaid* (from where Verrier Elwyn borrowed the idea) would never see the light of the day. Again carnage and bloodshed may have historical value and the depiction of such scenes as the sack of Delhi by Nadirshah may be permissible, if handled delicately and as part of an artistic portrayal of the confrontation with Mohammad Shah Rangila. If Nadir Shah made golgathas of skulls, must we leave them out of the story because people must be made to view a historical theme without true history? Rape in all its nakedness may be objectionable but Voltaire's *Candide* would be meaningless without Cunegonde's episode with the soldier and the story of Lucrece could never be depicted on the screen.

52. Therefore it is not the elements of rape, leprosy, sexual immorality which should attract the censor's scissors but how the theme is handled by the producer. It must however, be remembered that the cinematograph is a powerful medium and its appeal is different. The horrors of war as depicted in the famous etchings of Goya do not horrify one so much as the same scenes rendered in colour and with sound and movement, would do. We may view a documentary on the erotic tableaux from our ancient temples with equanimity or read the *Kamasutra* but a documentary from them as a practical sexual guide would be abhorrent.

53. We have said all this to show that the items mentioned in the

directions are not by themselves defective. We have adhered to the 13 points of T. P. O'Connor framed in 1918 and have made a comprehensive list of what may not be shown. Parliament has left this task to the Central Government and, in our opinion, this could be done. But Parliament has not legislated enough, nor has the Central Government filled in the gap. Neither has separated the artistic and the socially valuable from that which is deliberately indecent, obscene, horrifying or corrupting. They have not indicated the need of society and the freedom of the individual. They have thought more of the depraved and less of the ordinary moral man. In their desire to keep films from the abnormal they have excluded the moral. They have attempted to bring down the public motion picture to the level of home movies.

54. It was for this purpose that this Court was at pains to point out in *Ranjit D. Udeshi's case*, (1965) 1 SCR 65 = (AIR 1965 SC 881) certain considerations for the guidance of censorship of books. We think that those guides work as well here. Although we are not inclined to hold that the directions are defective in so far as they go, we are of opinion that directions to emphasize the importance of art to a value judgment by the censors need to be included. Whether this is done by Parliament or by the Central Government it hardly matters. The whole of the law and the regulations under it will have always to be considered and if the further tests laid down here are followed, the system of censorship with the procedural safeguards accepted by the Solicitor General will make censorship accord with our fundamental law.

55. We allow this petition as its purpose is more than served by the assurance of the Solicitor General and what we have said, but in the circumstances we make no order about costs.

Petition allowed.

AIR 1971 SUPREME COURT 500
(V 58 C 115)(From Delhi: (1969) 71 Pun LR (D) 61)
J. M. SHELAT AND C. A. VAIDIALINGAM, JJ.

Joginder Singh, Appellant v. The State of Himachal Pradesh, Respondent.

Criminal Appeal No. 34 of 1969,
D/- 30-11-1970.

Criminal P. C. (1898), S. 549 — Rules under — Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules (1952), Rr. 3, 4 — Army Act (1950), Ss. 125, 126 — Prosecution of military personnel before ordinary Criminal Court — Charge and investigation by Police known to competent Military Authority — Surrender of accused to civil authorities — Indicates decision of Military authority not to try accused by Court-Martial — No need for Magistrate to comply with S. 126 or Rule 4.

In respect of an offence which could be tried both by a criminal court as well as a court-martial, Ss. 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the court-martial. But discretion is left to the officer mentioned in S. 125 to decide before which court the proceedings should be instituted. It is only when the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a court-martial, that the Army Act would not obviously be in the way of a criminal court exercising its ordinary jurisdiction in the manner provided by law and S. 126 would not come into operation.

(Paras 22, 27)

Rule 4 is related to cl. (a) of R. 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. When the competent military authorities, knowing full well the charge against the accused and the investigation that was being conducted by the Police release him from military custody and hand him over to the civil authorities, the Magistrate is justified in proceeding on the basis that the military authorities had decided that the accused need not be tried by the court-martial

and that he can be tried by the ordinary criminal Court. (Para 29)

Surrender of the accused to the civil authorities to be dealt with by the latter, after being made aware of the nature of the offence against the accused is a clear indication that the decision of the military authorities was that the accused need not be tried by a court-martial and that his trial can take place before the criminal court. Under these circumstances there is no occasion to follow the procedure under S. 126 or R. 4 requiring notice to the Commanding Officer of the accused. Case law discussed.

(Para 31)

Cases Referred: Chronological Paras

- | | |
|--|--------|
| (1970) AIR 1970 Punj & Har 351 | |
| (V 57) = 1970 Cri LJ 1119, Ajit Singh v. State of Punjab | 13 |
| (1969) AIR 1969 SC 414 (V 56) = (1969) 2 SCR 177 = 1969 Cri LJ 663, Som Datt Datta v. Union of India | 14, 20 |
| (1967) AIR 1967 Cal 323 (V 54) = 1967 Cri LJ 741, Avadh Behari Singh v. State | 12 |
| (1965) AIR 1965 SC 247 (V 52) = 1964-5 SCR 931, Ram Sarup v. Union of India | 19 |
| (1963) AIR 1963 Madh Pra 249 (V 50) = 1963 (2) Cri LJ 161, Major Gopinathan v. State of M. P. | 12 |
| (1962) AIR 1962 Mys 196 (V 49) = 1962 (2) Cri LJ 389, C. Ramanujan v. State of Mysore | 12 |
| (1961) AIR 1961 SC 1762 (V 48) = 1962-2 SCR 195 = 1961 (2) Cri LJ 828, Major E. G. Barsay v. State of Bombay | 17 |
| (1949) 1949-2 Mad LJ 44, In re, Major F. K. Mistry | 12 |
| (1945) AIR 1945 Mad 289 (V 32) = 47 Cri LJ 192, In re, Captain Hugh May Stollery Mundy | 12 |

Mr. R. L. Kohli, Advocate, for Appellant; M/s. V. C. Mahajan and R. N. Sachthey, Advocates, for Respondent.

The Judgment of the Court was delivered by

VAIDIALINGAM, J.:— In this appeal on certificate issued by the Delhi High Court, the appellant who is governed by the Army Act, 1950 (hereinafter referred to as the Act) challenges the legality of his trial and conviction for an offence under S. 376

I.P.C. by the Assistant Sessions Judge, Nahan.

2. The main attack levelled against the proceedings is that the material provisions of the Army Act read with the Criminal Courts and Court-Martial (Adjustment of Jurisdiction) Rules, 1952 (hereinafter referred to as the Rules) framed by the Central Government under S. 549 (1) Cr. P.C. have not been complied with by the Assistant Sessions Judge. The prosecution case is briefly as follows:

3. The appellant was a military personnel attached to Punjab Regiment No. 24, which moved to Nahan on March 3, 1967. The appellant was a Lance Naik and was appointed as a temporary Granthi of the Katcha-Johar temple used by the military personnel. One Jiwa Nand with his wife and children was living close by the temple. On March 8, 1967 at about 8.30 a.m. Gayatri Devi aged about 10 years and daughter of Jiwa Nand was called by the appellant and when she came near him she was taken inside the adjoining room where the appellant had forcible sexual intercourse with her. The victim narrated the occurrence to her mother and sister. When Gayatri Devi, her mother and certain others were proceeding towards the Cantonment to complain to the military authorities, they met 4 or 5 sikh gentlemen and Gayatri Devi pointed out the appellant in that group as the one who had misbehaved with her. The Sikh gentlemen, who were in military uniform declined to permit Gayatri Devi and others to go inside the Cantonment area on the ground that the entry into the same was prohibited to non-military personnel. Later on the father of Gayatri Devi took her to the police station and lodged a report Ex. 12/A. The accused pleaded alibi and denied the offence. He also let in defence evidence. The learned Assistant Sessions Judge accepted the prosecution case and disbelieving the plea of the appellant convicted him of the offence under S. 376 I. P. C. and sentenced him to three years' rigorous imprisonment. The appeal filed by the appellant was dismissed by the learned Sessions Judge, who confirmed the conviction and sentence.

4. The appellant filed a criminal revision No. 26 of 1968 before the

Delhi High Court, challenging his conviction and sentence passed by the learned Assistant Sessions Judge and as confirmed by the learned Sessions Judge. The learned Chief Justice before whom the criminal revision came for hearing held that the conviction of the appellant for the offence under S. 376 I.P.C. and the sentence imposed on him by the two subordinate courts on facts were justified and did not require any interference. However, a plea was taken before the learned Chief Justice on behalf of the appellant that according to a notification issued by the Ministry of Defence, Government of India dated November 28, 1962, the appellant on the material date must be considered to have been on active service. Based on this notification it was further urged that the appellant's trial should have been before a Court-Martial and that if the Assistant Sessions Judge decided to proceed with the trial, he should have given the required notice to the Commanding Officer of the Army as is mandatory under S. 126 (1) of the Act read with R. 4. As those provisions have not been complied with, the appellant's trial and conviction were illegal and null and void. The learned Chief Justice was, however, inclined to take the view that the omission by the Assistant Sessions Judge to follow the procedure indicated above does not affect his jurisdiction to conduct the trial.

5. In view of certain decisions of the High Courts wherein an opinion has been expressed that non-compliance with the provisions of the Act and the Rules vitiates the trial of a military personnel by the criminal courts, the learned Chief Justice referred the matter by his order dated June 25, 1968 to a Full Bench. The Full Bench which consisted of the learned Chief Justice Kapoor and Tatachari JJ. heard the criminal revision case. The learned Chief Justice and Tatachari J. after a very elaborate reference to the material provisions of the Act and the relevant Rules held that the Magistrates before conducting a trial of a military personnel have to conform normally to the relevant provisions of the Act and the Rules. But they held that in respect of offences for the trial of which both the Court-Martial and an ordinary Criminal Court had concurrent juris-

diction, the mere omission by a Magistrate, before conducting the trial, to issue the necessary notice under R. 4 will not vitiate the proceedings as being illegal. Kapoor J., on the other hand, disagreed with the majority opinion and held that under the Act read with the Rules the first option to try military personnel lies with the Army authorities and they have to decide the forum of the trial and that the Magistrate will get jurisdiction only after a decision in his favour by the Central Government in case of a conflict between the army authorities and the Magistrate. The learned Judge further held that a Magistrate cannot assume jurisdiction straightway without providing an opportunity to the military authorities to decide the forum. The learned Judge accordingly held that the observance of the Rules is obligatory and non-observance thereof makes the trial illegal. In accordance with the majority judgment, the High Court by its order dated July 28, 1968 held that non-observance of Rr. 3 and 4 of the Rules does not by itself deprive the Magistrate of his inherent jurisdiction or make the proceedings conducted by him null and void. The High Court further held that the effect of the violation is to be determined on the facts and circumstances of each case keeping in view the nature of the violation and all other relevant factors. After expressing opinion on the legal aspects, the case was remitted to the Single Judge for final disposal.

6. The matter came again before the learned Chief Justice, who by his order dated September 27, 1968 held that the trial by the Assistant Sessions Judge without conforming to the provisions of R. 4 has not caused any failure of justice to the appellant in this case. The learned Chief Justice further held that in view of certain circumstances it is legitimate to infer that there has been substantial compliance with the statutory provisions. Finally the learned Chief Justice held that the conviction of the appellant was proper and dismissed the revision filed by the appellant.

7. Mr. Kohli, learned counsel for the appellant, has reiterated the same objections taken on behalf of the appellant before the Delhi High Court.

According to Mr. Kohli, the offence in this case being one which could be tried, both by the Court Martial and the ordinary Criminal Court, it was for the competent officer to decide, in the first instance, whether the appellant is to be tried by a Court Martial. If the criminal court was of the opinion that the proceedings should be instituted before itself in respect of the offence alleged, it should have followed the mandatory provisions contained in Section 126 of the Act read with Rr. 3 and 4.

8. Under S. 549 (1), Cr. P. C. the Magistrate was bound to have regard to the rules. In this case inasmuch as the said procedure had not been followed and the appellant accused was tried straightway by the criminal court, the trial is illegal and void. Being a question of jurisdiction the objection raised by the appellant before the High Court goes to the root of the matter and vitiates the entire proceedings.

9. Mr. V. C. Mahajan, learned counsel for the State, on the other hand, urged two contentions: (i) as held by the High Court there has been a substantial compliance with the provisions of the Act and the Rules in this particular case and hence the trial by the Assistant Sessions Judge is legal and valid, and (ii) even assuming that there has been a breach of the rules, such a violation is at the most only an irregularity and not an illegality and as no prejudice has been shown to have been caused to the accused by such an irregular proceeding held by the Assistant Sessions Judge, the conviction is legal.

10. At the outset we may state that the question regarding the competency of the criminal court to try the appellant does not appear to have been raised before the learned Assistant Sessions Judge. It is no doubt seen, that the learned Assistant Sessions Judge, appears to have made enquiries from the counsel appearing for the appellant and the State regarding the position of the appellant who was in military employ. The public prosecutor drew the attention of the Court to S. 70 of the Act and appears to have pointed out that as the Punjab Regiment No. 24 to which the appellant was attached was not 'on active ser-

vice', the appellant could be tried by the ordinary criminal court.

11. On behalf of the appellant it was urged that in view of the declaration of Emergency, the appellant must be deemed to be 'on active service'. But this contention was not accepted by the Court. Nahan station where the Punjab Regiment was then stationed being a rest station, the court proceeded with the trial reserving liberty to the counsel for both the parties to raise any further point before the close of the trial to establish that the appellant must be considered to be 'on active service'. Obviously neither party cared to place any material before the Court and the trial was proceeded with resulting in the conviction of the appellant.

12. Mr. Kohli, learned counsel for the appellant, has drawn our attention to certain decisions of the High Courts in support of his contention that a trial held by a Magistrate without conforming to the provisions of the Act and the Rules is illegal and not a mere irregularity. Those decisions are: *In re Captain Hugh May Stollery Mundy*, AIR 1945 Mad 289; *Major F. K. Mistry*, 1949-2 Mad LJ 44; *C. Ramanujan v. State of Mysore*, AIR 1962 Mys 196; *Major Gopinathan v. The State of Madhya Pradesh*, AIR 1963 Madh Pra 249 and *Awadh Behari Singh v. The State*, AIR 1967 Cal 323.

13. On the other hand Mr. Mahajan drew our attention to the Full Bench decision of the Punjab and Haryana High Court reported in *Ajit Singh v. State of Punjab*, AIR 1970 Punj and Har 351, wherein the High Court has held that the trial suffers not from an illegality but only an irregularity. Such an irregularity does not render the trial liable to be set aside, unless it is shown that prejudice has been caused to the accused.

14. In view of certain decisions of this Court, to which we will presently refer and having regard to the particular circumstances of this case we do not think it necessary to consider the question whether non-observance of the Rules by the Magistrate trying and convicting a person who is governed by the Act is illegal or only irregular. The scheme of the Act and the Rules have been considered in three decisions of this Court.

which are being referred to presently and hence we do not think it necessary to either quote Sections 125 and 126 or Section 549, Criminal P. C. We will, however, refer to the relevant rules at the appropriate stage. They have been referred to in particular in the latest decision of this Court in *Som Datt Datta v. Union of India*, 1969-2 SCR 177 = (AIR 1969 SC 414).

15.. There is no controversy that the appellant is one subject to the Act as a person enrolled under the Act under Section 2 (1) (b). Section 3 (1) defines 'on active service'. Over and above that, power is given to the Central Government under Section 9, by notification, to declare any person or class of persons subject to the Act and who may be deemed to be 'on active service' within the meaning of the Act. The Government of India, Ministry of Defence, had issued the following notification on November 28, 1962:

"In exercise of the powers conferred by Section 9 of the Army Act, 1950 (46 of 1950), the Central Government hereby declare that all persons subject to that Act, who are not on active service under Clause (1) of Section 3 thereof, shall, wherever they may be serving, be deemed to be on active service within the meaning of that Act for the purpose of the said Act and of any other law for the time being in force".

16. By virtue of this notification it follows that on the material date Punjab Regiment No. 24, to which the appellant was attached though it was at Nahan, which was a rest station, must be considered to have been 'on active service'. This notification was issued in the year 1962. Unfortunately, it was not brought to the notice of the learned Assistant Sessions Judge, notwithstanding the specific enquiry he made about the position of the accused. Section 70 of the Act runs as follows:

"A person subject to this Act who commits an offence of murder against a person not subject to military, naval or air force law, or of culpable homicide not amounting to murder against such a person or of rape in relation to such a person, shall not be deemed to be guilty of an offence against this Act and shall not be tried

by a court-martial, unless he commits any of the said offences—

- (a) while on active service, or
- (b) at any place outside India, or
- (c) at a frontier post specified by the Central Government by notification in this behalf”.

17. As the appellant was alleged to have committed rape in relation to a person who was not subject to military, naval or air law, under Section 70, normally he could be tried by the ordinary criminal Court, but inasmuch as he was on active service at the time of the alleged offence, the Court-martial also gets jurisdiction to try the appellant. Therefore, this is a case where both the Court-martial and the ordinary criminal Court had concurrent jurisdiction to try the appellant. To meet such a situation suitable provisions have been made in Sections 125, 126 of the Act and the Rules framed under Section 549, Criminal P. C. In *Major E. G. Barsay v. The State of Bombay*, 1962-2 SCR 195 = (AIR 1961 SC 1762) the jurisdiction of the Special Judge to try an officer who was subject to the Army Act was questioned. No doubt the ultimate decision of the Court rested on a construction of the provisions of the Prevention of Corruption Act, 1947 and the jurisdiction of the Special Judge to try the military officer in that case was upheld. But in dealing with the contention raised on behalf of the appellant therein that the Special Judge had no jurisdiction to take cognizance of the offences with which the accused was charged and that he should have been tried only by a Court-martial under the Act, this Court had to consider the scheme of the Act.

18. After holding that the Act does not expressly bar the jurisdiction of the criminal Court in respect of the acts or omission punishable under the Act if they are also punishable under any other law in force in India, this Court held that Sections 125, 126 and 127 excluded any inference about prohibition regarding jurisdiction of the criminal Courts and those sections in express terms provide not only for resolving conflict of jurisdiction between a criminal Court and a court-martial in respect of the same offence, but also provide for successive trials of an accused in respect of the same

offence. This Court has further laid down that Sections 125 and 126 provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation. This decision in our opinion lays down that there is no exclusion of jurisdiction of the ordinary criminal Courts in respect of offences which are triable also by the Court-martial.

19. In dealing with the Act, this Court in *Ram Sarup v. The Union of India*, 1964-5 SCR 931 = (AIR 1965 SC 247) has observed that there could be a variety of circumstances which may influence the decision as to whether the offender is to be tried by the court-martial or by the ordinary criminal court and the military officers, who are charged with the duty of exercising discretion are to be guided by the circumstances and the exigencies of the service, maintenance of discipline in the army, speedier trial, nature of the offence and the person against whom the offence is committed.

20. In 1969-2 SCR 177 = (AIR 1969 SC 414) this Court has again elaborately considered the scheme of the Act as well as the Rules. Dealing with Sections 125 and 126, at p. 183 (of SCR) = (at p. 418 of AIR) this Court observes:

“Section 125 presupposes that in respect of an offence both a criminal Court as well as a court-martial have each concurrent jurisdiction. Such a situation can arise in the case of an act or omission punishable both under the Army Act as well as under any law in force in India. It may also arise in the case of an offence deemed to be an offence under the Army Act. Under the scheme of the two sections, in the first instance, it is left to the discretion of the officer mentioned in Section 125 to decide before which Court the proceedings shall be instituted, and, if the officer, decides that they should be instituted before a Court-martial, the accused person is to be detained in military custody; but if a criminal Court is of opinion that the said offence shall be tried before itself, it may issue the requisite notice under Section 126 either to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the

Central Government. On receipt of the said requisition, the officer may either deliver over the offender to the said Court or refer the question of proper court for the determination of the Central Government whose order shall be final. These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation in any particular case".

21. A reference to the Act particularly to Chapter VI, which comprises of Sections 34 to 70, under the heading 'offences', the position that emerges according to the above decisions is that under Chapter VI there are three categories of offences, namely, (1) offences committed by a person subject to the Act triable by a Court-martial in respect whereof specific punishments have been assigned; (2) civil offences committed by the said person at any place in or beyond India, but deemed to be offences committed under the Act and, if charged under Section 69 of the Act, triable by a Court-martial; and (3) offences of murder and culpable homicide not amounting to murder or rape committed by a person subject to the Act against a person not subject to the military law. Subject to a few exceptions, they are not triable by Court-martial, but are triable only by ordinary criminal Courts. The said categorisation of offences and tribunals necessarily bring about a conflict of jurisdiction. Where an offence is for the first time created by the Army Act, such as those created by Sections 34, 35, 36, 37, etc., it would be exclusively triable by a Court-martial; but where a civil offence is also an offence under the Act or deemed to be an offence under the Act, both an ordinary criminal Court as well as a court-martial would have jurisdiction to try the person committing the offence.

22. It is further clear that in respect of an offence which could be tried both by a criminal Court as well as a Court-martial, Sections 125, 126 and the Rules, have made suitable provisions to avoid a conflict of jurisdiction between the ordinary criminal courts and the Court-martial. But it is to be noted that in the first instance, discretion is left to the officer mention-

ed in Section 125 to decide before which court the proceedings should be instituted. Hence the officer commanding the army, army corps, division or independent brigade in which the accused person is serving or such other officer as may be prescribed will have to exercise his discretion and decide under Section 125 in which court the proceedings shall be instituted. It is only when he so exercises his discretion and decides that the proceeding should be instituted before a court-martial, that the provisions of Section 126 (1) come into operation. If the designated officer does not exercise his discretion and decide that the proceedings should be instituted before a Court-martial, the Army Act would not obviously be in the way of a criminal Court exercising its ordinary jurisdiction in the manner provided by law.

23. We will presently show that in the case before us the designated officer in Section 125 has not chosen to exercise his discretion and decided before which Court the proceedings should be instituted and in particular he has also not decided that the proceedings should be instituted before a Court-martial. When that is so, in our opinion, there was no occasion for the Criminal Court in this case to adopt the procedure laid down in Section 126 of the Act. This view finds support from the second part of Section 126 (1) which requires the Criminal Court to issue a notice to the officer designated in Section 125 of the Act to deliver over the offender to the nearest Magistrate or to postpone the proceedings pending a reference to the Central Government. This is a clear indication that Section 126 (1) presupposes that the designated officer has decided under Section 125 that the proceedings shall be instituted before a Court-martial and has also directed that the accused person shall be detained in military custody.

24. As the facts on which we are basing our conclusion that there was no necessity for the Criminal Court in question to adopt the procedure laid down in Section 126 of the Act, will have also bearing on the construction of the relevant rules, it is desirable to refer to the relevant rules relied on by the appellant

25. The rules have been framed by the Central Government under Section 549 (1), Criminal P. C. That section provides for the Central Government making rules consistent with the Criminal Procedure Code and the Acts mentioned therein in respect of offences which could be tried by an ordinary criminal court or by a court-martial. It enjoins upon a Magistrate when any person is brought before him, in respect of such an offence, to have due regard to the rules and to deliver him in proper cases to the appropriate officers mentioned therein, for being tried by a Court-martial. The material rules that are to be referred are Rules 2, 3, 4, 5 and 8.

26. Rule 2 defines the expressions "commanding officer", "competent military authority", "competent naval authority" and "competent Air Force authority". Rules 3, 4, 5 and 8 are as follows:

"Rule 3. Where a person subject to Military, Naval or Air Force Law is brought before a Magistrate and charged with an offence for which he is liable to be tried by a Court-martial, such Magistrate shall not proceed to try such person or to inquire with a view to his commitment for trial by the Court of Session or the High Court for any offence triable by such Court, unless

- (a) he is of opinion, for reasons to be recorded, that he should so proceed without being moved thereto by competent Military, Naval or Air Force Authority, or
- (b) he is moved thereto by such authority.

Rule 4. Before proceeding under Clause (a) of Rule 3, the Magistrate shall give a written notice to the Commanding Officer of the accused and until the expiry of a period of—

(i) three weeks, in the case of a notice given to a Commanding Officer in command of a unit or detachment located in any of the following areas of the hill districts of the State of Assam, that is to say—

- (1) Mizo,
- (2) Naga Hills
- (3) Garo Hills
- (4) Khasi and Jaintia Hills; and
- (5) North Cachar Hills.

(ii) seven days, in the case of a notice given to any other Commanding

Officer in command of a unit of detachment located elsewhere in India. from the date of the service of such notice, he shall not—

- (a) convict or acquit the accused under Sections 243, 245, 247 or 248 of the Code of Criminal Procedure, 1898 (Act 5 of 1898), or hear him in his defence under Section 244 of the said Code; or
- (b) frame in writing a charge against the accused under Section 254 of the said Code; or
- (c) make an order committing accused for trial by the High Court or the Court of Session under Section 213 of the said Code; or
- (d) transfer the case for inquiry or trial under Section 192 of the said Code.

Rule 5. Where within the period of seven days mentioned in Rule 4, or at any time thereafter before the Magistrate has done any act or made any order referred to in that rule, the Commanding Officer of the accused or competent Military, Naval or Air Force authority, as the case may be, gives notice to the Magistrate that in the opinion of such authority, the accused should be tried by a court-martial, the Magistrate shall stay proceedings and if the accused is in his power or under his control, shall deliver him, with the statement prescribed in sub-section (1) of Section 549 of the said Code to the authority specified in the said sub-section.

Rule 8. Notwithstanding anything in the foregoing rules, where it comes to the notice of a Magistrate that a person subject to Military, Naval or Air Force Law has committed an offence, proceedings in respect of which ought to be instituted before him and that the presence of such person cannot be procured except through military, naval or Air Force authorities, the Magistrate may by a written notice require the Commanding Officer of such person either to deliver such person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the court-martial, if since instituted,

and to make a reference to the Central Government for determination as to the Court before which proceedings should be instituted".

27. The main contention that has been urged by Mr. Kohli, on behalf of the appellant is that in this case the Assistant Sessions Judge had no jurisdiction to proceed with the trial of the appellant as he has not complied with the provisions of Rules 3 and 4. From a perusal of Rules 3 and 4, the scheme of these two rules appears to us to be that the Magistrate shall not proceed to try a Military personnel unless he forms an opinion for reasons to be recorded to proceed with the trial without being moved by the competent authority or the Magistrate has been so moved by the competent Military authority; but before a Magistrate decides to proceed with the trial without being moved by the competent authority, he is obliged to give a written notice to the Commanding Officer of the accused and is further enjoined not to pass any of the orders enumerated as (a) to (i) in Rule 4, till the expiry of the said period of the notice mentioned in Clauses (1) and (2).

28. According to Mr. Kohli the criminal Court has not been moved by the competent military authority to conduct the trial before it. The Magistrate has not also framed an opinion that he should try the accused without being moved by the competent military authority. Even assuming that he has formed such an opinion, he has not given the requisite notice and waited for the required period under R. 4. Hence it is argued that the criminal court has acted illegally in proceeding with the trial of the appellant. We are not inclined to accept this contention of the learned counsel.

29. Rule 4 is related to cl. (a) of Rule 3 and will be attracted only when the Magistrate proceeds to conduct the trial without having been moved by the competent military authority. It is no doubt true that in this case the Assistant Sessions Judge has not given a written notice to the Commanding Officer as envisaged under Rule 4. But, in our view, that was unnecessary. When the competent military authorities, knowing full well

the nature of the offence alleged against the appellant, had released him from military custody and handed him over to the civil authorities, the Magistrate was justified in proceeding on the basis that the military authorities had decided that the appellant need not be tried by the court-martial and that he could be tried by the ordinary criminal Court.

30. We will now refer in some detail to the particular circumstances in this case which will show that there has been no violation of the Act or the Rules. The High Court has pointed out that the District Inspector of Police, P. W. 12, has stated that after recording the statements of some of the witnesses he proceeded to the Cantonment area and contacted the officer commanding the Punjab Regiment No. 24. The said witness has also stated that with the permission of the said officer he interrogated the accused and examined his person. The Commanding Officer was not willing to hand over the accused till he obtained permission from the headquarters. The Commanding Officer assisted P. W. 12 in carrying out the identification parade of the accused. The High Court has further stated that after having full knowledge of the charge against the appellant and the investigation that was being conducted by the police, the competent authority ultimately released the appellant from military custody and delivered him to the civil authorities for being tried according to law.

31. From these circumstances, in our opinion, it is legitimate to hold that the competent authority had handed over the appellant to the civil authorities for being tried after the former had considered the question of so handing him over after consultations with the headquarters. In these circumstances, it follows that the designated officer under Section 125, who had the discretion in the first instance to decide that the appellant should be tried before a Court-martial had decided to the contrary. Surrender of the accused to the civil authorities to be dealt with by the latter, after being made aware of the nature of the offence against the appellant, is a clear indication that the decision of the military authorities was that the appellant need not be

tried by a Court-martial and that his trial can take place before the criminal Court. Under these circumstances there was no occasion to follow the procedure under Section 126 or Rule 4 as the military authorities had made abundantly clear that the appellant need not be tried by the court-martial. That being so, it would have been altogether superfluous for the Magistrate to give the notice as required by the said provisions. Rules 5 and 8 have no application to the facts of this case.

32. We agree with the High Court that there has been a substantial compliance with the relevant provisions of the Act and the Rules and hence the trial of the appellant and his conviction by the learned Assistant Sessions Judge are valid and legal.

33. In the result, the appeal fails and is dismissed.

Appeal dismissed.

**AIR 1971 SUPREME COURT 508
(V 58 C 116)**

(From: Mysore)*

**J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER
AND A. N. RAY, JJ.**

Dr. M. C. Sulkunte, Appellant v. The State of Mysore, Respondent.

Criminal Appeal No. 25 of 1967, D/- 27-11-1970.

(A) Prevention of Corruption Act (1947). S. 5A — Permission to investigate granted by Magistrate to Inspector of Police Anti-corruption only on basis that case required immediate investigation — Trap laid down by Inspector and after further investigation accused charge-sheeted — Special Judge directing reinvestigation by Deputy Superintendent of Police Anti-corruption after the stage of carrying out of the trap — Sanction held was not invalid or conviction held could not be said to be not maintainable on ground that trap had been carried out by a police officer below rank of Deputy Superintendent — To set aside conviction it must be shown that there

* (Cri. Appeal No. 48 of 1965 with Cri. Petn. No. 126 of 1965, D/- 30-9-1966—Mys.)

has been miscarriage of justice as a result of irregular investigation — AIR 1959 SC 707, Dist.; Cr. App. 48 of 1965 with Cri. Petn. 126 of 1965, D/- 30-9-1966 (Mys), Affirmed—(Criminal P.C. (1898), S. 537.) (Paras 10, 11 & 15)

(B) Constitution of India, Art. 136 — Appeal by special leave — Additional ground requiring investigation into facts not allowed by Supreme Court to be urged before it for first time. (Para 16)

Cases Referred: Chronological Paras
(1959) AIR 1959 SC 707 (V 46)

= 1959 Supp 2 SCR 201 =

1959 Cri LJ 920, State of Madhya Pradesh v. Mubarak Ali 15

(1955) AIR 1955 SC 196 (V 42)

= 1955-1 SCR 1150 = 1955 Cri LJ 526, Rishbud v. State of Delhi 8

S. Mohan Kumaramangalam, Sr. Advocate, (M/s. S. S. Javali and R. B. Datar, Advocates, with him), for Appellant; Mrs. Shyamla Pappu and S. P. Nayar, Advocates, for Respondent.

The Judgment of the Court was delivered by

MITTER, J. — The appellant was convicted of an offence under Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act and sentenced to six months' simple imprisonment and a fine of Rs. 1,000/-; in default of payment of fine to further simple imprisonment for six months by the Special Judge, Bidar in Special Case No. 1/2 of 1963. He appealed to the High Court against the conviction and on the admission of the appeal, the High Court suo motu gave him notice for enhancement of the sentence. Subsequently the State also filed Criminal Petition No. 126 of 1965 for enhancement of the sentence on the ground that under Section 5 (2) of the Act the minimum punishment was to be not less than one year unless the Court for special reasons thought fit to do otherwise. The reasons given by the Special Judge did not appeal to the High Court which dismissed the appeal of the appellant and confirmed the conviction under Section 5 (1) (d). It reduced the fine of Rs. 1,000/- to one of Rs. 100/- but increased the sentence under Section 5 (2) of the Act for the offence under Section 5 (1) (d) to simple imprisonment for one year

and in default of payment of fine to simple imprisonment for one month.

2. The main point advanced by Mr. Mohan Kumarmangalam appearing for the appellant was that the sanction to investigate the offence given by the Magistrate was not proper inasmuch as he had not recorded any reason as to why he had given permission to an inspector of police, P. Ramarao, to investigate the offence of criminal misconduct of obtaining illegal gratification.

3. Section 5-A of the Act contains certain safeguards from undue harassment of public officers from enquiry by ensuring that the investigation in regard to the offences specified is conducted by a police officer of certain designated high ranks except under orders of a Presidency Magistrate or a Magistrate of the First Class. A police inspector does not come within the designated ranks and such an officer could only investigate into the offences wherewith the appellant was charged by order of a Magistrate.

4. In order to appreciate the point urged on behalf of the appellant, it is necessary to state in brief the events as disclosed in the prosecution case culminating in his trial and conviction. The appellant was the District Surgeon in Bidar in 1961. One Abdul Qadeer who figured as the complainant in the case had submitted an application to the office of the Divisional Controller M. G. R. T. D. Gulbarga for an appointment to the post of bus conductor. To get the appointment he had to secure a certificate of training in First Aid. He approached the appellant who told him that no such certificate could be given from his office as there was no arrangement there for giving the requisite training. After rejecting the complainant's written application to him as the District Medical Officer Bidar, the appellant asked the complainant to meet him at his residence the same day. On the 2nd March the complainant met the appellant as requested when the appellant demanded Rs. 150/- for issuing the required certificate. The appellant informed the complainant that as the certificate had to be issued without training the money asked for must be paid. The

complainant met the appellant again on the 22nd March and told him that he had arranged for Rs. 50/- and could pay some more money afterwards. On receipt of Rs. 50/- the appellant gave him a letter addressed to the Medical Officer Bhalki and two type-written first aid certificate forms. The appellant asked the complainant to give Rs. 20 to the Medical Officer at Bhalki for getting the latter to sign the certificate and bring the same back to the appellant for his signature on payment of a further sum of Rs. 50/-. On the 25th March 1961 the complainant went to Bhalki and gave the letter and the forms of the certificate to the Medical Officer. He also paid Rs. 20/- and got the certificate signed by the said officer without receiving any training. On the 28th March the complainant met the appellant again at his residence and asked for his signature on the certificates. The appellant demanded a sum of Rs. 50/- for the purpose. The complainant told him that all that he could put up was Rs. 40/-. The appellant agreed to accept this amount but said that he would not put his signature on the certificate and issue the same unless the money and the certificates were brought to him immediately. The complainant then went to the Inspector of Police, Anti-Corruption, Gulbarga, P. W. 20, and narrated all the above facts in a written complaint. On the same day the Police Inspector submitted an application to the First Class Magistrate, Bidar asking for permission under Section 5-A of the Act to investigate the offences under Section 161, I. P. C. and Section 5 (1) (d) of the Act against the District Medical Officer. The application shows that the complainant had arranged for Rs. 40/- to be paid to the appellant and records the numbers of the currency notes to be given to the appellant. The Inspector stated in the application:

"The nature of the complaint is such as warrants immediate investigation".

The Police Inspector prayed that permission be accorded as asked for and that he be authorised to conduct the search of the person of the appellant and the place where he kept the bribe amount after accepting it from the complainant.

5. The Magistrate who figured as a prosecution witness in the case gave evidence to the effect that the application was put up before him on the 29th March and that the Police Inspector had gone to him along with the complainant and the currency notes, that he had examined the complainant and made his order in writing then and there. The written order shows that the Magistrate was satisfied that there were grounds to investigate the case against the District Surgeon and that he was authorising the Inspector to investigate into the matter to search the person of the appellant and the premises where he kept the money and to seize the same and any other incriminating material. The Magistrate made it clear in his evidence that he had not enquired of the Inspector as to whether the Superintendent of Police or the Deputy Superintendent of Police were present at the headquarters; further the Inspector did not tell him why he and not the High ranking officer mentioned in Section 5-A of the Act was going to investigate the case. In his cross-examination he stated that he felt that the matter was urgent and the offence was likely to be committed; otherwise he would not have given the sanction.

6. The evidence led by the prosecution shows that after the usual formalities a trap was laid and search witnesses P. W. 3 and P. W. 5 besides another Sub-Inspector, P. W. 18, were present on the occasion. The complainant went inside the examination room of the appellant after the patients had left. On enquiry by the appellant as to whether he had brought the money the complainant handed the four currency notes smeared over with phenolphthalein and the appellant put them in the pocket of his shirt. The appellant asked for the certificates which were handed over to him by the complainant and counter-signed by the appellant. On a signal being given the police, the search witnesses along with others entered the room. On being accosted the appellant denied having taken any money. He was asked to dip his hands in water mixed with soda powder. The water turned pink indicating the presence of phenolphthalein on the appellant's

hand. On the Inspector asking him to produce the money the appellant put his hand into his shirt pocket and brought out the notes and a punchnama was drawn up.

7. It is unnecessary for the purpose of the appeal to examine the facts of the case in any greater detail. It appears that on April 1, 1961, P. W. 20 filed a second application before the Magistrate praying for sanction to investigate further into the case which was given. On August 14, 1961, on the transfer of P. W. 20 from Bidar his successor-in-office, Inspector Desai, asked for the Magistrate's sanction to carry on the investigation from the state at which it had been left by his predecessor and the Magistrate accorded permission. A charge sheet was filed and the case registered in the Court of the Special Judge on November 14, 1961. On August 13, 1962 the appellant presented two applications before the Special Judge by one of which he questioned the legality of the proceedings inter alia on the ground that the investigation had not been carried on by a designated officer under Section 5-A of the Act. The Special Judge went into the question in some detail and held that on the facts of the case there was "administrative exigency to permit the Inspector to investigate". He however directed re-investigation as from April 1, 1961 by the Deputy Superintendent, Anti-Corruption Measures, State Level, Bangalore.

8. The matter was taken up in revision to the High Court of Mysore. The High Court dismissed the revision petition. In rejecting the appeal the High Court relying upon the decision in *Rishbud v. State of Delhi*, 1955-1 SCR 1150 = (AIR 1955 SC 196), that the illegality, if any, had not resulted in miscarriage of justice observed that the Magistrate was satisfied about the urgency of the matter and had therefore sanctioned permission to investigate.

9. Before us counsel for the appellant referred to the evidence of the Police Inspector P. W. 20 to show that neither the Deputy Superintendent of Police nor the Superintendent of Police at Bidar had been contacted. It was argued that Section 5-A did not require that any officers of the Anti-Corruption department could investi-

gate into the matter and it should be held that the Magistrate did not apply his mind to the facts of the case when he granted the sanction to investigate to P. W. 20.

10. It is quite clear from the facts and circumstances that the Magistrate felt that the case required immediate investigation and it was only on that basis that he gave permission to the Police Inspector to investigate into the matter. The fact that there is no mention in the Magistrate's order as to whether he had asked the Inspector about the possibility of the case being investigated into by a Deputy Superintendent of Police is not of much moment in the circumstances of the case.

11. However the question still remains as to whether any prejudice was caused to the appellant by reason of the investigation being conducted and the trap being laid by the Inspector of Police in the way it was done. According to the High Court even if there was any irregularity committed at the early stage no miscarriage of justice had been caused thereby as re-investigation from April 1, 1961 had been made by P. W. 21, a Superintendent of Police, Bellary. It must be added here that the trap could not be laid for a second time and therefore the Special Judge could not have done anything about the initial investigation. He did all that was possible to be done on the facts of the case, namely, order investigation from April 1, 1961, that is to say, immediately after the happening of the incident and the carrying out of the trap.

12. Counsel contended—as was done before the High Court—that prejudice had been caused to his client by the selection of the search witnesses, P. W. 3 and P. W. 5 who were said to be friendly with P. W. 18, the Assistant Sub-Inspector taking part in the laying of the trap and the conduct of the search. All that P. W. 3 said in his evidence was that he knew both the complainant and the appellant-accused and that when he was in front of the New Mysore Cafe P. W. 18, a police officer had approached him and requested him to act as a search witness. P. W. 5 in his evidence similarly stated that he had been asked by P. W. 18 to be a search witness.

He further admitted that he had formerly worked in the Reserve Police when P. W. 18 was a tenant under him. At the most, all that can be said with regard to P. Ws. 3 and 5 is that P. W. 18 knew them but counsel was not able to point out any fact disclosing intimacy of P. W. 20 with the search witnesses.

13. The judgment of the High Court shows that no suggestion was made that either P. W. 18 or P. W. 20 bore any ill-will towards the appellant to get up a false case against him and the High Court found no reason for rejecting the evidence of P. W. 3, one of the search witnesses, as also of P. W. 18 and P. W. 20.

14. The High Court rejected the version put forward by the appellant with regard to the incident on the 29th March as false. According to the appellant, the complainant had rushed into his examination room when he was treating another patient and had thrust the money into his pocket—a story which is palpably false, for if he had not touched the notes himself the soda water solution would not have turned pink when he dipped his hand in it.

15. Although laying the trap was part of the investigation and it had been done by a police officer below the rank of a Deputy Superintendent of Police, we cannot on that ground hold that the sanction was invalid or that the conviction ought not to be maintained on that ground. It has been emphasised in a number of decisions of this Court that to set aside a conviction it must be shown that there has been miscarriage of justice as a result of an irregular investigation. The observations in *State of Madhya Pradesh v. Mubarak Ali*, 1959 Supp 2 SCR 201 at pp. 210 and 211 = (AIR 1959 SC 707 at pp. 710-711) to the effect that when the Magistrate without applying his mind only mechanically issues the order giving permission the investigation is tainted cannot help the appellant before us.

16. Counsel for the appellant wanted to raise an additional ground by producing certain documents and relying on certain rules of the Mysore Medical Department to show that the appellant in countersigning the certificate issued by the Medical Officer of

Bidar, P. W. 27, was only doing a professional act by way of private practice and that he was entitled to payment of fees therefor. Such a case requires investigation into facts, which were not brought forward in the trial and never mentioned either before the Special Judge or before the High Court. We therefore refused permission to counsel to urge the additional grounds.

17. In the result, the appeal fails and the conviction is maintained. The appellant's bail bond is cancelled and he must surrender himself for serving out the sentence awarded by the High Court.

Appeal dismissed.

AIR 1971 SUPREME COURT 512
(V 58 C 117)

(From Calcutta)*

J. M. SHELAT,
C. A. VAIDIALINGAM AND
P. JAGANMOHAN REDDY, JJ.

Haji Hafiz Tanwar Ahmed, Appellant v. Union of India, Respondent.

Civil Appeal No. 138 of 1967, D/- 24-11-1970.

Arbitration Act (1940), Section 20 — Arbitration agreement — Arbitrator to be appointed under Section 19, Defence of India Act, 1939 and not under Section 20 (4) — Award given by Arbitrator appointed under S. 20 (4) held on facts not binding. Civil Rule No. 1324 of 1961, D/- 14-3-1963 (Cal), Reversed.

Certain disputes having arisen in respect of property belonging to the appellant which were requisitioned for the Government of India under the Defence of India Rules, the appellant entered into an agreement with the Governor-General in Council in the matter of payment of compensation. The agreement was signed by the appellant but was not executed by any one on behalf of the Governor-General in Council or the Government of West Bengal which had requisitioned the property on behalf of the Central Government. The agreement also contained an arbitration clause in case of dispute. The properties were derequisitioned and the appellant who claim-

ed compensation etc., applied to the Court under Section 20 of the Arbitration Act on the basis of the clause in the agreement to appoint an arbitrator. The parties to the application were the appellant and the Province of Bengal and not the Governor-General in Council. The Court passed an order in terms of the application and set out the items of difference to be decided by the arbitrator and fixed a date to submit the award. After years of this order the Government of West Bengal in exercise of powers under Section 6 of Requisitioned Land (Continuance of Powers) Act (1947). Section 6 of General Clauses Act and a Central Government Notification appointed an arbitrator. This appointment was not made under the Arbitration Act but was one made under Section 19 of the Defence of India Act (1939) and therefore the arbitrator was not bound by the order of the Court or the questions framed for adjudication and the date fixed for submission of award. The arbitrator could not conclude the arbitration. Subsequently the Government appointed another arbitrator M. and in this order there was no mention of Section 19 of Defence of India Act but it referred to the original agreement between parties and the order of the Court for appointment of arbitrator. The arbitrator started the proceedings afresh, gave a fresh number to the case and issued notices to parties under the Arbitration Act as well as Section 19 of Defence of India Act. There were successive appointments of arbitrators who continued these proceedings and the award was ultimately passed.

Held, that the award was without jurisdiction as the appointment of M. arbitrator was under Section 20(4) of the Arbitration Act which did not apply and it was made in pursuance of the order passed in suit to which the Union Government was not a party and the agreement on the basis of which the order was passed was never executed by either of the two Governments. Civil Rule No. 1324 of 1961, D/- 14-3-1963 (Cal), Reversed.

(Para 17)

Mr. A. K. Sen, Senior Advocate, (Mr. D. N. Mukherjee, Advocate, with him), for Appellant; Mr. B. R. L. Iyengar, Senior Advocate, (Mr.

*(Civil Rule No. 1324 of 1961, D/- 14-3-1963 — Cal.)

Ram Punjani Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

SHELAT, J. — This appeal by special leave, arises out of a writ petition filed by the appellant under Article 227 of the Constitution in the High Court of Calcutta for quashing an Arbitrator's award for compensation in respect of certain premises belonging to him which were requisitioned for the period between March 1942 to November 1947 under Rule 75-A of the Defence of India Rules, 1939. The award granted compensation to the appellant at the rate of Rs. 475/- per month for the said period during which the premises remained under requisition as against the appellant's claim for Rs. 6 lacs and odd.

2. Certain disputes having arisen as early as 1944, the appellant entered into an agreement, dated January 27, 1944, with the Governor-General in Council. Under Clause (1) of the said agreement the appellant agreed to accept Rs. 475/- per month "for the said property in full settlement of the construction for structure" from March 15, 1942 till the Government remained in possession and the requisitioning thereof continued. Clause (5) of the said agreement provided for arbitration by an arbitrator to be appointed by Government in case of any dispute or difference arising out of or concerning the said requisitioned property. It further provided that such arbitration would be governed by the Arbitration Act, 1940.

3. It is not disputed that although the said agreement was signed by the appellant it was not executed by any one on behalf of the Governor-General in Council or the Government of West Bengal which had requisitioned the said property on behalf of the Central Government. Even so, the Government paid and the appellant received Rs. 475/- as monthly compensation. According to the appellant, he accepted the compensation at the rate of Rs. 475/- per month under protest. According to him, that was the rent he used to receive from his tenant for one of the buildings and the compensation for other structures and premises had not been taken into account.

4. The said property was de-requisitioned with effect from November 28, 1947. In 1948, the appellant filed an application under Section 20 (1) of the Arbitration Act in the Court of the 5th Subordinate Judge, Alipore, which was numbered as Suit No. 169 of 1948, requiring the Government of West Bengal to appoint an arbitrator as provided under Clause (5) of the said agreement. The parties to the said application were the appellant (the plaintiff) and the Province of Bengal, but not the Governor-General in Council. A number of contentions were raised on behalf of the Province of Bengal including waiver, estoppel and acquiescence, but no question was at that time raised that the said agreement was not valid and binding as it had not been signed by any one on behalf of the Government of West Bengal or the Governor-General in Council. By its order dated September 13, 1949 the Court allowed the said suit No. 169 of 1948 and ordered that the said agreement be filed by the Government of West Bengal. In passing the said order the learned Judge observed that the monthly compensation of Rs. 475/- mentioned in Clause (1) of the said agreement was in respect of the structures standing on the said property only and that no compensation had been agreed upon in respect of the lands, tanks, loss of fishery rights and other rights, and therefore, disputes regarding compensation in respect of them had arisen which required arbitration as provided by Clause (5) of the said agreement. The learned Judge set out the items of differences to be decided by the arbitrator to be appointed in terms of Clause (5) of the said agreement.

5. Although the said order required the arbitrator to submit his award by September 11, 1950, no steps were taken to proceed with the arbitration until February 9, 1955 when the Government of West Bengal, in exercise of the power conferred by Section 6 of the Requisitioned Land (Continuance of Powers) Act (XVII of 1947), Section 6 of the General Clauses Act, 1897 and Government of India, Defence Department Notification No. 1365-OR-42, dated September 19, 1942, appointed one D. N. Chakravarty, Additional District Judge, 24-Parganas as the Arbitrator. The said Chakra-

varty not having been able to complete the arbitration, the Government of West Bengal, by its order dated September 19, 1955, appointed his successor, one G. S. Chatterji as the Arbitrator.

6. It appears that these appointments were made not under the Arbitration Act, 1940, but under Section 19 of the Defence of India Act, 1939. That being so, the Arbitrator was not bound by the terms of the said order of the Court and the questions which the Court had framed for adjudication by the Arbitrator or the date fixed for making the award. The arbitration case was registered by the said Chakravarty as Arbitration Case No. 5 of 1955. When the said Chatterji took it over, he continued the said arbitration proceedings under the said number, namely, No. 5 of 1955.

7. During the pendency of the said arbitration proceedings before the said Chatterji, the Government of West Bengal applied on December 6, 1955 for amendment of its written statement filed on July 12, 1955. By that amendment it submitted that the appellant's claim was unenforceable as (a) the said agreement, dated January 27, 1944 was not executed by the Governor-General in Council or any one on his behalf, and (b) the Governor-General in Council was not a party to the said Suit No. 169 of 1948, nor to the instant reference. On December 23, 1955, the said Chatterji allowed the said amendment application.

8. The said Chatterji also could not conclude the arbitration. Consequently, the Government of West Bengal, by its order dated December 16, 1957, appointed one G. Kumar as the Arbitrator. It is important to bear in mind that the said order did not mention or refer to Section 19 of the Defence of India Act, but on the other hand recited the said agreement dated January 27, 1944, the said Suit No. 169 of 1948 and the said order passed therein by the learned Subordinate Judge, Alipore.

9. The said G. Kumar started the arbitration proceedings afresh on December 19, 1955 substituting the Union of India in place of the State of West Bengal and also registered them under a new number, namely,

No. 280 of 1957, and issued notices both under Section 20 of the Arbitration Act and Section 19 of the Defence of India Act. The parties also filed their statements afresh, adopting the statements filed by them previously, the Union of India adopting the statement filed earlier by the State of West Bengal. The said G. Kumar also did not complete the arbitration and thereupon the Governor of West Bengal successively appointed N. G. Ganguli, P. M. Lahiri and lastly, W. Basu Mazumdar as arbitrators on January 2, 1958, January 21, 1959 and November 10, 1960 respectively. It was the last named arbitrator who ultimately completed the arbitration and whose award, dated March 18, 1961 has been challenged in the present proceedings.

10. We may note that all the arbitrators appointed after the said G. Kumar continued the arbitration proceedings under the number given to them by him, namely, No. 280 of 1957. As in the case of the said G. Kumar, Ganguli and Lahiri, the order dated November 10, 1960 appointing the said W. Basu Mazumdar was passed in the name of Governor of West Bengal and recited the requisitioning and the derequisitioning of the said property, the said agreement dated January 27, 1944 and its principal terms, the said Suit No. 169 of 1948 and the said order passed therein by the Subordinate Judge, Alipore. No reference whatsoever was made therein of Section 19 of the Defence of India Act or any other provision thereof. Thus, it is clear that whereas the first two appointments of the said Chakravarty and Chatterji were made under Section 19 of the Defence of India Act, the rest of the orders, it would appear, were issued under Section 20 (4) of the Arbitration Act and in pursuance of the order passed in the said Suit No. 169 of 1948.

11. Such a conclusion appears to be borne out by an application made on behalf of the Union of India on February 8, 1961 before the said W. Basu Mazumdar. It appears, the appellant contended that it was necessary to obtain an order from the Subordinate Judge, Alipore for extension of time for making the award as the order of that Court in Suit No. 169 of 1948 had fixed time within which

the ward had to be made, i. e., by September 11, 1950. Counsel for the Union of India, no doubt, argued that no such order was necessary as the said order of the Court at Alipore was not binding on the Union of India as the Union of India was not a party to that suit. It is true that the Arbitrator accepted the submission made on behalf of the Union and passed an order to the effect that there was no necessity for obtaining an order for extension of time. It is significant however, that counsel for the Union of India did not argue that an order for extension of time was unnecessary because the arbitration proceedings were under the Defence of India Act and not under Section 20 of the Arbitration Act, nor did the arbitrator so rule in his said order, nor did he rule that his appointment was under Section 19 of the Defence of India Act, and therefore, the order of the learned Subordinate Judge fixing the time for making the award was not binding on him. It is true that Section 19 of the Defence of India Act was referred to by counsel for the Union of India, but that was done with a view to assert that if the award was made under Section 19 which provided for payment of compensation, the award would not have to be filed before the Alipore Court as under the rules framed by the Government on March 30, 1943 the award would by itself operate as a decree. What is important is that it was never contended at that time that the arbitrator was appointed under Section 19 of the Defence of India Act and not under Section 20 (4) of the Arbitration Act, and therefore, the Alipore Court's order was not binding on the arbitrator or that that Court had no jurisdiction to fix the time for making the award or extending it. Besides, if the appointment of the said G. Kumar, and following him that of the said Ganguli, Lahiri and Mazumdar, had been made under the Defence of India Act, 1939, or understood to be so, as were the appointments of the first two arbitrators, namely, Chakravarty and Chatterji, there was no need for the said G. Kumar, to start the arbitration proceedings afresh, register a new number to the proceedings, namely No. 280 of 1957 (which number was continued by his successors, including

the present Arbitrator, W. Basu Mazumdar) and for the parties to file afresh their claims and counter-statements. Furthermore, in para 13 of the writ petition the appellant expressly averred that the appointments beginning from that of the said G. Kumar and ending with that of the present arbitrator, the said Mazumdar, were all made under the Arbitration Act pursuant to the said order passed in Suit No. 169 of 1948. Neither the Union of India nor the State of West Bengal contradicted or denied the said averments. Indeed, neither of them filed any counter-affidavit at all.

12. In these circumstances, the contention of counsel for the appellant is that the appointment of W. Basu Mazumdar was under S. 20 (4) of the Arbitration Act and not under S. 19 of the Defence of India Act, 1939. That being so, the argument proceeded, no such appointment under S. 20 (4) could be made as, on the contention raised by the Union of India and the State of West Bengal, the said agreement dated January 27, 1944 was not valid and binding as it was never executed by or on behalf of the Governor-General in Council or the Province of West Bengal, and that therefore, the said award was without jurisdiction.

13. This very contention was raised by the appellant before the High Court. But the High Court rejected it relying on a Memorandum, No. LA/VIII/50 of 1941-42, dated November 18, 1960, by the office of the Land Acquisition Collector, Alipore in which it was stated that the reference to arbitration was under S. 19 of the Defence of India Act. The High Court concluded that in view of this Memorandum

"it cannot be said that Shri Basu Mazumdar was not appointed an Arbitrator under the Defence of India Act. Therefore, the argument of Mr. Sen Gupta that the impugned order was passed without jurisdiction cannot be accepted."

14. But the appointment of the said Basu Mazumdar as the arbitrator was surely not made by or under the said Memorandum. That was done by the Government Order bearing No. 16516 Reqn., dated November 10, 1960.

That order, as already stated, recited the said agreement dated January 27, 1944, the said Suit No. 169 of 1948 and the said order passed therein by the learned Subordinate Judge, Alipore. There was no reference in the order of appointment passed in the name of the Governor to S. 19 of the Defence of India Act, 1939 or to any other provision thereof, nor did it have any reference to any notification under which the Governor of West Bengal had been authorised to appoint an arbitrator on behalf of the Union of India in arbitration proceedings against it. Obviously, the order of appointment was, like the previous three orders appointing the said G. Kumar, Ganguli and Lahiri, under the Arbitration Act pursuant to the said order of the Court of the Subordinate Judge, Alipore in Suit No. 169 of 1948 on the footing of the said agreement which, according to the case of the Union of India and the State of West Bengal, was never executed by or on behalf of either of them.

15. It is clear that at the time of the appointment of the said Basu Mazumdar as arbitrator the Land Acquisition Department (Requisition Branch) of the Government of West Bengal and the Land Acquisition Collector, Alipore were acting at cross purposes, the former thinking that the appointment had to be made under the Arbitration Act, 1940 pursuant to the said order in Suit No. 169 of 1948 and the latter thinking that the order of appointment was made under S. 19 of the Defence of India Act, 1939. But if the said appointment was under the Defence of India Act, surely the order of appointment would have said so, as it did when the first two arbitrators, viz., the said Chakravarti and Chatterji, were appointed.

16. Mr. Iyengar, appearing for the Union of India, candidly conceded that he was not in a position to support the judgment of the High Court on the basis of the said Memorandum of the Land Acquisition Collector. He, however, urged that even if the order of appointment under S. 20 (4) of the Arbitration Act were to be found invalid, as the Union of India was not a party to the said Suit No. 169 of 1948 and the said agreement dated January 27, 1944 was not executed by any one on behalf of either of the two Govern-

ments, the appointment should still be upheld if the power of appointment were to be found under the Defence of India Act, 1939. He argued that the fact that the said G. Kumar substituted the Union of India as a party in place of the State of West Bengal and started the arbitration proceedings afresh giving a new number to them indicated that he was consciously acting under S. 19 of the Defence of India Act and breaking away from the Arbitration Act. The fact that he issued notices under S. 19 of the Defence of India Act was another fact showing that he was acting under the Defence of India Act.

17. The difficulty which, however, faces us is that the appointment orders, right from the order of appointment of the said G. Kumar to that of the present arbitrator, were all made and continued to be made under Section 20 (4) of the Arbitration Act and none of them referred to S. 19 of the Defence of India Act. The said G. Kumar substituted the Union of India and issued notices under S. 19 of the Defence of India Act because the liability to pay compensation arose under S. 19. The order-sheet of the arbitration proceedings shows that as early as February 8, 1961 the appellant had pointed out that an order for extending the time for making the award from the Court of the Fifth Subordinate Judge, Alipore, who had passed the order in Suit No. 169 of 1948 under S. 20 of the Arbitration Act, was necessary. As stated earlier, he was overruled on the ground that that order was not binding on the arbitrator as the Union of India was not a party to the said suit. On being overruled, the appellant appeared before the Arbitrator under protest and his doing so was recorded. At that time at least a fresh order of appointment under S. 19 of the Defence of India Act could have been made. Instead, the Arbitrator went on with the arbitration proceedings under the order of his appointment in pursuance of the said order in Suit No. 169 of 1948. Once the said G. Kumar, on an application by the Government of West Bengal, had substituted the Union of India as the opposite party in the arbitration proceedings before him, a fresh order under the Defence of India Act ought to have been passed.

In any event, when his successors, including the said Basu Mazumdar were appointed, orders of their appointments could have been passed under the Defence of India Act. Surprisingly, all those orders uniformly recited the said agreement, the said Suit No. 169 of 1948 and the order passed therein under the Arbitration Act. When all these orders were so passed, it is difficult for us to uphold them as if they were passed under the Defence of India Act. Apart from that difficulty, there is such a vast difference between the amount awarded and the claim made by the appellant, (into the merits of which we do not enter) that it would be hardly fair or just to stretch the language of the several orders of appointment of arbitrators and treat them as having been made under S. 19 of the Defence of India Act. Reluctant as we are, in view of the long time that has elapsed, we are compelled, in the circumstances and for the reasons earlier set out, to accept the contentions of Mr. Sen and order that the award was without jurisdiction as the appointment of the said W. Basu Mazumdar as the arbitrator was under S. 20 (4) of the Arbitration Act, which did not apply and it was made in pursuance of the said order passed in Suit No. 169 of 1948 to which the Union of India was not a party and the said agreement, on the basis of which the said order was passed, was never executed by either of the two Governments. The delay in the appellant's recovering compensation due to him has primarily arisen because of the lapse of time between the time when the property was derequisitioned in 1947 and the time when the impugned award was at last made.

18. The consequence is that the High Court's order is set aside and the appeal is allowed with costs.

Appeal allowed.

**AIR 1971 SUPREME COURT 517
(V 58 C 118)**

(From Madhya Pradesh: 1965 MPLJ
(Notes) 95)

J. C. SHAH, K. S. HEGDE, AND A. N. GROVER, JJ.

Civil Appeal No. 2214 of 1969:
Bimal Chandra Banerjee, Appellant v.

IN/IN/D972/70/GKC/T

State of Madhya Pradesh etc. Respondent. and Civil Appeal No. 308 of 1970: Jagannath Prasad and others, Appellants v. State of Madhya Pradesh and others, Respondents.

Civil Appeal No. 2214 of 1969 and Civil Appeal No. 308 of 1970, D/- 19-8-1970.

(A) Constitution of India, Art. 265 — Tax by rule or regulation cannot be imposed unless specially authorised by statute.

No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it. (Para 18)

(B) M. P. Excise Act (2 of 1915), Ss. 25 and 62—Duty on excisable articles under S. 25 — Liquor which contractors failed to lift is not an excisable article — Notification issued under S. 62 imposing duty on liquor which contractors failed to lift is, therefore, invalid. 1965 MPLJ (Notes) 95, Reversed. (Para 17)

The following Judgment of the Court was delivered by

HEGDE, J.: These appeals by certificates granted by the High Court of Madhya Pradesh raise common questions of law. Hence we propose to dispose them of by a common order.

2. The appellants herein are excise contractors. They are the successful bidders for some of the shops in Madhya Pradesh for the financial year 1964-65. The sale memorandum on the strength of which auction was held intimated that the successful bidders will have to sell a prescribed minimum quantity of liquor in their shops and if they fail to take delivery of the prescribed minimum quantity of liquor, they will have to pay excise duty on the quantity of liquor which they failed to take delivery. On March 20, 1964, the Government in the purported exercise of its powers under cls. (d) and (h) of S. 62 of the Madhya Pradesh Excise Act, 1915 (Act II of 1915) (to be hereinafter referred to as the Act) issued the notification

No. 144401089/V-SR amending the rules published on January 7, 1960. This notification prescribed that the conditions mentioned therein should be inserted in the licences to be issued to the successful bidders. At present we are only concerned with Clause 2 (C) thereof. That Clause reads:

"The minimum quantity for taking issues from the Warehouse for sale is fixed at 3213 p. litres spiced spirit and 25940 p. litres plain spirit. You shall be liable to make good every month the deficit of monthly average of the total minimum duty on or before the 10th day of each month following the month to which the deficit duty relates."

3. The appellants are challenging the validity of this notification.

4. An excise licensee in Madhya Pradesh as in other places has to meet three charges namely (1) he has to pay the prescribed licence fee for obtaining the privilege of vending liquor in a shop (2) he has to pay the price of the liquor purchased by him — generally the Government has a monopoly of liquor manufacture and (3) he has to pay excise duty on the liquor purchased by him.

5. In this case there is no dispute that the appellants had paid the prescribed licence fee, the price of the liquor purchased by them and also the duty on the liquor taken delivery of by them. The dispute centres round the duty required to be paid by them under the impugned clause in the notification of March 20, 1964 referred to earlier. The controversy is whether the said clause is valid in law.

6. The Government of Madhya Pradesh have issued demand notices on the appellants demanding the duty said to be due from them as per the impugned clause in the notification. The appellants have challenged the validity of these notices as well.

7. It is contended on behalf of the appellants that excise duty is a tax. The same can be levied on the basis of a valid law. No tax can be levied on the basis of a contract nor can tax be levied by executive orders. Tax can only be levied by the legislature. Hence the fact that cl. 2 (C) in the notification of March 20, 1964 has been made a part of the licence condition is immaterial. It was contended

that the question for decision is whether the Government of Madhya Pradesh was entitled to amend its rules and add the impugned clause as a part of the licence conditions.

8. The scheme of the Act is similar to the scheme of other excise Acts in this country. In the Act 'Excise Duty' and "countervailing duty" have been defined (in S. 2 (6-A)) as meaning any such excise duty or countervailing duty, as the case may be, as is mentioned in entry 51 of list II in the Seventh Schedule to the Constitution, which entry reads:

"Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:

(a) alcoholic liquors for human consumption;

(b) opium, Indian hemp and other narcotic drugs and narcotics; but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry."

9. In view of this entry the State is competent to levy excise duty only on goods manufactured or produced in the State. The expression "export" is defined in S. 2 (9) of the Act as meaning to take out of the State otherwise than across customs frontier as defined by the Central Government. The term manufacture is defined in S. 2 (14). It reads:

"manufacture" includes every process whether natural or artificial by which any intoxicant is produced or prepared and also redistillation and every process for the rectification, flavouring, blending or colouring of liquor."

10. The word "transport" is defined in S. 2 (19) to mean to move from one place to another within the State.

11. The excise duty is a duty on manufacture or production and countervailing duty is a tax imposed on excisable articles brought into the State from other parts of the country. Chapter V of the Act deals with Duties and Fees. That Chapter contains four sections, viz. Ss. 25, 26, 27 and 27-A. Section 25 deals with duty on excisable articles. Section 26 prescribes the ways of levying such duty. Section 27

provides for payment for grant of leases — licence fee. Section 27A saves the duties that were being levied at commencement of the Constitution. Herein we are not concerned with section 27-A.

12. Section 25 reads:

"Duty on excisable articles: (1) An excise duty or a countervailing duty as the case may be, shall, if the State Government so direct, be levied on excisable articles—

- (a) imported; or
- (b) exported; or
- (c) transported; or

(d) manufactured, cultivated or collected under any licence granted under S. 13; or

(e) manufactured in any distillery established, or any distillery or brewery licensed under this Act;

Provided that it shall be lawful for the State Government to exempt any excisable article from any duty to which the same may be liable under this Act.

(2) Duty may be imposed under sub-section (1) at different rates according to the places to which any excisable article is to be removed or according to the strength and quality of such article.

(3) Notwithstanding anything contained in sub-section (1) duty shall not be imposed thereunder on any article which has been imported into India and was liable, on such importation, to duty under the Sea Customs Act, VIII of 1878 or the Indian Tariff Act, VIII of 1894."

13. Under this section excise duty or countervailing duty can be imposed on excisable articles when they are either imported or exported or transported or manufactured or cultivated or collected and not otherwise.

14. Section 26 deals with the manner of levying the duty. It says:

"Subject to such rules regulating the time, place and manner as the State Government may prescribe, such duty shall be levied rateably on the quantity of excisable articles imported, exported, transported, collected or manufactured in or issued from a distillery, brewery or warehouse.

Provided that:

(1) duty may be levied—

(a) on intoxicating drugs by an acreage rate levied on the cultivation

of the hemp plant or by a rate charged on the quantity collected;

(b) on spirit or beer manufactured in any distillery established or any distillery or brewery licensed under this Act—

(i) in accordance with such scale of equivalents calculated on the quantity of materials used, or by the degree of attenuation of the wash or wort, as the case may be, as the State Government may prescribe, or

(ii) by rate charged directly on the materials used;

(c) on tari, by a tax on each tree from which the tari is drawn.

(2) Where payment is made upon the issue of an excisable article for sale from a warehouse, it shall be at the rate of duty in force on the date of issue of such article from the warehouse."

Section 27 says:

"Payment for grant of leases: Instead of or in addition to any duty leviable under this chapter, the State Government may accept payment of a sum in consideration of the grant of any lease under section 18."

15. Section 18 deals with the power to grant lease of right to manufacture or right to sell excisable articles.

16. The only other relevant section for our present purpose is Section 62 which confers power on the State Government to make rules. Clause (1) of that section says:

"The State Government may make rules for the purpose of carrying out the provisions of this Act."

In Clause 2 reliance was placed on sub-cl. (d) and (h). Those sub-clauses read:

"In particular, and without prejudice to the generality of the foregoing provision, the State Government may make rules. . . .

xx xx xx

(d) regulating the import, export, transport, manufacture, collection, possession, supply or storage of any intoxicant, or the cultivation of the hemp plant and may, by such rules, among other matters—

(i) regulate the tapping of tari producing trees, the drawing of tari from such trees, the marking of the same and the maintenance of such marks;

(ii) declare the process by which spirit shall be denatured and the denaturation of spirit ascertained, and

(iii) cause spirit to be denatured through the agency or under the supervision of its own officers;

(d-1) regulating the import, export, transport, collection, possession, supply, storage or sale of Mahua flowers prescribing licences and permits therefor, throughout the State or in any specified area or for any specified period."

x x x

(h) prescribing the authority by the form in which and the terms and conditions on and subject to which any licence, permit or pass shall be granted, and may by such rules among other matters—

(i) fix the period for which any licence, permit or pass shall continue in force,

(ii) prescribe the scale of fees or the manner of fixing the fees payable in respect of any such license, permit or pass,

(iii) prescribe the amount of security to be deposited by holders of any licence, permit or pass — for the performance of the conditions of the same;

(iv) prescribe the account to be maintained and the returns to be submitted by licence holders, and

(v) prohibit or regulate the partnership in, or the transfer of, licences."

17. Neither S. 25 or S. 26 or S. 27 or S. 62 (1) or cls. (d) and (h) of S. 62 (2) empower the rule-making authority viz. the State Government to levy tax on excisable articles which have not been either imported, exported, transported, manufactured, cultivated or collected under any licence granted under S. 13 or manufactured in any distillery established or any distillery or brewery licensed under the Act. The legislature has levied excise duty only on those articles which come within the scope of S. 25. The rule-making authority has not been conferred with any power to levy duty on any articles which do not fall within the scope of S. 25. Therefore it is not necessary to consider whether any such power can be conferred on that authority. Quite clearly the State Government purported to levy duty on liquor which the contractors failed to lift. In so doing it was attempting to

exercise a power which it did not possess.

18. No tax can be imposed by any bye-law or rule or regulation unless the statute under which the subordinate legislation is made specially authorises the imposition even if it is assumed that the power to tax can be delegated to the executive. The basis of the statutory power conferred by the statute cannot be transgressed by the rule-making authority. A rule-making authority has no plenary power. It has to act within the limits of the power granted to it.

19. We are of the opinion that the impugned rule as well as the demands are not authorised by law. Hence we allow these appeals as well as the writ petitions from which these appeals arise and quash the impugned notification as well as the demand notices. The State of Madhya Pradesh shall pay the costs of the appellants in both these appeals — hearing fee one set.

Appeals allowed.

AIR 1971 SUPREME COURT 520 (V 53 C 119)

(From Madras: AIR 1968 Mad. 117)

J. M. SHELAT AND G. K.
MITTER, JJ.

P. Sirajuddin etc., Appellants v.
The State of Madras etc. Respondents.

Criminal Appeals Nos. 233 to 235
of 1966 and 9 to 11 of 1967, D/- 9-3-
1970.

**(A) Prevention of Corruption Act
(1947), Ss. 5 and 5A — Criminal P. C.
(1898), Ss. 160, 161, 162, 163 and 164—
Public servant charged for serious mis-
demeanour — Preliminary enquiry
necessary before lodging FIR — Duty
of enquiring officer.**

Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who occupied the top position in a department, even if base-

JN/KN/B194/70/CWM/T

less, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for some one in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. (Para 17)

Where the enquiring officer was a high ranking police officer, simply because he was technically not exercising powers under Chapter XIV of the Criminal Procedure Code in that a formal first information report had not been lodged he should not overlook or deliberately overstep the limits of investigation contained in the said Chapter. Howsoever serious the crime and howsoever incriminating the circumstances may be against a person supposed to be guilty of a crime the Code of Criminal Procedure aims at securing a conviction if it can be had by the use of utmost fairness on the part of the officers investigating

into the crime before the lodging of a charge sheet.

As soon as it became clear to such enquiring officer that the servant appeared to be guilty of serious misconduct, it was his duty to lodge a FIR and proceed further in the investigation according to Chapter XIV of the Code. (Paras 19, 21, 24 and 25)

View of the High Court in AIR 1968 Mad 117 with regard to the date of the commencement of the investigation so far as Chap. XIV of Cr. P.C. was concerned held not correct.

(Para 29)

(B) Criminal P. C. (1898), Ss. 156 and 337 — Prevention of Corruption Act (1947), Ss. 5 and 5A — Preliminary enquiry — Granting of amnesty by enquiring Officer to persons who were to be examined as prosecution witnesses, is highly irregular—Neither Code nor Act recognises immunity from prosecution — Grant of pardon is not in discretion of police authorities. AIR 1968 Mad 117, Affirmed.

(Para 26)

(C) Constitution of India, Art. 14 — Discrimination — Public servant, head of department found actively responsible for directing commission of offences by his subordinates in particular manner — He cannot be allowed to take plea that subordinates must also be joined as co-accused with him. AIR 1968 Mad 117, Affirmed.

(Para 27)

(D) Prevention of Corruption Act (1947), S. 5 (1) (b) — "Any person having any connection with the official functions of himself" — Includes any subordinate of person who accepts valuable things. AIR 1968 Mad 117, Reversed.

The portion of provision "whom he knows to have been or to be or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him or" qualifies the expression "any person" in the same way as the portion reading "having any connection with the official function of himself". So read "any person having any connection with the official functions of himself" would include any subordinate of the person who accepts the valuable thing. The words "of himself" do not refer to the person in the expression "any person" but refers to the pronoun "he" at the beginning of the sub-section. A sub-

ordinate of the public servant would have connection with his official functions. The sub-section aims at folding within its ambit not only outsiders "who are likely to be concerned in any proceeding or business transacted or about to be transacted" by the public officer but also any subordinate or any other person who is connected with the official functions of the public servant. AIR 1968 Mad 117, Reversed.

(Para 28)

Cases Referred: Chronological Paras

(1947) AIR 1947 PC 75 (V 34)=

74 Ind App 80, Zahiruddin v.

King Emperor

13

Mr. M. C. Chagla, Senior Advocate (M/s. Amjad Nainar and R. Gopalakrishnan, Advocates, with him), for Appellant (In Cr. As. Nos. 233 to 235 of 1966) and for Respondent No. 1 (In Cr. As. Nos. 9 to 11 of 1967); Mr. S. Govind Swaminadhan, Advocate-General for the State of Tamil Nadu (M/s. A. V. Rangam, K. S. Ramaswami Thevar and N. S. Sivan, Advocates, with him), for Respondent (In Cr. As. Nos. 233 to 235 of 1966) and for Appellants (In Cr. As. Nos. 9 to 11 of 1967).

The following Judgment of the Court was delivered by

MITTER, J.: These six appeals arise out of certificates granted by the High Court of Madras arising out of two Writ Petitions and a petition under Ss. 435 and 439 of the Code of Criminal Procedure filed in that court by P. Sirajuddin, the appellant in the first set of appeals. It is not necessary to give an outline of these petitions as the salient features thereof appear sufficiently from the judgment of the High Court and the substance thereof is dealt with hereafter.

2. The facts are as follows. The appellant was the Chief Engineer, Highways and Rural Works, Madras having risen from the status of a District Board Engineer in which capacity he joined service in the year 1935. He attained the age of 55 years on March 14, 1964 on which date he was asked to hand over charge of his office to one Shiv Sankar Mudaliar, Superintending Engineer, Madras. He expected to be retained in service up to the age of 58, a privilege said to be normally accorded to person physically and

otherwise fit for public service. It appears that on March 1, 1964 a copy of a petition concerning him and dated February 28, 1964 addressed to the Minister, Public Works by one Rangaswami Nadar was received by the Chief Minister of the State. It is said that apart therefrom allegations about want of rectitude of the appellant had already reached the Government. The Chief Minister asked the Director of Vigilance and Anti-Corruption to make confidential enquiries. On March 10, 1964 Government received a note from the said officer which cast serious aspersions on the appellant's reputation and mentioned quite a few instances of his lack of probity. The endorsement of the Chief Minister on the note read:

"Secretary, P. W. D. I had this (petition already mentioned) from the Director of Vigilance. This may be immediately looked into. I have asked the Director to pursue the investigation further."

Thereupon the Chief Secretary orally ordered a full-fledged enquiry in the matter and the Deputy Superintendent of Police, Vigilance and Anti-Corruption one G. K. Ranganathan, was asked to make a personal enquiry and report under the supervision of R. N. Krishnaswamy. The Director of Vigilance registered an enquiry numbering 8/HD/64 on 15th April, 1964. That the enquiry was taken up with great keenness appears from a note of Ranganathan to the effect that he would require the assistance of two Inspectors to assist him. There can be no doubt that the enquiry launched by the Vigilance and Anti-Corruption Department was a very thorough and searching one. A very large number of persons were examined by the Vigilance and Anti-Corruption officers including 18 public servants who spoke to matters touching the allegations against the appellant. Statements in writing signed by the makers were taken from no less than nine public servants regarding the above and two of them, namely, S. Sivasubrahmanyam and S. Chidambaram were given certificates assuring them immunity from prosecution for the part played by them in rendering aid to the appellant in the commission of his malpractices. These two persons occupied the posi-

tion of an Assistant Engineer and a Junior Engineer and were subordinates of the appellant. On June 27, 1964 a first information report was lodged in the Directorate of Vigilance and Anti-Corruption, Madras and the case recorded as 3/AC/64. The offences to be investigated into were under Ss. 161 and 165 of the Indian Penal Code and S. 5 (1) (a) and (d) of the Prevention of Corruption Act. The complaint was made by Ranganathan, Deputy Superintendent of Police, Vigilance and Anti-Corruption Department to the Additional Superintendent of Police in the same department. It is pertinent to note that the Directorate of Vigilance and Anti-Corruption which had been set up under a Government order dated 8th April 1964 was declared to be a 'police station' under clause (s) of sub-section (1) of section 4 of the Code of Criminal Procedure by a notification dated May 25, 1964 and by another notification of the same date the Governor of Madras conferred upon the Director and the Superintendents of Police of the said Directorate all the ordinary powers of a Magistrate of the First Class under section 5-A of the Prevention of Corruption Act within the limits of the whole of the State of Madras except the Presidency Town. The complaint by Ranganathan to the Additional Superintendent of Police, Vigilance and Anti-Corruption, gave details of various malpractices with which the appellant was charged. He was inter alia said to have obtained various articles of furniture with the help of Sivasubrahmanyam and Chidambaram mentioned above by paying only a small fraction of the cost and asking them to adjust the balance by manipulations of the muster rolls claims. He was also said to have got his residence whitewashed in similar manner. It was also alleged against him that he had constructed a kungallow by diverting building materials allotted for the construction of the Cauveri bridge at Tiruchirapalli. The complaint wound up with a paragraph to the effect that a criminal case would be registered against him as a regular investigation alone would facilitate the collection of additional evidence by way of recovery of valuable things which he had obtained from his subordinates by various illegal means and in addition more incriminating evidence

was likely to be forthcoming during the investigation. Sanction to prosecute the appellant was obtained on September 27, 1964 and a charge-sheet was filed against the appellant in the Court of the Special Judge, Madras on October 5, 1964 numbered as C. C. No. 10 of 1964. No less than 47 witnesses had been examined during the investigation following the first information report and at least nine of them had been previously examined at what was termed as a "preliminary or detailed enquiry."

3. No less than 19 malpractices were alleged against him in different paragraphs of the charge sheet and the appellant was charged with having obtained for himself or for members of his family various valuable things from his subordinates by corrupt and illegal means and by abusing his position as a public servant. The charges were for offences already mentioned.

4. In the enquiry the appellant was supplied with copies of records on which the prosecution proposed to rely including the statements recorded by the investigating officer which according to the appellant showed prima facie that a number of public servants who had given the statements were themselves responsible for commission of various offences including falsification of accounts and forgery of public records.

5. Before the Special Judge the appellant moved an application for discharge under Section 251-A of the Code of Criminal Procedure on the ground that the charges against him were groundless. In that application he also complained: (a) that the instances alleged against him related mostly to his personal matters unconnected with his official functions; (b) that none of the items referred to in the charge had been handed over to or delivered to him for the purpose of securing an advantage in order to attract Section 5 (1) (d) read with Section 5 (2) of the Prevention of Corruption Act, and (c) that on the admitted statements of the public servants they were liable to be charged with various offences and he had been greatly prejudiced by discriminatory treatment.

6. While holding that there was no basis of charging the appellant

under Section 165, I. P. C., or under Section 5 (2) read with Section 5 (1) (b) of the Prevention of Corruption Act, the Judge held that a charge could be framed against him under Section 5 (2) read with Section 5 (1) (d) of the Act. He observed that the "investigating officers evidently felt that if they arraigned the subordinate officers along with the appellant the case may fail for lack of evidence".

7. Against that order dated January 16, 1965 the Public Prosecutor preferred Cr. R. C. 294 of 1965 and the appellant preferred Cr. M. P. 934 of 1965 under Section 561-A of the Code, for quashing the proceedings and discharging him as the charge was groundless. The appellant filed two writ petitions before the High Court, namely, one for a writ of mandamus directing the forbearing from prosecution of C. C. No. 10 of 1964 and a second for a writ of certiorari to quash the order of the Special Judge mentioned above. There was a petition under Sections 435/439 of the Criminal Procedure Code for revision of the order of the Special Judge and one under Section 561-A of the Code for quashing his said order.

8. The High Court dealt with all the Writ Petitions and the different allied matters together. Broadly speaking, it was urged before the High Court:

(1) There had been such a violent departure from the provisions of the Code in the matter of investigation and cognizance of offences as to amount to denial of justice and to call for interference by the issue of prerogative writs.

(2) The investigation and prosecution were wholly mala fide and had been set afoot by his immediate junior officer, one Sivasankar Mudaliar, Superintending Engineer, Madras who was related to the Chief Minister of the State.

(3) The appellant's case was being discriminated from those of others who though equally guilty according to the prosecution case were not only not being proceeded against but were promised absolution from all evil consequences of their misdeeds because of their aid to the prosecution.

9. In his petition for the issue of a writ of mandamus by the High

Court the appellant stated that it was only by perusing copies of the statements furnished to him under Section 173 (4), Criminal P. C., that he found that 18 public servants had stated having given him valuables without any or adequate consideration and that it was at his instance that they had committed offences of criminal conspiracy under Section 120-B, I. P. C., and criminal breach of trust of Government moneys under Section 409, I. P. C. besides falsification of accounts etc. His positive case was that the Director of Vigilance and Anti-Corruption had obtained signed statements which were confessional and self-incriminatory from persons who were going to be called as witnesses by giving them assurances of immunity. These assurances were not only directed towards immunising them from prosecutions but also any departmental action likely to affect adversely the makers of the statements. The case of discrimination was based mainly on the above averments that the Directorate had singled him out leaving others who were equally guilty. According to the appellant this also showed mala fides and malice directed towards him.

10. Another main argument which was canvassed before the High Court related to the applicability of Sections 162 and 163 of the Criminal Procedure Code and the effect of the violation thereof, if any. For the appellant, it was argued that the taking of signed statements from persons who were eventually going to be examined in the criminal proceedings by giving them assurances of immunity and thereafter relying on their subsequent unsigned statements as those under Section 161 (3) of the Code for the purpose of Section 173 amounted to a fraud on the procedure established by law. It was contended that as the statements recorded under Section 161 were the material on which the Special Judge had to consider whether the charge was groundless under Section 251-A of the Code, the illegality "corroding the foundation vitiated the enquiry and necessitated the discharge of the appellant".

11. The High Court examined the case made out in the affidavits of the appellant and the counter affidavits on behalf of the State

It expressed great dissatisfaction at the variance in the attitude of the State in the different affidavits in that whereas in the first counter-affidavit there was no contradiction of the appellant's averment that assurances of immunity had been given to all the 18 persons examined before the lodging of the first information report, the plea put forward in a subsequent affidavit was that such assurance had been given only to two persons, namely, the two subordinates of the appellant and only after signed statements had been given by them. The Court was however not satisfied that a direction was called for for the prosecution of the subordinate officers also. Further the High Court was not impressed with the plea of hostile discrimination against the appellant observing that although the "policy of not securing judicial pardon to accomplices by bringing them as approvers but retaining them at the sole discretion of the prosecution might be open to question" "that cannot by itself invalidate the arraignment of the persons actually put up for trial" specially where the person charged was in a position to wield influence and power over those asked by him to aid him in commission of misconduct.

12. Although not of the view that the record before it established a case of mala fide or hostile discrimination against the appellant which called for the quashing of the proceedings, the High Court took the view that the investigation of the case under Chapter XIV of the Code should be held to have commenced when Ranganathan, the Deputy Superintendent of Police, started the enquiry on 15th April 1964 on the reasoning that though "an enquiry may start with shadowy beginnings and vague rumours, once a police officer forms a definite opinion that there are grounds for investigating a crime, an investigation under the Code has started". According to the High Court

(a) "substantial information and evidence had been gathered before the so-called first information report was registered".

(b) the police officer who had conducted the enquiry prior to 27th June 1964 was a person competent to enter upon investigation:

(c) admittedly there had been an earlier probe by the Vigilance Department prior to 10th March 1964 on the basis whereof he was not re-employed;

(d) there was definite information to the Government contained in the report dated 13th March, 1964 relating to corrupt activities of the appellant; and

(e) the "delay on the part of the investigating officer in registering the first information report may be an irregularity, but certainly the statements recorded subsequent to the receipt of definite information of the commission of an offence in gathering evidence of the offence would nonetheless be statements recorded during investigation and hit by Section 162 of the Criminal Procedure Code".

13. With regard to the disregard of the provisions of Sections 162 and 163 of the Code, the High Court observed that the result of taking his signature to a statement would be to tie a witness down to the statement or at least to give him the impression that he would not be free to make a different statement at the trial but the statement of a witness at the trial would not become inadmissible by reason of his having signed a statement before going into the witness box. Reference was made to several decisions bearing on Section 162 of the Code and in particular to Zahiruddin v. King Emperor, 74 Ind App 80 at p. 85 = (AIR 1947 PC 75 at p. 77), that the evidence of a witness who had previously signed a statement in writing did not become inadmissible or vitiate the whole proceeding although the value of the evidence would be seriously impaired thereby.

14. The Court seems to have been of the view that it was the duty of the Magistrate or the presiding Judge on discovering that a witness had while giving evidence, made material use of a statement given by him to the police to disregard the evidence of that witness as inadmissible. The High Court's definite conclusion was that there had been a deliberate violation of the provisions of the Code and a departure from a recognised and lawful procedure for investigation.

15. With regard to the propriety of taking self-incriminatory statements

even when there had been no assurance of immunity from prosecution, the High Court observed that as the learned Advocate-General for the State had stated that the record of manipulations in the muster rolls by the subordinate officers of the appellant had to be disregarded as not proper material for consideration as the "Special Judge had not considered these vitiating features in regard to the documents placed before him while ordering the framing of charges against the appellant" it was unnecessary to examine the question at length.

16. The High Court found partly in favour of the appellant and held that the order of the Special Judge directing the framing of a charge on consideration of the statements before him under Section 173 (4) of the Code without reference to the illegalities in the investigation should be quashed. The High Court further directed the Special Judge to take up the matter once again and consider the case excluding from consideration all statements recorded under Sections 161 (3) and 164 which were found vitiated in the light of the observations made by it. A direction was also given to exclude portions of the statements which were self-incriminatory and confessional in character of the maker even if the same did not otherwise violate the provisions of Sections 162 and 163 of the Code.

17. In our view the procedure adopted against the appellant before the laying of the first information report though not in terms forbidden by law, was so unprecedented and outrageous as to shock one's sense of justice and fairplay. No doubt when allegations about dishonesty of a person of the appellant's rank were brought to the notice of the Chief Minister it was his duty to direct an enquiry into the matter. The Chief Minister in our view pursued the right course. The High Court was not impressed by the allegation of the appellant that the Chief Minister was moved to take an initiative at the instance of a person who was going to benefit by the retirement of the appellant and who was said to be a relation of the Chief Minister. The High Court rightly held that the relation-

ship between the said person and the Chief Minister, if any, was so distant that it could not possibly have influenced him and we are of the same view. Before a public servant, whatever be his status, is publicly charged with acts of dishonesty which amount to serious misdemeanour or misconduct of the type alleged in this case and a first information is lodged against him, there must be some suitable preliminary enquiry into the allegations by a responsible officer. The lodging of such a report against a person, specially one who like the appellant occupied the top position in a department, even if baseless, would do incalculable harm not only to the officer in particular but to the department he belonged to, in general. If the Government had set up a Vigilance and Anti-Corruption Department as was done in the State of Madras and the said department was entrusted with enquiries of this kind, no exception can be taken to an enquiry by officers of this department but any such enquiry must proceed in a fair and reasonable manner. The enquiring officer must not act under any preconceived idea of guilt of the person whose conduct was being enquired into or pursue the enquiry in such a manner as to lead to an inference that he was bent upon securing the conviction of the said person by adopting measures which are of doubtful validity or sanction. The means adopted no less than the end to be achieved must be impeccable. In ordinary departmental proceedings against a Government servant charged with delinquency, the normal practice before the issue of a charge-sheet is for someone in authority to take down statements of persons involved in the matter and to examine documents which have a bearing on the issue involved. It is only thereafter that a charge-sheet is submitted and a full-scale enquiry is launched. When the enquiry is to be held for the purpose of finding out whether criminal proceedings are to be resorted to the scope thereof must be limited to the examination of persons who have knowledge of the affairs of the delinquent officer and documents bearing on the same to find out whether there is prima facie evidence of guilt of the officer. There-

after the ordinary law of the land must take its course and further inquiry be proceeded with in terms of the Code of Criminal Procedure by lodging a first information report.

18. The Code of Criminal Procedure is an enactment designed inter alia to ensure a fair investigation of the allegations against a person charged with criminal misconduct. Chapter XIV of the Code gives special powers to the police to investigate into cases whether cognizable or non-cognizable in the manner provided therein. Section 160 empowers a police officer making an investigation to require the attendance before himself of any person who appears to be acquainted with the circumstances of the case. Section 161 (1) gives him the right to examine orally any person supposed to be acquainted with the facts and circumstances of the case. Although bound to answer questions put to him, sub-section (2) of the section exempts a person from answering any question which would have a tendency to expose him to a penal charge or to a penalty for forfeiture. Under sub-s. (3) the police officer is empowered to reduce into writing any statement made to him in the course of such examination. Section 162 (1) expressly lays down that such a statement made in the course of an investigation if reduced into writing is not to be signed by the maker thereof and no part of such statement except as expressly provided is to be used for any purpose at any enquiry or trial in respect of any such offence under investigation at the time when the statement was made. The only exceptions to these are cases when the statement falls under Section 32, Clause (1) of the Evidence Act and to statements which are covered by Section 27 of that Act. The obvious idea behind this provision is that an over-zealous police officer may not misuse his position by getting a statement in writing signed by the maker which would tend to pin him down to the statement but leave him free to speak out freely when called to give evidence in Court. In order that statements made in the course of such investigations be recorded without any pressure or inducement by an investigating officer, Section 163 (1) lays down an embargo on the investigating authorities using any inducement,

threat or promise to the maker which might influence his mind and lead him to suppose that thereby he would gain any advantage or avoid any evil in reference to his conduct as disclosed in the proceedings. It is to be noted that whereas the other sections hereinbefore referred to contain guidelines for the police officers in making investigation, this section expressly provides that any person in authority even if he is not a police officer must guide himself accordingly, in case where a crime is being investigated under this Chapter of the Code. All this is however subject to the provisions of sub-section (2) which allows a person to make any statement against his own interest by way of confession if he does so of his own free will. Even then the law enjoins by Section 164 that such a statement or confession can only be recorded by a Magistrate of the Class mentioned therein and even such a Magistrate must explain to the person making the confession before recording the same, that he is not bound to make it and if he does so it may be used as evidence against him. Further the Magistrate must make sure that the person was making the confession voluntarily and not acting under any pressure from an outside source.

19. All the above provisions of the Code are aimed at securing a fair investigation into the facts and circumstances of the criminal case: howsoever serious the crime and howsoever incriminating the circumstances may be against a person supposed to be guilty of a crime the Code of Criminal Procedure aims at securing a conviction if it can be had by the use of utmost fairness on the part of the officers investigating into the crime before the lodging of a charge sheet. Clearly the idea is that no one should be put to the harassment of a criminal trial unless there are good and substantial reasons for holding it.

20. Section 169 of the Code empowers a police officer making investigation to release an accused person from custody if there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of him to a Magistrate by taking a bond from him with or without sureties. Section 173 enjoins upon

a police officer to complete the investigation without unnecessary delay and forward to a Magistrate empowered to take cognizance of the offence a report in the form prescribed by Government setting forth inter alia the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case and to communicate to the State Government the action taken by him to the person, if any, by whom information relating to the commission of the offence was first given. When a report has been made under this section it is the duty of the officer in charge of the police station to furnish to the accused before the commencement of the enquiry or trial a copy of the report above mentioned and of the first information report under Section 154 and of all other documents or relevant extracts on which the prosecution proposes to rely including the statements and confessions, if any recorded under Section 164 and the statements recorded under sub-section (3) of Section 161 of all persons whom the prosecution proposes to examine as its witnesses.

21. In our view the enquiring officer pursued the investigation with such zeal and vigour that he even enquired into and took down statements of persons who were supposed to have provided the appellant with articles of food worth trifling sums of money long before the launching of the enquiry. The whole course of investigation as disclosed in the affidavits is suggestive of some predetermination of the guilt of the appellant. The enquiring officer was a high-ranking police officer and it is surprising that simply because he was technically not exercising powers under Chapter XIV of the Criminal Procedure Code in that a formal first information report had not been lodged he overlooked or deliberately over-stepped the limits of investigation contained in the said Chapter. He recorded self-incriminating statements of a number of persons and not only secured their signatures thereto obviously with the idea of pinning them down to those but went to the length of providing certificates of immunity to at least two of them from the evil effects of their own misdeeds as recorded. It was said

that the certificates were given after the statements had been signed. It is difficult to believe that the statements could have been made before the grant of oral assurances regarding the issue of written certificates. There can be very little doubt that the persons who were given such immunity had made the statements incriminating themselves and the appellant under inducement, threat or promise as mentioned in Section 24 of the Indian Evidence Act.

22. It is no doubt the duty of the State to track down and punish all delinquent officers but it is certainly not in accordance with justice and fairplay that their conviction should be sought for by such questionable means.

23. The office of the Directorate of Vigilance and Anti-Corruption Department, Madras became a police station for the purpose of the Criminal Procedure Code under sub-clause (s) of sub-section (1) of Section 4 of the Code by a notification dated 25th May, 1964. Prior to that it was only functioning under a Memorandum No. 1356/64-2 dated 8th April, 1964 when it was set up to ensure the maintenance of the highest standard of integrity and probity in public servants. If the investigation had been taken up after May 25, 1964 it would have been one under Chapter XIV of the Code without any doubt.

24. Although we are not disposed to concur with the view that the investigation under Chapter XIV of the Code started as early as 15th April, 1964 we are of opinion that there was no warrant for the Vigilance and Anti-Corruption Department which was in charge of one of the highest police officers of the State to disregard the provisions of Sections 162 and 163 of the Code of Criminal Procedure. The investigation was of a type more thorough and elaborate than is usually to be found; as noticed already it was in charge of a senior police officer who had the assistance of two police inspectors in the matter. No blame attaches to them for making enquiries of a large number of persons, but the whole course of investigation is suggestive of guidance by someone who was intimately familiar with the affairs of the

appellant and his department and throwing out scents which the investigating officers were only too keen to pick up and follow. The appellant may have been guilty of all the charges levelled against him but we cannot approve of the manner in which the investigation against him was conducted and an attempt made to lay a guideline for the persons who were to be cited as prosecution witnesses in their evidence at the trial. To say the least it would be surprising to find so many persons giving confessional and self-incriminatory statements unless they had been assured of immunity from the evil effects thereof whether oral or in writing.

25. There can be no excuse for the Directorate of Vigilance and Anti-Corruption for proceeding in the manner adopted in the preliminary enquiry before the lodging of the first information report. As soon as it became clear to them—and according to the High Court it was before March 13, 1964 in which we concur—that the appellant appeared, to be guilty of serious misconduct, it was their duty to lodge such a report and proceed further in the investigation according to Chapter XIV of the Code. Their omission to do so cannot prejudice the appellant and the State ought not to be allowed to take shelter behind the plea that although the steps taken in the preliminary enquiry were grossly irregular and unfair, the accused cannot complain because there was no infraction of the rules of the Evidence Act or the provisions of the Code.

26. In our view the granting of amnesty to two persons who are sure to be examined as witnesses for the prosecution was highly irregular and unfortunate. It was rightly pointed out by the High Court:

"Neither the Criminal Procedure Code nor the Prevention of Corruption Act recognises the immunity from prosecution given under these assurances and that the grant of pardon was not in the discretion of police authorities".

27. We are not impressed by the argument that the appellant was singled out from a number of persons who had aided the appellant in the commission of various acts of misconduct and that they were really in the position of accomplices. It was pointed

out by the High Court that the prosecution may have felt that "if the subordinate officers were joined along with the appellant as accused the whole case may fall for lack of evidence". In our view, if it be a fact that it was the appellant who was the head of the department actively responsible for directing the commission of offences by his subordinates in a particular manner, he cannot be allowed to take the plea that unless the subordinates were also joined as co-accused with him the case should not be allowed to proceed.

28. It was contended before us by the learned Advocate-General for the State of Madras that both the High Court and the Special Judge had gone wrong in the interpretation of Section 5 (1) (b) of the Prevention of Corruption Act. Having heard counsel on both sides, we find ourselves unable to sustain the view of the High Court on this point. Omitting the portions of the section which are not relevant it reads:

"5 (1) A public servant is said to commit the offence of criminal misconduct—

(a) * * * *

(b) if he habitually accepts or obtains for himself any valuable thing without consideration or for a consideration which he knows to be inadequate, from any person (whom he knows to have been, or to be, or to be likely to be concerned in any proceeding or business transacted or about to be transacted by him, or) having any connection with the official functions of himself, or
* * * *

The portion of the sub-section within brackets in our view qualifies the expression "any person" in the same way as the portion reading "having any connection with the official function of himself". So read "any person having any connection with the official functions of himself" would include any subordinate of the person who accepts the valuable thing. The words "of himself" do not refer to the person in the expression "any person" but refers to the pronoun "he" at the beginning of the sub-section. A subordinate of the public servant would have connection with his official functions. In our view the sub-section aims at folding within its ambit not only out-

siders "who are likely to be concerned in any proceeding or business transacted or about to be transacted" by the public officer but also any subordinate or any other person who is connected with the official functions of the public servant.

29. In the result, all the appeals are dismissed. Although we do not endorse the view of the High Court with regard to the date of the commencement of the investigation so far as Chapter XIV of the Code of Criminal Procedure is concerned, we do hold that serious irregularities were committed in the so-called "full-fledged enquiry" to the prejudice of the appellant. We do not however feel that there is any need to modify the directions given by the High Court to the Special Judge who will follow the directions of the High Court in addition to the modification indicated by us.

Appeals dismissed.

AIR 1971 SUPREME COURT 530
(V 58 C 120)

M. HIDAYATULLAH, C. J., J. C. SHAH,
S. M. SIKRI, J. M. SHELAT, V.
BHARGAVA, G. K. MITTER,
C. A. VAIDIALINGAM, K. S. HEGDE,
A. N. GROVER, A. N. RAY AND
I. D. DUA, JJ.

H. H. Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur and others etc., Petitioners v. Union of India, Respondent. H. H. Maharaja Satbir Singh of Jind, Intervener.

Writ Petns. Nos. 376 to 383 of-1970,
D/- 15-12-1970.

(A) Constitution of India, Article 366 (22) — In recognising or derecognising Ruler, President exercises executive and not political power. (Constitution of India, Article 53). AIR 1970 SC 1946 Rel. on; AIR 1955 SC 549, AIR 1964 SC 648 and AIR 1965 SC 1798, Distinguished.

(Per majority; Ray, J., Contra):— The functions of the State are classified as legislative, judicial and executive: the executive function is the residue which does not fall within the other two functions. Constitutional mechanism in a democratic polity does not contemplate

existence of any function which may qua the citizens be designated as political and orders made in exercise thereof are not liable to be tested for their validity before the lawfully constituted courts. In recognising or de-recognising a person as a Ruler the President does not exercise any political power. He exercises only an executive function. (Paras 94, 96)

(B) Constitution of India, Art. 362 — Agreements between Rulers and Union of India were not political agreements — (Constitution of India, Arts. 32, 363).

(Per majority, Ray J. Contra):

The history of negotiations which culminated in the integration of the territories of the Princely States before the commencement of the Constitution clearly indicates that the recognition of the status of the Rulers and their rights was not temporary, and also not liable to be varied or repudiated in accordance with "State policy". The relevant agreements in which the rights of the Rulers were recognised were not political agreements and were not liable to be set at naught by the unilateral act of the Union of India. By the merger agreements the Princes ceased to retain any vestige of sovereign rights or authority qua their former States. They acquired the status of citizen of India. Power of the President to determine the status of the Rulers by cancelling or withdrawing their recognition to effectuate the policy of the Government to abolish the concept of Rulership is liable to be challenged under Article 32 of the Constitution.

(Paras 97, 108, 109)

(C) Constitution of India, Art. 291 — Under the article there is an obligation on the part of the Union to pay and a corresponding right in the Rulers to require payment of privy purse. (1908) ILR 35 Cal 837 and AIR 1922 Pat 529, Rel. on; (1875) 19 Eq 509 and (1906) 1 KB 613 and AIR 1964 SC 1903, Distinguished.

(Per majority, Mitter and Ray, JJ. Contra.)

The words of Article 291 clearly raise an obligation on the Union to pay the privy purse. Our Constitution does not recognize any sequence of priorities. But that does not alter the fundamental character of a charge that it specifies a fund out of which satisfaction of the expenditure charged must be made, and the prescribed expenditure shall have priority in payment to the person for

whose benefit the expenditure is charged on the Fund.

The constitutional obligation to proceed in the manner set out in Arts. 112, 113 and 114 imposed upon the President and the Parliament implies a right in the person or persons in respect of whom the expenditure is to be incurred. By leaving the payee innominate in Article 291 (a) no intention to raise an obligation without a corresponding right is disclosed. The expression "shall be charged on, and paid out of the Consolidated Fund" in Article 291, is intended to enact that the privy purse "shall be charged on, and shall be paid out of the Consolidated Fund". The expression "sums so paid to any Ruler" does not mean "sums if paid to any Ruler": it means that "sums when paid to any Ruler".

The Article does not raise an imperfect obligation. An obligation which arises out of a constitutional provision to pay to the citizen sums of money in recognition of obligations of the predecessor Government can scarcely be called imperfect. Article 291 does not merely incorporate recognition of the obligation to pay the privy purse under covenants incurred by the Government of the Dominion of India: it gives rise to a liability *de hors* the covenants.

The obligation which arose out of the merger agreement and was on that account an act of State shed its original character on acceptance by the Constitution. The entity obliged to pay the privy purse did not after the Constitution remain the same; the source out of which the obligation was to be satisfied was not the original source; the incident relating to exemption from payment of tax was vitally altered, and the amount also was in some cases different. Whereas the liability to pay the privy purse to the Rulers under the merger agreements was assured by the Dominion Government, the Constitution imposed upon the Union Government a directive to pay the privy purse.

(Paras 118, 121, 122, 123 and 124)

(D) Constitution of India, Art. 362 — Article implies acceptance and recognition of personal rights, privileges and dignities but guarantee under the article relates to original covenants and agreements.

The structure of Article 362 is somewhat different from Article 291. That

Article imposes restrictions upon the exercise of legislative and executive functions. Recognition of the personal rights and privileges of the Rulers arising out of the covenants is not explicit, but the injunction that in the exercise of legislative and executive power due regard shall be had to the guarantees, clearly implies acceptance and recognition of the personal rights, privileges and dignities.

The Constitution thereby affirms the binding force of the guarantees and assurances under the covenants, of personal rights, privileges and dignities, but unlike the guarantee of payment of the privy purse in Article 291, the guarantee under Article 362 is of the obligations under the original covenants and agreements executed by the Rulers, barring those regarding which there is express legislation enacted to give effect to certain personal rights and privileges, e. g. Wealth-tax Act, 1957, Gift-tax Act, 1958, notifications under the Sea Customs Act, 1878, Code of Civil Procedure, 1908 and Code of Criminal Procedure, 1898.

(Para 127)

(E) Constitution of India, Art. 363 — Dispute in respect of right to privy purse under Article 291 is not barred under Article 363. AIR 1964 SC 1043 Rel. on; Observations in AIR 1965 SC 1798 held to be obiter and not correct. (Constitution of India, Articles 299, 366 (22), 362).

(Per majority, Mitter and Ray, JJ. Contra.):

Exclusion of the jurisdiction of the Courts is emphasized by the non obstante clause with which Article 363 commences. Notwithstanding the investment of jurisdiction upon the Supreme Court by Article 32, notwithstanding the jurisdiction conferred upon the High Courts by Article 226, and notwithstanding the competence of all Civil Courts to decide disputes in respect of the obligations of the Union, it is declared that the Courts have no jurisdiction in respect of the two classes of disputes. The exception carved out of the exclusion in respect of the jurisdiction conferred upon the Supreme Court by Article 143 is not a real exception for the jurisdiction of the Court under Article 143. It is merely advisory. The non obstante clause, however, does not enlarge the field of exclusion of judicial authority. (Para 128)

An act of State need not, it is true, arise out of war or conquest; it may be

the result of an agreement, and the terms of the agreements and the obligations flowing only from such agreements may not be enforced in the Municipal Courts of either State, unless the rights and obligations are recognised and accepted by the States, or unless the document evidencing the act of State is itself the Constitution of the State or States.

But there can be no act of State against its own citizen by the State. The Rulers who were before integration of their States aliens qua the Dominion Government are now citizens. Their rights and obligations which arose from an act of State are now recognized and accepted by the Union of India. Enforcement of those rights and obligations is governed by the municipal laws, and unless the jurisdiction of the Courts is excluded in respect of any dispute, the Courts will be competent to grant relief. An act of State vanishes when the new sovereign recognizes either expressly or by implication the rights flowing therefrom. (Para 129)

Jurisdiction of the Courts in matters specified in Article 363 is excluded not because the Union of India is a successor to the paramountcy of the British Crown, nor because the rights and obligations accepted and recognised by the Constitution may still be regarded as flowing from acts of State; it is only excluded in respect of specific matters by the express provision in Article 363 of the Constitution. Jurisdiction of the Courts even in those matters is not barred "at the threshold". The President cannot lay down the extent of the Supreme Court's jurisdiction. He is not made by the Constitution the arbiter of the extent of his authority, nor of the validity of his acts.

Action of the President is liable to be tested for its validity before the Courts unless their jurisdiction is by express enactment or clear implication barred. It is within the province of the Court alone to determine what the dispute brought before it is, and to determine whether the jurisdiction of the Court is, because it falls within one of the two limbs of Article 363, excluded qua that dispute. (Para 132)

The expression "provisions of this Constitution relating to" in Article 363 means "provisions having a dominant and immediate connection with": it does not mean merely having a reference to. A

wide meaning of the expression may exclude disputes from the jurisdiction of the Courts in respect of rights or obligations, however indirect or tenuous the connection between the constitutional provision and the covenant may be. Jurisdiction to try a proceeding is barred under the first limb of Article 363 if the dispute arises out of the provision of a covenant; it is barred under the second limb of Article 363 if the Court holds that the dispute is with respect to a right arising out of a provision of the Constitution relating to a covenant.

A dispute that an order of an executive body is unauthorised, or a legislative measure is ultra vires, is not one arising out of any covenant under the first limb of Article 363, merely because the order or the measure violates the rights of the citizen which, but for the act or measure, were not in question. The dispute in such a case relates to the validity of the acts or the vires of the measure. Exclusion of the Court's jurisdiction by the terms of the relevant words in the second limb lies in a narrow field. If the constitutional provision relating to a covenant is the source of the right claimed to accrue, or liability claimed to arise, then clearly under the second limb the jurisdiction of the Court to entertain a dispute arising with respect to the right or obligation is barred. (Paras 134, 135)

Article 366 (22) is a provision relating to recognition of Rulers; that is the direct and only purpose of the provision. It is not a provision relating to a covenant. The qualification of a person being recognized as a Ruler is undoubtedly that he is a Prince, Chief or other person who had entered into a covenant or agreement as is referred to in Art. 291, or that he is the successor to such a Ruler. Reference to the covenant or the agreement of the nature mentioned in Article 291 is for determining who may be recognized as a Ruler. Because of that reference the provision enacted with the object of conferring authority upon the President to recognize a Ruler, will not be deemed one relating to the covenant or agreement.

The source of the right to receive the privy purse is the constitutional mandate, it is not in the covenant. A dispute as to the right to receive the privy purse is therefore not a dispute arising out of the covenant within the first limb of Article 363, nor is it a dispute with

regard to a right accruing or obligation arising out of a provision of the Constitution relating to a covenant. The personal rights (other than the right to the Privy Purse), privileges and dignities are recognized by Article 362 of the Constitution and the Legislature and the executive are enjoined to have due regard to those personal rights, privileges and dignities in exercising their respective power.

Article 362 is plainly a provision relating to covenants within the meaning of Article 363. A claim to enforce the rights, privileges and dignities under the covenants will therefore be barred by the first limb of Article 363 and a claim to enforce the recognition of rights and privileges recognised by Article 362 will be barred under the second limb of Article 363. Jurisdiction of the Court will, however, not be excluded where the relief claimed is founded on a statutory provision enacted to give effect to personal rights under Article 362. The Courts have jurisdiction to interpret and to determine the true meaning of Articles 366 (22), 291, 362 and 363. The bar to the jurisdiction of the Courts by Article 363 is a limited bar: it does not arise merely because the Union of India sets up a plea that the dispute falling within Article 363 is raised.

The Court will give effect to the constitutional mandate if satisfied that the dispute arises out of any provision of a covenant which is in force and was entered into or executed before the commencement of the Constitution and to which the predecessor of the Government of India was a party, or that it is in respect of rights, liabilities or obligations accruing or arising under any provision of the Constitution relating to a covenant.

But since the right to the Privy Purse arises under Article 291 the dispute in respect of which does not fall within either clause, the jurisdiction of the Court is not excluded. Again, the jurisdiction of the Court is not excluded in respect of disputes relating to personal rights and privileges which are granted by statutes. (Paras 137, 140, 141, 142)

(F) Interpretation of Statutes — Provisions ensuring security of fundamental human rights to be liberally construed.

In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including

the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of Constitution and statutory provisions alike. (Para 133)

(G) Interpretation of Statutes — Interpretation of constitutional provision — Considerations stated.

A constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. The meaning of a word or expression used in the Constitution often is coloured by the context in which it occurs: the simpler and more common the word or expression, the more meanings and shades of meanings it has. It is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was used by the Constitution makers and in discharging the duty the Court will take into account the context in which it occurs, the object to serve which it was used, its collocation, the general congruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the Court will avoid repugnancy with accepted norms of justice and reason. (Para 134)

(H) Precedents — It is not proper to regard a word, a clause or a sentence occurring in a judgment of the Supreme Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment. (Para 138)

(I) Constitution of India, Article 32 — President does not exercise political power and exercise of powers by him is justiciable.

The President is not invested with any political power transcending the Constitution, which he may exercise to the prejudice of citizens. The powers of the President arise from and are defined by the Constitution. Validity of the exercise of those powers is always amenable to the jurisdiction of the Courts, unless the jurisdiction is by precise enactment excluded. Power of the Supreme Court under Article 32 or of the High Courts under Article 226, cannot be bypassed under a claim that the President has exercised political power. (Para 143)

(J) Constitution of India, Art. 366(22) — Power to recognize implies power to withdraw recognition — But an order

merely de-recognizing a ruler without continuation of the institution of Rulership is illegal. AIR 1970 SC 1946, Rel. on.

(Per majority, Mitter and Ray, JJ. Contra.):

Granting that under Art. 366 (22) the President may withdraw the recognition of a person as a Ruler, no power to nullify important provisions of the Constitution flows from that clause. The power to recognise a Ruler may be exercised in the case of first recognition only in favour of a person who has signed the covenant; and in favour of his successor having regard to the custom and law governing the State if the Ruler dies, or becomes incapable of functioning or his recognition is withdrawn. By the use of the expression "for the time being" in Clause (22) of Article 366 the President is not invested with authority to accord a temporary recognition to a Ruler, nor with authority to recognise or not to recognise a Ruler arbitrarily; the expression "for the time being" predicates that there shall be a Ruler of the Indian State, that if the first recognised Ruler dies, or ceases to be a Ruler, a successor shall be appointed, and that there shall not be more Rulers than one at a given time. Granting that power to recognise a Ruler carries with it the power to withdraw recognition of the Ruler the power must be exercised bona fide, and in the larger interests of the people consistently with the provisions of the Constitution to maintain the institution of Rulership.

Power may therefore be exercised in the course of and for recognising another person as a successor to the Ruler, having regard to the laws and customs governing the State. The President is not competent to recognise a person as a Ruler who is not by the custom and laws governing succession to Rulership qualified to be a Ruler. The President cannot obviously withdraw recognition of a Ruler and recognise another person, as a matter of political patronage.

Nor can he lawfully depart from the laws and customs governing succession so as to introduce a person as a Ruler who is not by ties of blood or affiliation related to the previous Ruler. The power of the President is plainly coupled with a duty, a duty to maintain the constitutional institution, the constitutional provisions, the constitutional scheme, and the sanctity of solemn agreements enter-

ed into by the predecessor of the Union Government which are accepted, recognised and incorporated in the Constitution. An order merely "de-recognising" a Ruler without providing for continuation of the institution of Rulership which is an integral part of the constitutional scheme is, therefore, plainly illegal. AIR 1970 SC 1946, Rel. on.

(Paras 110, 111)

(K) Constitution of India, Article 19 — Privy Purse is property — (X Ref. Constitution of India, Articles 31, 32).

Per Hidayatullah, C. J. and Hegde, J., Ray, J. Contra):

Rulers are citizens of India. Their privy purses are property within Arts. 19 and 31. As soon as an Appropriation Act is passed there is established a credit debt and the outstanding Privy Purse becomes the property of the Ruler in the hands of Government. It is also a sum certain and absolutely payable. A petition under Article 32 would be maintainable for the action of depriving the rulers of the privy purses as it would amount to an infringement of Articles 19 and 31. AIR 1964 SC 444, Rel. on.

(Paras 52, 53, 60)

(L) Constitution of India, Article 366 (22) — Ruler means a former Prince, Chief or other person who was recognised as Ruler on or after 26-1-1950.

Some degree of obscurity is introduced by the use of the expressions "Ruler" and "Ruler of an Indian State" in the Articles. But the meaning is reasonably plain. Ruler as defined in Article 366 (22) is a former Prince, Chief or other person who was on or after January 26, 1950 recognised as a Ruler, he having signed the covenant, or his successor. The Ruler of an Indian State had sovereign authority over his State. The Ruler recognized by the President rules over no territory, and exercises no sovereignty over any subjects. He has no status of a potentate and no privileges which are normally exercised by a potentate. He is a citizen of India with certain privileges accorded to him because he or his predecessor had surrendered his territory his powers and his sovereignty.

(Para 136)

(M) Constitution of India, Art. 366 (22) — 'Other person' means some one analogous to a Prince.

(Per Hegde, J.):— The words "other person" in the first part of Art. 366 (22) means some one analogous to a Prince or Chief of a former Indian State who

had entered into the Covenant or Agreement referred to in that clause. It cannot be some third person because no person other than a Ruler of an Indian State had entered into any Covenant or Agreement with the Dominion of India. The words "other person" should be read ejusdem generis with the words "Prince, Chief" preceding the words "other person". Indian Rulers were known by various names such as Maharana, Maharao, Maharaja, Nizam etc. To avoid listing all those names in Art. 366 (22), the draftsman has used the words "other person" but the meaning of those words has been made clear by the words accompanying the words "other person" viz. by whom any such agreement as is referred to in Clause (1) of Article 291 was entered into and who for the time being is recognised by the President as Ruler. (Para 263)

(N) Constitution of India, Article 366 (22) — Order dated 6-9-70 by President derecognising Rulers of former Indian States being for a collateral purpose i.e., to do that indirectly what could not be done directly in Parliament must be held to be ultra vires Article 366 (22). AIR 1963 SC 649, Rel. on. — (Per Hegde, J.) (Para 271)

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- In W. P. No. 376 of 1970:—
M/s. N. A. Palkhivala and M. C. Setalvad, Senior Advocates (M/s. B. G. Murdeshwar, R. Gopalakrishnan and M/s. J. B. Dadachanji, Ravinder Narain and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co. and Mrs. Suroja Gopalakrishnan, Advocate, with them), for Petitioners.
- In W. P. No. 377 of 1970:—
Mr. M. C. Setalvad, Senior Advocate (M/s. B. G. Murdeshwar, R. Gopalakrishnan, Advocates and M/s. J. B. Dadachanji, Ravinder Narain and O. C. Mathur

Advocates of M/s. J. B. Dadachanji and Co., and Mrs. Suroja Gopalakrishnan, Advocate, with him), for Petitioners.

In W. P. No. 378 of 1970:—

Mr. M. C. Chagla, Senior Advocate (M/s. B. G. Murdeshwar, J. B. Dadachanji and R. Gopalakrishnan, Advocates and Mrs. Suroja Gopalakrishnan, Advocate, with him), for Petitioners.

In W. P. No. 379 of 1970:—

Mr. M. K. Nambyar, Senior Advocate (M/s. B. G. Murdeshwar, J. B. Dadachanji and R. Gopalakrishnan, Advocates, with him), for Petitioners.

In W. P. No. 380 of 1970:—

M/s. N. A. Palkhivala and M. C. Setalvad, Senior Advocates (M/s. B. G. Murdeshwar, J. B. Dadachanji, R. Gopalakrishnan and R. N. Banerjee, Advocates and Mrs. Anjali Verma, Advocate, with them), for Petitioners.

In W. P. No. 381 of 1970:—

Mr. M. C. Setalvad, Senior Advocate (M/s. B. G. Murdeshwar, J. B. Dadachanji and R. Gopalakrishnan, Advocates, with him), for Petitioners.

In W. P. No. 382 of 1970:—

Mr. M. C. Setalvad, Senior Advocate (M/s. B. G. Murdeshwar, J. B. Dadachanji and R. Gopalakrishnan, Advocates, with him), for Petitioners.

In W. P. No. 383 of 1970:—

Mr. M. K. Nambyar, Senior Advocate (M/s. B. G. Murdeshwar, J. B. Dadachanji, R. Gopalakrishnan, Sheldandra Swarup and B. Dutta, Advocates, with him), for Petitioners.

In W. P. No. 376 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India, and M/s. S. T. Desai and Amiya K. Basu, Senior Advocates (M/s. R. H. Dhebar, N. H. Hingorani and S. P. Nayar, Advocates with them), for Respondents.

In W. P. No. 377 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India, and Mr. H. R. Gokhale, Senior Advocate (M/s. R. H. Dhebar, S. K. Dholakia and S. P. Nayar, Advocates with them), for Respondents.

In W. P. No. 378 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India, and Dr. V. A. Seyid Muhammad, Senior Advocate (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with them), for Respondents.

In W. P. No. 379 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India (M/s. R. H. Dhebar and S. P. Nayar, Advocates with them), for Respondents.

In W. P. No. 380 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India (M/s. R. H. Dhebar, S. P. Nayar, Advocates and Miss Chakravarti, Advocate, with them), for Respondents.

In W. P. No. 381 of 1970:—

Mr. Niren De, Attorney General for India and Mr. Jagdish Swarup, Solicitor General of India (M/s. R. H. Dhebar and S. P. Nayar, Advocates, with them), for Respondents.

In W. P. No. 382 of 1970:—

Mr. Jagdish Swarup, Solicitor General of India (M/s. Rameshwar Nath and S. P. Nayar, Advocates, with him), for Respondents.

In W. P. No. 383 of 1970:—

M/s. S. Mohan Kumaramangalam and Ram Murthi, Senior Advocates (M/s. Ram Panjuwani and S. P. Nayar, Advocates, with them), for Respondents.

Mr. R. M. Hazarnavis, Senior Advocate (M/s. R. N. Sachthey and Vineet Kumar, Advocates, with him), for Advocate General for the State of Maharashtra. Mr. M. M. Abdul Khadar, Advocate General for the State of Kerala (Mr. K. M. K. Nair, Advocate, with him), for Advocate General for the State of Kerala. Mr. Lal Narayan Sinha, Advocate General for the State of Bihar (M/s. D. P. Singh, R. K. Garg and S. C. Agarwala, Advocates, with him), for Advocate General for the State of Bihar.

Mr. B. Das, Advocate General for the State of West Bengal, Mr. S. Ray, Senior Advocate (M/s. G. S. Chatterjee and Sukumar Basu, Advocates, with them), for Advocate General for the State of West Bengal. Mr. Ashok Das, Advocate General for the State of Orissa (M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates, with him), for Advocate General for the State of Orissa.

Mr. G. S. Kasliwal, Advocate General for the State of Rajasthan (Mr. K. Baldev Mehta, Advocate, with him), for Advocate General for the State of Rajasthan. Mr. H. L. Sijabal, Advocate General for the State of Punjab (Mr. R. N. Sachthey, Advocate, with him) for the Advocate General for State of Punjab.

In W. P. No. 376 of 1970:—

M/s. A. C. Gulati, Rajinder Jain, D. P. Ghosh, and G. Banerjee, Advocates for the Intervener.

The following Judgments of the Court were delivered by

HIDAYATULLAH, C. J. — On September 6, 1970, the President of India passed a laconic order in respect of each of the Rulers of former Indian States. The order was served by a Secretary to Government of India. A sample order issued to the Ruler of Gwalior State may be read here:

"No. 21/14/70-Poll. III, Government of India, Ministry of Home Affairs.

New Delhi,

September 6, 1970

ORDER

In exercise of the powers vested in him under Article 366 (22) of the Constitution, the President hereby directs that with effect from the date of this Order His Highness Maharajadhiraja Madhav Rao Jiwaji Rao Scindia Bahadur do cease to be recognised as the Ruler of Gwalior.

By order and in the name of the President,

Sd. L. P. SINGH

(L. P. SINGH)

Secretary to the Government of India."

All these orders were notified together in the Gazette of India of September 19, 1970, Part II. They resulted in the forthwith stoppage of the Privy Purses received by the Rulers and the discontinuance of their personal privileges.

2. These writ petitions under Article 32 of the Constitution were filed by some of the Rulers as test cases to question the orders. They ask for a writ, direction or order, declaring the Presidential Order to be unconstitutional, mala fide, ultra vires and void, and for quashing it, a writ, direction or order declaring that the several petitioners continue to be rulers and thus to be entitled to their respective Privy Purses and personal rights and privileges and a further writ, direction or order directing the Union of India to continue to pay the Privy Purses as before and to recognise the personal rights and privileges and to observe the provisions of the Covenants and Merger Agreements.

3. This judgment and order will govern all these petitions. Since

the issues involved in all the petitions are common and there are only minor differences in the steps before the States merged with the Indian Union, it is sufficient if an illustrative petition is dealt with. In this judgment I shall refer to the petition filed by the Ruler of Gwalior which is first on my list and embraces almost all the varying aspects of the question. The other petitions are identical except for some details which are special to a particular Ruler but are not material for the discussion of the issues involved.

4. The Ruler of the Gwalior State succeeded to the gaddi of the State on July 13, 1961 on the demise of his father. On August 15, 1947 the father had signed an Instrument of Accession of his State to the Dominion of India, as then established, and it was accepted by the Governor-General of India on the following day. This Instrument of Accession was similar to those which the other Rulers signed on diverse dates. It is to be found at p. 165 of the White Paper on Indian States and is exhibited with the Petition as Ex. A. On April 22, 1948 the father, as Ruler, signed a Covenant with other Rulers of this area and the United States of Madhya Bharat was formed on June 15, 1948. On the coming into force of the Constitution of India, the State of Madhya Bharat became a Part B State. On the passing of the Constitution (Seventh Amendment) Act, 1956, Madhya Bharat States ceased to be a Part B State and was integrated with the State of Madhya Pradesh as provided under the States Reorganisation Act, 1956. I shall now say something in more detail about these several steps.

5. The Instruments of Accession were executed in furtherance of the Indian Independence Act, 1947. On June, 3, 1947 the British Government announced their plan of transfer of power in India. The Government of India formed a Ministry of States under Sardar Vallabhbhai Patel and it was decided to secure the accession of Indian States on three subjects: Defence, External Affairs and Communications. The Act provided for lapse of sovereignty of the British Crown in India over the Indian States and they were free to accede to any of the two Dominions of India or Pakistan or to continue as independent sovereigns. A reference to the Indian

Independence Act, 1947 appears necessary at this stage.

6. The preamble of the Act stated that the Act was to make provision for the setting up in India of two independent Dominions and to provide for matters consequential on or connected with the setting up of those Dominions and to substitute certain provisions in the Government of India Act, 1935. Section 1 of the Act fixed the 15th day of August, 1947 as the appointed date, from which the two independent Dominions were to come into existence. Section 2 demarcated their territories, but without prejudice to the generality of the provisions of sub-section (3) of that section the accession of Indian States to either of the two Dominions was not to be prevented. Immediately afterwards the India (Provisional Constitution) Order 1947 was promulgated and certain substitutions were made in the Government of India Act, 1935 by the Governor-General by virtue of sub-section (2) of Section 8 read with Section 9 of the Indian Independence Act. Sections 5 and 6 of the Government of India Act, 1935 were replaced by the following sections:

"5. Establishment of the Dominion:

(1) The Dominion of India established by the Indian Independence Act, 1947, shall as from the fifteenth day of August 1947, be a Union comprising—

- (a) the Provinces hereinafter called Governors' Provinces;
- (b) the Provinces hereinafter called Chief Commissioners' Provinces;
- (c) the Indian States acceding to the Dominion in the manner hereinafter provided, and
- (d) any other areas that may with the consent of the Dominion be included in the Dominion.

(2) The said Dominion of India is hereinafter in this Act referred to as "the Dominion" and the said fifteenth day of August is hereafter in this Act referred to as 'the date of the establishment of the Dominion'.

"6. Accession of Indian States—

(1) An Indian State shall be deemed to have acceded to the Dominion if the Governor General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof

whereby the Ruler on behalf of the State:—

(a) declares that he accedes to the Dominion with the intent that the Governor-General, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of his Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion exercise in relation to the State such functions as may be vested in them by order under this Act; and

(b) assumes the obligation of ensuring that due effect is given within the State to the provisions of this Act so far as they are applicable therein by virtue of the Instrument of Accession.

(2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Dominion Legislature may make laws for the State and the limitations, if any, to which the power of the Dominion Legislature to make laws for the State, and the exercise of the executive authority of the Dominion in the State, are respectively to be subject.

(3) A Ruler may, by a supplementary Instrument executed by him and accepted by the Governor General vary the Instrument of Accession of his State by extending the functions which by virtue of that Instrument are exercisable by any Dominion authority in relation to his State.

(4) References in this Act to the Ruler of a State include references to any persons for the time being exercising the powers of the Ruler of the State whether by reason of the Ruler's minority or for any other reason.

(5) In this Act a State which has acceded to the Dominion is referred to as an acceding State and the Instrument by virtue of which a State has so acceded construed together with any supplementary Instrument executed under this section, is referred to as the Instrument of Accession of that State.

(6) As soon as may be after an instrument of Accession or supplementary instrument has been accepted by the Governor-General under this Section, copies of the Instrument and of the Governor-General's acceptance thereof shall be laid before the Domi-

nion Legislature and all courts shall take judicial notice of every such instrument and acceptance”.

7. In furtherance of these new provisions, the Instruments of Accession were executed on different dates, after negotiations between the Government of India and the Rulers, but nothing turns upon the date of an Instrument. Many Rulers had immediately signed Instruments of Merger, transferring full and exclusive authority, jurisdiction and powers in relation to the governance of their States to the Government of India. They were merged with the existing Provinces or were set up as Chief Commissioner's Provinces. Some others signed Instruments of Accession first and Instruments of Merger later. The remaining at first formed themselves into different Unions of States, making over the administration of their States to a Rajpramukh of the Union of the States vesting in him all rights, authority, and jurisdiction belonging to the Ruler which appertained to or were incidental to the Government of the Covenanting States. In this way several Unions of States or United States emerged. A brief reference to the Instrument of Accession, the Covenants and the Instruments of Merger is necessary at this stage. The Ruler of Gwalior, father of the present petitioner, joined the United State of Madhya Bharat as already indicated. I can therefore conveniently study the Instrument of Accession and the Covenant executed by him as illustrative of the documents signed by the Rulers.

8. I begin with the Instrument of Accession. In the Preamble to the Instrument the Ruler observed that he was executing it in the exercise of his sovereignty in and over his State. He declared that he was acceding to the Dominion of India and authorised the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion Authority, established for the purposes of the Dominion to exercise in relation to his State functions vested in them by or under the Government of India Act, 1935 as in force on the 15th August, 1947. On his part he undertook the obligation of ensuring that effect was given to the provisions of the Government of India Act, 1935 in his State. He accepted that the Domi-

nion Legislature would make laws with respect to matters specified in the Schedule to his Instrument. These topics have only a historical significance and need no mention here. There were certain reservations, particularly in regard to any future constitution of India affecting the continuance of his sovereignty in and over the State, and the exercise of any powers, authority and rights then enjoyed by him as Ruler. The Governor-General accepted the Instrument of Accession and signed it in token thereof.

9. The Ruler of Gwalior next signed a Covenant with certain Rulers in the former Madhya Bharat area and agreed to form a United State of Madhya Bharat. The covenant contains 18 articles and 4 schedules. This covenant is a detailed document and is reproduced in the White Paper and is also exhibited in the case before me. It is not necessary to refer to all its terms but the relevant ones may be noted here. The Covenanting States agreed to unite and integrate their territories into one State with common Executive, Legislature and Judiciary. Room was kept for other Rulers to join later if they were so minded. The Covenant established a Council of Rulers, with a right to elect a President (to be called the Rajpramukh of the United State) and one Senior Vice-President and two Junior Vice-Presidents. The President and the Senior Vice-President were to hold office during their lifetime and the Junior Vice-Presidents for a term of five years. The Rajpramukh was to be aided and advised by a Council of Ministers to be chosen by him and they were to hold office during his pleasure. July 1, 1948 was fixed for making over the administration of the Covenanting States to the Rajpramukh including a transfer of all assets and liabilities of the State and of the Scheduled Areas. The Rajpramukh had jurisdiction to make laws for the peace and good government of those areas whether with or without consultation with his Council of Ministers but subject to directions or instruments of the Government of India. The Rajpramukh was to execute by 15th June, 1948, a fresh Instrument of Accession in place of the separate Instruments already executed by the Covenanting Rulers. By that Instrument he was to accept the making of laws by the

Dominion Legislature on all matters mentioned in Lists I and III of the Seventh Schedule to the Government of India Act, 1935 except the entries in List I relating to any tax or duty. The Rajpramukh and the Vice-Presidents were to enter upon their duties on 11th May, 1948. The Rajpramukh and the Vice-President were to be paid Rs. 2,50,000 per year as consolidated allowances and the Junior Vice-Presidents were to be paid such allowances as the Rajpramukh was to fix. The executive authority of the United State (subject to the provisions of the Covenant and a Constitution to be framed later) was to be exercised by the Rajpramukh and the competent Legislature of the United State was to be given the competence to confer functions upon the subordinate authorities but the Covenant was not to be deemed to transfer to the Rajpramukh any functions conferred by any existing law on any Court, Judge, officer or local or other authority in a Covenanting State.

10. The Covenant next provided for the setting up, as soon as possible, of a Constituent Assembly in the manner set out in the Third Schedule to the Covenant to frame a Constitution of a unitary type for the United State within the framework of the Covenant and the Constitution of India and for providing a Government responsible to the Legislature. The Rajpramukh was to constitute not later than August 1, 1948 an interim Legislative Assembly for the United State in accordance with the provisions set out in Schedule IV till the formation of the Constituent Assembly which was then to perform legislative functions as well. The Rajpramukh was also given power to promulgate Ordinances. Articles XI to XV were as follows:

"ARTICLE XI

(1) The Ruler of each Covenanting State shall be entitled to receive annually from the revenues of the United State for his privy purse the amount specified against that Covenanting State in Schedule I:

Provided that the sums specified in the Schedule in respect of the Rulers of Gwalior and Indore shall be payable only to the present Rulers of these States and not to their successors for whom provision will be made subsequently.

(2) The said amount is intended to cover all the expenses of the Ruler and his family including expenses of his residence, marriages and other ceremonies, etc., and shall subject to the provisions of paragraph (1) neither be increased nor reduced for any reason whatsoever.

(3) The Rajpramukh shall cause the said amount to be paid to the Ruler in four equal instalments at the beginning of each quarter in advance.

(4) The said amount shall be free of all taxes whether imposed by the Government of the United State or by the Government of India.

ARTICLE XII

(1) The Ruler of each Covenanting State shall be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the administration of that State to the Rajpramukh.

(2) He shall furnish to the Rajpramukh before the first day of August 1948, an inventory of all immovable properties, securities and cash balances held by him as such private property.

(3) If any dispute arises as to whether any item of property is the private property of the Ruler or State property, it shall be referred to such person as the Government of India may nominate in consultation with the Rajpramukh and the decision of that person shall be final and binding on all parties concerned:

Provided that no such dispute shall be so referable after the first day of July 1949.

ARTICLE XIII

The Ruler of each Covenanting State, as also the members of his family, shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State, immediately before the 15th day of August, 1947.

ARTICLE XIV

(1) The succession, according to law and custom to the gaddi of each covenanting State, and to the personal rights, privileges, dignities and

titles of the Ruler thereof, is hereby guaranteed.

(2) Every question of disputed succession in regard to a Covenanted State shall be decided by the Council of Rulers after referring it to a bench consisting of all the available Judges of the High Court of the United State and in accordance with the opinion given by the High Court".

Article XV gave complete immunity to the Ruler in respect of past acts and omissions. The next two articles guaranteed the continuance in service of the permanent members of the public service of the States on conditions not less advantageous than those existing on April 15, 1948 or payment to them of reasonable compensation. There were other guarantees and also immunity for past acts or omissions in the execution of duty as a public servant. Article XVIII continued in their respective States the prerogative of suspension, remission or commutation of death sentences enjoyed by the former Rulers of Gwalior and Indore. Schedule I then stated the Privy Purses of the Rulers. It was divided into two sections — Salute States and Non-Salute States. They ranged from Rs. 25,00,000 to the Ruler of Gwalior to Rs. 6,000 to the Ruler of Mathwar. The rest of the provisions are not material for my discussion.

11. The Covenant was signed by all the Rulers of the Covenanted States and the Government of India endorsed on it their acceptance thus:

"The Government of India hereby concur in the above Covenant and guarantee all its provisions. In confirmation whereof Mr. Vapal Pangunni Menon, Secretary to the Government of India in the Ministry of States, appends his signature on behalf and with the authority of the Government of India.

Secretary to the Government
of India,
Ministry of States".

Further agreements were devised for each of such other States as might join later and the Government of India concurred in the same way with such agreements.

12. A fresh Instrument of Accession was executed by the Rajpramukh on behalf of the United State of Madhya Bharat. Special provisions were made for avoiding legislative conflict, and for any future

agreement between the Rajpramukh and the Government of India. Such agreements were to form part of the Instrument of Accession. It was however expressly provided by Clause 6 as follows:

"6. The terms of this Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by the Rajpramukh of the United State by an Instrument supplementary to this Instrument".

The Governor-General of India accepted this Instrument of Accession on September 13, 1948. By then 23 Rulers had joined the United State. On November 24, 1948, on the passing of the Constitution of India, the Rajpramukh issued a Proclamation after a resolution of the Covenanted Rulers. It affirmed the 'constitutional relationship' between the United State and the Dominion of India and provided as follows:

"Proclamation for Madhya Bharat Gwalior, the 24th November 1949.

Whereas with the inauguration of the new Constitution for the whole of India now being framed by the Constituent Assembly of India, the Government of India Act, 1935, which now governs the constitutional relationship between the State and the Dominion of India, will stand repealed;

And whereas, in the best interests of the State of Madhya Bharat, which is closely linked with the rest of India by a community of interests in the economic, political and other fields, it is desirable that the constitutional relationship established between this State and the Dominion of India, should not only be continued as between this State and the contemplated Union of India but further strengthened, and the Constitution of India as drafted by the Constituent Assembly of India, which includes duly appointed representatives of this State, provides a suitable basis for doing so;

I, Jiwajirao Madhavrao Scindia, Rajpramukh of the Madhya Bharat, now hereby declare and direct —

That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall be the Constitution for the Madhya Bharat as for the other parts of India and shall

be enforced as such in accordance with the tenor of its provisions;

That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State."

13. This in short is the constitutional history of the States which united to form the United State of Madhya Bharat. It is apparent that the Instrument of Accession and the Covenants operated as a constitution in little for the governance of the United State. The identity of the United State as a semi-independent unit was preserved and the constitutional framework of this State was indicated. The Covenant was an Act of State on the part of the Rulers. It may be regarded also as such by the Government of India although no volition, beyond concurrence, of the Government played any part whatever might have been the diplomatic consultations between the acceding United State and the Government of India. The Government of India merely accorded them recognition and guaranteed its provisions. If treated as an act of State it ended with the recognition. It was also an act of State on the part of the Rulers who surrendered their rights but the provisions that they evolved for the joint governance of their territories made a constitution proper of which the Courts were to take judicial notice and apply according to their tenor as occasion demanded. From these documents flowed consequences which were binding alike upon the Covenanting States, the United State of Madhya Bharat and the Government of India and the Courts. None of them could avoid these consequences.

14. The Merger agreements were much simpler documents. As an illustration I may refer to the Bilaspur Merger agreement. It was executed on the 15th August 1948 by the Raja of Bilaspur. It consisted of five articles. By the first article the Raja acceded to the Dominion government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State, agreeing to transfer the administration on October 12, 1948. By article 2 the Raja was to receive annually a sum of Rs. 70,000 as privy purse free of taxes.

The sum included Rs. 10,000 as an allowance for the Yuvraj. These amounts were to cover all expenses and were not to be increased nor reduced for any reason whatsoever. By article 3 the Raja was entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him, and he was to furnish an inventory of such properties. In case of dispute the matter was to be referred to such officers with judicial experience as the Dominion government might nominate and the decision was to be binding on both parties. By article 4, the Raja, the Rajmata, the Yuvraj and the Yuvrani were to enjoy all personal privileges enjoyed by them within and without the territories immediately before the 15th day of August 1947. By article 5 the Dominion government guaranteed the succession, according to law and custom, to the gaddi of the State and to the Raja's personal rights, privileges, dignities and titles. The Merger agreement was signed by the Raja and Mr. V. P. Menon, Secretary in the Ministry of States.

15. Although the Merger Agreement of the Raja of Bilaspur sufficiently illustrates the line followed it may be mentioned here that some of the Merger Agreements had more clauses than the one noticed. In the Merger Agreement of the Maharao of Kutch there were other articles such as immunity for past acts of the Maharao in his personal capacity or otherwise and also a guarantee for continuance in service of the permanent members of the Public services of Kutch and for their conditions of service, pensions and leave salaries and immunity for past acts. In the Bhopal Merger Agreement the Nawab was to receive Rs. 11,00,000 as Privy Purse but each of his successors was to receive only Rs. 9,00,000. Article IV however provided that the income derived annually from the share of the Nawab in the original investment by Qudsia Begum in the Bhopal State Railway, which share was agreed to be Rs. 5,50,000, was to be treated as the personal income of the Nawab and to be paid by the Government of India to the Nawab and his successors. Article VII provided that the succession to the throne of Bhopal State would be governed by and regulated in ac-

cordance with the provisions of the Act known as "The Succession to the Throne of Bhopal Act of 1947", and then in force in the Bhopal State. The Government of India further agreed that all rights and privileges secured by the Agreement to the Nawab would be continued to his successor.

16. The course of historical events is different according to the States emerged in or merely acceded to the Dominion. The merged States were either incorporated in the existing Governor's Provinces or, were administered centrally as Chief Commissioner's Provinces. I am not concerned with these historical events and, therefore, I refrain from saying anything here.

17. The next step in the chain of historical events in regard to Gwalior came with the Constitution which was accepted by the Rajpramukh in his Proclamation. Special provisions were incorporated in the Constitution to which reference may be made here. Four Articles in the Constitution are only relevant and are quoted here. Article 291 was amended by the Constitution (Seventh Amendment) Act, 1956 by deleting clause (2) but is quoted here as it was before the Amendment:

"291 (1) Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as Privy Purse—

(a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income.

(2) Where the territories of any such Indian State as aforesaid are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on, and paid out of, the Consolidated Fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of article 278, be determined by order of the President".

This Article does not apply to the State of Jammu and Kashmir. Article 366 contained a definition in (21) which was deleted by the Constitution (Seventh Amendment) Act 1956. This definition may be read here:

"366. In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(21) "Rajpramukh" means—

(a) in relation to the State of Hyderabad, the person who for the time being is recognised by the President as the Nizam of Hyderabad;

(b) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State; and

(c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of the State, and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State;"

These two repeals were occasioned by the constitutional readjustment of States when Part B States disappeared. The definitions became obsolete after the Reorganisation and hence they were deleted. Article 366 contained other definitions in (15) and (22) which may be quoted:

"(15) 'Indian State' means any territory which the Government of the Dominion of India recognised as such a State;"

"(22) 'Ruler' in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler;"

They are intact till today. So also two other Articles, namely, 362 and 363. Of these the former does not apply to the State of Jammu and Kashmir, but the latter does. They may be quoted here:

"362. In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in clause (1) of article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State.

363 (1). Notwithstanding anything in this Constitution but subject to the provisions of article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

(2) In this article—

(a) 'Indian State' means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) 'Ruler' includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

18. The intention behind the definitions in 2 (a) and (b) specially included here was to bind even those Rulers who were recognised before and who might not have been recognised by the President under Art. 366 (22).

19. The Indian States formed a significant but separate part of India before they merged with the rest of India. It is common knowledge that the aim of the Government of India Act, 1935 was to associate the Indian States with British India as equal partners in a loose federation. When

India became independent by the Indian Independence Act 1947, British paramountcy in respect of the Indian States lapsed. In theory the Rulers became independent but, as shown above, in actual fact, almost all the Rulers signed almost immediately, Instruments of Accession in August 1947 surrendering Defence, External Affairs and Communications. The Rulers immediately after Independence became divided into four classes:

(a) those who had signed Instruments of Accession;

(b) those who had signed Instruments of Merger;

(c) those who had formed themselves into Unions and the Unions had signed Instruments of Accession;

(d) Hyderabad, Mysore and Jammu and Kashmir.

20. The merged States were either directly administered by the Dominion Government as Chief Commissioner's Provinces or were handed over to the neighbouring Provinces. Thus 216 States merged in the adjoining Provinces, 61 States were converted into centrally administered areas and 275 States formed Unions. Only three States retained their integrity; but when the Constitution came into force, they too became part of the Union of India on a later date. They were Hyderabad, Mysore and Jammu and Kashmir.

21. The Indian States covered about 48 per cent of the area of the Indian Dominion. The population of this area formed 28 per cent of the total population of the Dominion. All the Rulers (including the Rajpramukhs of the Unions) issued proclamations of which reference has earlier been made in relation to Gwalior. On the merger or integration of the States with the Union of India the Rulers were left with a Privy Purse and a few of their personal privileges and properties. The Privy Purses were fixed with due regard to the incomes of the Rulers before integration with a ceiling of Rs. 10 lakhs. Eleven Rulers were to be paid more than that sum as a personal Privy Purse. The total amount of the Privy Purses came to Rs. 5.8 crores. Today the highest Privy Purse is Rs. 26 lakhs per annum to the Ruler of Mysore and the lowest is Rs. 192 per annum to the Ruler of Kotodia.

22. The Privileges of the Rulers included many items. A memorandum

on these privileges was issued by the Ministry of States in 1949. It did not contain an exhaustive list but was drawn up to inform Provincial and Union Governments about them. It contained an itemised list of 34 privileges. They included several exemptions from the operation of Indian laws, the enjoyment of Jagir and personal property of the Rulers and members of their families, the payment by the States of the marriage expenses of the brothers and sisters of the Rulers, immunity from some processes of courts of law, immunity from requisitioning of the private properties of the Rulers and their families and so on and so forth. During the negotiations letters were written to the Rulers to assure them that the Privy Purses was fixed in perpetuity and the freedom enjoyed by them would be continued.

23. The Privy Purses and the Privileges were continued till 6th September 1970. Their payment or enjoyment was a part of the guarantee of the Constitution. However the All India Congress Committee passed a Resolution on 25th June 1967 for their abolition. In furtherance of this resolution the Union Home Ministry held several conferences with the representatives of the Rulers. Although shorn of all but a shadow of their former power and panoply, the Rulers seemed to regard themselves as something different from the people or perhaps, as princes in exile. They had their Concord, their Intendant-General and Conciliar Committee, thereby evoking a certain measure of hostility among persons who were oblivious of the constitutional transition in India. The summary of the proceedings of these conferences were marked collectively as Annexure A annexed to the affidavit of the Union of India. It shows six meetings between November 3, 1967 and January 8, 1970. There were perhaps a number of informal meetings and consultations. Nothing seems to have been achieved. Government of India repeated their intention of withdrawing the recognition of the Rulers and stoppage of the Privy Purses and Privileges, and was prepared only for a negotiated settlement as to the terms on which the abolition should take place. The Concord of Princes was not prepared to enter into any negotiations and were chary of a fresh settlement which might be broken just as

simply as the past solemn engagements and assurances. The Rulers who, before Independence, had always displayed the sentiment *Ego at rex meus* had realised that Princes were not the only people in whose word trust should not be placed.

24. The Government of India acted rapidly. The President in his speech to the Houses gave expression to the policy of Government. A Resolution recommending the abolition was moved and passed in the Rajya Sabha. A Bill was then moved in the Lok Sabha intitled The Constitution (Twenty Fourth Amendment) Bill 1970. It consisted of three clauses and a short statement of Objects and Reasons. The Statement read:

"The concept of rulership, with Privy Purses and Special Privileges unrelated to any current functions and social purposes, is incompatible with an egalitarian social order. Government have therefore decided to terminate the Privy Purses and Privileges of the Rulers of former Indian States. Hence this Bill

14-5-1970

Y. B. Chavan"

The Address of the President to the Joint Session of Parliament, the Resolution above referred to and the Statement of Objects and Reasons all gave identical reasons. The Bill was voted upon in the Lok Sabha on September 2, 1970. 332 votes for and 154 votes against it, were cast. It was considered in the Rajya Sabha on September 5, 1970 and was defeated, 149 voting for and 75 against it. It failed in the Rajya Sabha to reach the requisite majority of not less than two-thirds of the members present and voting.

25. The Bill originally gave no indication of the date when the Act was to come into operation but in the Lok Sabha an amendment was accepted by which it was to come into force from October 15, 1970. By the second clause the Bill omitted Articles 291 and 362 of the Constitution and the third clause omitted Article 366 (22). The same evening the Cabinet is said to have met and to have decided to advise the President to withdraw the recognition of the Rulers. The same night the President signed at Hyderabad an instrument withdrawing recognition of all the Rulers. Separate orders were issued to all the Rulers on the 6th September 1970 and they were also

notified in the Gazette as already mentioned.

26. On September 7, 1970, the Finance Minister laid on the table of the Rajya Sabha a statement. He claimed that the power of the President to withdraw the recognition of the Rulers was unquestioned and had also been suggested as alternative to the amendment of the Constitution and that Government was in fact going to use the power after the adoption of the Bill amending the Constitution. He gave as his reason for the President's action that the Bill amending the Constitution was lost by a fraction of a vote in one of the Houses, that there was widespread support against this 'out-moded and antiquated system of Privy Purses', that even those who opposed the Bill supported the abolition and that it was Government's policy to put an end to the concept of Rulership and to abolish Privy Purses and the Privileges. He hinted that arrangements would be made to enable Rulers to make adjustments in the transitory period. These petitions were then filed to question the action of the President and the Government of India.

27. The petitioners put at the forefront the sentiments expressed at the time of the Merger of the Indian States. The Princes were then described as imbued with imagination, foresight and patriotism and as co-architects of a democratic and united India. Sardar Vallabhbhai Patel as the Minister in the newly formed Ministry of States made a speech on October 12, 1949 in the Constituent Assembly (Ex. C) in which he pointed out that the Madhya Bharat Rajpramukh alone gave sufficient cash assets which, if invested, would cover payments to the Rulers as Privy Purses, and that the payments to the Rulers represented one-fourth of what they were previously enjoying. He said that there was nothing by which the Rulers could be forced to merge their States with India and that the Privy Purses were quid pro quo for parting with the ruling power by the Rulers and the dissolution of their States as separate units. He regarded this as a small price for the bloodless revolution and avoidance of mischief. He exhorted the Constituent Assembly that the Indian Peoples on their part should

ensure fully the guarantee given to them and concluded:

"Our failure to do so would be a breach of faith and seriously prejudice the stabilization of the New Order". The same sentiments were reiterated by Mr. V. P. Menon (who was the Secretary to the Ministry) in his recent book "The Story of the Integration of the Indian States" (1961) Pp. 461 and 462. He catalogued the number of villages, palaces, museums, buildings, stables, garages, fleets of motor cars, aeroplanes etc. surrendered by the Rulers. He pointed out that cash balances were to the tune of Rs. 77 crores and that palaces in Delhi alone were worth several lakhs of rupees. According to him, the price paid as Privy Purses was not too high for integration and indeed it was insignificant when compared with what the Rulers had lost.

28. The petitions are long argumentative documents and the reply affidavit equally so. The verbosity of the petitions (which are almost identical) and the reply affidavit (which is common to all petitions) does not render the task of the Court in this important case any the easier. It is, therefore, necessary to place in their proper perspective the respective cases of the parties.

29. According to the petitioners, the failure to amend the Constitution resulted in the retention in it of the articles relevant to the Rulers' rights. These Articles, particularly Articles 291 and 362 continued the obligation of the Government to pay the Privy Purses and also to recognise the Privileges. The Privy Purses stood charged on and were to be paid out of the Consolidated Fund of India and even Parliament could not vote upon them. The assurances and guarantees being that of the people in their Constitution, the Executive Government could not by the indirect device of withdrawing the recognition of the Rulers avoid the obligations created by the Constitution. These assurances and guarantees of the Constitution, the Accession and Integration were but steps and the fixation of Privy Purses and the recognition of the Privileges was no doubt a historical fact but the guarantees flowed from the Constitution and were independent of the historical fact, and had thus to be carried out according to the constitutional pro-

visions. They based their claim not on the agreements or the covenants but on the constitutional provisions. According to them, the order of the President was in violation of the spirit and meaning of Articles 366 (22), 291 and 362 and was an affront to Parliament which had turned down the move for amendment of these articles. The President's action robbed the articles of their content which Parliament did not allow to be done and thus the order of the President indirectly had the effect of amending the Constitution. The President's order itself was said to be mala fide, ultra vires since his power was to recognise a Ruler at a time and for the time being or to withdraw recognition from a Ruler for cogent and valid reasons, naming in his place a successor, and not to withdraw recognition from all Rulers en masse for no reason except that the concept of Rulership was considered outmoded or that some persons held the view that it should not be continued. According to the petitioners the gaddi of a Ruler had to be filled in accordance with the law and custom of the family and could not be left vacant. The vast power to withdraw recognition from all the Rulers at the same time without nominating any successor could not and did not flow from the definition of a Ruler in Article 366 (22) which contemplated the continuance of a Ruler who had signed the Merger Agreement or his successor. The President was thus guilty of a breach of his duties under the Constitution and acted outside his jurisdiction. The act of the President was thus said to offend Articles 53, 294, 295, 291 and 362 of the Constitution.

30. In supporting their petition under Article 32, the petitioners claimed that important questions of deprivation of property and of personal liberty were involved. As illustrations the petitioners contended that the right to receive Privy Purses was a right to property of which the Rulers stood deprived as also of other personal properties and benefits of exemptions under diverse laws was also an inroad upon property rights. Since there was no authority of law and no compensation, the action was said to offend Articles 19 (1) (f) and 31 of the Constitution. They also claimed that Government was prevented by promissory estoppel and had acted in breach of a fiduciary duty.

31. In the reply affidavit filed by Mr. Asoka Sen (Joint Secretary in the Ministry of Home Affairs) all the allegations and submissions (besides the patent facts) were denied. The main contentions in reply were that this Court lacked jurisdiction to enter upon this dispute in view of the express bar of Article 363 that the petitions did not lie as no right of property or personal liberty of the petitioners was jeopardised and lastly that the action of the President was perfectly valid and binding as it was a political act in the exercise of the sovereignty of India, as to which this Court could say nothing being outside its jurisdiction. Article 363, it was claimed, barred the jurisdiction of all Courts (including the Supreme Court of India) in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was executed before the commencement of the Constitution and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which had or had been continued in operation or in any dispute in respect of any right accruing under or any liability arising out of any of the provisions of the Constitution relating to any such treaty etc. and the present was such a dispute. Since the article began with the words "Notwithstanding anything in this Constitution", the article could only be read by itself and even the chapter on Fundamental Rights was excluded. The reason given was that these instruments were political agreements between High Contracting Parties and the Municipal Courts had no say in matters which were political or Acts of State. The Covenants were not self-executing and created imperfect obligations and depended for their enforceability upon the willingness of Government to implement them. Since the claim was based upon what was recognised in these instruments, this Court could not give any relief as it had no jurisdiction to do so. The President's powers to recognise a Ruler, which carried with it the power to withdraw such recognition flowed from Article 366 (22) and this power being an incident of sovereignty and a political act was not questionable in Courts of Law. The bar of Art. 363 covered such a case also because there

was nothing to show that any recognition carrying with it a Privy Purse and Privileges was ever intended to be perennial even when the State policy demanded an abolition. The Privy Purse itself being in the nature of a political pension, a claim to it was not property and no claim could arise if it was stopped. Article 291 did not create any legal right but only laid down the source and method of payment of Privy Purse guaranteed by the Dominion of India and even if it were assumed that it was private property or that other property rights were affected by the withdrawal of the recognition, the matter was not justiciable because of the bar of Article 363 which applied to Articles 291 and 362.

32. The pleadings in the case are long but the points are few. The case involves a positive and a negative approach in so far as this Court is concerned. The positive approach involves the consideration of the reliefs that can be granted and the negative approach the bar operating under Article 363. The first approach requires consideration of the validity of the action of the President. It is obvious that if the action of the President is valid and operative, the implications of that action must necessarily follow. If it is invalid, for any reason, then the question of the bar of the jurisdiction of the Court to give relief will arise. The Union Government however places the bar at the very threshold and contends that the dispute is such as is expressly barred by Article 363 but the petitioners contend that there is no dispute at all under Articles 291 and 362 or it is not of the kind contemplated by that Article. The Union Government asks that the question of jurisdiction be decided first because in their opinion it is conclusive, while the other side contends that there is no dispute once the invalidity of the President's order is established, since articles 291 and 362 would then speak for themselves.

33. I intend considering first the question of the validity of the order of the President because everything turns on it. The arguments for and against that action may, therefore, be considered. According to the Union of India the act is political and in the exercise of sovereignty and paramountcy. It cannot therefore, be questioned in a Court of Law. According to

the petitioners it is not, and is a plain executive order open to question like any other such act and the bar of article 363 does not apply to such a dispute.

34. The Union government invokes the analogy of the British Crown Paramountcy which lapsed on the Indian Independence. In this connection the claim is that the provisions of Articles 363 and 366 (15) and (22) preserve the paramountcy of the Crown in the President. This argument is independent of the question of bar of jurisdiction under Article 363. It seeks to put the President's act outside the jurisdiction of the Court by reason of the nature of the act. A word may, therefore, be said about the paramountcy of the British Crown and what it meant. Reference was made in this connection by the Attorney General to the White Paper on Indian States, Mr. V. P. Menon's book already referred to, and the account contained in a recent book 'The Great Divide' by Mr. Hodson. He traced the paramountcy of the British Crown in India. I do not consider it necessary to refer to them. The best exposition of British Paramountcy is to be found in a famous letter by Lord Reading Viceroy of India addressed to the Nizam of Hyderabad when the latter claimed rights of kingship. It is printed as Appendix I to the White Paper. This is what the Viceroy said:

"4. The Sovereignty of the British Crown is Supreme in India, and therefore no ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing. Its supremacy is not based only upon treaties and engagements, but exists independently of them and, quite apart from its prerogative in matters relating to foreign powers and policies, it is the right and duty of the British Government, while scrupulously respecting all treaties and engagements with the Indian States, to preserve peace and good order throughout India. The consequences that follow are so well known, and so clearly apply no less to Your Exalted Highness than to other Rulers, that it seems hardly necessary to point them out. But if illustrations are necessary, I would remind Your Exalted Highness that the Ruler of Hyderabad along with other Rulers received in 1862 a Sanad declaratory of the British Gov-

ernment's desire for the perpetuation of his House and Government, subject to continued loyalty to the Crown; that no succession in the Masnad of Hyderabad is valid unless it is recognised by His Majesty the King-Emperor; and that the British Government is the only arbiter in cases of disputed succession.

5. The right of the British Government to intervene in the internal affairs of Indian States is another instance of the consequences necessarily involved in the supremacy of the British Crown. The British Government have indeed shown again and again that they have no desire to exercise this right without grave reason. But the internal, no less than the external security which the Ruling Princes enjoy is due ultimately to the protecting power of the British Government, and where Imperial interests are concerned, or the general welfare of the people of a State is seriously and grievously affected by the action of its Government, it is with the Paramount Power that the ultimate responsibility of taking remedial action, if necessary, must lie. The varying degrees of internal sovereignty which the Rulers enjoy are all subject to the due exercise by the Paramount Power of this responsibility. Other illustrations could be added no less inconsistent than the foregoing with the suggestion that except in matters relating to foreign powers and policies, the Government of Your Exalted Highness and the British Government stand on a plane of equality. But I do not think I need pursue the subject further. I will merely add that the title "Faithful Ally" which Your Exalted Highness enjoys has not the effect of putting Your Government in a category separate from that of other States under paramountcy of the British Crown".

35. The 1858 Act had recognised all treaties made by the East India Company with the Rulers, as binding on the Crown. Lord Canning in his despatch of April 30, 1860 recommended the perpetuation of the rule of the Princes over their States. This was accepted and a special power of adoption was recognised and new sanads were issued. The policy of annexation started by Lord Dalhousie then ceased. The Ruler could, thereafter, be punished only for extreme bad conduct but even so the territory was not annexed.

The Ruler was deposed but a successor was recognized in his place.

36. This position continued down to 1935. In 1927 the Butler Committee clearly recognised the claim of the Princes that making any transfer of the Crown's rights and obligations in relation to the States, to persons not under the Crown's authority, would be conditional on the agreement of the States. This was particularly directed against an Indian Government responsible to the Indian Legislature. To keep the Indian Government away from the States, after the advent of the Government of India Act, 1935 the old political department under the charge of the Governor-General disappeared. Previously the Governor-General's Executive Council had left the States entirely to the Governor-General. The Act of 1935 formed the basis of a personal relationship between the States and the rest of India. This meant a reversal of the policy and the British Indian Executive was slowly deprived of all constitutional status vis-a-vis the States. A Crown Representative was introduced as the link between the States and British India. The Government of India Act 1935 had visualised a federation between British India and the Indian States but that scheme did not materialise. The Indian States were anxious to create sovereign States but the Crown prerogatives in respect of them continued. Lord Linlithgow's declaration promised no commitment about the States without their consent in any future constitution that the Indians might frame for themselves. This was implemented by instructions to the Governor-General not to hand over paramountcy to the future Indian Government and paramountcy, so long as it lasted was that of the Crown and not of the Government of India.

37. When the Constitution came paramountcy had already lapsed. The Indian States were able to make several reservations in their own favour. They were anxious to frame their own Constitutions but many States could not withstand pressure of the Ministry of States and thought better of merging with such reservations as the Merger Agreements made in their favour. The other States like Hyderabad, Mysore and Jammu and Kashmir on the one hand and the

United States or Union of States on the other also dropped the idea of separate Constitutions for themselves (except Jammu & Kashmir) and integrated with India, accepting the Indian Constitution. The Rulers were allowed to get a Privy Purse free of taxes on income and to enjoy personal property and privileges. Articles 291, 362, 366 (15) and (22) were included to recognise those conditions on which surrender of power had taken place. Article 363 was included to keep certain matters away from Courts and now the most important question is what was granted to the Rulers by the Constitution and how far their rights could be enforced in a Court of Law. Paramountcy as such was no more as there was no paramount power and no vassal. The Rulers had lost their territories and their right to rule and administer them. They were left only a recognition of their original title, a privy purse, their private properties and a few privileges. These rights were the only indicia of their former sovereignty but they enjoyed them by the force of the Constitution although in every respect they were ordinary citizens and not potentates. The paramountcy which the Crown exercised over them was different. Then the Crown had an absolute freedom to make and unmake Rulers in the exercise of paramountcy. The Constitution ensured the position of the Ruler and his successor with regard to the Privy Purse and privileges, although leaving the President the right to confer that status on a Ruler by recognition. This result was reached by treaties, covenants and agreements.

38. The source or origin of paramountcy of the Crown was not the treaties, sanads or agreements. There were no paramountcy rights by reason of which the British were paramount but because they were paramount, therefore, they had paramountcy rights. When paramountcy lapsed it did not fall on the shoulders of Indian Government. The right to recognise a Ruler from out of several claimants was not an act of paramountcy. The selection had to be in accordance with law and custom. It was not the arbitrary power which made the conferral of Rulership a gift from the Crown. There is no provision to that effect in the Constitution or even the Covenants and Agreements. That the Constitution gave the right to the Presi-

dent to recognise a Ruler for the time being, is apparent enough but it cannot be stretched to give a paramountcy of the same character as that enjoyed by the British crown. To claim such a paramountcy one has to ignore completely the arrangements by which the Rulers parted with their territories and Ruling rights and were assured of their Privy Purses and privileges. These rights became constitutionally protected rights which so long as the Ruler's line was not extinct belonged to the Ruler for the time being. In one sentence when the guarantees were given by the Constitution paramountcy, if any, went out. If it was intended that rightful claims could be disregarded, at any time, a very clear provision authorising that they be overridden would have been included. On the other hand Article 362 says in admonitory terms that in the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given in any such Covenant or Agreement as is referred to in Cl. (1) of Article 291 with respect to the personal rights, privileges, and dignities of the Ruler of an Indian State. This provision is rather the converse of paramountcy inasmuch as it compels the two limbs of Government to have 'due regard' to the guarantees and assurances given to the Rulers.

39. There can be no paramountcy against a citizen of India and the Rulers today are not potentates they were. They are citizens of India like other citizens albeit with some privileges and privy purses which other citizens do not get. That is an accident of history and with the concurrence of the Indian people in their Constituent Assembly. The power that has been exercised against them must, therefore, be justified under the Constitution and the laws and not by invoking a nebulous doctrine of paramountcy which Lord Jowitt describes in his Dictionary of English Law thus:

"The relationship of the Sovereign as Emperor of India to the rulers of the native States, terminated by the Indian Independence Act, 1947"

40. The Attorney General contended that Article 363 'recreated paramountcy.' That article was intend-

ed to keep certain matters outside the jurisdiction of the Court. It must be construed according to its own terms. No meaning, beyond what the words convey, can be attributed to those words by resorting to the imperial doctrine. What those words mean, I shall consider later but I reject the claim that the President or the Government of India can invoke the doctrine to sustain an illegal inroad upon the rights of citizens.

41. Nor is the argument that this was some kind of an 'act of State' of any more validity. This Court has ruled on more than one occasion that an 'act of State' is not available against a citizen. An act of State is a sovereign act which is neither grounded on law nor does it pretend to be so. It was described by me, quoting from Fletcher-Moulton L. J. *Salaman v. Secy. of State for India*, (1906) 1 KB 613 at p. 640, as 'a catastrophic charge constituting a new departure', in the State of Saurashtra v. Memon Haji Ismail, (1960) 1 SCR 537 at p. 544 = (AIR 1959 SC 1383 at p. 1387). I have not been able to better that expression. I further pointed out that 'in civil commotion, or even in war or peace, the State cannot act 'catastrophically' outside the ordinary law and there is legal remedy for its wrongful acts against its own subjects or even a friendly alien within the State.' I may again reaffirm the observations in that case based upon the statement of the law by Lord Kingsdown in *Secy. of State in Council for India v. Kamachee Boye Sahaba*, (1859) 13 Moo PC 22. This is what I said:

"The question thus is always: Did the State or its agents purport to act 'catastrophically' or subject to the ordinary course of the Law? This question was posed in (1859) 13 Moo PC 22 by Lord Kingsdown in these words:

"What was the real character of the act done in this case? Was it a seizure by arbitrary power on behalf of the Crown of Great Britain, of the dominations and property of a neighbouring State, an act not affecting to justify itself on grounds of Municipal Law? Or was it, in whole or in part, a possession taken by the Crown under colour of legal title of the property of

the late Raja of Tanjore, in trust for those who, by law, might be entitled to it on the death of the last possessor? If it were the latter the defence set up, of course, has no foundation'." The defence is not available if there is only a colour of legal title against a citizen. In that event the action must fail unless supported by law. Since there are no sovereign or political powers under our Constitution every action of the Executive limb of Government must seek justification in some law. The very existence of Article 363, which is said to incorporate some kind of paramountcy or act of State, shows that there is no political power outside the law, otherwise an additional bar would hardly have been necessary.

42. The learned Attorney General when faced by the rulings on the act of State of this Court and the English Courts, gave up the attempt for justification as such and pleaded that the Covenants and Agreements created 'imperfect obligations'. The phrase 'imperfect obligations' is more often to be met with in the Law of Contract but it was applied by Tindal C. J. to political treaties in *G. Gibson and Ors. Assignees of J. Mallandaino, Bankrupt v. The East India Co.*, (1839) 132 ER 1105. There the claim was made by a retired Military Officer for pension against the Directors of the East India Company based on certain treaties. It was held that such agreements lacked *vinculum juris*. The phrase 'imperfect obligations' was thus used in regard to individuals as subjects of international rights and duties. The recognition in an international treaty or other instrument of rights ensuring to the benefit of individuals other than the parties to the agreement, is sometimes held not to confer the right of enforceability at the instance of such other persons. Therefore, the beneficiary under these rights cannot take measures to enforce them by his own independent steps. In the *Peter Pazmany University*,* case the Permanent Court of International Justice observed:

"It is scarcely necessary to point out that the capacity to possess civil rights does not necessarily imply the capacity to exercise those rights oneself".

* (Series A/B No. 61 p. 231)

Thus a rule of International Law formerly held the field that persons holding such rights are incapable of asserting them in the international sphere or in the Municipal Courts. The instrument may make them owners of rights and yet take away the remedy from them. This is the sense in which Tindal C. J. used the phrase 'lacking in vinculum juris'.

43. This position has now altered and there is a rethinking on the subject. It is now gradually gaining recognition that if there be some municipal legislation giving enforceability to the right, then the right can be claimed in a Municipal Court. This change of view followed the Advisory Opinion of the Permanent Court of International Justice in the jurisdiction of the Courts of Danzig in the matter of Railway Officials in Danzig. (**) The rights given by a treaty received a broader acceptance there. This case gives an exposition of the rights of individuals in the international sphere and the Municipal Courts. The argument of Poland in the case was that the agreement between Poland and Danzig regulating the conditions of employment of the Railway Officials taken over in Railway Service, created rights only between Poland and Danzig and as that agreement was not incorporated in the laws of Poland, it created no rights for individuals, and that the Danzig Courts had no jurisdiction to decide in respect of those rights. The Court did not accept the contention. It observed:

"It may be readily admitted that, according to a well-established principle of international law, the Beamtenabkommen, being an international agreement, cannot, as such, create direct rights and obligations for private individuals. But it cannot be disputed that the very object of an international agreement, according to the intention of the contracting parties, may be the adoption by the parties of some definite rules, creating individual rights and obligations and enforceable by the national Courts. That there is such an intention in the present case can be established by reference to the terms of the Beamtenabkommen." (Page 17)

(**) Advisory Opinion No. 15, series B No. 15.

44. Before dealing with the position of the Rulers themselves, let me illustrate the application of this observation in our country in relation to third parties, safeguarded by an international agreement. The Covenants and Merger Agreements contained clauses guaranteeing continuance of service to the Civil Servants and of their pensions. Those Civil servants would not have been able to enforce these agreements in Municipal Courts by their own individual steps if there was no law or the rights were not otherwise recognised. But when they shared with the Civil servants of the former British India, the benefits of Articles 309-311 of the Constitution and the Rules governing such services, it is not possible to deny to them the benefits that the Constitution and the Rules confer. The Covenants cannot then be said to create 'imperfect obligations' since the Constitution takes the matter into itself and gives them its own guarantees. The individual rights and obligations no doubt originally flowed from a contract between High Contracting Parties and might not have created a vinculum juris in favour of third parties but the Constitution having granted rights and created corresponding obligations, those rights and obligations are enforceable in our Courts. This Court has ruled on many occasions that a recognition of rights by law or otherwise makes them justiciable: see for example *State of Rajasthan v. Shyam Lal*, (1964) 7 SCR 174 = (AIR 1964 SC 1495).

45. The case of the Rulers is a fortiori for they are the contracting parties. In so far as those guarantees became a part of our Constitution and were included in various statutes passed by Parliament such as the Income-tax Act, the Wealth-tax Act, etc., they would be enforceable according to the tenor of the Constitution and the other laws (subject of course to such bar as the Constitution creates by Article 363). Then no question of an 'act of State' or of 'imperfect obligations' arises. To sustain the President's act repudiating the rights and obligations on the basis of a discarded theory of 'imperfect obligations' would drain the Constitution and the laws of their efficacy by an executive act without amendment of the Constitution or the laws and that cannot be permitted. This is not

a right for enforcement in foro conscientiae to make good, or of which the performance could only be sought for by petition, memorial or remonstrance. This is a case for an action in a Court of Law if the dispute is not barred by the Constitution itself.

46. Therefore there is no bar to the jurisdiction of this Court except that created by Article 363. The ambit of that bar will be worked out by me on the terms of that article later but before that bar can be applied one must know what is it that is in controversy here. The main dispute is as to the validity of the action of the President in withdrawing recognition from the Rulers without an exception. The petitioners question the power, authority and jurisdiction of the President to do so. They characterise the act as mala fide, ultra vires and therefore a nullity. I will consider the matter in the same order.

47. The charge of mala fide action in this connection can only mean want of good faith. Good faith according to the definition in the General Clauses Act means a thing which is in fact done honestly, whether it is done negligently or not. In other words an act done honestly must be deemed to be done in good faith. Mr. Palkhivala described the act as wanting in good faith and relying on many cases contended that want of good faith must avoid the act. It is hardly necessary to refer to those cases here as it is well settled that lack of bona fides unravels every transaction. I do not think that it is open to Mr. Palkhivala to describe the act as wanting in good faith without pleading any collateral fact. Further it is not open to me to probe the reasons for a decision by the President. To begin with under Article 74 (2) the question, whether any and if so what, advice was tendered by the Ministers to the President cannot be inquired into by any Court. Again by Article 361 (1) the President is not answerable to any Court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise of those powers and duties except in an investigation of a charge under Article 61. All that is saved is that appropriate proceedings against the Government of India can be taken. Therefore, whether the

President acted rightly or wrongly in the matter may be decided against the Government of India without questioning the conduct of the President. Therefore, the only question open is whether the act of the President was ultra vires the Constitution.

48. The question of ultra vires was put thus by the petitioners:

"An executive exercise of power must be in accordance with the Constitution under Article 53. Article 362 says that the President must exercise the power with due regard to the guarantees and assurances. The President in his action has completely disregarded Articles 291 and 362 and by withdrawing the recognition of the Princes has acted ultra vires the Constitution. Under Article 73 the Executive power of the Union is continuous with the law making power of Parliament. When Parliament refused to amend the Constitution, the President's power did not extend that far by executive action. By his executive act the President has denuded Articles 291 and 362 of their content forever. The President was required to recognise the Rulers and has with one stroke withdrawn the recognition. He is trying to do indirectly what Parliament refused to do directly that is to say remove Articles 291, 362 and 366 (2) from the Constitution. This has been done without a hearing to the Rulers and is in breach of accepted principles of natural justice. The rule of law prevails and no unconstitutional act of any authority, unsupported by law, can avail: 1964-2 SCR 454 at p. 460 = (AIR 1967 SC 1170 at pp. 1173, 1174).

The action is not only against the Constitution but it also affects a large body of tax and other concessions. Prominent among them are Wealth Tax Act, 1957, Sections 2 (p) and 5 (1) (iii), Gift Tax Act, 1958, Section 5 (1) (xiv), Hindu Succession Act, 1956, Section 5 (iii), Income-tax Act, 1922, Section 4 (3) (x); Income-tax Act, 1961, Section 10 (19), Estate Duty Act, 1953, Section 33 (1) (i); Part B States (Taxation Concessions) Order, 1950, Cl. 15; Sea Customs Act, 1878, Section 23. Freedom from prosecutions and Civil suits to a certain extent is assured respectively by the Code of Criminal Procedure, 1898, Section 197-A and the Code of Civil Procedure, 1908, Sec-

tions 87-A and 87-B read with Sections 85 and 86. These privileges have fallen with Rulership and it could not have been intended that these laws would be rendered nugatory by the expedient of removing the Princes".

49. The power to withdraw recognition from a Ruler is claimed by the Attorney General to be implicit in Article 366 (22) because it defines a Ruler in terms of recognition 'for the time being' by the President. It is also contended that the power to recognise itself includes the power to withdraw recognition. It is, therefore, necessary to see how far the President can go on the words of the article. The critical words in the article are 'for the time being'. These words show that the Ruler is a person, who, to be considered as a Ruler must, at any given moment of time, be recognised by the President whether he be the original signatory of a Covenant or Agreement or his successor. The words thus indicate that only one person at a time can be recognised as the Ruler of a State. It also shows a continuity of succession so that an interregnum is avoided. It does show that Rulership cannot be permanent since the continuance as Ruler depends upon the continuance of the recognition. But the definition neither expressly nor by implication places the power in the hands of the President to say that although a Ruler was in existence or a successor was available that, there shall be no Ruler of any particular State. Such a power does not flow from the definition which contemplates the existence of a Ruler for the time being. The phrase 'for the time being' cannot mean that any person can be appointed who has no claim whatever or that temporary appointments may be made or that no appointment need be made. The continuity of a Ruler of an Indian State is obligatory so long as the Ruler is alive or a successor can be found. It may be that where the line becomes extinct (as happened in some cases) or no suitable successor could be found that no Ruler need be recognised. But where the Ruler exists or there is a suitable successor the power to recognise a Ruler is implicit just as much as the power to withdraw recognition in suitable cases. The Union Government cannot escape this obligation by invoking paramountcy or some

state policy. The obligation to recognise a Ruler is bound up with the other guarantees contained in Articles 291 and 362. The definition in Article 366 (22) is merely the key to find a particular Ruler. The withdrawal of recognition from all the Rulers renders the guarantees as also the relevant articles of the Constitution inoperative. It could never be the intention of the Constitution that by an Executive act the operation of those articles would come to a stop. The action of the President has the indirect effect not only of abrogating these articles but also of rendering certain provisions in the Income-tax Act, Wealth Tax Act, the Gift Tax Act, the Codes of Civil and Criminal Procedure, etc., completely otiose. Executive action can never be allowed to have that effect unless the power is explicitly conferred. The intention of Article 366 (22) is exactly the converse of what the Union Government understands it to be.

50. The answer to the first question is that the power of the President was wholly outside Article 366 (22). However wide that power, it does not extend to withdrawing recognition of all the Rulers by a mid-night order. The President was incompetent to do so and, therefore, his act must be treated as a nullity. This question is independent of Article 363 and has no bearing upon any Covenant, etc. It relates only to the power of the President in behalf of recognition of Rulers and withdrawal of recognition. The Court is, therefore, free from Article 363 to consider whether the act can be sustained or not. That Article only applies to acts within the four corners of the Article and not to acts wholly outside. I will show later how that bar can operate on Article 366 (22) when I consider Article 363. For the present I state my conclusion that having considered the matter I am satisfied that the act must be declared to be ultra vires and a nullity. This answers the first ground of attack in favour of the petitioners. The question, is however, reserved for answer whether I am barred by Article 363.

51. Before I consider the matter from the angle of the Articles of the Constitution bearing upon the controversy and the bar of Article 363 I wish to dispose of one matter which

is also, in a manner of speaking, a bar at the very threshold. That bar would arise if this is not a petition covered by Article 32. The petitioners seem to base their claim to relief on four grounds:

(a) that the order of the President is a nullity;

(b) that by the order of the President their privy purses are stopped and that is an infringement of Articles 19 (1) (f) and 31;

(c) that the order also deprives them of their privileges and some are property rights and some affect personal liberty; and

(d) that statutory rights under certain statutes (already mentioned above) are destroyed and they result in deprivation of property through illegal taxes.

52. It is sufficient for this purpose to find out if any right of property is involved. The most outstanding effect of the order is the deprivation of the Privy Purses. These Privy Purses are charge on and paid out of the Consolidated Fund of India, free of all taxes on income (Article 291). If the payments are obligatory and they can be regarded as property a petition under Article 32 will lie as the action to deprive the Rulers of their Privy Purses must be an infringement of Articles 19 and 31.

53. Therefore, I need begin only with the Privy Purses, the stoppage of which is the direct consequence of the order withdrawing recognition. A preliminary point arises under Article 19 whether the Rulers can be regarded as citizen. I have assumed this so far as I cannot see how otherwise they can be described. In *Bagwat Singh Bahadur of Udaipur v. State of Rajasthan*, (1964) 5 SCR 1 at p. 6 = (AIR 1964 SC 444 at p. 446) it is laid down that:—

"The appellant has also, since the Constitution, been a citizen of India, and his recognition as Ruler under Article 366 (22) of the Constitution has not altered his status, but as a citizen he is undoubtedly assured a privileged position".
Therefore, the matter can be considered both under Article 19 and Article 31.

54. In two cases of the Court *Madhaorao Phalke v. State of Madhya Bharat*, (1961) 1 SCR 957 = (AIR 1961 SC 298) and *State of Madhya Pradesh*

v. Ranojirao Shinde, (1968) 3 SCR 489 = (AIR 1968 SC 1053), pensions and cash grants were regarded as property. The reason for the decision is not as fully given as the importance of the subject required and, therefore, I permit myself to say a few words here.

55. I shall show later that the obligation to pay the Privy Purse to a Ruler is absolute and the right to claim it when due subsists in each Ruler. This is a position for the enforcement of Fundamental Right to property and therefore the petitioners must show that a right to property is infringed or is in imminent danger of being threatened. The learned Attorney General questioned the competency of these petitions and the claim that property rights were involved. According to him the right is one to continue to receive a payment de futuro and no more. A right to receive payment is not, according to him, a right to property.

56. The attempt is to equate the periodic payment as being in the nature of payments of debts. It is said that this creates a right in personam and not a right in rem. Therefore, there is enforcement of an obligation in personam but not a right to reach property which can be said to belong to the Rulers. I do not accept the contention of the learned Attorney General.

57. In his summary of the Law of Contract (p. 124) Langdell remarked that 'a debt according to the popular conception of the term, is a sum of money belonging to one person (the creditor), but in the possession of another the debtor'. He questioned this approach. Blackstone contrasted property in possession and property in action and held contracts to be within the latter (*). He was in effect thinking of a debt. According to him property in action exists:

"Where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law"

He was of opinion that till then the thing or its equivalent, remains in suspense, and the injured party has only the right

*(See Commentaries Vol. II XXV pp. 396-398).

and not the occupation. It being a thing in potentia and not in esse it is only a thing in action and not possession. Sohm (The Institutes) also says that till the fulfilment of the obligations the creditor has right only against the debtor and not against a thing.

58. This old concept of property is no longer held to be true. Markby (*) regards the liability of the promisor as itself a thing which is capable of being bought and sold, assigned and transferred and if of money value may itself be regarded as an object of ownership. An obligation according to him is as much a res as any other property and the only difference is in the mode of enjoyment. The creditor realizes this ownership by compelling the debtor to perform his obligation. As illustration he gives a catalogue of passive rights of ownership. Anson (Principles of Law of Contract) supports him by pointing out that an obligation is a right of control exercisable by one person over others for acts which have a money value.

59. The dynamic theory of obligations regards a debt as a claim to an equivalent in value to a floating charge against the generality of things which are the properties of the debtor. From this is developed the notion of a credit-debt where property rights arise from a promise, express or implied in respect of ascertained or readily ascertained sums of money. Thus a debt or a liability to pay money passes through four stages. First there is a debt not yet due. The debt has not yet become a part of the obligor's 'things' because no net liability has yet arisen. The second stage is when the liability may have arisen but is not either ascertained or admitted. Here again the amount due has not become a part of the obligor's things. The third stage is reached when the liability is both ascertained and admitted. Then it is property proper of the debtor in the creditor's hands. The law begins to recognise such property in insolvency, in dealing with it in fraud of creditors, fraudulent preference of one creditor against another, subrogation, equitable estoppel, stoppage in transitu etc. A credit-debt is then a debt fully provable and which is fixed and absolutely owing. The last stage is when the debt becomes a judgment-debt by reason of a decree of a Court. Thus an American Judge held 'outstanding uncol-

lected accounts' as property: Standard Marine Insurance Co. v. Board of Assessors, 123 La 717 at p. 720. It is because of this that the French Law includes such obligations in mobiles.

60. Applying these tests to the Privy Purses, it is clear that they would be property. As soon as an Appropriation Act is passed there is established a credit-debt and the outstanding Privy Purse becomes the property of the Ruler in the hands of Government. It is also a sum certain and absolutely payable.

61. The learned Attorney-General however contends that Article 291 which charges the Privy Purse on the Consolidated Fund of India, to be paid to the Ruler free of all taxes on income does not provide that it shall be paid and, therefore, the Article only lays down the source and manner of payment but creates no right to claim, receive or enforce payment. In my judgment this is a complete misreading of the Article.

62. The word 'charged', is a term of art. In general law 'a charge' creates a pledge and also a priority in payment. The word also denotes in parliamentary practice non-votability. The latter meaning distinguishes it from those items which are payable indiscriminately from the same fund. The result of charging a sum on the Consolidated Fund is to provide that its destination shall not be altered even by vote of Parliament and the charging is sufficiently effective for ensuring the right application. It also sometimes creates priorities as in the Constitutions of some other countries. In our Constitution numerous items of payment are charged on the Consolidated Fund but no priority inter se is established. Yet Article 291 makes the amount payable to the Ruler and, therefore, creates a right in him to demand it. The words of the Article are 'shall be charged on and paid out of etc.'. The article makes the payment obligatory. The words when expanded read 'shall be charged on and shall be paid out of etc.'. The direction to pay is in no uncertain terms. The article is thus self-ordaining. The recipient is mentioned in (b) where the Article says 'and the sums so paid to any Ruler' and this shows who is to be paid. Therefore, the article in addition to the source and manner also lays down that it shall be paid and paid free of taxes on income to the Ruler. The Article thus not only creates a liability but also a right in the

*(Elements of Law 1871 6th Edn. p. 320).

Ruler. It is self-supporting and self-ordaining.

63. The learned Attorney-General contends that even accepting all this as a valid construction of Article 291 of the Constitution, the petitioners must fail because they are seeking either to enforce the Covenants and Agreements or on seeking to enforce a provision of the Constitution relating to such Covenants and Agreements. The same argument is also raised in respect of articles 362 and 366 (22). According to him the petitioners stand excluded by Article 363. This is the crux of the case before us. The answer to this question depends on the meaning to be attributed to the four articles in question, and determines the fate of these petitions.

64. I begin with Article 363. That article was quoted in extenso earlier. The learned Attorney-General used the historical events as background for his contention that Article 363 must be construed as giving an exclusive right of determination to the President on the subject of recognition and withdrawal of recognition. He submitted that just as an act of State cannot be questioned in a Municipal Court so also the withdrawal of recognition cannot be called in question. He cited a large number of authorities in support of his case that an act of State is not subject to the scrutiny of the Courts.

65. The question here is not one of an act of State. Nor can any assurance be drawn from the doctrine of act of State. What we have to do is to construe the article. It bars jurisdiction of Courts. It has no bearing upon the rights of the Rulers as such. It neither increases nor reduces those rights by an iota. I shall presently attempt to find out its meaning. Before I do so I must say that it is a well known rule of interpretation of provisions barring the jurisdiction of Civil Courts that they must be strictly construed for the exclusion of the jurisdiction of a Civil Court, and least of all the Supreme Court, is not to be lightly inferred. The gist of the present dispute is whether the article bars the relief to the petitioners although as held by me, the order of the President is ultra vires.

66. The article commences with the opening words 'notwithstanding anything in this Constitution.' These exclusionary words are no doubt potent

enough to exclude every consideration arising from the other provisions of the Constitution including the Chapter on Fundamental Rights, but for that reason alone we must determine the scope of the article strictly. The article goes on to say that jurisdiction of all Courts including the Supreme Court is barred except that the President may consult the Supreme Court. Having said this the article goes on to specify the matters on which the jurisdiction is barred. This it does in two parts. The first part is:

"in any dispute arising out of any provision of a treaty etc. which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State to which the Government of the Dominion of India was a party and which has or has been continued in operation after such commencement."

This shows that a dispute relating to the enforcement, interpretation or breach of any treaty etc. is barred from the Courts' jurisdiction. The words 'arising out of the provisions of a treaty etc.' limit the words. Thus if a treaty, covenant etc., is characterised as forged by any party, that would not be a dispute 'arising out of any provision of a treaty, covenant, etc.' That dispute would be whether there is a genuine treaty or not. This illustration is given by me to show that the exclusion is not all embracing. The dispute to be barred must arise from a provision of the treaty, etc.

67. The second part bars the Courts' jurisdiction 'in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty etc.' Here the dispute must be in respect of a right which accrues under a provision of the Constitution or the liability or obligation must arise similarly from a provision. The words 'provisions of this Constitution' are not left unqualified. They could not be left unqualified for then the latter part would have barred every dispute from the Courts. The provision had to be pointed out. The article however does not refer to any article by its number. If the article had said in any dispute in respect of any right accruing under or any liability or obligation arising out of Articles 291, 362 and 366 (22), all controversy in this case would have been at an end. But the article uses a qualifying phrase which does not name, but des-

cribes the provisions. A search has, therefore, to be made with a view to determining which provision answers the description and which does not. In other words, we have to satisfy ourselves, before we deny our jurisdiction, that of the Articles 291, 362, 366 (22) which one, or all of them answer the description. The requirement is that the article must be a provision 'relating to' a treaty covenant, etc. I must therefore examine each of the three Articles 291, 362, 366 (22) to discover if all of them and, if not, which of them would fit in with those words.

68. The learned Attorney-General practically read every word through some dictionary or other. The words are 'relating to'. They mean that the provisions must bear upon treaties, etc. as its dominant purpose or theme. It is not sufficient if the treaties, etc., are mentioned there for some collateral purpose. During the course of arguments I illustrated my meaning by referring to Article 102 which provides that a person is disqualified if he is an undischarged insolvent and asked the question whether the provision could be said to be 'relating to membership or to insolvency and got the obvious answer that it is the former. The fact that it mentions 'insolvency', 'insanity' etc., does not make it any other than a provision relating to membership of Parliament. The dominant purpose and theme of the article is one and one only and that has to be discovered before one can say that it is 'relating to' this or that. A similar illustration is to be found in Article 105 (3) where a provision is to be found relating to powers etc., of Indian Parliament and not to those of the House of Commons. Therefore, in trying to find out whether any provision is 'relating to' a treaty, etc., it is not enough to find a mention of treaty etc.' That may be for a subsidiary purpose, not sufficient to qualify for consideration as the dominant theme. It is the dominant purpose and theme which alone determines the quality of the provision.

69. I shall now apply this test to Articles 291, 362 and 366 (22) beginning with Art. 362 since to my mind it is the plainest of all and is definitely within the description. It provides directly for the enforcement of guarantees and assurances by requiring Parliament, the Legislatures and the Executive Governments of the Union and the States to have 'due regard' for those guarantees and as-

surances. The article can only be used to support a claim to rights, privileges and dignities. Its dominant theme is the rights, privileges and dignities of the Rulers under Covenants and Agreements and therefore, the provision is 'relating to' Covenants and Agreements. The reference to Article 291 does not influence the application of the test to Article 291 because that is merely a legislative device and does not tie the two Articles together. It only saves repetition of certain phrases already used in Article 291. If Article 362 were earlier in the Constitution the phrase would have occurred in it and would have been referred to in the other article. Therefore no conclusion can be drawn from this description in Article 362. Therefore Article 362 is one of the provisions relating to a treaty, covenant etc. A litigant invoking its aid really relies on a provision relating to a Covenant etc.

70. I shall now consider Art. 366 (22). That is only a definition clause. It is intended to point out who is the Ruler and of which State. It does so by saying that a Ruler is a person (a) who entered into a Covenant or Agreement before the commencement of the Constitution and the payment of any sum free of tax had been guaranteed or assured by the Government of the Dominion of India as Privy Purse or (b) the successor of such Ruler. For purposes of (a) the same repetition is again avoided by the same legislative device of referring to Article 291 for brevity. This Article renders the certainty of assumption of Rulership to depend upon recognition and that recognition is worked out primarily under Covenants and Agreements. The dominant and immediate purpose and application of the Article depends upon Covenants and Agreements. I have earlier said that the President in recognising a Ruler or withdrawing his recognition does not act arbitrarily but in the light of Covenants and Agreements. All such instruments mention law and custom of the family except the Bhopal Agreement where a local statute has to be observed. The selection of a Ruler's successor thus has to be worked out under a Covenant or Agreement. The Article, therefore, has for its dominant purpose the selection of Rulers through the application of the Covenants and Agreements. After the President has exercised his jurisdiction and power to recognise a Ruler according to his understanding of the implications

of a Covenant etc., no one else has jurisdiction to enter upon the same question unless it can be proved that the act was null and void in toto. When the President acts within the four corners of his authority the matter is barred by Article 363. If this were not so then the recognition of a Ruler or successor by the President would be subject to further confirmation by the Courts and that is not the meaning of Article 366 (22).

71. During the course of arguments I pointed out that if the Maharaja of Jhind were recognised as the Nizam of Hyderabad, there would be no application of Article 366 (22) and the action so wholly arbitrary as not to be protected by Article 363. The answer was that the President would never do so. But who would have thought in 1950 that recognition of all the Rulers would be withdrawn by a single order? Therefore, extreme examples are necessary to solve extreme cases. I have questioned the action of the President because the bar of Article 363 does not operate. Neither is the recognition of an original signatory of a Covenant or Agreement involved, nor the recognition of a successor. The act is not even one which the Court leaves alone because the discretion is exercised in a manner and to the extent a President in the proper discharge of his functions can go. What is done is to take away recognition from all Rulers and as such power does not flow from Article 366 (22), the bar of Article 363 does not apply to such a dispute. It arises neither from the Covenants etc. nor from the provisions of the Constitution. It ceases to have the protection of Article 363.

72. Article 363 immediately follows Article 362. Although not much significance can be attached to the collocation of the articles, it is to be noticed that the exclusionary article wants us to search for a provision relating to a treaty etc., before staying our hands. It does leave the matter open when it could have ruled out the mystery by naming the articles under which relief was to be barred. By applying the test, I have indicated, the provision is located. One such provision is Article 366 (22) when the President acts within the discretion given by Covenants and Agreements.

73. There remains Article 291 to consider. That article was read and re-read before us. Every word in that article was commented upon and dicta-

ries were consulted. I do not propose to refer to dictionaries at all. The words of the article are plain enough to me and I have only to discover its dominant and immediate purpose or theme to say whether it is a provision relating to Covenants or Agreements. It, no doubt, begins by mentioning Covenants and Agreements but that is not all. We cannot from that fact alone bar ourselves. The relationship between the dominant purpose of the provision and the Covenants and Agreements still remains to be established and their involvement in the dispute must be found. In this connection we must ask the question: Is this provision in reality and substance a provision on the subject-matter of Covenants and Agreements? It is not enough that it refers to the Covenants and Agreements. It should make them the subject-matter of enactment and decision.

74. The Article when carefully analysed leads to these conclusions: The main and only purpose of the provision is to charge Privy Purses on the Consolidated Fund of India and make obligatory their payment free of taxes on income. It narrows the guarantee of the Dominion Government from freedom from all taxes to freedom only from taxes on income. Earlier I had occasion to show that the Princes had guaranteed to themselves their Privy Purses free of all taxes. The Dominion Government had guaranteed or assured the same freedom. The Constitution limits the freedom to taxes on income and creates a charge on the Consolidated Fund. There were other guarantees as in the Merger Agreements of Bilaspur and Bhopal (quoted earlier) which are ignored by the Article. The guarantee of the Dominion Government is thus continued in a modified form. The reference to Covenants and Agreements is casual and subsidiary. The immediate and dominant purpose of the provision is to ensure payment of Privy Purses, to charge them on the Consolidated Fund and to make them free of taxes on income. The argument of the learned Attorney-General that it indicates only the source and manner of payment rather destroys the case for the application of Article 363 than lends support to it. The mention therein of Covenants and Agreements is for its own purpose so that the amounts need not be specified. In this connection there is no difference between Articles 290-A and 291 although the learned Attorney-General made much of

the mention of the name of the Travancore Devasom Fund in the former and absence of the names of the Rulers in the latter, or again the mention of a specific sum in the former and no sum in the latter. The article is self-sustaining and self-ordaining. Its purpose is not relating to Covenants etc., but to something else. Article 291 differs from Articles 362 and 366 (22) in this that the Privy Purses have already been settled and one has not to enforce the Covenants at all. One does not enforce the Covenants but the mandate of the Article itself. Whenever the Privy Purse is modified under the terms of a Covenant, the Article is again invoked *ab extra*. That dispute is not related to Article 291 and the bar of Article 363 operates. That matter is outside the jurisdiction of Courts. It is only when the Privy Purse is a settled fact of which the Courts can take notice, without having to construe the Covenants for itself that the bar of Article 363 is avoided. In that case the Article does not answer the description of 'a dispute' or of the latter part of Article 363.

75. My conclusions on Arts. 291, 362 and 366 (22) are that Article 291 is not a provision relating to Covenants and Agreements but a special provision for the source of payment of privy purses by charging them on the Consolidated Fund and for making the payment free of taxes on income. It does not in its dominant purpose and theme answer the description in the latter part of Article 363. Article 362 is within the bar of Article 363 because its dominant purpose is to get recognised the Covenants and Agreements with Rulers. However, in so far as the same guarantees find place in legislative measures the provisions of Art. 362 need not be invoked and the dispute decided on the basis of those statutes. Such a case may not attract Article 362 and consequently the bar of Article 363 may not also apply. Article 366 (22) is within the description so long as the President in recognising a Ruler or a successor is effectuating the provisions of a Covenant or Agreement. It may apply when the discretion exercised is relatable to his powers flowing from the Covenants read with the Article. However where the President acts wholly outside the provisions of Article 366 (22) his action can be questioned because the bar applies on bona fide and legitimate action and not to ultra vires actions.

1971 S. C./36 III G—13

76. The error in the case of the Union of India arises from certain circumstances. The first is to think that the paramountcy of the Crown descended upon the President of Indian Government. In that paramountcy the recognition of a Ruler was a gift from the Crown. In view of the history of integration of States and the provisions of the Constitution in Articles 291, 362 and 366 (22), there is no paramountcy left at all, if paramountcy could at all be exercised against citizens. The only discretion left is to select a suitable successor to a Ruler and perhaps to withdraw recognition on grounds which are sound and sufficient. Whether such another kind of withdrawal of recognition may be equally capable of being questioned in a Court of law, is a matter on which I do not express an opinion. Therefore the President cannot claim a total immunity for his acts from the scrutiny of the Court. Neither the paramountcy of the Grand Moghul who could give Subehdarships to his Generals as he pleased nor the paramountcy of the British Crown has descended to him. This error is further enhanced by too facile a reading of Article 363. Any tenuous connection between an Article and the Covenant or Agreement, however remote, is not to be considered sufficient to make a provision fall within the description in the latter part of Article 363. Due regard was not paid to the fact that the draftsman would have referred to numbers of Articles if the disputes of every kind under those articles stood excluded.

77. The learned Attorney-General relied in particular on some cases which he said had laid down that the act of recognition is a political act, that it cannot be questioned before a Court of Law. He also referred to cases in which the question of the application of Article 363 had arisen. My brother Hegde in his judgment has sufficiently considered them and I am in such agreement with him that I find it unnecessary to repeat what he has said there. I adopt his reasoning.

78. In conclusion I hold the orders of the President to be ultra vires and declare them to be so. In consequence a writ of mandamus shall issue not to enforce the orders. The petitions are allowed with costs.

The Judgment of Shah, Sikri, Shelat, Bhargava, Vaidialingam, Grover and Dua, JJ., was delivered by

SHAH, J.:— 79. On August 15, 1947, Maharajadhiraja Jivaji Rao Scindia of Gwalior—hereinafter called 'Jivaji Rao'—executed an instrument of accession stipulating that the Governor-General of India, the Dominion Legislature, the Federal Court of India, and other Dominion authorities shall for the purpose of the Dominion, exercise in relation to the State of Gwalior, such functions as may be vested in them by the Government of India Act, 1935, in respect of Defence, External Affairs, Communications and matters ancillary thereto.

80. On April 22, 1948, twenty heads of States in the Madhya Bharat region executed a covenant to form the United State of Gwalior, Indore and Malwa. The covenant guaranteed to each head of covenanting State payment of the amount specified therein as his Privy Purse out of the revenues of the United State; to full ownership, use and enjoyment of all private properties belonging to him on the date of making over the administration of the State to the Rajpramukh; to succession to the gaddi of the State according to law and custom; and to all personal privileges, dignities and titles enjoyed by him within and outside the territories of his State immediately before the 15th day of August, 1947.

81. Five more States joined the United State of Gwalior, Indore and Malwa (Madhya Bharat) with effect from July 1, 1948. On July 19, 1948, Jivaji Rao executed on behalf of the United State of Gwalior, Indore and Malwa (Madhya Bharat) a revised instrument of accession. Pursuant to the merger agreements, it was proclaimed on November 24, 1949, that the United State of Madhya Bharat adopted the Constitution of India as the Constitution of the United State. The Constitution of India was promulgated on November 26, 1949, and was brought into force (except for certain articles specified in Article 394) with effect from January 26, 1950.

82. The President of India recognized Jivaji Rao as the Ruler of Gwalior. The Government of India continued to pay the privy purse and accorded to him the privileges specified in the instrument of accession and the merger agreement, except those which were modified by

statutes. After the death of Jivaji Rao the President recognized Madhav Rao—petitioner herein—as the Ruler of Gwalior.

83. Under the Madhya Bharat Gangajali Fund Trust Act, 1954, enacted by the State Legislature the Ruler of the State of Gwalior is one of the three trustees authorised to manage the Gangajali Fund settled by the State and to apply the income thereof for charitable purposes.

84. On September 2, 1970, a Bill intituled the Constitution (Twentyfourth Amendment) Bill, 1970, and providing that "Articles 291 and 362 of the Constitution and clause (22) of Article 366 shall be omitted" was introduced in the Lok Sabha. The Bill was declared passed with the amendment that the provisions thereof shall come into operation with effect from October 15, 1970. On September 5, 1970, the motion for consideration of the Bill did not obtain, in the Rajya Sabha, the requisite majority of not less than two-thirds of the members present and voting as required by Article 368 of the Constitution. The motion for introduction of the Bill was declared lost. A few hours thereafter the President of India purporting to exercise power under Clause (22) of Article 366 of the Constitution signed an instrument withdrawing recognition of all the Rulers. A communication dated September 6, 1970 issued "by Order and in the name of the President" was received by the petitioner stating that:

"In exercise of the powers vested in him under Article 366 (22) of the Constitution, the President hereby directs that with effect from the date of this Order His Highness Maharajadhiraja Madhav Rao Jivaji Rao Scindia Bahadur do cease to be recognised as the Ruler of Gwalior."

Similar orders were communicated to all other Rulers in India who had been previously recognised under Art. 366 (22) of the Constitution.

85. The Union Finance Minister laid on the table of the Rajya Sabha, on September 7, 1970, a statement, *inter alia*, that:

"....Government is fortified in the belief that there is widespread support in the country for putting an end to an outmoded and antiquated system which permitted the enjoyment of privileges and privy purses by a small section of our

people without any corresponding social obligations on their part.

As it has been Government's declared policy to abolish these privileges and privy purses and also to put an end to the very concept of Rulership, Government felt they would be justified in de-recognising the Rulers and thus putting an end to a period of political and other uncertainties so undesirable in a matter of this nature. Accordingly, President has decided to derecognise all the Rulers and thereby terminate their privy purses and privileges with immediate effect. Orders have been issued in pursuance of the decision."

86. Madhav Rao Scindia moved a petition on September 11, 1970, in this Court under Article 32 of the Constitution claiming — (a) a declaration that the order dated September 6, 1970 was "un-constitutional, ultra vires and void" and a direction quashing that order; (b) a declaration that the petitioner continues to be the Ruler of Gwalior and to be entitled to the privy purse and to personal rights and privileges accorded to him as Ruler; and (c) a direction to the Union of India to continue to pay the privy purse and to continue to recognise the Rulership and the personal rights and privileges of the petitioner and to implement and observe the provisions of the covenant and the merger agreement. He claimed that in making the order the President acted without authority of law; that the order was made for a collateral purpose; and that by the order the rights guaranteed to the petitioner under Articles 14, 19 and 31 of the Constitution were infringed. The petition was later amended with leave of the Court and it was claimed that the order infringed the guarantee under Article 21 of the Constitution also.

87. The Union of India by their affidavit contended, inter alia, that the petition was not maintainable because the source of the right to receive the privy purse and to be accorded the privileges claimed was a political agreement and the privy purse was in the nature of a political pension; that Article 291 did not impose any obligation upon the Union to pay the privy purse; that Articles 291 and 362 of the Constitution did not invest the petitioner and the other Rulers with any enforceable rights; that recognition of the Rulers under Art. 366 (22) was a "matter of State policy" and the

President was competent to pass the order dated September 6, 1970, that the order was not made for a collateral purpose as alleged; and that by the order the guarantee of Articles 14, 19 (1) (f), 31 (1) or any other article of the Constitution was not infringed.

88. By the order of the President withdrawing his recognition as a Ruler, the petitioner is denied the right to the privy purse and to the personal rights, privileges and dignities accorded to him as a Ruler; he is also denied the benefit of the exemption from liability to pay income-tax under Section 10 (1a) of the Income-tax Act, 1961; Wealth-tax under Section 5 (1) (iii) and (xiv) of the Wealth-tax Act, 1957; gift-tax under S. 5 (1) (xiv) of the Gift-tax Act, 1958; and of the exemption from liability to pay duty under the Sea Customs Act, 1878, which remains operative under the Customs Act, 1961; he is also deprived of the statutory protection that he shall not be sued without the consent of the Central Government under Section 87-B of the Code of Civil Procedure, 1908, and that cognizance of any offence alleged to have been committed by him shall not be taken by any Court without the previous sanction under Section 197-A of the Code of Criminal Procedure, 1898. The petitioner is also disentitled to the management and administration of the Gangajali Fund Trust.

89. By his order dated August 22, 1961, the President recognised the petitioner as the Ruler of Gwalior. If the order of the President is without authority of law, as the petitioner contends it is, there is a clear infringement of the guarantee of the fundamental rights under Articles 19 (1) (f), 21 and 31 (1) of the Constitution. It is unnecessary in the view we take, to deal with the plea raised by Mr. Palkhivala that Rulership is "property" and the order of the President deprives the petitioner of that property without authority of law.

90. Validity of the order of the President is challenged on the grounds that—(1) the President has no power to withdraw recognition of a Ruler once recognised; (2) exercise of the power to withdraw recognition, assuming that the President has such power, is coupled with the duty to recognise his successor and an order made without recognising a successor is invalid; (3) the order of the President "de-recognising" all the Rulers en masse amounted to arbitrary exercise

of power; and (4) in any event, the order was made for a collateral purpose, that is, to give effect to the "policy of the Government" after the Government was unable to secure the requisite majority in the Parliament to the Constitution Amendment Bill.

91. Article 366 (22) of the Constitution reads:

"In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them, that is to say—

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler."

Clause (15) of Article 366 defines an "Indian State" as meaning "any territory which the Government of the Dominion of India recognised as such a State." Article 291, as amended by the Constitution (Seventh Amendment) Act, 1956, reads as follows:

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

- (a) such sums shall be charged on, and paid out of, the Consolidated Fund of India; and
- (b) the sums so paid to the Ruler shall be exempt from all taxes on income."

The definition of "Ruler" in Clause (22) of Article 366 is in two parts; a person is a Ruler if he being (a) a Prince, Chief or other person who had entered into the covenant or agreement as is referred to in Clause (1) of Article 291, is for the time being recognised by the President as the Ruler; or (b) if he is for the time being recognised by the President as the successor of the Ruler mentioned in part (a). Use of the expression "for the time being" in relation to the persons who had entered into covenants or agreements and in relation to the successor, may perhaps imply that the President has the

power in appropriate cases and for adequate reasons to withdraw recognition, but that is a matter on which it is unnecessary for the purpose of this petition to express any final opinion.

92. Granting that the President may withdraw recognition of a Ruler once granted, the power conferred by Article 366 (22) is exercisable only for good cause, i. e., because of any personal disqualifications incurred by a Ruler. By the provisions enacted in Arts. 366 (22), 291 and 362 of the Constitution the privileges of Rulers are made an integral part of the constitutional scheme. Thereby a class of citizens are, for historical reasons, accorded special privileges. They cannot be deprived of those privileges arbitrarily, for the foundation of our Constitution is firmly laid in the Rule of Law and no instrumentality of the Union, not even the President as the head of the Executive, is invested with arbitrary authority.

93. In the affidavit on behalf of the Union of India it was averred that "the concept of Rulership, the privy purse and the privileges without any relatable function or responsibility have become incompatible with democracy, equality and social justice in the context of India of today"; and that since "the commencement of the Constitution many things have changed; many hereditary rights and unearned income have been restricted and many privileges and vested interests have been done away with and many laws have been passed with the object of checking the concentration of economic power—both rural and industrial, the Union of India have decided that the concept of Rulership, the privy purse and the privileges should be abolished." Thereby the executive arrogates to itself power which it does not possess: our Constitution does not invest the power claimed in the executive branch of the Union.

94. The plea that in recognising or "de-recognising" a person as a Ruler, the President exercises "political power which is a sovereign power" and that after an order of de-recognition "no erstwhile Ruler can make a claim in respect of the Rulership or the privy purse or any of the privileges" since the relevant covenants under which the rights of the Rulers were recognised were "political agreements" and the rights and obligations thereunder were liable to be varied or repudiated in accordance with "State

policy" in the interests of the people also received no countenance from our Constitution. The first branch of the argument is inconsistent with the basic concept under our Constitution of division of State functions; the second is inconsistent with the history of events between 1947 and 1949, and the third receives, for reasons to be presently stated, no support from the relevant constitutional provisions.

95. Whether the Parliament may by constitutional amendment abolish the rights and privileges accorded to the Rulers is not, and cannot be, debated in this petition, for no such constitutional amendment has been made. The petitioner challenges the authority of the President by an order purporting to be made under Article 366 (22) to withdraw recognition of Rulers so as to deprive them of the rights and privileges to which they are entitled by virtue of their status as Rulers.

96. The functions of the State are classified as legislative, judicial and executive; the executive function is the residue which does not fall within the other two functions. Constitutional mechanism in a democratic polity does not contemplate existence of any function which may qua the citizens be designated as political and orders made in exercise whereof are not liable to be tested for their validity before the lawfully constituted courts. *Rai Sahib Ram Jawaya Kapur v. State of Punjab*, (1955) 1 SCR 225 = (AIR 1955 SC 549), *Jayantilal Amritlal Shodhan v. F. N. Rana*, (1964) 5 SCR 294 = (AIR 1964 SC 648); and *Halsbury's Laws of England*, 3rd Edn., Vol. 7, Art. 409, at p. 192. Observations made in two judgments of this Court, on which the Attorney-General relied, do not support a contrary view. In *Nawab Usman Ali Khan v. Sagarmal*, (1965) 3 SCR 201 = (AIR 1965 SC 1798) this Court held that the amount payable to the Ruler of Jaora "on account of the privy purse" was exempt from attachment in execution of the decree of a Civil Court, because it was a "political pension" within the meaning of Section 60 (1) (g) of the Code of Civil Procedure. The Court in determining the true nature of the privy purse, characterised the sanction for payment as "political and not legal". That has, however, no bearing on the question in issue here. In *Kunwar Shri Vir Rajendra Singh v. Union of India*, (1970) 2 SCR 631 = (AIR

1970 SC 1946) this Court negated the claim of an applicant that his right to property was violated because the President accepted another claimant to the gaddi of Dholpur as Ruler. The Court observed that the recognition of Rulership by the President, in exercise of his political power, did not amount to recognition of any right to private properties of the Ruler. The Court did not attempt to classify the exercise of the Presidential function under Art. 366 (22) as distinct from executive functions; that is clear from the dictum that the exercise of the President's power was "an instance of purely executive function".

97. The history of negotiations, which culminated in the integration of the territories of the Princely States before the commencement of the Constitution clearly indicates that the recognition of the status of the Rulers and their rights was not temporary, and also not liable to be varied or repudiated in accordance with "State policy". Power of the President to determine the status of the Rulers by cancelling or withdrawing recognition to effectuate the policy of the Government to abolish the concept of Rulership is therefore liable to be challenged in these petitions.

98. The circumstances in which the constitutional provisions under cls. (15) and (22) of Article 366, and Articles 291 and 362 were incorporated may be briefly set out.

99. In the era before 1947 the term "State" applied to a political community occupying a territory in India of defined boundaries and subject to a single Ruler who enjoyed or exercised, as belonging to him, any of the functions and attributes of internal sovereignty duly recognised by the British Crown. There were in India more than 560 States: forty out of those States had treaty relations with the Paramount Power; a larger number of States had some form of engagements or sanads, and the remaining enjoyed in one or the other form recognition of their status by the British Crown. The treaties, engagements and sanads covered a wide field, and the rights and obligations of the States arising out of those agreements varied from State to State. The rights that the British Crown as the Paramount Power exercised in relation to the States covered authority in matters external as well as internal. The States had no international personality, the Paramount

Power had exclusive authority to make peace or war or to negotiate or communicate with foreign States. The Paramount Power had the right of intervention in internal affairs which could be exercised for the benefit of the head of the State, of India as a whole, or for giving effect to international commitments.

100. The Government of India Act, 1935, was a step in the direction of achieving a political unity over the entire sub-continent: it envisaged a constitutional relationship between the Indian States and Provinces in British India on a federal basis. But the concept of a loose federation of disparate constituent units in which the power and authority of the Federation were to differ between one constituent unit and another was soon abandoned as inherently impracticable. The Second World War awakened a new consciousness which regarded colonialism as an anachronism. With the object of transferring power to a Dominion, several schemes were evolved by the British authorities from time to time. There was the Cripps Plan, followed by the Simla Conference of 1945, and the Cabinet Mission Plan of 1946. The Cabinet Mission issued a Memorandum dated May 12, 1946, in regard to the States' Treaties and to Paramountcy: it affirmed that the rights of the States which flowed from their relationship with the Crown will no longer exist and that the rights surrendered by the States to the Paramount Power will revert to the States. The void caused by the lapse of paramountcy, it was said, may be filled either by the States entering into a federal relationship with the successor Government or Governments in British India, or by entering into a particular arrangement with it or them. On May 16, 1946, the Cabinet Mission announced its Plan for the entry of the States into the proposed Union of India. They simultaneously declared that the paramountcy of the British Crown could not be retained nor transferred to the new Government.

101. The British Parliament decided to set up the two Dominions of India and Pakistan, and promulgated on July 18, 1947, the Indian Independence Act, 1947. By Section 1, two new independent Dominions of India and Pakistan were set up as from August 15, 1947, and Section 7 of the Act provided:

"(1) As from the appointed day—

- (a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;
- (b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all obligations of His Majesty at that date, towards Indian States or the rulers thereof and all powers, rights, authority or jurisdiction exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise; and

(c) * * *

Provided that, notwithstanding anything in paragraph (b) or paragraph (c) of the sub-section, effect shall, as nearly as may be continued to be given to the provisions of any such agreement as is therein referred to which relate to customs, transit and communications, posts and telegraphs, or other like matters, until the provisions in question are denounced by the ruler of the Indian State or person having authority in the tribal areas on the one hand, or by the Dominion or Province or other part thereof concerned on the other hand, or are superseded by subsequent agreements.

(2) The assent of the Parliament of the United Kingdom is hereby given to the omission from the Royal Style and Titles of the words "Indian Imperator" and the words "Emperor of India", and to the issue by His Majesty for that purpose of His Royal Proclamation under the Great Seal of the Realm."

By the Indian (Provisional Constitution) Order, 1947, Sections 5 and 6 of the Government of India Act, 1935, were extensively amended, setting up machinery for the Indian States to accede to the Dominion of India. Promulgation of the Indian Independence Act generated great political activity. On July 5, 1947, Sardar Vallabhbhai Patel, Minister for Home Affairs, made a statement defining the policy of the Government of India, and inviting the Princes to accede to the Dominion on three subjects—Defence,

Foreign Affairs and Communications, in which the common interests of the country were involved. He assured the Princes that the policy of the States Department (which had been set up in place of the Political Department) was not to conduct the relations with the States in a manner savouring of domination of one over the other; the domination, if any, would be the domination of mutual interests and welfare. He expressed the hope that the Princes would bear in mind that the alternative to co-operation in the general interest was anarchy and chaos which would overwhelm the great as well as the small in a common ruin, if the States and Provinces were unable to act together in the minimum of common tasks. On July 25, 1947, at a special meeting of the Princes, Lord Mountbatten—the Crown representative—advised the Princes to accede to the appropriate Dominion in regard to the three subjects of Defence, External Affairs and Communications and assured them that their accession on those subjects would involve no financial liability and in other matters there would be no encroachment on their internal sovereignty.

102. The plea for accession met with a favourable response. Negotiations for accession of the States were soon completed and instruments of accession were executed by the heads of the Indian States. Simultaneously, Standstill Agreements, the acceptance of which was made by the Government of India a condition of accession by the States concerned, were also entered into between the Dominion Government and the acceding States. The Standstill Agreements recited:

"Whereas it is to the benefit and advantage of the Dominion of India as well as of the Indian States that existing agreements and administrative arrangements in the matters of common concern, should continue for the time being between the Dominion of India or any part thereof and the Indian States:

Now therefore it is agreed between the State and the Dominion of India that:—

"1. (1) Until new agreements in this behalf are made, all agreements and administrative arrangements as to matters of common concern now existing between Crown and any Indian State shall, insofar as may be appropriate, continue as between the Dominion of India, or, as the

case may be, the part thereof, and the State.

(2) In particular, and without derogation from the generality of sub-cl. (1) of this clause the matters referred to above shall include the matters specified in the Schedule to this Agreement.
* * *

3. Nothing in this agreement includes the exercise of any paramountcy functions."

103. By the instruments of accession the Princes were assured that the terms of the instruments will not be varied by any amendment of the Government of India Act, 1935, or the Indian Independence Act, 1947, unless such amendment be accepted by the Prince by the supplementary instrument; that nothing in the instrument shall be deemed to commit the Prince in any way to acceptance of any future Constitution of India or to fetter his discretion to enter into agreements with the Government of India under any such future Constitution, and that nothing in the instrument shall affect the continuance of the Prince's sovereignty in and over the State, or, save as provided by or under the instrument, the exercise of any powers, authority and rights enjoyed by the Prince as head of the State or the validity of any law in force in the State.

104. This was a significant step in the direction of forging a vital constitutional link between the Dominion of India and the States. It was followed by the next phase culminating in integration of some States in the Provinces, consolidation of other States into sizable administrative units, and some other States executing agreements integrating with the Dominion. The process of integration of States varied from State to State. 216 out of the States merged with the existing Provinces; 61 States were taken over as centrally administered areas; and 275 States were integrated in five Unions of States, Saurashtra, Madhya Bharat, Rajasthan, Pepsu and Travancore Cochin. Merger of the States with the Provinces was achieved initially in name only, because the authority—executive, legislative and judicial—was still exercised under the Extra-Provincial Jurisdiction Act by the Provinces within which the States were initially merged. The merger agreements of the Unions of States were to operate as their provisional constitutions. Even the centrally ad-

ministered areas did not become part of the Dominion territory.

105. The instruments of merger provided for the integration of States and for transfer of power from the Ruler and guaranteed to the Princes the privy purse, succession to the gaddi, rights and privileges, and full ownership, use and enjoyment of all private properties belonging to them. The covenants for establishing Union of States and the agreements of merger contained provisions guaranteeing to the heads of merged States or integrated States payment of privy purses. These instruments were concurred in and guaranteed by the Government of the Dominion of India.

106. The next phase was of assimilation and consolidation of the unity achieved till then. In the case of the "provincially merged" and centrally administered States, authority for exercising the powers of administration and legislation originally derived from the Extra-Provincial Jurisdiction Act, 1947, was later exercisable by virtue of orders issued under Sections 290A and 290B incorporated in the Government of India Act, 1935 with effect from January 15, 1949. By an order issued under Section 290A diverse steps were taken for integration of the former States into the Provinces.

107. To ensure an organic unity of India, the Princes were invited to accede to the Dominion, and later to integrate with India under a Constitution with a Republican form of Government. The Princes, some out of patriotism and others from motives of self-interest, agreed to merge their territories and to abandon all authority in regard to their territories in consideration of certain special concessions. To give constitutional sanction to the merger agreements, special provisions were expressly incorporated in the draft Constitution recognising the status of the Princes, the obligation to pay the privy purse, and the personal rights and privileges guaranteed to them. The territories of the States after integration retained no political or legal identity. Special recognition was given to the status of the Princes and to their rights and the obligations of the Union and for that purpose, Articles 366 (15), 366 (22), 291 and 362 were incorporated in the Constitution. In Article 366 (15) the expression "Indian State" was defined as meaning any territory which the Government of the Dominion of India recognised as such a State; and in Arti-

cle 366 (22) a special definition of the expression "Ruler" was evolved for the purpose of the Constitution; by Art. 291 the privy purse was charged on, and made payable out of, the Consolidated Fund of India, and the sum so paid as privy purse to the Ruler was declared exempt from all taxes on income. By Article 362 the Parliament, the State Legislatures and the executive of the Union and the States were enjoined to have "due regard to the guarantees and assurances" under the covenants and agreements between the Government of the Dominion of India and the heads of the former Indian States.

108. The stage was then set for the promulgation of the Constitution. A few days before November 26, 1949, a large majority of the States proclaimed that the Constitution of India will be the Constitution for their respective territories, and shall be enforced as such in accordance with its provisions, and that the provisions of that Constitution shall, as from the date of its commencement, supersede and abrogate all other existing constitutional provisions inconsistent therewith. Merger agreements were executed to give effect to the proclamations. The proclamation and the execution of the merger agreements resulted in complete extinction of the States and Unions of States as separate units. The princes ceased to retain any vestige of sovereign rights or authority qua their former States. They acquired the status of citizens of India.

109. The plea raised by the Union must be considered in the light of these developments. The negotiations, the assurances given by leading statesmen, and the terms of the covenants and agreements were certainly not intended to be an exercise in futility. The argument that the parties to the instruments were entering into solemn undertakings intending the arrangements to be temporary, and liable to be set at naught by the unilateral act of the Union of India, must be rejected.

110. In form Article 366 (22) is a definition clause. It however invests the President with authority to recognize a person as a Ruler. Granting that under Article 366 (22) the President may withdraw the recognition of a person as a Ruler, the power to nullify important provisions of the Constitution does not flow from that clause. The plea raised by the Attorney-General that recognition

of Rulership was a "gift of the President" or was "in the gift of the President" is not borne out by the position of and the nature of the powers and functions of the President under our constitutional scheme. The President is made by the Constitution repository of the power to recognise the Rulers. That power may be exercised consistently with and in aid of the Constitutional scheme. A democratic Constitution founded in the Rule of Law does not envisage authority in any instrumentality of the Union reminiscent of autocracy. The power to recognise a Ruler may be exercised in the case of first recognition only in favour of a person who has signed the covenant, and in favour of his successor having regard to the custom and law governing the State if the Ruler dies, or becomes incapable of functioning or his recognition is withdrawn. By the use of the expression "for the time being" in Clause (22) of Article 366 the President is not invested with authority to accord a temporary recognition to a Ruler nor with authority to recognise or not to recognise a Ruler arbitrarily: the expression "for the time being" predicates that there shall be a Ruler of the Indian State, that if the first recognised Ruler dies, or ceases to be a Ruler, a successor shall be appointed, and that there shall not be more Rulers than one at a given time.

111. By express injunction in Article 53 (1) of the Constitution the executive power vested in the President is directed to be exercised "in accordance with the Constitution". That power is intended to be exercised in aid of and not to destroy constitutional institutions. Granting that power to recognise a Ruler carries with it the power to withdraw recognition of the Ruler, the power must be exercised bona fide, and in the larger interest of the people consistently with the provisions of the Constitution to maintain the institution of Rulership. Power may therefore be exercised in the course of and for recognising another person as a successor to the Ruler, having regard to the laws and customs governing the State. The President is not competent to recognise a person as a Ruler who is not by the custom and laws governing succession to Rulership qualified to be a Ruler. The President cannot obviously withdraw recognition of a Ruler and recognise another person, as a matter of political patronage. Nor can he lawfully depart from the laws and

customs governing succession so as to introduce a person as a Ruler who is not by ties of blood or affiliation related to the previous Ruler. Whether in certain exceptional circumstances the President may in granting recognition to a successor depart in the larger interest of the country from the strict rule or custom governing succession to the gaddi, is a question which need not be decided. But unquestionably the President is not invested with authority to recognise a stranger as successor to the gaddi, or not to recognise any person at all as a successor if he so chooses. The power of the President is plainly coupled with a duty; a duty to maintain the constitutional institution, the constitutional provisions, the constitutional scheme, and the sanctity of solemn agreements entered into by the predecessor of the Union Government which are accepted, recognised and incorporated in the Constitution. An order merely "de-recognising" a Ruler without providing for continuation of the institution of Rulership which is an integral part of the constitutional scheme is, therefore, plainly illegal.

112. Clause (22) of Article 366 is intended to invest the President with authority to recognise Rulers; see *Kunvar Shri Vir Rajendra Singh v. Union of India*, (1970) 2 SCR 631 = (AIR 1970 SC 1946). The clause incorporates the history of momentous events which took place in India between 1947 and 1949 leaving a lasting impression upon our national and constitutional structure. Articles 291, 362 and Part VII of the Constitution were when incorporated intended to grant recognition to the solemn promises on the strength of which the former Princes were invited by those at the helm of affairs to join the experiment for achieving for the millions their dream of securing a truly democratic form of Government in a united independent India, and clauses (15) and (22) of Article 366 were intended to serve the purpose of identifying the persons who remained entitled to the benefits of those constitutional guarantees.

113. A brief reference may be made to what was said in the Constituent Assembly by the Minister for Home Affairs who was in charge of the States when he moved for adoption of Art. 291. He used memorable words:

"These guarantees (merger agreements) form part of the historic settlements which enshrine in them the con-

summation of the great ideal of geographical, political and economic unification of India, an ideal which for centuries remained a distant dream and which appeared as remote and as difficult of attainment as ever even after the advent of Indian Independence.

"Human memory is proverbially short. Meeting in October, 1949, we are apt to forget the magnitude of the problem which confronted us in August, 1947 * * * the so-called lapse of paramountcy was a part of the Plan announced on June 3, 1947, which was accepted by the Congress. We agreed to this arrangement in the same manner as we agreed to the partition of India. We accepted it because we had no option to act otherwise. While there was recognition in the various announcements of the British Government of the fundamental fact that each State should link up its future with that Dominion with which it was geographically contiguous, the Indian Independence Act released the States from all their obligations to the British Crown. In their various authoritative pronouncements, the British spokesmen recognised that with the lapse of paramountcy technically and legally the States would become independent. * * * The situation was indeed fraught with immeasurable potentialities of disruption, for some of the Rulers did wish to exercise their technical right to declare independence and others to join the neighbouring Dominion.

* * *

It was against this unpropitious background that the Government of India invited the Rulers of the States to accede on three subjects of Defence, External Affairs and Communications. At the time the proposal was put forward to the Rulers, an assurance was given to them that they would retain the status quo except for accession on these subjects. It had been made clear to them that * * * there was no intention either to encroach on the internal autonomy or the sovereignty of the States or to fetter their discretion in respect of their acceptance of the new Constitution of India. These commitments had to be borne in mind when the States Ministry approached the Rulers for the integration of their States. There was nothing to compel or induce the Rulers to merge the identity of their States. Any use of force would have not only been against our professed principles but would have also caused

serious repercussions. * * * The minimum which we could offer to them as quid pro quo for parting with their ruling powers was to guarantee to them privy purses and certain privileges on a reasonable and defined basis. The privy purse settlements are therefore in the nature of consideration for the surrender by the Rulers of all their ruling powers and also for the dissolution of the States as separate units.

* * *

"The Rulers have now discharged their part of the obligations by transferring all ruling powers and by agreeing to the integration of their States. The main part of our obligation under these agreements, is to ensure that the guarantees given by us in respect of privy purse are fully implemented. Our failure to do so would be a breach of faith and seriously prejudice the stabilisation of the new order."

In the larger interest of achieving the unity of the country, our statesmen chose to appeal to the patriotism of the Princes and not to rely upon the force of arms or methods of political agitation within the States. Negotiation of a friendly settlement was in the circumstances then prevailing the only advisable course. A discontented group of Princes was a serious threat to a smooth and orderly transition. The Constituent Assembly resolved to honour, without reservation, the promises made to the Princes from time to time. Clauses in the draft Constitution relating to the obligation of the Union to pay the privy purses and recognising certain rights, privileges and dignities till then enjoyed by the Princes, were intended to incorporate a just quid pro quo for surrender by them of their authority and powers and dissolution of their States.

114. A legislative mechanism was devised to grant the benefit to the former Princes by making a provision for recognising them as Rulers, and of incorporating in the Constitution the guarantees of the privy purse and personal rights and privileges. The former Princes were accordingly recognised as a class of citizens with special privileges granted to them because they had surrendered their powers, privileges and authority. The argument that the President as the head of the Executive may, in exercise of his executive power, destroy that institution, is plainly contrary to the fundamental concept of the Rule of Law.

115. There are many analogous provisions in the Constitution which confer upon the President a power coupled with a duty. We may refer to two such provisions. The President has under Articles 341 and 342 to specify Scheduled Castes and Scheduled Tribes; and he has done so. Specification so made carries for the members of the Scheduled Castes and Scheduled Tribes certain special benefits, e. g., reservation of seats in the House of the People, and in the State Legislative Assemblies by Arts. 330 and 332, and of the numerous provisions made in Schedules V and VI. It may be noticed that expressions 'Scheduled Castes' and 'Scheduled Tribes' are specially defined for the purposes of the Constitution by Articles 366 (24) and 366 (25). If power to declare certain classes of citizens as belonging to Scheduled Castes and Scheduled Tribes includes power to withdraw declaration without substituting a fresh declaration, the President will be destroying the constitutional scheme. The power to specify may carry with it the power to withdraw specification, but it is coupled with a duty to specify in a manner which makes the constitutional provisions operative.

116. Article 366 (21) before it was deleted by the Constitution (Seventh Amendment) Act, 1956, defined "Rajpramukh" as meaning:—

- (a) in relation to the State of Hyderabad, the person who for the time being is recognised by the President as the Nizam of Hyderabad;
- (b) in relation to the State of Jammu and Kashmir, or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State; and
- (c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State.

and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State;" The first two clauses contemplated recognition of the Nizam of Hyderabad

and the Maharajas of Jammu and Kashmir and of Mysore to be the Rajpramukhs. There can be no dispute that the Ruler of Hyderabad was the Nizam, and the Rulers of Jammu and Kashmir and Mysore were the Maharajas of those States. Assuming that power to recognise a person as the Nizam or Maharaja may carry with it the power to withdraw recognition, it carried with it a duty to recognise the successor. If no successor was recognised the constitutional scheme of administration of Part B States would be destroyed. Such a result could never have been contemplated.

117. By Article 291 payment of any sum free of tax guaranteed or assured under any covenant or agreement with a Ruler of an Indian State as privy purse, is charged on and is made payable out of the Consolidated Fund of India, and the sum so paid to any Ruler is exempt from all taxes on income. The Attorney-General said that the recognition by Article 291 of the existence of the guarantees and assurances under the covenants and agreements gives rise to no obligation to pay the privy purse, that even if the constitutional provisions raise an obligation of the Union, they do not raise corresponding rights in the Rulers; that in any event the covenants being acts of State violation of their terms will not because of Article 363, first limb and also on general principles of law found an action in the Municipal Courts. He finally submitted that the dispute with respect to the rights claimed to accrue in favour of the Rulers arises out of the provisions of the Constitution relating to the covenants, and on that account the jurisdiction of the Courts is excluded in regard to that dispute.

118. The Constitution in terms recognizes and accepts the obligation of the Union to pay the privy purse to the Rulers, Clause (a) of Article 291 enacts that the privy purse shall be charged on and be paid out of the Consolidated Fund of India. The words clearly raise an obligation of the Union to pay the privy purse.

119. The second branch of the argument is also without force. Article 266 provides that all revenues received by the Government of India, all loans raised by the issue of treasury bills, loans or ways and means advances, and all moneys received in repayment of loans shall form the Consolidated Fund of India. By Article 112 (2) the President

is required in respect of every financial year to cause to be laid before the Houses of Parliament the annual financial statement of the estimated receipts and expenditure of the Government of India showing separately—(a) sums required to meet expenditure charged upon the Consolidated Fund of India; and (b) sums required to meet other expenditure proposed to be made from the Consolidated Fund of India. Clause (3) of Article 112 categorizes heads of expenditure charged on the Consolidated Fund of India. So much of the estimates as relate to expenditure charged upon the Consolidated Fund are by Art. 113 (1) open to discussion in, but not to be submitted to the vote of the Houses of Parliament. After demands in respect of sums required to meet other expenditure have been made and assented to by the House of the People, a Bill is introduced to provide for appropriation out of the Consolidated Fund of India of all moneys required to meet the expenditure charged on the Consolidated Fund of India and the grants: Article 114 (1). No amendment may be proposed in either House to vary the amounts or to alter the destination of the grant or the expenditure charged.

120. In support of his contention that by using the expression "charged" in Articles 291 and 112 (2) it is only intended to enact that the expenditure is not subject to the vote of the Parliament and that no priority in payment in respect of expenditure is declared, and in any event the expression "charged" creates no obligation enforceable at the instance of the person for whose benefit it is charged, the Attorney-General invited our attention to different provisions of the Constitution in each of which there is both a charge on the Consolidated Fund of an item of expenditure and an express direction for payment of the prescribed sum, and contended that Article 291 which merely recognizes the obligations of the Union Government to abide by the pre-existing covenants, creates no obligation for payment of the privy purse to the Rulers. He urged that the word "charge" in the Constitution in dealing with State financial procedure has the meaning it has in accountancy practice; it merely specifies the source from which payment is to be made and does not create a right in the Ruler or any enforceable obligation against the Union. Under the general law relating to transfer of property, a charge does not give rise to a right in

rem the right is however more than a mere personal obligation, for it is a jus ad rem, a right to payment out of property specified: *Govind Chandra Pal v. Dwarka Nath Pal*, (1908) ILR 35 Cal 837 at p. 843; *Raja Sri Shiva Prasad v. Beni Madhab*, ILR 1 Pat 387 = (AIR 1922 Pat 529). A charge gives a right to payment out of a specific fund or property and a right to prior payment; but it does not create a right in rem in the fund or the property. A charge therefore gives rise to a right to receive payment, out of a specified fund or property in preference over others. In the absence of a clear indication to the contrary, it would be difficult to hold that the expression "charged" used in the context of financial matters of the State, has a different meaning. Our Constitution-makers borrowed the concept of a Consolidated Fund from the British system. That has also been adopted in the Constitutions of Canada, Australia, South Africa and other Commonwealth Countries. Certain Acts in the United Kingdom and elsewhere prescribe a sequence of priorities in payment of different heads of expenditure charged on the Consolidated Fund: s. 1 Consolidated Funds Act, 1816; s. 1 The House of Commons (Speaker) Act, 1832; ss. 103, 104 and 105 of the British North America Act, 1867; ss. 117, 119 Constitution of the Union of South Africa, 1909; ss. 81 and 82 of the Australian Constitution 1900.

121. Our Constitution does not recognize any sequence of priorities. But that does not alter the fundamental character of a charge that it specifies a fund out of which satisfaction of the expenditure charged must be made, and the prescribed expenditure shall have priority in payment to the person for whose benefit the expenditure is charged on the Fund. The constitutional obligation to proceed in the manner set out in Articles 112, 113 and 114 imposed upon the President and the Parliament implies a right in the person or persons in respect of whom the expenditure is to be incurred. That view is supported by other provisions in the Constitution. The expression "shall be charged on and paid out of the Consolidated Fund" is used in Articles 290, 290A and 291. Articles 290 and 291 do not expressly designate the payee: Art. 290A designates the payee. Article 273 merely uses the expression "shall be charged" in dealing with the grants-in-aid to the States of Assam, Bihar, Orissa and West

Bengal, without any direction for payment. Article 275 (1) deals with grants-in-aid to the revenues of such States as the Parliament may determine: it is only the provisions dealing with the capital and recurring sums which refer to the obligation to pay, but in respect of these heads of expenditure there is no charge. There are also other provisions in the Constitution which charge expenditure on the Consolidated Fund, e. g. Article 148 (6); Article 146 (3); Article 229 (3) and Article 332, without any express provisions in the Constitution relating to payment. By leaving the payee indeterminate in Article 291 (a) no intention to raise an obligation without a corresponding right is disclosed. The expression "shall be charged on, and paid out of the Consolidated Fund" in Article 291, is intended to enact that the privy purse "shall be charged on, and shall be paid out of the Consolidated Fund." The expression "sums so paid to any Ruler" does not mean "sums if paid to any Ruler": it means that "sums when paid to any Ruler". Clauses (a) and (b) of Art. 291 read with Articles 112, 113 and 114 are, in our judgment, parts of a single scheme: they contemplate that the privy purse shall be included in the financial statement as charged upon the Consolidated Fund: it shall be beyond the voting power of the Parliament: its destination shall not be altered: it shall be paid to the Ruler after the Appropriation Bill is passed, and when paid it shall be free from liability to pay taxes on income. This is an integrated process, which cannot be interrupted without dislocating the constitutional mechanism.

122. The Attorney-General said that Article 291 raises an "imperfect obligation". An imperfect obligation is used to describe a moral duty—for instance, a duty to pay a debt of honour or a debt barred by limitation, but is properly left to the free will of him whose duty it is to discharge the obligation. A perfected obligation pertains to the domain of law and justice: an imperfect obligation to the domain of benevolence. An obligation which arises out of a constitutional provision to pay to the citizens sums of money in recognition of obligations of the predecessor Government may scarcely be called imperfect.

123. Article 291 does not merely incorporate recognition of the obligation to pay the privy purse under covenants incurred by the Government of the Domi-

nion of India: it gives rise to a liability dehors the covenants. Under the covenants and agreements the obligation to pay the privy purse was undertaken in the case of all Princes (bar the heads of the States of Bhopal, Hyderabad and Mysore) to be made out of the revenues of their respective States. The Government of India concurred in and guaranteed payment of the amount of the privy purse under the terms of the agreements constituting the Unions. By the States Merger (Governors' Provinces) Order, 1949, this liability was imposed upon the Provinces when the States merged with those Provinces. In the case of a Union of States the liability to pay the privy purse to a head of State lay upon the Union of States to be discharged out of the revenues of the State. In the case of centrally merged States the Dominion Government had to pay the privy purse out of the revenues of the State.

124. Even after the integration of States, the obligations under the covenants were to be met out of the revenues of the respective States. The covenants and the various stages through which ultimate integration was achieved probably remained acts of State. The rights and obligations accruing or arising under those acts of State could be enforced only if the Union of India accepted those rights and obligations. After the Constitution the obligation to pay the privy purse rested upon the Union of India, not because it was inherited from the Dominion of India; but because of the constitutional mandate under Article 291. The source of the obligation was in Article 291, and not in the covenants and the agreements. Reference to the covenants and agreements in Article 291 was for defining the privy purse: the obligations of the Provinces in respect of the "Provincially merged States", and obligation of the Union of States in respect of the States merged in such Unions, ceased by recognition to retain their original character. The obligation which arose out of the merger agreement and was on that account an act of State shed its original character on acceptance by the Constitution. The entity obliged to pay the privy purse did not after the Constitution remain the same; the source out of which the obligation was to be satisfied was not the original source; the incident relating to exemption from payment of tax was vitally altered, and the

amount also was in some cases different. Whereas the liability to pay the privy purse to the Rulers under the merger agreements was assured by the Dominion Government, the Constitution imposed upon the Union Government a directive to pay the privy purse.

125. In support of his contention that even if Article 291 itself gives rise to a fresh obligation, the Union of India has the same defences against the claim by the Rulers which the predecessor Government had and on that account if the Dominion Government could plead an act of State as a defence, the Union of India could do so, the Attorney-General relied upon two decisions: *Doss v. Secy. of State for India in Council*, (1875) 19 Eq 509; and (1906) 1 KB 613. These cases were decided on the interpretation of the Government of India Act, 1858, which by Section 67 enacted that treaties and all contracts, covenants, liabilities and engagements of the East India Company made before the Act of 1858 were declared enforceable against the Secretary of State as they might have been by and against the East India Company, if the Government of India Act, 1858, had not been passed. There is no such reservation in Article 291, or in Articles 294(1)(b) and 295(1)(b) of the Constitution. The cases of *Doss*, (1875) 19 Eq 509 and *Salaman*, (1906) 1 KB 613 have therefore no application.

126. The judgment of this Court in *Union of India v. Gwalior Rayon Silk Manufacturing (Weaving) Co. Ltd.*, (1964) 7 SCR 892 = (AIR 1964 SC 1903) has also no bearing on the character of the obligation arising by virtue of Art. 291. In that case a company which had entered into an agreement with the State of Gwalior in 1947, whereby the State of Gwalior granted exemption from liability to taxation of certain industries started in the State, claimed to enforce that right against the Union of India after integration of the State. This Court held that by virtue of the agreement the Central Legislature was not deprived of its legislative power to impose taxes, and on that account after the extension of the Income-tax Act, 1922, the exemption granted under the agreement of 1947 must fall and that the Company was entitled only to such concessions as may be provided by the State law applicable thereto after the integration.

127. The structure of Article 362 is somewhat different. That Article im-

poses restrictions upon the exercise of legislative and executive functions. Recognition of the personal rights and privileges of the Rulers arising out of the covenants is not explicit, but the injunction that in the exercise of legislative and executive power due regard shall be had to the guarantees, clearly implies acceptance and recognition of the personal rights, privileges and dignities. The Constitution thereby affirms the binding force of the guarantees and assurances under the covenants, of personal rights, privileges and dignities, but unlike the guarantee of payment of the privy purse in Article 291, the guarantee under Article 362 is of the obligations under the original covenants and agreements executed by the Rulers, barring those regarding which there is express legislation enacted to give effect to certain personal rights and privileges, e. g. Wealth-tax Act, 1957, Gift-tax Act, 1958, notifications under the Sea Customs Act, 1878, Code of Civil Procedure 1908 and Code of Criminal Procedure, 1898. A Ruler seeking to enforce privileges which parliamentary statutes have recognised relies for right to relief upon the mandate of the statutes, and not of the covenant.

128. Article 363 of the Constitution provides:

"(1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143 neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad, or other similar instrument.

(2) In this article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State."

Exclusion of the jurisdiction of the Courts is emphasized by the non obstante clause with which the Article commences. Notwithstanding the investment of jurisdiction upon this Court by Article 32, notwithstanding the jurisdiction conferred upon the High Courts by Art. 226, and notwithstanding the competence of all Civil Courts to decide disputes in respect of the obligations of the Union, it is declared that the Courts have no jurisdiction in respect of the two classes of disputes. The exception carved out of the exclusion in respect of the jurisdiction conferred upon this Court by Article 143 is not a real exception for the jurisdiction of this Court under Art. 143 is merely advisory. The non obstante clause however, does not enlarge the field of exclusion of judicial authority.

129. The Attorney-General urged that the jurisdiction of the Courts to enforce rights and obligations arising out of the covenants entered into by the Rulers to which the Government of the Dominion or the predecessor Governments were parties was excluded, because the rights and obligations arose out of acts of State and by constitutional provision that exclusion was affirmed and extended after the Constitution. An act of State need not, it is true, arise out of war or conquest: it may be the result of an agreement, and the terms of the agreements and the obligations flowing only from such agreements may not be enforced in the Municipal Courts of either State, unless the rights and obligations are recognised and accepted by the States or unless the document evidencing the act of State is itself the Constitution of the State or States. But there can be no act of State against its own citizen by the State. The Rulers who were before integration of their States aliens qua the dominion Government are now citizens. Their rights and obligations which arose from an act of State are now recognized and accepted by the Union of India. Enforcement of those rights and obligations is governed by the municipal laws, and unless the jurisdiction of the Courts is excluded in respect of any dispute, the Courts will be competent to grant relief.

An act of State vanishes when the new sovereign recognizes either expressly or by implication the rights flowing from the reform. *State of Gujarat v. Vora Fiddali Badruddin Mithibarwal*, (1964) 6 SCR 461 = (AIR 1964 SC 1043).

130. We are unable to agree with the Attorney-General that the "old unidentified concept of paramountcy of the British Crown" was inherited by the Union, by reason of the instruments of accession and merger agreements, and that "recognition of Rulership was a 'gift of the President', and not a matter of legal right, existing as it did in the area of paramountcy and remaining with the Government of India". The British Crown did not acquire paramountcy rights by any express grant, cession or transfer: it exercised paramountcy because it was the dominant power. Paramountcy had no legal origin, and no fixed concept: its dimensions depended upon what in a given situation the representatives of the British Crown thought expedient. Paramountcy meant those powers which the British authorities by the might of arms, and in disregard of the sovereignty and authority of the States chose to exercise. But that paramountcy lapsed with the Indian Independence Act, 1947; even its shadows disappeared with the integration of the States with the Indian Union. After the withdrawal of the British power and extinction of paramountcy of the British power the Dominion Government of India did not and could not exercise any paramountcy over the States. In clause 3 of the Standstill Agreement it was expressly recited that "Nothing in the agreement includes the exercise of any paramountcy functions." The relations between the States and the Dominion Government were strictly governed by the instruments executed from time to time. Subject to the power conferred in respect of certain matters of common interest to legislate and exercise executive authority the Princes had sovereignty within their territories. With the advent of the Constitution the States ceased to exist, and the Princes and Chiefs who were recognised as Rulers were left with no sovereign authority in them. It is difficult to conceive of the government of a democratic Republic exercising against its citizens "paramountcy" claimed to be inherited from an Imperial Power. The power and authority which the Union may exercise against its citizens and even aliens spring

from and are strictly circumscribed by the Constitution.

131. The fundamentals on which paramountcy rested—i. e., the compulsion of geography and the essentials for ensuring security and special responsibility of the Government of India to protect all territories in India survived the enactment of the Indian Independence Act, for between August 15, 1947 and the date of integration of the various States the Government of India was the only fully sovereign authority. But paramountcy with its brazen-faced autocracy no longer survived the enactment of the Constitution. Under our Constitution an action not authorised by law against the citizens of the Union cannot be supported under the shelter of paramountcy. The functions of the President of India stem from the Constitution—not from a “concept of paramountcy of the British Crown” identified or unidentified. What the Constitution does not authorise, the President cannot grant. Rulership is therefore not a privilege which the President may in the exercise of his discretion bestow or withhold.

132. Jurisdiction of the Courts in matters specified is excluded not because the Union of India is a successor to the paramountcy of the British Crown, nor because the rights and obligations accepted and recognized by the Constitution may still be regarded as flowing from acts of State; it is only excluded in respect of specific matters by the express provision in Article 363 of the Constitution. Jurisdiction of the Courts even in those matters is not barred “at the threshold” as contended by the Attorney-General. The President cannot lay down the extent of this Court’s jurisdiction. He is not made by the Constitution the arbiter of the extent of his authority, nor of the validity of his acts. Action of the President is liable to be tested for its validity before the Courts unless their jurisdiction is by express enactment or clear implication barred. To accede to the claim that the jurisdiction of the Court is barred in respect of whatever the executive asserts is valid is plainly to subvert the Rule of Law. It is therefore within the province of the Court alone to determine what the dispute brought before it is, and to determine whether the jurisdiction of the Court is, because it falls within one of the two limbs of Article 363, excluded qua that dispute.

133. In dealing with the dimensions of exclusion of the exercise of judicial power under Article 363, it is necessary to bear in mind certain broad considerations. The proper forum under our Constitution for determining a legal dispute is the Court which is by training and experience, assisted by properly qualified advocates, fitted to perform that task. A provision which purports to exclude the jurisdiction of the Courts in certain matters and to deprive the aggrieved party of the normal remedy will be strictly construed, for it is a principle not to be whittled down that an aggrieved party will not, unless the jurisdiction of the Courts is by clear enactment or necessary implication barred, be denied recourse to the Courts for determination of his rights. The Court will interpret a statute as far as possible, agreeably to justice and reason and that in case of two or more interpretations, one which is more reasonable and just will be adopted, for there is always a presumption against the law maker intending injustice and unreason. The Court will avoid imputing to the Legislature an intention to enact a provision which flouts notions of justice and norms of fairplay, unless a contrary intention is manifest from words plain and unambiguous. A provision in a statute will not be construed to defeat its manifest purpose and general values which animate its structure. In an avowedly democratic polity, statutory provisions ensuring the security of fundamental human rights including the right to property will, unless the contrary mandate be precise and unqualified, be construed liberally so as to uphold the right. These rules apply to the interpretation of constitution and statutory provisions alike.

134. Article 366 (22) defines a “Ruler” as a Prince, Chief or other person who has entered into a covenant or agreement as is referred to in Article 291, and is recognized for the time being by the President and includes the Successor of such Ruler. Article 291 in defining the sum guaranteed or assured to the Ruler as Privy Purse refers to covenants and agreements entered into by the Rulers which guarantee or assure the payment of sums as Privy Purse free from tax. It was contended on behalf of the Union that the expression “relating to” in Article 363 means “referring to”, and since Articles 291, 362 and 366 (22) refer to covenants, the Courts have no jurisdiction

to entertain disputes with respect to rights arising from those provisions. In support of that argument counsel for the Union referred us to the diverse meanings in which the expression "relating to" is used. But a constitutional provision will not be interpreted in the attitude of a lexicographer, with one eye on the provision and the other on the lexicon. The meaning of a word or expression used in the Constitution often is coloured by the context in which it occurs: the simpler and more common the word or expression, the more meanings and shades of meanings it has. It is the duty of the Court to determine in what particular meaning and particular shade of meaning the word or expression was used by the Constitution makers and in discharging the duty the Court will take into account the context in which it occurs, the object to serve which it was used, its collocation, the general congruity with the concept or object it was intended to articulate and a host of other considerations. Above all, the Court will avoid repugnancy with accepted norms of justice and reason. The expression "provisions of this Constitution relating to" in Article 363 means provisions having a dominant and immediate connection with": it does not mean merely having a reference to. A wide meaning of the expression may exclude disputes from the jurisdiction of the Courts in respect of rights or obligations, however indirect or tenuous the connection between the constitutional provision and the covenant may be.

135. Jurisdiction to try a proceeding is barred under the first limb of Article 363 if the dispute arises out of the provision of a covenant: it is barred under the second limb of Article 363 if the Court holds that the dispute is with respect to a right arising out of a provision of the Constitution relating to a covenant. A dispute that an order of an executive body is unauthorised, or a legislative measure is *ultra vires*, is not one arising out of any covenant under the first limb of Article 363, merely because the order or the measure violates the rights of the citizen which, but for the act or measure, were not in question. The dispute in such a case relates to the validity of the acts or the *vires* of the measure. Exclusion of the Court's jurisdiction by the terms of the relevant words in the second limb lies in a narrow field. If the constitutional provision relating to a covenant is the source of the right claim-

ed to accrue, or liability claimed to arise, then clearly under the second limb the jurisdiction of the Court to entertain a dispute arising with respect to the right or obligation is barred. We need in the present case express no opinion on the question whether a dispute that an executive act or legislative measure operating upon a right accruing or liability arising out of a provision is invalid falls within the second limb of Article 363.

136. As a *quid pro quo* for agreeing to surrender their power and authority, it was enacted in the Constitution that the Princes who had signed the covenant of the nature specified will be recognized as Rulers. But under the treaties, covenants and agreements executed by the former Princes, there was no provision for recognition of Rulers. The President was invested by the Constitution with power to recognise Rulers under Article 366 (22). The status of the Rulers under the Constitution is not the status which the Princes had: their rights, privileges and functions are fundamentally different from those of the former Princes. Some degree of obscurity is introduced by the use of the expression "Ruler" and "Ruler of an Indian State" in the Articles. But the meaning is reasonably plain. Ruler as defined in Article 366 (22) is a former Prince, Chief or other person who was on or after January 26, 1950 recognised as a Ruler, he having signed the covenant, or his successor. The Ruler of an Indian State means a Prince, or Chief who was recognized before the Constitution by the British Crown. The Ruler of an Indian State had sovereign authority over his State. The Ruler recognized by the President rules over no territory, and exercises no sovereignty over any subjects. He has no status of a potentate and no privileges which are normally exercised by a potentate. He is a citizen of India with certain privileges accorded to him because he or his predecessor had surrendered his territory, his powers and his sovereignty.

137. Article 366 (22) is, in our judgment, a provision relating to recognition of Rulers: that is the direct and only purpose of the provision. It is not a provision relating to a covenant. The qualification of a person being recognized as a Ruler is undoubtedly that he is a Prince, Chief or other person who had entered into a covenant or agreement as is referred to in Article 291, or that he is the successor to such a Ruler. Reference

to the covenant or the agreement of the nature mentioned in Article 291 is for determining who may be recognized as a Ruler. Because of that reference the provision enacted with the object of conferring authority upon the President to recognize a Ruler, will not be deemed one relating to the covenant or agreement.

138. The Attorney-General urged that this Court has decided that the Courts have no jurisdiction to determine whether the order of the President under Article 366 (22) is valid, and that the Court will not be justified in unsettling the law. The decisions relied upon are: (1965) 3 SCR 201 = (AIR 1965 SC 1798), and (1970) 2 SCR 631 = (AIR 1970 SC 1946). In our judgment, in neither of these cases the question about the bar to the Court's jurisdiction by virtue of Article 363 was directly in issue. In Nawab Usman Ali Khan's case, (1965) 3 SCR 201 = (AIR 1965 SC 1798) this Court upheld the claim that the Privy Purse payable to the Ruler of Jaora was exempt from attachment under Section 60 (1) (g) of the Code of Civil Procedure. The Court in that case considered the nature of the Privy Purse and held that it was a "political pension" within the meaning of Section 60 (1) (g) of the Code of Civil Procedure. Bachawat, J., speaking for the Court, after setting out the history of integration and absorption of States, summarised the provisions of Articles 291, 362, 363 and 366 (22) of the Constitution and observed at p. 208 (of SCR) = (at p. 1802 of AIR):

"Now, the Covenant entered into by the Rulers of Madhya Bharat States was a treaty entered into by the Rulers of independent States by which they gave up their sovereignty over their respective territories and vested it in the new United State of Madhya Bharat. The Covenant was an act of State, and any violation of its terms cannot form the subject of any action in any municipal courts. The guarantee given by the Government of India was in the nature of a treaty obligation contracted with the sovereign Rulers of Indian States and cannot be enforced by action in municipal courts. Its sanction is political and not legal. On the coming into force of the Constitution of India, the guarantee for the payment of periodical sums as Privy Purse is continued by Article 291 of the Constitution, but its essential political character is preserved by Article 363 of

the Constitution, and the obligation under this guarantee cannot be enforced in any municipal court. Moreover, if the President refuses to recognise the person by whom the covenant was entered into as the Ruler of the State, he would not be entitled to the amount payable as Privy Purse under Article 291."

The dictum that the essential political character of the guarantee for the payment of periodical sums as Privy Purse is preserved by Article 363, and the obligation cannot be enforced in any municipal Court was not necessary for the purpose of the decision, and is, in our judgment, not correct. Article 363 prescribes a limited exclusion of the jurisdiction of Courts, but that exclusion does not operate upon the claim for a Privy Purse, relying upon Article 291. The question as to the jurisdiction of the Courts to entertain a claim for payment of Privy Purse did not fall to be determined in Nawab Usman Ali Khan's case, (1965) 3 SCR 201 = (AIR 1965 SC 1798). The only question raised was whether the Privy Purse was not capable of attachment in execution of the decree of a Civil Court, because of the specific exemption of political pensions under Section 60 (1) (g) of the Code of Civil Procedure. In Kunwar Shri Vir Rajendra Singh's case, (1970) 2 SCR 631 = (AIR 1970 SC 1946) the Court did not express any opinion that Article 366 (22) was a provision relating to a covenant within the meaning of Article 363. In that case the petitioner who was not recognised as a Ruler by the President abandoned at the hearing of his petition his claim to the privy purse payable to the Ruler of Dholpur, and pressed his claim by succession under the Hindu Law to the private property of the former Ruler. The Court was not called upon to decide and did not decide that Article 366 (22) was a provision relating to a covenant within the meaning of Article 363. It is difficult to regard a word, a clause or a sentence occurring in a judgment of this Court, divorced from its context, as containing a full exposition of the law on a question when the question did not even fall to be answered in that judgment.

139. In the view we have expressed, the argument raised by Mr. Palkhivala that even if clause (22) of Article 366 is a provision relating to the covenants the jurisdiction of this Court under Article 32 to grant relief against an invalid exercise of power withdrawing recog-

nition of the Rulers is not barred, needs no consideration.

140. The source of the right to receive the privy purse is for reasons already stated the constitutional mandate: it is not in the covenant. Reference to the covenant in Article 291 merely identifies the sum payable as privy purse: it does not make Article 291 a provision relating to the covenant. A dispute as to the right to receive the privy purse is therefore not a dispute arising out of the covenant within the first limb of Article 363, nor is it a dispute with regard to a right accruing or obligation arising out of a provision of the Constitution relating to a covenant.

141. The personal rights (other than the right to the Privy Purse), privileges and dignities are recognised by Article 362 of the Constitution and the Legislature and the executive are enjoined to have due regard to those personal rights, privileges and dignities in exercising their respective power. Article 362 is plainly a provision relating to covenants within the meaning of Article 363. A claim to enforce the rights, privileges and dignities under the covenants will therefore be barred by the first limb of Article 363 and a claim to enforce the recognition of rights and privileges recognised by Article 362 will be barred under the second limb of Article 363. Jurisdiction of the Court will, however, not be excluded where the relief claimed is founded on a statutory provision enacted to give effect to personal rights under Art. 362.

142. We are accordingly of the view that the Courts have jurisdiction to interpret and to determine the true meaning of Articles 366 (22), 291, 362 and 363. The bar to the jurisdiction of the Courts by Article 363 is a limited bar: it does not arise merely because the Union of India sets up a plea that the dispute falling within Article 363 is raised. The Court will give effect to the constitutional mandate if satisfied that the dispute arises out of any provision of a covenant which is in force and was entered into or executed before the commencement of the Constitution and to which the predecessor of the Government of India was a party, or that it is in respect of rights, liabilities or obligations accruing or arising under any provision of the Constitution relating to a covenant. But since the right to the Privy Purse arises under Article 291 the dispute in respect

of which does not fall within either clause; the jurisdiction of the Court is not excluded. Again, the jurisdiction of the Court is not excluded, in respect of disputes relating to personal rights and privileges which are granted by statutes.

143. We further hold that the President is not invested with any political power transcending the Constitution, which he may exercise to the prejudice of citizens. The powers of the President arise from and are defined by the Constitution. Validity of the exercise of those powers is always amenable to the jurisdiction of the Courts, unless the jurisdiction is by precise enactment excluded. Power of this Court under Article 32 or of the High Courts under Article 226, cannot be by-passed under a claim that the President has exercised political power.

144. On the view we have expressed, it is unnecessary to express any opinion on the plea that the order was made for a collateral purpose.

145. A writ will therefore issue declaring that the order made by the President on September 6, 1970 "de-recognising" the Rulers is illegal and on that account inoperative and the petitioner will be entitled to all his pre-existing rights and privileges including the right to the Privy Purse, as if the order had not been made. The petitioner will get his costs of the petition.

146. Writ Petitions Nos. 377 to 383 of 1970 raise the identical question which is raised in the main petition. For reasons set out in the principal petition a similar writ will issue. Each petitioner will get his costs of the petition. One hearing fee in those petitions in which the petitioners have appeared through the same counsel.

MITTER, J.:— 147. On the 6th September, 1970 there was issued in the name of the President an order of the following text:

"In exercise of the powers vested in him under Article 366 (22) of the Constitution of India, the President hereby directs with effect from the date of this order His Highness Maharajadhiraj Madhav Rao Jiwaji Rao Scindia Bahadur do cease to be recognised as a Ruler of Gwalior."

Admittedly this followed the signing of an instrument by the President on the night of 5th September, 1970 purporting to withdraw recognition of all the Rulers. Orders like the above were issued in the

case of each and every individual Ruler of an Indian State numbering over three hundred and sixty. The petitioner in Writ Petition No. 376 of 1970 is the person to whom the above order was directed. He is a national and citizen of India and was recognised by the President of India as a Ruler on 16th July, 1961, as the successor to the gaddi of the State of Gwalior on the death of the preceding Ruler of the State. The late Ruler had signed an instrument of Accession on the 15th August 1947, which was accepted by the then Governor-General of India on the 16th August, 1947. On 22nd April, 1948, the said preceding Ruler of the State had signed a covenant with the other Rulers of various States in Central India which led to the formation of the Madhya Bharat State on the 15th June, 1948. As such Ruler, the petitioner was being paid a Privy Purse of Rs. 10,00,000 per year and was also entitled to certain rights and privileges under various statutes.

148. The recognition as a Ruler was not an empty formality. Different Articles of the Constitution provide for and deal with the rights and privileges of the Rulers. The foremost among them is Article 291 which after its amendment as a result of the Seventh Amendment of the Constitution Act, 1956, runs as follows:

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as Privy Purse—

(a) such sums shall be charged on, and paid out of the Consolidated Fund of India;

(b) the sums so paid to any Ruler shall be exempt from all taxes on income."

Article 362 of the Constitution in its present form deals with the rights and privileges of Rulers of Indian States other than the Privy Purse and reads:

"In the exercise of the power of Parliament or of the Legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State."

149. The only article in the Constitution which mentions the recognition of a person as a Ruler is Article 366 which is a key to the meaning of various words and expressions used throughout the Constitution. Clause 22 of the Article provides:

"In this Constitution unless the context otherwise requires, the following expressions have the meaning hereby respectively assigned to them, that is to say—

(22) "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (1) of Article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State, and includes any person who for the time being is recognised by the President as the successor of such Ruler;"

Clause (15) of Article 366 defines an Indian State as any territory which the Government of the Dominion of India recognised as such a State. Clause (21) of Article 366 (now deleted) provided as follows:—

"Rajpramukh" means—

(a) In relation to the State of Hyderabad the person who for the time being is recognised by the President as the Nizam of Hyderabad;

(b) in relation to the State of Jammu and Kashmir or the State of Mysore, the person who for the time being is recognised by the President as the Maharaja of that State; and

(c) in relation to any other State specified in Part B of the First Schedule, the person who for the time being is recognised by the President as the Rajpramukh of that State,

and includes in relation to any of the said States any person for the time being recognised by the President as competent to exercise the powers of the Rajpramukh in relation to that State;"

150. To complete the account of the provisions of the Constitution with regard to Rulers it is necessary to set out Article 363 of the Constitution, the interpretation of which is the most important point in the series of petitions presented by a number of Rulers of Indian States to this Court with identical prayers.

"363 (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising

out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to such treaty, agreement, covenant, engagement, sanad or other similar instrument.

(2) * * * *

150A. The grievance of the petitioners in this series of petitions is the same as the rights asserted by them flow from more or less similar transactions.

151. We have to delve into the past history of India in order to appreciate the setting in which these persons or their ancestors who were formerly Rulers of territories in India were brought within the fold of the Constitution. Though not sovereign within the meaning of that expression in International Law these former Rulers had certain attributes of sovereignty during the days preceding the independence of India.

152. As is well known to all students of history the achievement of setting up a British Empire in India was "in its early stages at any rate, brought about by the agents of the East India Company in India." The Company entered into treaties with Indian States in the early stages aiming at no more than securing for the Company a privileged position in trade against its rivals. For the first time the Parliament of England asserted its authority and control over the East India Company's activities both in India and in England by the Regulating Act of 1773 under which the Governor of Bengal became the Governor-General in Council with a certain amount of control over the Presidencies of Bombay and Madras. The Marquis of Wellesley as the Governor-General felt convinced when he came to India in 1798 and saw the state of affairs here that the British must become the one paramount power in the country. He set up a system under which no Indian State which had accepted subsidiary alliance with the British could make any war or carry on negotiations with another State without the Company's knowledge

and consent. It was during his time that the British Dominion in India expanded considerably. He had practically eliminated the French influence in India and brought many States under the subsidiary alliance, the notable instances being Hyderabad, Travancore, Mysore, Baroda and Gwalior. Under this system of subsidiary alliance the bigger States were to maintain armies commanded by British officers for preservation of the public peace and their rulers were to cede certain territories for the upkeep of these forces; the smaller States were to pay a tribute to the Company. In return the Company was to protect them, one and all, against external aggression and internal rebellion. A British Resident was also installed in every State that accepted the subsidiary alliance. This process was carried on during the regime of Hastings and Dalhousie. The Marquis of Hastings who came out as a Governor-General in 1813 crushed the Pindaris and finally broke the Maharatta power and carried the spread of the British Dominion over Northern and Central India to a stage which it was only left for Lord Dalhousie, a quarter of century later, to complete. He resumed Wellesley's policy by extending the Company's supremacy and protection over almost all the Indian States. By the time he left the country in 1823, the British Empire in India had been formed and its map in essentials drawn. Every State in India outside the Punjab and Sind was under the Company's control. The influence of the company over the internal administration of the States rapidly increased during the period following the retirement of Lord Hastings. Residents became gradually transformed into diplomatic agents representing a foreign power into executive and controlling officers of a superior government. The charter of 1833 abolished the Company's trading activities and the Company assumed the functions of the Government of India. Lord Dalhousie acquired vast territories for the Company conquering the Punjab and pushing the frontiers to the natural limits of India, i.e., the base of the mountains of Afghanistan. Whatever may have been the cause which led to the Mutiny of the year 1857 it was realised by the British people that the Indian States could play a vital role as one of the bulwarks of British rule. An Act of 1858 intituled "An Act for the Better Government of India" provided by the 67th section that

"all treaties made by the Company shall be binding upon Her Majesty". In her proclamation Queen Victoria made it clear that the Government would respect the rights, dignity and honour of Native Princes. The policy of annexation vigorously pursued by Dalhousie gave way to the perpetuation of the States as separate entities. Lord Canning carried this new policy to its next logical step by recommending that the integrity of the States should be preserved by perpetuating the rule of the Princes whose power to adopt heirs should be recognised. The Secretary of State for India agreed to this recommendation and sanads were granted to the Ruler under which in the event of the failure of the natural heirs, they were authorised to adopt their successors according to their law and custom. These sanads were intended to remove mistrust and suspicion and knit the Native Sovereigns to the paramount power. The new policy was to punish the ruler for extreme mis-government and if necessary to depose him but not to annex his State for misdeeds. The Indian States thus became part and parcel of the British Empire in India. In the words of Lord Canning:

"The territories under the sovereignty of the Crown became at once as important and as integral a part of India as territories under its direct domination. Together they form one direct core and the political system which the Moghuls had not completed and the Maharattas never contemplated is now an established fact of history."

153. The next five decades were occupied with the task of evolving a machinery for controlling the States. A political department was set up under the direct charge of the Governor-General. It had at its disposal a service known as the Indian Political Service, manned by officers taken from the Indian Civil Service and the Army. It had a police force which was maintained partly by the revenues of the Central Government and partly by contributions made by the States. The Political Department had Residents and Political Agents in all important States and groups of States. The Secretary of State kept a close control over the activities of the Political Department mainly because of the interest of the Crown in matters affecting the rights and privileges of the Rulers.

154. Constitutionally the States were not part of the British India nor were their inhabitants British subjects.

Parliament had no power to legislate for the States or their people. The Crown's relationship with the Indian States was conducted by the Governor-General in Council and since he was in charge of the political Department, his Executive Council tended in practice to leave States' affairs to him which meant that the Political Department came gradually to assume the position of a government within a government.

155. With the building up of a strong Political Department the Crown started asserting rights never claimed by the East India Company and even at times cutting across treaties. The most outstanding example and at the same time one of far-reaching consequence, in the relations of the paramount power with the Rulers was the prerogative assumed of recognising succession in the case of natural heirs. The first ruling in this behalf was laid down by the Government of India in 1884 in a letter addressed to the Chief Commissioner of the Central Provinces in which it was stated that succession to a native State is invalid until it receives in some form the sanction of the British authority. In the view of the Secretary of State expressed in 1891 it was admittedly the right and duty of Government to settle successions in the protected States in India. This right it was claimed flowed essentially from the position of the British as the Supreme power responsible for maintaining law and order throughout the country. That power alone had the necessary sanction to enforce decisions regarding disputed successions. The Ruler thus did not inherit his gaddi as of right but as a gift from the paramount power.

156. A definite pattern of the Government of India's relationship with the States had been developed by the time the first World War broke out in 1914. The Rulers rallied to fight for the Empire, and the organisation of the war effort involved closer co-ordination of administrative activity in the States as well as in the Provinces.

157. Throughout the country the tide of national aspirations was rising fast. Although Britain claimed to be fighting a war to defend freedom and democracy the system of government by which she continued to hold India in imperial thrall was clearly at variance with her professed aims. The British Government recognised that the situation

needed new handling. In 1917 Montagu, the Secretary of State for India, announced that the policy of His Majesty's Government with which the Government of India was in complete accord, was that of an increasing association of Indians in every branch of the administration and the gradual development of self-governing institutions with a view to progressive realisation of responsible government in India as an integral part of the British Empire.

158. The Secretary of State for India and the Viceroy Lord Chelmsford published a joint report on Constitutional Reforms which was the first major investigation into the relations of the States with the rest of India and with the paramount power. The authors of the report visualised that the Provinces would ultimately become self-governing units held together by a Central Government which would deal solely with matters of common concern to all of them.

159. With regard to the Rulers the authors of the report felt that the time had come to end their isolation and that steps should be taken for joint consultations by them for the furtherance of their common interest. There was a conference of ruling Princes and Chiefs in 1919 which recommended that the Rulers of States having full and unrestricted powers of civil and criminal jurisdiction in their States, and the power to make their own laws should be termed sovereign Princes as against those who lacked such powers. This was however not favoured by the Government of India. In 1921 a Chamber of Princes was brought into being by a Royal Proclamation which announced that the Viceroy would take counsel of the Chamber freely in matters relating to that territories of Indian States generally and in matters which affected these territories jointly with British India or with the rest of the Empire. The Chamber of Princes would have no concern in the internal affairs of individual States or relations of individual States with the Government of India while the existing rights of these States and their freedom of action would in no way be prejudiced or impaired.

160. In the years following the first world War the Nationalist Movement in India gained considerable impetus. Lord Irwin who came out as Viceroy in 1926 felt that the political situation in the country demanded some gesture on the part of Britain. In March

1927 an announcement was made for appointing a statutory Commission to enquire into the working of the Government of India Act 1919 and to make recommendations regarding further constitutional advancement. At or about this time the Rulers of the Indian States also demanded an impartial enquiry into the whole relationship between themselves and the paramount power. The Secretary of State appointed a Committee of three members headed by Sir Harcourt Butler to enquire into the relationship between the States and the paramount power and to suggest means for the more satisfactory adjustment of the existing economic relations between the States and the British India.

161. On behalf of the State it was contended before the Committee that all original sovereign powers except those which had been transferred with their consent to the Crown were still possessed by them and that such transfers could be effected only by the consent of the States and that the paramountcy of the British Crown was limited to certain matters only — those relating to foreign affairs and external and internal security. The Committee was not prepared to accept this and held that none of the States ever had any international status. The Committee refused to define paramountcy but asserted that paramountcy must remain paramount; it must fulfil its obligations defining or adopting itself according to the shifting necessities of the time and the progressive development of the States. They however observed that if any Government in the nature of a Dominion Government should be constituted in British India such Government could clearly be a new Government resting on a new written Constitution. The Committee voted the grave apprehension of the Princes on this score and recorded a strong opinion that in view of the fact of the historical nature of the relationship of the paramount power and the Princes the latter should not be transferred without their agreement to a relationship with a new Government in British India responsible to an Indian Legislature. This really laid the foundation of a policy whereby in later years a wedge was effectively driven between the States and the British India.

162. The Rulers were certainly disappointed with the finding of the Butler Committee with regard to their main hopes of being freed from the un-

fettered discretion of the Political Department to intervene in their internal affairs. Nationalist opinion in the country viewed the recommendations of the Butler Committee with grave apprehension and emphatic protests were entered in the report of a committee presided over by Pandit Motilal Nehru and All Parties Conference was arranged in 1928 to frame a Dominion Constitution for India. It gave a warning that it was inconceivable that the people of the States who were fired by the same ambitions and aspirations as the people of British India would quietly submit to existing conditions forever, or that the people of British India bound by the closest ties of family, race and religion to their brethren on the other side of an imaginary line would never make common cause with them. The Viceroy Lord Irwin who had conferred with the British Government in 1929 made an official pronouncement on his return to India to the effect that the natural issue of India's constitutional progress was the attainment of Dominion Status. He also announced that the British Government had accepted the suggestion of Sir John Simon for a Round Table Conference. There was a series of these conferences which debated on many and various points including Federation of the States with the Provinces of British India.

163. Then came the Government of India Act 1935 which provided for a constitutional relationship between the Indian States and British India on a federal basis. A special feature of the scheme was that whereas in the case of the provinces accession to the Federation was to be automatic in the case of the states it was to be voluntary. A State was to be considered to have acceded when its Ruler executed an Instrument of Accession and after it was accepted by His Majesty the King of England. The Government of India Act 1935 other than the Part relating to Federation, came into force on the 1st April, 1937. From that date the functions of the Crown in the relations with the States were entrusted to the Crown Representative; those functions included negotiations with the Rulers after accession to the Federation. The Federation however never took shape.

164. An important announcement in the Constitutional set up of India which came after the Second World War

had broken out was the Draft Declaration known as Cripp's Plan. This accepted the principle of self-determination but it contained numerous pitfalls which imperilled the future of India. The mission failed but its failure gave a new turn to India's political struggle. In spite of the deepening crisis of war no further serious effort was made to resolve the political deadlock in India until the Simla Conference of 1945. This also proved abortive. After the assumption of power by the Labour Government in England a Parliamentary delegation visited India and later the Secretary of State announced the Government's decision to send a delegation of three Cabinet Ministers to India. In May 1946 the Cabinet Mission issued the memorandum dated 12th May 1946 in regard to States' treaties and paramountcy; it affirmed that the rights of the States which flowed from the relationship of the Crown would no longer exist and that the rights surrendered by the States to the Paramount Power would revert to the States. The plan provided for the entry of the States to the proposed Union of India in the following manner:—

(a) Paramountcy could neither be retained by the British Crown nor transferred to the new Government. But according to the assurance given by the Rulers that they were ready and willing to do so, the States were expected to co-operate in the new development of India.

(b) The precise form which the co-operation of the States would take must be a matter for negotiation during the building up of the new constitutional structure.

(c) The States were to retain all subjects and powers other than those ceded to the Union, namely, Foreign Affairs, Defence and Communications.

(d) In the preliminary stage the States were to be represented on the Constituent Assembly by a Negotiating Committee.

165. The Viceroy Lord Mountbatten made it clear that the British Government resolved to transfer power by June 1948 and a solution had to be found in a few months' time. On June 3, 1947 he announced that His Majesty's Government would be prepared to relinquish power to two Governments of India and Pakistan on the basis of Dominion Status and this relinquishment of power would take place much earlier than June 1948. In regard to States the plan laid down

that the policy of His Majesty's Government towards the Indian States contained in the Cabinet Mission Memorandum of May 1945 remained unchanged. At a Press Conference held by him Lord Mountbatten gave it out that the date of transfer of power would be about 15th August, 1947.

166. The Indian Independence Act enacted for the purpose of giving effect to the plan envisaged as above received the Royal Assent on 18th July 1947. It provided for the setting up of two independent Dominions as and from the 15th August, 1947. Section 2 of the Act defined what the territories of the two Dominions would be. Section 6 provided that the Legislature of each of the new Dominions would have power to make laws for that Dominion. Under Section 7 (1) (b) the suzerainty of His Majesty over the Indian States would lapse and with it all treaties and agreements in force at the date of the passing of the Act between His Majesty and the Rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the Rulers thereof. Under cl (c) any treaties or agreements in force at the date of passing of this Act between His Majesty and any person having authority in the tribal areas were also to lapse. Section 9 empowered the Governor-General to promulgate orders for making such provisions as appeared to him to be necessary or expedient for bringing the provisions of the Act into effective operation, for dividing between the new Dominions, and between the new Provinces to be constituted under the Act, the powers, rights, property, duties and liabilities of the Governor-General in Council etc. Even before the passing of the Act Lord Mountbatten was debating the States' problems with Indian leaders. He put forward to them a peaceful settlement he had in mind, namely to allow the Rulers to retain their titles, extra territorial rights and personal property and civil list in return for which they would join a Dominion—most of them India, and a few like Bahawalpur Pakistan — only three subjects of defence, external affairs and communications being reserved for the Central Government. A draft Instrument of Accession was prepared in the States Department of the Dominion of India. The Instrument of Accession took three forms according to the existing status and

powers of the various States. By the Instrument of Accession the States were to accede to the Dominion of India on the three subjects, Defence, External Affairs and Communications and their content being as defined in Schedule VII of the Government of India Act, 1935. Shortly before the 15th August with the helpful efforts of Lord Mountbatten negotiations were concluded and barring Hyderabad, Kashmir and Junagadh all the States within the geographical limits of the Indian Union had acceded to the Indian Dominion by the 15th August. The accession of the Indian States to the Dominion of India established a new organic relationship between the States and the Government of India.

167. The second phase which rapidly followed involved a process of two-fold integration, consolidation of States into sizable administrative units and their democratization.

168. With the advent of independence in India the popular urge in the States for attaining the same measure of freedom as was enjoyed by the people in the Provinces gained momentum and unleashed strong movements for the transfer of power from the Rulers to the people.

169. So far as the larger units were concerned democratization of administration could be a satisfactory solution of their constitutional problem. However in the case of small States responsible Government could have only proved a farce. The Rulers of smaller States were in no position to meet the demand for equating the position of their people with that of their countrymen in the Provinces. Without doubt the smaller State units could not have continued in modern conditions as separate entities; integration provided the only approach to the problem.

170. The integration of States did not however follow a uniform pattern. Merger of States in the Provinces geographically contiguous to them was one form of integration; the second was conversion of States into Centrally administered areas; and the third form was the creation of new viable units known as Unions of States. Each of these forms was adopted according to size, geography and other factors relating to each State or group of States.

171. The problem of integration was first faced in Orissa where the States

formed scattered bits of territory with no geographical contiguity. After long discussions with the Rulers of the States and the Minister of the State Department it was eventually decided to integrate the small States with the adjoining Provinces. Agreements were signed by the Rulers of these States in December 1947 and on subsequent dates providing for cession by them to the Dominion of India full and exclusive authority, jurisdiction and power in relation to the governance of their States.

172. There were several groups of States which with due regard to geographical, linguistic, social and cultural affinities of the people could be consolidated into sizable and viable units consisting entirely of States. In such cases, territories of States were united to form Unions of States on the basis of full transfer of power from the Rulers to the people. A special feature of these Unions was the provision for the Rajpramukh as the constitutional head of the State who was to be elected by a Council of Rulers. The United State of Gwalior, Indore and Malwa and other small States came to be known as Madhya Bharat of which the Ruler of Gwalior became the Rajpramukh. Integration of Rajputana was completed in three stages.

173. As a result of the application of the various merger and integration schemes 216 States were merged in Provinces, 61 States were taken over as Centrally administered areas and 275 States were integrated into the Union of States.

174. The process of the merger of the States with the Provinces or their constitution into Centrally Administered areas, transfer of power to the people was automatic in that the merged States became part of the Administrative units which were governed by the popular Government of the Provinces and the Centre as the case might be. So far as the Provincially merged States were concerned, under the arrangements made virtually by the statutory orders issued under Section 290-A of the Government of India Act 1935 provision was made for the representation of the people of the merged States in the Provincial Legislature. As regards the Unions of States wherever practicable popular interim ministries were set up to conduct their administration.

175. The Instruments of Merger and the covenants establishing the various

units of States were in the nature of overall settlements with the Rulers who had executed them. While they provided for the integration of States and for the transfer of powers from the Rulers they also guaranteed to the Rulers Privy Purse, succession to the gaddi, rights and privileges and full ownership, use and enjoyment of all private properties belonging to them as distinct from State properties.

176. The above is a thumb-nail sketch of the political developments and the major political events between 1773 and 1948 or 1949. Most of the historical account is taken verbatim from V. P. Menon's "Story of Integration of Indian States" and the White Paper on Indian Constitution — both of which were freely referred to by counsel appearing in the case. In the above setting I now propose to examine the implications of the important documents to which the Ruler of Gwalior became a party.

177. An Instrument of Accession was signed by the Ruler of Gwalior on the 15th August, 1947 in the exercise of his sovereignty in and over his State containing inter alia the following material terms:—

"I declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purpose of the Dominion shall, by virtue of this instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State ... such functions as may be vested in them by or under the Government of India Act, 1935.

Clause 3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for the State. (The schedule mentioned contained several matters of which the main were defence, external affairs and communications).

Clause 5. The terms of this Instrument of Accession shall not be varied by any amendment of the Act (Government of India Act) or the Indian Independence Act, 1947 unless such amendment is accepted by me by an instrument supplementary to this instrument.

Clause 7. Nothing in this Instrument shall be deemed to commit me in any

way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.

Clause 8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

Clause 9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors"

178. This Instrument was accepted by the Governor-General of India and signed by him.

179. On 22nd April 1948 a document was executed by the Ruler of Gwalior, Indore and certain other States in Central India for the formation of the United State of Madhya Bharat. The recitals to the document show that the Rulers were entering into a covenant on the terms mentioned therein as they were convinced that the welfare of the people of the region could best be secured by the establishment of a State with a common executive, legislature and judiciary, and they were resolved to entrust to a Constituent Assembly consisting of elected representatives of the people the drawing up of a democratic constitution of the State within the framework of the Constitution of India. By Article II the Covenanted States agreed to unite and integrate their territories into one State with a common executive, legislature and judiciary and to include therein any other State the Ruler of which agreed with the approval of the Government of India to the merger of his State in the United State. Article III provided for the constitution of a Council of Rulers with a President known as the Rajpramukh. Article IV provided inter alia for payment of a sum of Rs. 2,50,000 to the Rajpramukh from the revenues of the United State as consolidated allowance. Under Article V there was to be a council of Ministers to aid and advise the Rajpramukh in the exercise of his functions. Under Article VI the Rulers of each Covenanted State agreed as soon as possible and not later than the 1st July, 1948, to make over the administration of his State to the Rajpra-

mukh whereupon all rights, authority and jurisdiction belonging to the Ruler which pertained to or were incidental to the Government of the Covenanted State were to vest in the United State and all the assets and liabilities of the Covenanted State were to be the assets and liabilities of the United State. Under Article VIII the Rajpramukh was to execute on behalf of the United State, as soon as practicable and in any event not later than 15th June, 1948 an Instrument of Accession in accordance with the provisions of Section 6 of the Government of India Act, 1935 and he was to accept as matters with respect to which the Dominion Legislature might make laws for the United State all the matters mentioned in List I and List III of the Seventh Schedule to the said Act, except the entries in List I relating to any tax or duty, by such instrument. Under Article XI the Ruler of each Covenanted State was to be entitled to receive annually from the revenues of the United State for his Privy Purse the amount specified against that Covenanted State in Schedule I; provided that the sums specified in the Schedule in respect of the Rulers of Gwalior and Indore were to be payable only to the Rulers of these States and not to their successors for whom provision was to be made subsequently. The said amount was intended to cover all expenses of the Ruler and his family including expenses of his residence, marriage and other ceremonies and subject to the provisions of paragraph 1 were neither to be increased nor reduced for any reason whatever. Under paragraph 3 the Rajpramukh was to cause the said amount to be paid to the Ruler in four equal instalments at the beginning of each quarter in advance. Under paragraph 4 the said amount was to be free of all taxes whether imposed by the Government of the United State or by the Government of India. Under Article XII the Ruler of each Covenanted State was to be entitled to the full ownership, use and enjoyment of all private properties (as distinct from State properties) belonging to him on the date of his making over the administration of that State to the Rajpramukh. Under paragraph 3 of this Article if any dispute arose as to whether any item of property was the private property of the Ruler or State Property, it was to be referred to such person as the Government of India might nominate in consultation with the Rajpramukh and his

decision was to be final and binding. Article XIII ran as follows:—

“The ruler of each Covenantee State, as also the members of his family, shall be entitled to all the personal privileges, dignities and titles enjoyed by them, whether within or outside the territories of the State immediately before the 15th day of August, 1947.”

Article XIV provided:

(1) The succession, according to law and custom to the gaddi of each Covenantee State, and to the personal rights, privileges, dignities and titles of the Ruler thereof, is hereby guaranteed.

(2) Every question of disputed succession in regard to a Covenantee State shall be decided by the Council of Rulers after referring it to a Bench consisting of all the available Judges of the High Court of the United State and in accordance with the opinion given by that High Court.”

180. The document ends with the following paragraph:—

“The Government of India hereby concur in the above Covenant and guarantee all its provisions. In confirmation whereof Mr. V. P. Menon, Secretary to the Government of India in the Ministry of States, appends his signature on behalf and with the authority of the Government of India.”

181. On July 19, 1948 the Ruler of Gwalior who had become the Rajpramukh of the United State of Madhya Bharat executed a revised Instrument of Accession reciting the covenant of April 1948 referring in particular to Article VIII of the same and declaring that he as Rajpramukh was acceding to the Dominion of India with intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purpose of the Dominion would by virtue of the Instrument of Accession but subject always to the terms thereof and for the purposes only of the Dominion exercise in relation to the United State such functions as may be vested in them or under the Government of India Act, 1935. By Clause (2) he assumed the obligation of ensuring that due effect was given to the provisions of the Act (the Government of India Act, 1935) within the United State so far as they were applicable by virtue of the Instrument of Accession. By Clause (3) he accepted all matters enumerated in List I

and List III of the Seventh Schedule to the Act as matters in respect of which the Dominion Legislature might make laws for the United State. This was of course subject to some provisos which it is not necessary to set out. Under Cl. (6) that terms of the Instrument of Accession were not to be varied by any amendment of the Act or the Indian Independence Act, 1947 unless such amendment was accepted by the Rajpramukh. Under Clause (8) it was made clear that nothing in the instrument was to be deemed to commit the United State in anyway to acceptance of any further Constitution of India or to fetter the discretion of the Government of the United State to enter into arrangements with the Government of India under any such future Constitution.

182. This Instrument of Accession was duly accepted by the Governor-General of India.

183. The Constituent Assembly was in session about this time and the future Constitution of India was being discussed and given a final shape and form.

184. The provisions of the Constitution had been finally settled before the 24th November, 1949, the date on which the Rajpramukh made a solemn declaration that the Constitution of India shortly to be adopted by the Constituent Assembly of India was to be the Constitution for the Madhya Bharat as for the other parts of India and was to be enforced as such in accordance with the tenor of its provisions. The preamble to the proclamation shows that the Rajpramukh took this step in the best interest of the State of Madhya Bharat which was closely linked with the rest of India by the community of interests in the economic, political and other fields and it was felt desirable that the Constitutional relationship established between the State of Madhya Bharat and the Dominion of India should not only be continued but further strengthened and the Constitution of India as drafted by the Constituent Assembly of India, which included duly appointed representatives of the States provided a suitable basis for doing so.

185. The Constitution of India was finally adopted by the Constituent Assembly on the 26th November, 1949. Under Article 394 of the Constitution fifteen of its articles were to come into force at once and the remaining provi-

sions of the Constitution were to come into force on the 26th day of January, 1950 referred to in the Constitution as the commencement of the Constitution. By Article 395 the Indian Independence Act, 1947 and the Government of India Act, 1935 together with all enactments amending or supplementing the latter were replaced.

186. The above gives a fairly complete picture of the disappearance of the former Indian States which formed the combination of the United States of Madhya Bharat with the commencement of the Constitution of India as also the rights and privileges of the Rulers save as expressly provided otherwise in the Constitution itself, or the covenants, agreements etc. to the extent necessary.

187. The above pattern did not however apply to all the Indian States. A number of small States of Orissa executed Merger agreements which were confirmed on behalf and with the authority of the Governor-General by the Secretary to the Ministry of States. Those agreements were entered into in December, 1947. By Article I of the agreement the Raja of the State ceded to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State and agreed to transfer the administration of the State to the Dominion Government on the 1st January, 1948. As from that date the Dominion Government was to be competent to exercise the said powers and authority and jurisdiction in such manner and through such agency as it might think fit. Under Article II the Raja was to be entitled to receive from the revenues of the State annually for the privy purse a certain sum of money which was to cover all the expenses of the Ruler and his family etc. Under Article III he was to be entitled to the full ownership, use and enjoyment of all private property (as distinct from State properties) belonging to him on the date of the agreement. Under Article IV the Raja and certain other persons were to be entitled to all personal privileges enjoyed by them whether within or outside the territories of the State immediately before the 15th August, 1947. By Article V the Dominion Government guaranteed the succession according to law and custom to the gaddi of the State and to the Ruler's personal rights, privileges, dignities and titles.

188. Similar Merger agreements were signed by the Rulers of Gujarat and Deccan States. The terms of the agreements were on similar lines.

189. There were however departures from the above in some cases. For instance, the Nawab of Bhopal executed a Merger agreement on the 30th April, 1949 whereby the administration of the State of Bhopal was to be taken over and carried on by the Government of India and for a period of five years next after the date of transfer the State was to be administered as a Chief Commissioner's Province. The personal rights and privileges and the privy purse were secured as in the case of other Rulers. With regard to succession to the throne of Bhopal State it was agreed that the same would be governed and regulated in accordance with the provisions of the Act known as the Succession to the Throne of Bhopal Act, 1947. It may be mentioned that in the case of Bhopal Article III of the agreement provided that although the then Ruler was to get a sum of Rs. 11 Lakhs per annum free of all taxes, each of his successors with effect from the date of succession was to be entitled to receive for his privy purse a sum of Rs. 9 lakhs per annum free of all taxes.

190. There was some similar provision in the cases of Mysore and Hyderabad but it is hardly necessary for the purpose of this series of petitions to go into the differences. There were separate agreements with the Nizam of Hyderabad regarding the privy purse, private property and rights and privileges entered into on the 25th January, 1950. Under Article I of the agreement with the Nizam the said Ruler was to be entitled to receive annually for his privy purse a sum of Rs. 50 lakhs free of all taxes. But with regard to his successors provision was to be made subsequently by the Government of India. Under Article IV the Government of India guaranteed the succession according to law and custom to the gaddi of the State. A very similar agreement was entered into with the Maharaja of Mysore on the 23rd January, 1950. The then Maharaja was to receive Rs. 26 lakhs free of all taxes as and by way of privy purse per annum but provision was to be made subsequently by the Government of India with regard to his successor.

191. For another instance of integration through Merger Agreement I

may refer to the Kutch Merger Agreement dated 4th May, 1948 between the Governor-General of India and the Maharao of Kutch. The preamble shows that the agreement was being entered into in the best interests of the State of Kutch as well as of the Dominion of India to provide for the administration of the said State by or under the authority of the Dominion Government. Under Article 1 the Maharao ceded to the Dominion Government full and exclusive authority, jurisdiction and powers for and in relation to the governance of the State and agreed to transfer the administration of the State to the Dominion Government on the 1st day of June, 1948. As from that day the Dominion Government was to be competent to exercise the said powers, authority and jurisdiction in such manner and through such agency as it might think fit. By Article 2 the Maharao was to be entitled to continue the same personal rights, privileges, dignities and titles which he would have enjoyed had the agreement not been made. Under Article 3 the Maharao was to be entitled with effect from the said day to receive from the revenues of the State annually for his Privy Purse the sum of Rs. 8 lakhs free of all taxes. The Government of India undertook that the said sum of Rs. 8 lakhs would be paid to the Maharao in four equal instalments in advance. Article 4 provided for the retention by the Maharao of full ownership, use and enjoyment of all private properties (as distinct from State properties). Under Article 6 the Dominion Government guaranteed the succession of the State according to law and customs of the gaddi of the State and to the Maharao his personal rights, privileges, dignities and titles. As the original Government of India Act, 1935 did not provide for any Merger agreement steps had already been taken towards that end. The Extra Provincial Jurisdiction Act, 1947 was passed giving power to the Central Government to exercise extra Provincial jurisdiction over a State only if it had by a treaty-agreement etc. acquired full and exclusive authority and jurisdiction and power for and in relation to the governance of the State. The Government of India Act, 1935 was also amended by insertion of Sections 290-A and 290-B.

192. The States' Merger (Governors' Provinces) Order, 1949 was promulgated on the 27th July, 1949 under Section 290A of the Government of India

Act for the administration of the States specified in the Schedule together with the adjoining Governors' Provinces. Under Clause 3 the States specified in each of the Schedules were to be administered as from the appointed day in all respects as if they formed part of the Provinces specified in the heading of that Schedule and, accordingly, any reference to an Acceding State in the Government of India Act, 1935, or in any Act or Ordinance made on or after the appointed day was to be construed as not including a reference to any of the merged States, and any reference in any such Act or Ordinance as aforesaid to Provinces specified in that Schedule. Under Clause 4 all the law in force in a merged State or in any part thereof immediately before the appointed day including orders made under Section 3 or Sec. 4 of the Extra-Provincial Jurisdiction Act, 1947 was to continue in force until repealed, modified or amended by a competent Legislature or other competent authority. Under Clause 5 all property wherever situate which immediately before the appointed day was vested in the Dominion Government for purposes of the governance of a merged State was as from that date to vest in the Government of the absorbing Province unless the purposes for which the property was held immediately before the appointed day were central purposes.

193. Another Order known as the States Merger (Chief Commissioners' Provinces) Order, 1949 was promulgated on the 29th July, 1949. The State of Kutch along with other States was to be administered by and under this Order in all respects as if they were a Chief Commissioner's Province to be known as the Chief Commissioner's Province of Kutch.

194. The unification of India however thus achieved was not as a result of negotiations across the table nor was it accomplished overnight in the way ordinary contracts and engagements are entered into after some deliberation. Full credit for the same goes not only to the Ministry of States led by Sardar Vallabhbhai Patel but also to the Rulers of the hundreds of Indian States who realised that in the interest of the people of their States as also their personal interest it was necessary for them to come to terms with the Government of India. They agreed to part with their States and the territories so far governed by them on the basis of the assurances

and guarantees given by the Dominion of India before the commencement of the Constitution by the Government of India as contained in the Constitution itself. It will not be out of place to set out what Sardar Vallabhbhai Patel said in the Constituent Assembly on 12th October, 1949 in regard to the settlements with the Rulers. A portion of his speech is quoted as below:

"In the past, in most of the States there was no distinction between the expenditure on the administration and the Ruler's Privy Purse. Even where the Ruler's Privy Purse had been fixed no effective steps were taken to ensure that the expenditure expected to be covered by the Privy Purse was not, directly or indirectly charged on the revenues of the State. Large amounts, therefore, were spent on the Rulers, on the members of the ruling families.... the Privy Purse settlements made by us will reduce the burden of the expenditure on the Rulers to at least one-fourth of the previous figure. Besides, the States have benefited very considerably from the process of integration in the form of cash balances inherited by them from the Rulers..... I shall now come to the political and moral aspect of the settlements. In order to view the payments guaranteed by us in their correct perspective, we have to remember that they are linked with the momentous developments affecting the most vital interests of this country. These guarantees form part of the historic settlements which enshrine in them the consummation of the great ideal of geographical, political and economic unification of India, an ideal which for centuries remained a distant dream and which appeared as remote and as difficult of attainment as ever even after the advent of Indian independence..... Human memory is proverbially short. Meeting in October, 1949, we are apt to forget the magnitude of the problem which confronted us in August 1947..... the so-called lapse of paramountcy was a part of the plan announced on June 3, 1947 which was accepted by the Congress. We agreed to this arrangement in the same manner as we agreed to the partition of India. We accepted it because we had no option to act otherwise. While there was recognition in the various announcements of the British Government of the fundamental fact that each State should link up its future with that Dominion with

which it was geographically contiguous, the Indian Independence Act released the States from all their obligations to the British Crown..... They (the British Crown) even conceded that theoretically the States were free to link their future with whichever Dominion they liked, although, in saying so, they referred to certain geographical compulsions which could not be evaded. The situation was indeed fraught with immeasurable potentialities of disruption, which some of the Rulers did wish to exercise their technical right to declare independence and others to join the neighbouring Dominion. If the Rulers had exercised their right in such an unpatriotic manner, they would have found considerable support from influential elements hostile to the interests of this country.. It was in this unpropitious background that the Government of India invited the Rulers of the States to accede on three subjects of Defence, External Affairs and Communications. At the time the proposal was put forward to the Rulers, an assurance was given to them that they would retain the status quo except for accession on these subjects..... There was nothing to compel or induce the Rulers to merge the identity of their States. Any use of force would have not only been against our professed principles but would have also caused serious repercussions. If the Rulers had elected to stay out, they would have continued to draw the heavy Civil Lists which they were drawing before and in a large number of cases they could have continued to enjoy unrestricted use of the State revenues. The minimum which we could offer to them as quid pro quo for parting with their ruling powers was to guarantee to them privy purses and certain privileges on a reasonable and defined basis. The Privy Purse settlements are therefore in the nature of consideration for the surrender by the Rulers of all their ruling powers and also for the dissolution of the States as separate units..... The capacity for mischief and trouble on the part of the Rulers if the settlement with them would not have been reached on a negotiated basis was far greater than could be imagined at this stage. Let us do justice to them; let us place ourselves in their position and then assess the value of their sacrifice. The Rulers have now discharged their part of the obligations by transferring all ruling powers and by

agreeing to the integration of their States. The main part of our obligation under these Agreements is to ensure that the guarantees given by us in respect of privy purses are fully implemented. Our failure to do so would be a breach of faith and seriously prejudice the stabilisation of the new order."

195. It may not be out of place to quote from the debates in the Constituent Assembly which bear upon the interpretation of Article 363. Before the Constitution finally took shape in the draft, this article was numbered as 302-AA and Article 143 was numbered as 119. Shri T. T. Krishnamachari who moved for the insertion of Art. 302-AA said in the course of his speech:

"..... it is self-explanatory. The idea is to bar the jurisdiction of the courts including the Supreme Court in regard to adjudicating in respect of any disputes that might arise out of any treaty, agreement, covenant, engagement, sanad or other similar instruments that might have been entered into by the Government of the Dominion of India or by any predecessor Government...."

196. Questioned by a member as to who would decide, T. T. Krishnamachari replied:

"The idea is that the court shall not decide in this particular matter. It is subject only to the provisions of Art. 119 by which the President may refer the matter to the Supreme Court and ask for its opinion and the Supreme Court would be bound to communicate its opinion to the President on any matter so referred by him. The House will also remember that there are a few Articles in the Constitution, specifically 302-A (the present Article 291) and 267-A (the present Article 362) where there are references to these agreements, covenants, sanads etc. and even these are precluded from adjudication by any court. The House will recognise that it is very necessary that matters like these should not be made a matter of dispute that goes before a court and one which would well might probably upset certain arrangements that have been recommended and agreed to by the Government of India in determining the relation between the rulers of States and the Government of India in the transitory period. After the Constitution is passed, the position will be clear. Practically all the States have come within the scope of Part VI-A and

they will be governed by the provisions of this Constitution and, excepting so far as certain commitments are positively mentioned in the Constitution, and as I said the two Articles 267-A and 302-A the covenants will by and large not affect the working of the Constitution; and it is therefore necessary in view of the vast powers that have been conceded in this Constitution to the judiciary that anything that has occurred before the passing of this Constitution and which might incidentally be operatable after the passing of the Constitution must not be a subject-matter of a dispute in a court of law. I think that Members of this House will understand that it is a very necessary provision so as to save unnecessary disputes by people which might feel that they have been affected or injured and who would rush to a court to make the court recognise such rights and other similar matters which have been practically extinguished by the provisions of this Constitution excepting in so far as certain articles of the Constitution preserved them."

197. There was also some discussion with regard to the definition of "Ruler" and "Rajpramukh" which figured in Article 303 of the draft Constitution. According to Dr. B. R. Ambedkar the definition of 'Ruler' was intended only for the limited purpose of making payments out of the privy purse. It had no other reference at all. He also said that the expression was deliberately used in order to give the power of recognition to the President.

198. After referring to the historical background of the settlement W. P. No. 376 of 1970 takes note of the attempt made to amend the Constitution by the Constitution (Twenty Fourth Amendment) Bill 1970 passed by the Lok Sabha on 2nd September, 1970. It was however rejected by the Rajya Sabha on the 5th September, 1970. The same night the President signed an instrument withdrawing recognition of all the Rulers and orders were issued for and on his behalf to each and every Ruler in the country. According to the petition the order of the 6th September violated Articles 14, 19 (1) (f), 21 (as per amendment allowed) and 31 (1) and (2) of the Constitution. The order was dubbed as unconstitutional, ultra vires, void and inoperative, arbitrary, mala fide and a fraud on the Constitution on various grounds formu-

lated in paragraph 20, the notable ones being as follows:—

(i) Art. 291 embodied the Constitutional acceptance and recognition of the guarantees or assurances regarding tax-free privy purses.

(ii) The privy purses guaranteed by the Government under the Merger agreements or Covenants were further assured and guaranteed by the Constitution and charged on the Consolidated Fund of India. Articles 291 and 362 themselves created new and independent rights. The pledge to pay privy purses and the guarantee regarding privileges etc. are inseverable from these accessions and mergers. The obligation to pay privy purses and the said guarantee regarding privileges etc. which are inseverable from the accession and merger cannot be abolished by any law, much less by any executive action.

(iii) The President of India passed the order withdrawing the recognition of the petitioner and the other Rulers without applying his mind to the question of legality or propriety of the Order. The whole and only object of the Order was to deprive the petitioner and the other Rulers of their privy purses and their personal rights and privileges. The de-recognition of all the Rulers en masse is itself the clearest possible proof that the whole object is to abolish the institution of Rulership altogether and all the rights and privileges attached thereto.

(iv) Under the agreement executed between the Dominion of India and the Rulers and the covenants concurred in and guaranteed by the Dominion of India a Ruler is entitled to privy purse of a stipulated amount and to rights and privileges which he enjoyed before the 15th August, 1947 and succession to his 'gaddi' in accordance with the law and custom of the family was guaranteed. Once the President has recognised a person as entitled to receive privy purse and to be accorded rights and privileges due to him as a Ruler, there can be no interference with his right to receive the privy purse or with his other rights and privileges. The Constitution contains no substantive provision conferring on the President a right to recognise or not to recognise a Ruler or to withdraw recognition. All that the Constitution requires is an indication of the Indian States which are recognised as such under Arti-

cle 366 (15) and a Ruler with reference to such a State under Article 366 (22), Articles 366 (22) and 366 (15) cast upon him not a power or authority but a constitutional duty to recognise an existing fact and continue to do so in accordance with the provisions of the covenants and agreements. The Order being in clear contravention of Articles 291, 362 and 366 (22) was also in contravention of Article 53 (1) which required that the executive powers of the Union vesting in the President be exercised by him in accordance with the provisions of the Constitution.

(v) The right to receive privy purse and other rights of Rulers constitute property within the meaning of Arts. 19 (1) (f) and 31. Deprivation of privy purses and other rights without authority of law contravenes Article 31 (1) as the petitioner was to be expropriated of his moneys and his right to receive money periodically by way of privy purse without any compensation.

(vi) The privy purse was in substance and in reality compensation for the transfer by Rulers of inter alia their properties.

(vii) There was a duty cast upon the Government of India to respect and implement the provisions of the Merger agreements and the Covenants.

199. The petitioner's further contentions were that the order left the Merger agreements and covenants untouched and did not in any way abrogate or affect any of the assurances, guarantees and obligations under the agreements and covenants. According to the petition Article 363 covered cases of a dispute arising out of a settlement with a Ruler or a dispute in respect of a right or obligation founded on a provision of the Constitution relating to such a settlement but it did not cover the case of policy embodied in legislative or administrative action to abolish altogether the institution of Rulership and its rights and privileges and of privy purses.

200. The prayers formulated in the petition were as follows:—

(a) A writ, direction or order under Article 32 of the Constitution declaring the Order dated 6th September, 1970 to be unconstitutional, ultra vires and void and further to quash the Order;

(b) a writ, direction or order declaring that the petitioner continues to be the Ruler and continues to be entitled to

the privy purse and to his personal rights and privileges as a Ruler;

(c) a writ, direction or order directing the Union of India to continue to pay the privy purse to the petitioner and to continue to recognise the Rulership and the personal rights and privileges of the petitioner and to implement and observe the provisions of the covenant/Merger agreement entered into with the petitioner.

201. In the forefront of the counter affidavit of the Joint Secretary to the Government of India in the Ministry of Home Affairs is the contention that "by reason of the provisions of Article 363 of the Constitution this Court has no jurisdiction to entertain the petition." The main propositions put forward in the said counter affidavit are as follows:

(a) By the petition disputes had been raised which arose directly out of the provisions of the relevant covenant as also his alleged rights accruing under the provisions of the Constitution.

(b) The covenant was a political agreement among High Contracting Parties and an act of the State and as such could not form the subject-matter of any proceeding in any municipal Court. The guarantee given by the Dominion of India was only a political act and not a legal one.

(c) Neither the covenants nor the Merger agreements nor any provision of the Constitution relating to the covenants or the Merger agreements confer any legal right on the petitioner or on any erstwhile Ruler.

(d) The covenant being a political agreement, the alleged rights and obligations thereunder could not be and were not perennial and were inherently temporary in character and liable to be varied or repudiated in accordance with State policy in the interests of the people.

(g) The power of the President to recognise or not to recognise a person as a Ruler was political in character and an incident of sovereignty. The power included the power to recognise and the power to cease to recognise any person as a Ruler.

(k) The relevant covenant being a political agreement among High Contracting Parties and an act of State, the petitioner has no legal right to the gaddi or the Privy Purse or any of the said privileges and as such neither the gaddi nor the Privy Purse or any of the said privileges is property within the meaning

of Article 19 (1) (f) or Article 31 (1) or Article 31 (2) of the Constitution.

(l) If the State policy changed and the States decided not to pay such political pension in future, a dispute arising from such decision was not justiciable in a municipal Court.

(m) Rulership or the succession thereto, the Privy Purse and the said privileges were inter alia the subject-matter of an agreement and an agreement could not confer on the petitioner any fundamental right under the Constitution.

(n) Article 291 of the Constitution did not create any legal right in a person. It only laid down the source and method of payment of the Privy Purse. The article in laying down that the Privy Purse shall be charged on and paid out of the Consolidated Fund of India meant no more than that these sums would be sums within the meaning of Articles 112 (2) (a) and 113 (1) of the Constitution and would not be submitted to the vote of Parliament. And secondly that such sums would be exempt from all taxes on income. Even if the article created a legal right in a person recognised by the President as a Ruler to receive payment of Privy Purse Article 363 barred the enforcement of such right.

(o) Article 362 of the Constitution did not create or impose any legal obligation on Parliament or the Legislature of a State or the Union executive or the State executive in respect of the said privileges and even with respect thereto Article 363 barred jurisdiction of all Courts in India.

(p) The concept of Rulership, the Privy Purse and the said privileges unrelated to any current functions and social purposes have become incompatible with democracy, equality and social justice in the context of India to-day. Since the commencement of the Constitution many things have changed, many hereditary rights and unearned incomes have been restricted and many privileges and vested interests have been done away with. The question of continuance of covenants and Merger agreements had been exercising the minds of the Congress Party for many years past and the Constitution (Twenty-Fourth Amendment) Bill was introduced with that object.

202. All the grounds set forth in paragraph 20 of the petition were controverted. In particular it was said:—

(a) Article 291 did not cast an obligation on the Government to pay the

Privy Purse and the obligation, if any, was not a legal obligation.

(b) The Order of 8th September, 1970 did not violate Article 291 or Article 362. To recognise or not to recognise any person as a Ruler was exercise of a political power which was not dependent on any provision of the Constitution.

(c) The covenants and Merger agreements were and continued to be political agreements and acts of State which could not be enforced in a Court of Law by reason of Article 363.

(d) Article 366 (22) impliedly conferred a power on the President to recognise or not to recognise a person as a Ruler and such a power was a political power. There was no provision in the Constitution which conferred on the petitioner or any of the erstwhile rulers any rights to be recognised as Ruler and continued to be recognised as such or to Privy Purse or any of the privileges.

(e) As neither the petitioner nor any erstwhile Ruler had or now has any legal right to the Privy Purse or to any of the privileges or to any of the alleged other rights enforceable in a Court of law, there could be no question of the impugned order infringing Article 19 (1) (f), Article 31 (1) or Article 31 (2) and that in any event Article 363 barred the enforcement of any such alleged right.

(f) The Rulers entered into the covenants and Merger agreements by reason of political compulsion and in their own interests and not on the faith of any undertaking or guarantee on the part of the then Dominion of India. Neither the petitioner nor any erstwhile Ruler acted upon any assurance or guarantee on the part of the Government of India. On the other hand a fiduciary duty was cast upon the respondent Government not to continue Feudal institutions and anachronistic systems against the interests of the people.

(g) The petitioner has no fundamental right as claimed and Article 363 barred adjudication by a Court of Law with respect to the rights claimed.

203. The crucial question in the petition is whether the petitioner is entitled to a declaration that the order withdrawing his recognition as a Ruler is beyond the scope of any executive action of the President. The only provision in the Constitution in which the recognition of a person as a Ruler appears is Article 366 (22). The article being a Code to the

meaning of the words used in the Constitution we have to see exactly what it proposes to do and what it achieves. Unless a ruler can be identified for the purposes of the Constitution Article 291, Art. 362 and Article 363 cannot be applied. Clause (22) fixes the identity of the Ruler for the purposes of the Constitution as a Prince, Chief or other person by whom any covenant or agreement as is referred to in Clause (1) of Article 291 was entered into. Obviously before a person can be a Ruler under this limb of the article he must be a person who had entered into the kind of agreement just now mentioned. But in order to be a Ruler for the purpose of the Constitution he is also to be recognised by the President as a Ruler of a State. This means that at the commencement of the Constitution claims of the former Rulers to be recognised as the Rulers of the respective States had to be considered. Clearly the Constitution did not contemplate the eventuality of the President not choosing to recognise anybody as a Ruler or choosing only those whom he liked. In the setting in which the Rulers accepted the Constitution as binding on them and their States it must have been in their contemplation as also of the Constitution-makers that all of them who were alive at the commencement of the Constitution would get such recognition. So much for the time when the Constitution became effective to start with. But as Rulers are human beings and are not immortal, the Constitution had to provide for the continuity of the line of Rulers and to lay down who would be a Ruler after the first set of Rulers was no more. This was done by providing that the President would recognise someone as a successor of the Ruler who had departed from this life. The expression "for the time being" was not inserted for the purpose of giving power to the President to recognise a person or withdraw recognition from him as his fancy dictated. It was put in for the purpose of fixing the identity of the Ruler at a given point of time and to emphasise the fact that there could be only one Ruler for a State at any point of time. Read as a whole the clause proceeds on the assumption that the President had the right, power or duty or obligation to recognise some person as a Ruler both at the commencement of the Constitution and ever afterwards so long as the line of Rulers lasted and so long as these provisions were in the Constitu-

tion. A duty or power or right or obligation to recognise someone as successor to the Ruler is also imbedded in the clause. If there were no covenants or agreements to guide him or bind him, the President could probably recognise and derecognise or withdraw recognition at his will and pleasure. Clearly however the grant of such a power was not in the minds of the Constitution-makers. At the time when they entered into covenants and agreements, a solemn assurance or guarantee was given by the Dominion of India that succession to the gaddi of each Ruler would be according to law and custom of the State. It would appear that invariably the rule of lienal male primogeniture coupled with the custom of adopting a son prevailed in the case of Hindu Rulers who composed of the bulk of the body. When on the eve of the Constitution being finally adopted the Rulers with the exception of two or three accepted the same as binding upon them and their States, it must follow that they accepted and adopted the Constitution of India because they thought and were assured that the provisions in it regarding themselves and their successors were to their satisfaction and were binding in nature. They certainly never imagined that they would be the play-things of the executive Government of the Union of India to be thrown out like pawns off the chequer board of politics at any moment when the Government felt that their presence was irksome or that they were anachronistic in the democratic set up of India. This democratic set up was what the Constitution ushered in albeit with a shadow of the past in the Rulers with attenuated pomp and pelf. The choice of a person as a Ruler to succeed another on his death was certainly not left to the mere caprice of the President. He had to find out the successor and this he could do not by applying the ordinary rules of Hindu Law or Mohamedan Law but by the law and custom attaching to the gaddi of a particular State. That the Government of India had no doubts about it is exemplified by several instances where on a question of disputed succession a reference was made to a very high judicial officer to find out the rightful successor with the help of other Rulers. I may mention only two such instances, namely, the appointment of Shri H. V. Divatia, Chief Justice of the Saurashtra High Court and a retired Judge of the Bombay High Court and

their Highnesses the Maharaja of Jaipur and the Maharao of Kotah as members, to enquire into and report on the rights of the various claimants to the gaddi of Sirohi and the validity of the succession of His Highness Maharao Shri Tejsinghji Bahadur who was recognised as the Maharao of Sirohi by the Crown Representative in May, 1946, on the death of His Highness Shri Sarupringsinghji who left no male heir of the body or adopted son. The insertion in the Gazette of India Extraordinary under date 7th October, 1950, refers to this as also to the activities of the Committee and its conclusion that there was no such valid adoption of Shri Tejsinghji into the Bajawat family as deprived him of his legal status as a member of the ruling family. The notification ends with the following:—

"Having carefully considered the report, the President accepts the finding of the Committee of Enquiry in their entirety. Accordingly in exercise of the powers vesting in him under Article 366 (22) of the Constitution, the President is pleased to recognise Shri Abhaisinghji as the Ruler of Sirohi in place of the present minor Maharao Shri Tejsinghji Bahadur who shall cease to be recognised as such with effect from the date of this Order."

This clearly shows that the President did not act in any arbitrary manner. The claims were investigated into with the help of one of the highest judicial officers of the land and reported on to the President. The President thereupon withdrew recognition from Shri Tejsinghji Bahadur and recognised Shri Abhaisinghji as the Ruler of Sirohi. To my mind Article 366 (22) read with the rules of succession, the Merger agreements and the covenants was given full effect. Recognition was given to the person lawfully entitled to be declared the successor to the gaddi and the same was withdrawn from a person who was held not entitled to it. The act was certainly executive in nature; but it was based on a judicial scrutiny and not on any political consideration or in an arbitrary fashion.

204. Another instance of applying the law and custom of succession is afforded by the case of Dholpur which was enquired into by Shri K. N. Wanchoo, Chief Justice of Rajasthan High Court (as he then was) forming a Committee with two Rulers.

205. To my mind the Merger agreements and covenants did not become waste paper on the commencement of the Constitution to be consigned to the record room or any museum. So long as the above provisions enure in the Constitution a Ruler will have to be found for a State and such finding must be on the basis of the law and custom of the State. That is the assurance which was given to the Rulers when they accepted the Constitution and I see no reason why the Constitution should be interpreted in a way to set that at naught.

206. In the light of the above, my view is that Article 366 (22) implied not merely a right or power but a duty or obligation to recognise a person as a Ruler i. e., a duty or obligation to do so and the power or duty to withdraw recognition must be confined to cases when the first recognition was not proper as in the case of the Sirchi succession.

207. But the learned Attorney-General would interpret the same differently. He put forward his contention in the following propositions:—

(a) Recognition was only for the purpose of fixing the identity of a person for payment of privy purse and grant of privileges pursuant to the Constitutional provisions in Articles 291 and 362.

208. In support of this he relied on the Debates in the Constituent Assembly to which reference has already been made. He relied on a decision of this Court in *Maharaja Pravir Chandra Bhanj Deo Kakatiya v. State of Madhya Pradesh*, (1961) 2 SCR 501 = (AIR 1961 SC 775). There the appellant was the Ruler of the State of Bastar and had entered into an agreement with the Government of India whereby he had ceded the State of Bastar to the Government of India to be integrated with the Central Provinces and Berar. He challenged the applicability to him of Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, 1950 (Madhya Pradesh Act 1 of 1951) meant to provide for the acquisition of the rights of proprietors in estates, mahals, alienated villages and alienated lands in Madhya Pradesh which was applicable to a person described as an ex-Ruler of an Indian State merged with Madhya Pradesh. The appellant's contention was that he was still a sovereign Ruler and absolute owner of the villages to which the Act was sought to be applied.

In the course of the judgment of this Court there is an observation at p. 506 (of SCR) = (at p. 778 of AIR) reading:—

"The effect of the Merger Agreement is clearly one by which factually a Ruler of an Indian State ceases to be a Ruler but for the purpose of the Constitution and for the purposes of the privy purse guaranteed, he is a Ruler as defined in Article 366 (22) of the Constitution. There is nothing in the provisions of Article 366 (22) which requires a court to recognise such a person as a Ruler for the purposes outside the Constitution."

Earlier in the judgment at page 504 (of SCR) = (at p. 777 of AIR) it was said:—

"The expression 'Ruler' as defined in Article 366 (22) of the Constitution applied only for interpreting the provisions of the Constitution."

In my view these observations do not advance contention of the Respondent as the Court was not there concerned with the question of the power to recognise or withdraw recognition from a Ruler. The only question before the Court was whether the appellant was an ex-Ruler for the purposes of the Act.

209. Reference may be usefully made to paragraph 241 (3) at page 129 of the White Paper on Indian States under the heading "Recognition of Rulers" reading:—

"The Rulers of the merged and integrated States have been guaranteed succession according to law and custom. In the Covenants and some of the Agreements of Merger, provision has been made for the procedure to be observed for the settlement of the cases of disputed succession. In the case of Rulers of States forming Unions, every question of disputed succession is to be decided by the Council of Rulers after referring to the High Court of the Union and in accordance with the opinion of that Court." The above is followed by the quotation of Article 366 (22) and according to the White Paper

"it is expected that in according recognition to Rulers, the President will show due regard to the provisions of the Covenants and Agreements of Merger in respect of the cases to which these provisions apply."

210. (b) The learned Attorney-General then submitted that power of recognition was a political power in the paramountcy field to which the Dominion Government and thereafter the Union Government under the Constitution suc-

ceeded and for this he referred to White Paper, paragraph 266 at p. 143 reading:

"In spite of the declaration regarding the lapse of paramountcy, the fundamentals on which it rested remained. The essential defence and security requirements of the country and the compulsions of geography did not cease to be operative with the end of British Rule in India. If anything, in the context of world events, they have become more imperative. The Central Government in India which succeeded the British was unquestionably the paramount power in India both de facto and de jure and that Government alone was the only completely independent sovereign in India." To my mind the British Crown was the paramount power in India because of the might of its power. Its power was so great compared to that of the Rulers of the Indian States that it could annex any territory at any time and bring under subjugation all the Rulers by compulsion or subsidiary alliances. There was no sanction of International Law behind it. Paramountcy after the British had come to be the foremost power in the country was one of their own creation. In strict legal theory whatever paramountcy there was before the 15th August, 1947, in the British Government lapsed with the passing of the Indian Independence Act. Thereafter the Dominion of India was free to do what it liked subject to world opinion and their own conscience. Paramountcy de facto there undoubtedly was but speaking for myself I cannot ascribe any legal sanction to such paramountcy. The Rulers of Indian States submitted or agreed to the cession of their territory and the government of their people by the Government of the States with which they merged and ultimately the Government of the Union of India because they felt that it was in the best interests of their people and also of themselves.

211. (c) The learned Attorney-General argued that paramountcy continued and the advent of the Constitution did not put an end to it and the debates of the Constituent Assembly with regard to Article 302-AA (present Article 363) that the disputes covered by the said article were beyond the pale of adjudication of Courts of Law only recognised the same. According to him the old concept of paramountcy was virtually inherited by the Dominion of India before January 1950, by reason of the Instruments of Accession, covenants and Merger agree-

ments: the recognition of a Ruler which was the gift of a paramount power was not the matter of a legal right and was exercised as an act of paramountcy and retained the same character. He cited various decisions of this Court to show that covenants and Merger agreements have always been so interpreted, e.g., *Virendra Singh v. State of U. P.*, 1955-1 SCR 415 at p. 429 = (AIR 1954 SC 447 at p. 452), *Dalmia Dadri Cement Co. Ltd. v. Commr. of Income-tax*, 1959 SCR 729 at p. 744 = (AIR 1958 SC 816 at p. 825) and a number of other cases. He argued further that a plea which was available to the Dominion of India can now be put forward by its successor government and in support of his contention relied on the cases of (1859) 7 Moo Ind App 476 (PC), (1875) 19 Eq 509, 1906-1 KB 613 and several others. In the first case the British Government acting as a sovereign power had seized the whole of the Raj of Tanjore as an escheat on the ground that the dignity of Rajah was extinct for want of male heir and this being an act of State the Supreme Court of Madras had no jurisdiction. In Doss's case (1875) 19 Eq 509 (supra) what was sought to be enforced was the liability of an ex-Ruler of Oudh which was annexed by the Government of India in 1856 on inter alia the ground that the claim was a charge upon the revenues of Oudh. The plaintiffs who filed the Bill in the English Court of Chancery sought to rely upon a statement of Lord Stanley, President of the Board of Control in the House of Commons that "the transfer of the revenues of the Kingdom of Oudh carried with it a liability for such debts on the former government as were justly contracted". The plea in demurer that the seizure of the property was an act of State and that it was not liable to any review by a Court of Law or equity was upheld. The above and cases of the type to my mind are easily distinguishable. Once the Rulers ceded their territory and accepted the Constitution of India as the Constitution of their States they became citizens of India on the commencement of the Constitution and the plea of continuance of an act of State as against them cannot be accepted. The Rulers became citizens of India like millions of others but in recognition of the past the Constitution gave them certain special rights like Privy Purses and assured them of continuance of personal privileges in terms of Articles 291 and 362.

212. (d) The learned Attorney-General submitted that the recognition of Rulership was an exercise of political power vested in the President on the strength of certain observations in 1973-2 SCR 631 = (AIR 1970 SC 1946). In that case the petitioner claimed to be entitled to the private properties left by Maharaja Rana Udaibhan Singh of Dholpur on the basis that it was an impartible estate and he was entitled thereto according to the law and custom of lineal primogeniture. There was a writ petition to this Court as also an appeal from a judgment of the High Court which were dealt with by a common judgment of this Court. The last Ruler of Dholpur died in 1954 leaving him surviving no direct male heir but he had left his daughter who was married to the Maharaja of Nabha. His widow adopted a grandson, viz., one of the sons of the daughter and thus arose a controversy as to who was entitled to the Rulership of Dholpur and the Government of India by notification dated December 22, 1954 constituted a Committee, as already mentioned to examine the contentions of various claimants and on the basis of the report of that Committee, the President recognised His Highness Maharaja Rana Shri Hemant Singh as the Ruler of Dholpur from 22nd October, 1954. The contentions put forward on behalf of the petitioner, the appellant to this Court were:

(1) The handing over or authorising the taking over of private properties was by executive fiat and was ex facie bad as infringing Article 19 (1) (f) and Article 31 of the Constitution; (2) That the recognition of a Ruler even if it was an instance of exercise of political power was itself an insignia of property and therefore it could only be by authority of law and would have to yield to fundamental rights; (3) After the commencement of the Constitution recognition of the Ruler was not an exercise of political power and that such recognition under clause (22) meant recognising a fact that a person was a Ruler and the clause did not empower the President to create a fact of bringing into effect a Ruler by recognising a person as a Ruler; (4) If there was any power to recognise the Ruler it was an arbitrary and unguided power and infringing the fundamental right to property; and (5) As there was no dispute regarding the covenant inasmuch as succession did not arise out of the covenant Article 363 of the Constitution was

not affected. The right to succession to private property was said to be independent of any covenant. The above contentions were turned down by this Court. Referring to the notification published in the Gazette of India on 22nd December 1956 the Court said that it did not state that the Ruler thereby became entitled to private properties of the late Ruler. It was observed:

"The recognition of the Ruler is a right to succeed to the gaddi of the Ruler. This recognition of Rulership by the President is an exercise of political power vested in the President and is thus an instance of purely executive jurisdiction of the President. The act of recognition of Rulership is not, as far as the President is concerned, associated with any act of recognition of right to private properties." It was also said:

"The words 'is recognised by the President' indicate beyond any doubt that the power of the President to recognise a Ruler is embedded and inherent in the clause itself. Again, the words 'for the time being' indicate that the President has power not only to recognise but also to withdraw recognition whenever occasion arises...."

The recognition of Rulership is one of personal status. It cannot be said that claim to recognition of Rulership is either purely a matter of inheritance or a matter of descent by devolution. Nor can claim to recognition of Rulership be based only on covenants and treaties. That is why Article 363 of the Constitution constitutes a bar to interference by Courts in a dispute arising out of treaties and agreements. No claim to recognition of Rulership by virtue of a Covenant is justiciable in a Court of law. The Constitution, therefore, provided for the act of recognition of the Rulership by the President as a political power".

Some of the above observations undoubtedly sustain the contention of the learned Attorney-General but they must be limited to the facts of the case. The petitioner-cum-appellant before this Court did not claim any right to the gaddi. He only claimed to be entitled to the private properties of the deceased Ruler according to law and custom of lineal primogeniture. His complaint against the notification under clause (22) of Art. 366 was not accepted mainly because the notification made no reference to the private

properties of the late Ruler. The Court held that the petitioner had not been able to establish any claim to any private property belonging to the last Ruler.

213. There have however been instances where the President did not act strictly in accordance with what I conceive to be his power, duty or obligation to recognise or to withdraw recognition to a Ruler. A notable instance of this occurred soon after the commencement of the Constitution when recognition was withdrawn from Sir Pratap Singh, the Ruler of Baroda and his eldest son Yuvaraj Fatehsingh was purported to be recognised as the Ruler of Baroda under the powers conferred by Art. 366 (22). The order was served on Sir Pratap Singh on April 12, 1951. The trouble in this case originated with Sir Pratap Singh's attempt to foment trouble against the Union of India and his design to challenge the merger of Baroda. Full details of this episode are given in Mr. Menon's book from page 403 onwards. Some instances where there was no recognition of any successor to an erstwhile ruler occurred in the case of Baudhraj of Orissa, Nandgaon of Madhya Pradesh and Delath of Himachal Pradesh. In the first case the widow of the Raja was informed in May 1958 that "after consideration of the report submitted by Shri B. C. Das the President has decided not to recognise any successor to the late Raja Narayan Prasad Roy". There was no statement that the Rulership had lapsed. In the other two cases Rulership was said to have lapsed.

214. (e) The learned Attorney-General also argued that the rights given by Art. 291 and Art. 362 at best were imperfect obligations not enforceable in a Court of Law. In view of my conclusion on Article 363 I do not think it necessary to examine the decisions cited by him or make any pronouncement on his contention.

215. (f) The learned Attorney-General next submitted that assuming Article 366 (22) gave a right to be recognised as a Ruler and obligation to recognise, the enforcement of such right or obligation was barred by Article 363. According to him, claim to recognition arose from the covenant and not from Art. 366 (22). The covenant was signed by the Ruler as a Ruler and it was guaranteed by the Government of India. I have already dealt with the scope and content of Article 366 (22) and held that it is in-

extricably linked with the covenants, Merger agreements etc.

216. On the basis of the above contentions it cannot be said that the Government of India has not raised a dispute with regard to the right, power, obligation or duty to recognise and a correlated power or duty etc., to withdraw recognition.

217. However, in the light of historical facts i.e., the events preceding the Constitution, the covenants and the Merger agreements entered into by the Rulers uniformly providing for succession to the gaddi by the law and custom of the particular State, the guarantee thereof by the Government of the Dominion of India and the provisions of the Constitution perpetuating the payment of privy purses and mandate of due regard to the personal rights and privileges of the Rulers, the contention of the learned Attorney-General cannot find favour in a court of law. The covenants and Merger Agreements were undoubtedly political acts entered into by High Contracting Parties and as such they could not be enforced in a court of law. But once the Constitution of India took the field and the Rulers became citizens of India there could be no acts of States as against such citizens living in India.

218. The question however remains as to whether these are matters which can be adjudicated upon by the municipal courts in India.

219. This point would fall to be considered under Article 363 but before that one must refer to Article 291 which is the prop and pillar to the claim of privy purse. This article places the payment of privy purse on a constitutional foundation. It expressly refers to the covenants or agreements entered into by a Ruler of an Indian State before the commencement of the Constitution and provides for the disbursement thereof by directing that the sums shall be charged on and paid out of the Consolidated Fund of India. In effect it means that the guarantee given by the Government of India for the payment of sums free of taxes by way of Privy Purse under covenants or agreements etc., is to be worked out and discharged by ensuring that the said sums shall be charged on and paid out of the Consolidated Fund.

220. According to Mr. Palkhivala.

(1) Article 291 is mandatory. It creates new and independent rights and

obligations by being engraved in the Constitution and as such beyond the reach of the Legislature and the Executive. This new and independent right makes the article a self-ordaining and self-sustaining one. In cases where there is no dispute about the amount of the Privy Purse no question of any reference to the covenant arises.

(2) The amounts of Privy Purse guaranteed by Article 291 are the same as mentioned in the covenants but in other vital respects the provisions of Article 291 constitute a marked departure from the provisions of the covenants.

(3) First, whereas the liability under the covenant was that of the relevant State or the United State, it is made a liability of the Central Government under Article 291; secondly, the amounts of privy purses are charged on the Consolidated Fund of India for the first time; thirdly, the amounts are guaranteed to be exempt from all taxes on income whereas under the covenants the amount were to be free of all taxes whether imposed by the Government of the United State or Government of India.

(4) The covenants are referred to in the article only for the limited purpose of identifying the privy purses which are the subject matter of Article 291. The article cannot be said to relate to covenants merely because it refers to them for the limited purpose of identifying the privy purses.

(5) Once Article 291 is held to be mandatory there can be no dispute as to whether the privy purse will or will not be paid. In other words Article 363 only refers to bona fide disputes and not disputes which would merely amount to a mockery of the Constitution.

(6) The principle of harmonious construction would have to be applied. Article 363 cannot be so construed as to violate the effect and mandate of Articles 112, 113, 114, 291 and 366 (22). Article 366 (22) would be violated because one of the main legal effects of recognition under that article is to entitle the recognised Ruler to the privy purse and denial of the Privy Purse would stultify one of the main objects of recognition.

(7) The second limb of Article 363 read along with the first makes it clear that the whole object is to prevent disputes arising from covenants being raised in the garb of enforcing a right confer-

red by a provision of the Constitution. In the present series of cases Article 363 does not apply since there is no dispute as to rights arising from the covenant and the constitutional provisions merely guarantee that right.

(8) In any view of the matter any decision to repudiate the obligations under Article 291 would be mala fide and ultra vires. The power or jurisdiction cannot avail an authority to make an order or decision which is mala fide and ultra vires because such an order or decision is a nullity and the bar of jurisdiction under Article 363 cannot be pleaded to protect a nullity.

221. The submissions of the learned Attorney-General were:

(a) The right to privy purse which accrues under Article 291 clearly relates to a covenant: hence Article 363 bars any dispute in respect of such a right or recognition. The Constituent Assembly Debates go to show that this article was meant to give constitutional recognition to guarantees given by the Government of India and provided for the expenditure being charged on the Central revenues subject to such recoveries as might be made from time to time from the Provinces and States in respect of these payments. It did not create any new and independent right unrelated to the covenant.

(b) The second limb of Article 363 bars any dispute under Article 291 as would be apparent from the correspondence between Shri V. P. Menon, the Secretary to the Ministry of States and S. N. Mukherjee.

(c) Article 291 which gave constitutional guarantee to those demands embodied constitutional sanction for the due fulfilment of the Government of India's guarantees and assurances in respect of privy purses.

(d) The covenant was an act of State and any violation of its terms cannot form the subject of any action in any municipal courts. The guarantee given by the Government of India was in the nature of a treaty obligation contracted with the sovereign Rulers of independent States and cannot be enforced by action in municipal courts; its sanction is political and not legal; on the coming into force of the Constitution of India the guarantee for payment of periodical sums as privy purse is continued by Art. 291 of the Constitution but its essential political character is preserved by Art. 363

of the Constitution. Article 363 in effect recreated paramountcy and barred the adjudication of any dispute which had its seed in acts of State by any court of law.

(e) A charge on the Consolidated Fund of India only means that it shall not be submitted to the vote of Parliament as provided in Article 113 (1). It does not by itself create an independent right in the recipient.

(f) Article 291 arose out of an act of State to give constitutional recognition to a right which was previously unenforceable.

(g) Assuming that Article 291 by itself created a new right and a new obligation the article related to a covenant on the face of it and as such is barred by Article 363.

222. In my view, it is not necessary to examine all the contentions raised for and against the petitioner for the final conclusion to be arrived at. There can be no doubt that the provision of Article 291 was not a mere declaration of pious intention which the executive could disregard at its whim or pleasure. So long as it finds a place in the Constitution it was meant to be acted upon. It was meant to assure the Rulers that the privy purses which were contained in the covenants and agreements guaranteed by the Government of the Dominion of India were to be fully honoured and not cast away on a false morass of public opinion or buried under acts of State. No doubt the covenants or Merger agreements were acts of State but when the framers of the Constitution came to provide for the Rulers by giving them assurance of continuance of the payment of privy purse and regard to their personal rights and privileges by enshrining them in the Constitution, in my view they never contemplated that the same was to be the play-thing of the executive. It was by the incorporation of Articles 291 and 362 that the Constitution-makers were able to get the willing consent and co-operation of the Rulers to be brought within the fold of the Constitution. As observed by Sardar Vallabhbhai Patel the settlements with the Rulers were overall settlements taking all the pros and cons of the situation into consideration—the aspirations and ambitions of the people of the States, their wish and desire to get independence of the same type which their brethren in the erstwhile British India had obtained, their right and deter-

mination to have a voice in the administration of the country through their elected representatives, their zeal for getting out of the arbitrariness of some of the Rulers, no less than the wish and desire of the Rulers to honour and accept the desires and ambitions of their people coupled with a desire to live in peace at least with a part of their denuded status, their decimated right to property and a fraction of the personal privileges to which they were previously entitled. As Sardar Vallabhbhai Patel put it:

“The privy purses and the guarantee as to personal rights and privileges was the quid pro quo for the parting of their powers and their huge States by the Rulers and was the minimum which could be afforded to them.”

Sardar Vallabhbhai Patel speaking in 1949 said that human memory was proverbially short and that in October 1949 people might not remember what had taken place in the years preceding, namely, the tremendous upheaval in the country since 1946 and the possibility of the Rulers taking sides with States or peoples not favourably disposed towards India. Only twenty years have passed since then.....too short a period to sweep overboard all that took place during the memorable years preceding the commencement of the Constitution. The old order must change yielding place to new but the change should not be cataclysmic at the sacrifice of the interests of fairly large number of persons who had helped to consolidate India in a manner far different from anything that had taken place in the past. However that may be, we are only concerned with the legal aspect, the morals being for the country at large through their elected representatives to decide.

223. Article 291 was undoubtedly meant to put the guarantee as to payment of privy purses contained in the covenants and agreements on a firm and sure footing. But it was not completely dissociated from the covenants. It has a link with the covenants which were partially projected into the Constitution. This article has its base in the covenants. Its object was to give a lasting and permanent setting to the term in the covenants as to payment of privy purses. I find myself unable to hold that the article does not relate to a covenant. In my view it deals with a portion.....the main portion of the entire stream of the covenant and makes it flow along a parti-

cular and well-defined channel.....a channel which is not only well-defined but with a solid foundation and sides.

224. Counsel on both sides were at pains to show what the effect of the expression 'charged on and paid out of the Consolidated Fund of India' meant. According to the learned Attorney-General and Mr. Mohan Kumarmangalam who followed him, the expression "charged on" was only a form of expression used for the purpose of financial estimates and Appropriation Bills. It was meant to distinguish certain items in the Appropriation Bills from grants which were votable at the will of Parliament and the further direction for paying out thereafter did not advance matters. According to Mr. Palkhivala who referred to some of the financial provisions in the Constitution, a security was created thereby on the Consolidated Fund, that there was something akin to a pledge of it for the payment of the privy purse giving rise to a new right. In my view whatever the nature of their right it is related to the covenants and as such within the fold of Article 363.

225. Before referring to any decision on the point it may be useful to make an attempt to define the scope of Article 363 as if it was a case of first impression. The article purports to override all other provisions of the Constitution excepting Article 143 in respect of recourse to any court of law for settlement of any disputes covered by it. Article 143 is a provision enabling the President of India to obtain the opinion of this Court by a reference on any question of law or fact of such public importance as merits a scrutiny by the highest court of the land. Article 143 is only an enabling provision but its scope is so wide that on any question of public importance—be it one of law or fact—the President may refer to this Court for its opinion. Save for the power of the President to refer a matter to this Court for its opinion under Article 143, Article 363 imposes an absolute bar on the jurisdiction of all courts to adjudicate upon disputes covered by it. Of necessity, the bar must apply to Article 32 also. Under the last mentioned article the Constitution reserves to everybody entitled to any right covered by Part III i. e. the fundamental rights, to move this Court. The amplitude of the right and the kind of directions which may be issued to enforce that right are contained

in various clauses of the article. None of these clauses override the all embracing provision of Article 363. Rights, be they fundamental or otherwise which form the subject of any dispute covered by this article must alike come under its bar.

226. The disputes which fall within this bar may be of two kinds. Under the first limb of the article any dispute arising out of any provision of a treaty, engagement, covenant, sanad or other similar instrument which was entered into or executed before the 26th January 1950 by any Ruler of an Indian State and to which the Dominion of the Government of India or any of its predecessor Governments was a party and which is or has been continued in operation after the said date, are not to be the subject matter of any judicial proceedings.

227. Clearly, therefore, any one seeking to have his rights adjudicated upon on the basis of a covenant or agreement or Merger agreement or Instrument of Accession would be debarred from coming to court and ventilate his grievance about any violation of his right.

228. Under the second limb of the article fall disputes in respect of any right accruing under or any liability or obligation arising out of any provisions of the Constitution relating to any treaty, agreement etc. To see whether any dispute falls within this limb one must examine the content of the right or the limit of the liability or obligation arising out of any constitutional provision which provision in its turn must relate to any treaty, agreement etc. Dispute means any contradiction or controversy. When a person asserts or claims a right in respect of a subject matter and another person contradicts it or denies it, there is a dispute. Disputes may be many and of various kinds. It may relate to a question of fact or a question of law which again may be a very simple or a complicated one. A question of law may arise about the interpretation of a contract; equally it may arise about the interpretation of the provisions of the Constitution. But whatever be the quality or the nature of the controversy it would be a dispute short of somebody trying to raise a contention which was absurd on the face of it e. g., that 'black means white'.

229. The right, liability or obligation in dispute must arise out of the provisions of the Constitution which has any bearing on any treaty, agreement, covenant, engagement etc. The expression "relating to" means *inter alia* "stand in some relation, to have bearing or concern, to pertain, to refer, to bring into association with or connection with".

230. In my view Article 291 is undoubtedly a provision of the Constitution relating to covenant, agreement etc. As I have already indicated Article 291 is not merely a provision for finding out the amount of the liability of the Dominion of India by way of privy purse to a Ruler. It expressly refers to covenants or agreements entered into by the Ruler under which payment of sums free of tax had been guaranteed or assured by the Government of the Dominion of India as privy purse and gives the term as to privy purse a new shape and form. Article 291 not only refers to the covenant, engagement etc. but certainly has a bearing on or concern with the same and is brought into association or connection with the same.

231. As already indicated, the article seeks to instil life and vigour into the term for payment of privy purse in the covenant by creating a new channel leading out of the guarantee of the Government of the Dominion of India which was no longer in existence and making it flow along a constitutional course by putting the liability of the Union of India for payment of the sums beyond any controversy. The article places the payment beyond the reach of voting by Parliament and expressly directs that the moneys shall be paid out of the Consolidated Fund of India and that the sums so paid shall be exempt from all taxes of income. I find myself unable to accept the argument of Mr. Palkhivala that for the purpose of Article 291 a reference to the covenants is only called for to find out the amount of privy purse. If that was the sole object of the article it might well have been achieved by using the following words or words to the like effect:

"all sums of money mentioned as privy purse of Rulers of Indian States in any engagements entered into by them and to which the Government of the Dominion of India was a party, shall be charged on and paid out of the Consolidated Fund of India."

If one was asked whether and if so, how the Constitution had dealt with the rights of the Rulers to Privy purses contained in the covenants and Merger agreements guaranteed by the Government of India, the answer would have to be that the same has been recognised and perpetuated in Article 291 making assurance doubly sure by directing the charging of the Consolidated Fund with the amounts thereof and payment thereof without deduction of income-tax. So considered Article 291 must be held to be an article of the Constitution relating to covenants or Merger agreements and any dispute as to payment of privy purse would come under the bar of Article 363.

232. Article 363 has come up for consideration before this Court in a number of cases and reference has been made to this article quite frequently in several decisions. In one of the earliest decisions of this Court in *State of Seraikella v. Union of India*, 1951 SCR 174 = (AIR 1951 SC 253) the Court had to consider whether a suit filed on the 15th January, 1950 (before the commencement of the Constitution) under the Original Jurisdiction of the Federal Court for a declaration that the various orders under which the State of Seraikella came to be administered as a part of Bihar and the laws under which those orders were made were *ultra vires* and the Province of Bihar had no authority to carry on the administration of the State, was dismissed by a majority of the Judges of this Court as being barred by Art. 363. Among the contentions urged there was one that the suit which was filed before the 26th January, 1950 stood transferred to Supreme Court under Article 374 (2) of the Constitution and that the Bar of Article 363 was only prospective and not retrospective. Kania, C. J. observed that the all-embracing opening words of Article 363 overrode the operation of Article 374 (2). The learned Chief Justice also said:

"If the plaintiff contends that that agreement (agreement of 15th December, 1947) is not binding on it, it cannot enforce its rights under the original jurisdiction of the Court. If the plaintiff has a grievance and a right to a relief which the defendants contend it has not, the forum to seek redress is not the Supreme Court exercising its original jurisdiction on the transfer of the suit from the Federal Court."

In *Sudhansu Shekhar Singh Deo v. The*

State of Orissa, 1961-1 SCR 779 = (AIR 1961 SC 196) the Ruler of the erstwhile State of Sonapur in Orissa which had merged with Orissa complained of a violation of his rights and privileges by the inclusive definition of a "person" in Section 2 (1) of the Orissa Agricultural Income Tax Act, 1947 (Orissa Act 24 of 1947). His case in substance was that as a Ruler of a State he had been immune from payment of agricultural income-tax when it was imposed in 1947 and by articles IV and V of the Merger agreement executed by him, the Dominion of India had guaranteed to him all his personal rights, privileges etc. and so the attempt to tax his private property violated that guarantee. In dismissing his appeal this Court referred to Article 362 and observed:

"If, despite the recommendation that due regard shall be had to the guarantee or assurance given under the covenant or agreement, the Parliament or the Legislature of a State makes laws inconsistent with the personal rights, privileges and dignities of the Ruler of an Indian State, the exercise of the legislative authority cannot, relying upon the agreement or covenant, be questioned in any court, and that is so expressly provided by Article 363 of the Constitution."

1965-3 SCR 201 = (AIR 1965 SC 1798) was a case where the respondent had taken execution proceedings in enforcement of an award and a prohibitory order under Order 21, Rule 46, Civil Procedure Code was passed in respect of the sums payable to the appellant by the Central Government on account of privy purse. One of the contentions urged on behalf of the appellant was that the privy purse was a political pension within the meaning of Section 60 (1) (g) of the Civil Procedure Code and as such protected from the execution proceedings. Relying upon the decisions of the Judicial Committee in *Bishambar Nath v. Nawab Imdad Ali Khan*, (1890) 17 Ind App 181 and *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.*, 58 Ind App 215 = (AIR 1931 PC 160) the Court came to the conclusion that privy purses were political pensions. The Court also referred to Articles 291 and 363 of the Constitution and observed that "the covenant entered into by the Rulers of Madhya Bharat State was a treaty entered into by the Rulers of independent States by which they gave up their sovereignty over their respective territories

and vested it in the new United State of Madhya Bharat. The covenant was an act of State, and any violation of its terms cannot form the subject of any action in any municipal courts. The guarantee given by the Government of India was in the nature of a treaty obligation contracted with the sovereign Rulers of Indian States and cannot be enforced by action in municipal courts. Its sanction is political and not legal. On the coming into force of the Constitution of India, the guarantee for payment of periodical sums as privy purse is continued by Article 291 of the Constitution, but its essential political character is preserved by Article 363 of the Constitution and the obligation under this guarantee cannot be enforced in any municipal court." With all respect, it appears to me that all the above was not strictly necessary for the decision of the case and it would have been enough to say that privy purse was a pension — a word which according to the Oxford Dictionary means, "a periodical payment made specially by a Government, company, employer etc." — which was political in nature because it was based on a political settlement. However, it was not the expression of opinion of only one learned Judge but the unanimous view of three learned Judges of this Court. In 1970-2 SCR 631 = (AIR 1970 SC 1946) (supra) a Bench of another five learned Judges of this Court have pronounced on the non-enforceability of the provision for payment of privy purse under Art. 291 by resort to legal proceedings. In my view, on the reasoning already given by me it must be held that the payment of privy purse although placed on a pedestal which defies annihilation or fragmentation as long as the abovementioned constitutional provisions enure is still subject to the constitutional bar of non-justiciability and cannot be upheld or secured by adjudication in a court of law including this Court.

233. Mr. Palkhivala however tried to cut across the argument of the learned Attorney-General that a dispute which fell under either limb of Article 363 of the Constitution was not justiciable by urging that if the act complained of was ultra vires or a nullity, the jurisdiction of the courts of law would not be excluded and this would apply with greater force to denial of a petitioner's right to the property of privy purse i. e. a fundamental right and the solemn duty

of this Court to uphold the same. To support this plea under this head he referred to a fairly large number of decisions of this Court where it had been held that an order which was a nullity or which was mala fide or ultra vires would not stand in the way of the exercise of jurisdiction of a court of law to strike it down. The notable decisions of this Court are the following:

Pratap Singh v. The State of Punjab, 1964-4 SCR 733 at p. 773 = (AIR 1964 SC 72 at p. 97), Makhan Singh v. State of Punjab, 1964-4 SCR 797 = (AIR 1964 SC 381), R. M. Lohia v. State, 1966-1 SCR 709 = (AIR 1966 SC 740), Ram Swarup v. Shikar Chand, 1966-2 SCR 553 = (AIR 1966 SC 893), Sadanandan v. Kerala State, 1966-3 SCR 590 = (AIR 1966 SC 1925), Jaichand Lal v. West Bengal, 1966 Supp SCR 464 = (AIR 1967 SC 483), Raja. Anand v. U. P. State, 1967-1 SCR 373 = (AIR 1967 SC 1081), Dhulabhai v. Madhya Pradesh, 1968-3 SCR 662 = (AIR 1969 SC 78). He also relied on several English decisions, namely, The General Assembly of Free Church of Scotland v. Lord Over Town, 1904 AC 515, R. v. Bryant, 1956-1 All ER 341 and Anismimic Ltd. v. Foreign Compensation Commission, 1969-1 All ER 208.

234-235. The first case 1964-4 SCR 733 = (AIR 1964 SC 72) (supra) was one where the appellant who was civil surgeon in the employment of the State of Punjab challenged the legality of the orders of suspension, revocation of leave, retention in service after the date of superannuation and institution of the departmental inquiry against him inter alia on the ground that the same were mala fide passed at the instance of the Chief Minister who was personally hostile to him in order to wreak vengeance on him. The power exercised by the Government in that case rested on service rules the proper application of which is always subject to scrutiny by courts of law. Examining the content of the power vested in the Government to pass the impugned orders the Court observed that "the use of that power for achieving an alien purpose — wreaking the minister's vengeance on the officer would be mala fide and a colourable exercise of that power, and would therefore be struck down by the Courts". The second case 1964-4 SCR 797 = (AIR 1964 SC 381) (supra) was one where the appellants contended that Sections 3 (2) (15) (i) and 40 of the Defence of India Act, 1962 and

Rule 30 (1) (b) of the Defence of India Rules were unconstitutional and invalid as they contravened the fundamental rights of the appellant inter alia under Articles 14, 21 and 22. The petitions had been dismissed by the High Court on the ground that the Presidential Order which had been issued under Art. 359 of the Constitution created a bar which precluded them from moving the High Court under Section 491 (1) (b) of the Cr. P. C. This Court held (p. 827 of SCR) = (at p. 399 of AIR):

"If in challenging the validity of this detention order, the detenu is pleading any right outside the rights specified in the Order, his right to move any court in that behalf is not suspended because it is outside Article 359 (1) and consequently outside the Presidential Order itself."

236. The observation amounts to saying that the Presidential Order suspending the right to move a court of law can only apply within the proper ambit of the President's power and the same cannot be used by the executive as a cloak to shield any misuse of that power.

237. With regard to the allegation of mala fides it was observed that:

"It is hardly necessary to emphasise that the exercise of a power mala fide is wholly outside the scope of the Act conferring the power and can always be successfully challenged."

The third case (1966) 1 SCR 709 = (AIR 1966 SC 740) (supra) was one in which the petitioner moved this Court under Article 32 of the Constitution challenging the order of a District Magistrate and asking for his release on various grounds, inter alia that though an order of detention could be made to prevent acts prejudicial to the maintenance of public order it could not be made to prevent acts which were only prejudicial to law and order as distinct from public order. It was there observed by our present Chief Justice that:

"where statutory powers are conferred to take drastic action against the life and liberty of a citizen those who exercise it may not depart from the purpose. Vast powers in the public interest are granted but under strict conditions. If a person, under colour of exercising the statutory power, acts from some improper or ulterior motive, he acts in bad faith. The action of the authority is capable of being viewed in two ways. Where

power is misused but there is good faith the act is only ultra vires but where the misuse of power is in bad faith there is added to the ultra vires character of the act, another vitiating circumstance. Courts have always acted to restrain a misuse of statutory power and the more readily when improper motives underlie it."

The provision of law which came up for consideration there was the Defence of India Rules and his Lordship laid down that powers given by such rules could be used only within the limits prescribed. (1966) 2 SCR 553 = (AIR 1966 SC 893) (supra) was a case in which the appellants complained of refusal of permission to sue their tenants by the District Magistrate under Section 3 (1) of the U. P. Act 3 of 1947. The said section provided that

"Subject to any order passed under sub-section (3) no suit shall, without the permission of the District Magistrate, be filed in any Civil Court against a tenant for his eviction from any accommodation except on one or more of the following grounds."

Sub-section (2) enabled the party aggrieved by the order of the District Magistrate to go up in revision to the Commissioner and Section 7-E provided for revisional powers to the State Government in very wide terms. Section 16 of the Act in terms provided that the order made under the Act to which Sec. 3 (4) applied was not to be called in question in any court. There it was observed:

"... but the exclusion of the jurisdiction of the civil courts must be made by a statutory provision which expressly provides for it, or which necessarily and invariably leads to that inference. In other words, the jurisdiction of the civil courts can be excluded by a statutory provision which is either express in that behalf or which inevitably leads to that inference."

The bar of jurisdiction of the court of law came up for consideration in two notable cases decided by the Judicial Committee of the Privy Council. Secretary of the State v. Mask and Co., 67 Ind App 222 = (AIR 1940 PC 105) was a case in which a suit was filed by the respondent to recover the excess amount collected from them, under protest, by levying duty upon a tariff and not on ad valorem basis. The main question for determination in the appeal was whether the order passed by the Collec-

tor of Customs under the provisions of Section 183 of the Sea Customs Act, 1878 against the assessment of duty by the officer of Customs and which was subsequently affirmed on revision under the provisions of Section 191 of the Act, constituted a final adjudication or whether the civil courts had jurisdiction to entertain the suit of the respondents. Section 188 provided that

"every order passed in appeal under this section shall, subject to the power of revision conferred by Section 191, be final".

While rejecting the respondents' contentions including inter alia that an exclusion of the subject's right of resort to the civil courts would be ultra vires of the Indian Legislature in view of the provisions of Section 32 of the Government of India Act, 1915 the Board referred to the well known principle of law laid down in *Wolverhampton New Waterworks Co. v. Hawkesford*, (1859) 6 CB (NS) 336 approved by the House of Lords in *Neville v. London "Express" Newspaper, Ltd.*, 1919 AC 368 and adopted on the basis of these decisions the dictum that:

"Where a liability not existing at common law is created by a statute which at the same time gives a special and particular remedy for enforcing it" the party must adopt the form of remedy given by the statute. It was also observed:

"It is settled law that the exclusion of the jurisdiction of the civil courts is not to be readily inferred, but that such exclusion must be either explicitly expressed or clearly implied. It is also well settled that even if jurisdiction is so excluded, the civil courts have jurisdiction to examine into cases where the provisions of the Act have not been complied with, or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure."

In *Raleigh Investment Co. Ltd. v. Governor-General in Council*, (1947) 74 Ind App 50 the bar of jurisdiction of civil courts in regard to income-tax proceedings was contained in S. 67 of the Indian Income-tax Act, 1922 providing:

"no suit shall be brought in any civil court to set aside or modify any assessment made under this Act, and no prosecution, suit or other proceeding shall lie against any officer of the Crown for anything in good faith done or intended to be done under this Act."

The argument for the appellant was that an assessment was not "made under the Act" if it gave effect to a provision which was ultra vires the Indian Legislature and that in law such a provision was a nullity and non-existent. The Board held that there was ample provision in the Income-tax Act by which an assessee could question the validity of any taxing provision in the statute which provided effective and proper machinery for review on grounds of law of any assessment. Further according to the Board: "...assessment made under this Act" is an assessment finding its origin in an activity of the assessing officer acting as such. The circumstance that the assessing officer has taken into account an ultra vires provision of the Act is in this view immaterial in determining whether the assessment is "made under this Act".....

Jurisdiction to question the assessment otherwise than by the use of the machinery expressly provided by the Act would appear to be inconsistent with the statutory obligation to pay arising by virtue of the assessment."

238. It may be noted that this authority has not found favour with this Court.

239. Most of the other decisions which were cited by Mr. Palkhivala were cases where liability under various Sales Tax Acts was questioned. I do not find it necessary to examine these cases in any detail because of the lucid exposition of the law on the subject in (1968) 3 SCR 662 = (AIR 1969 SC 78) (supra), a case arising out of the Madhya Pradesh Sales Tax Act 30 of 1950 which by S. 17 provided that:

"Save as is provided in Section 13, no assessment made and no order passed under this Act, or the rules made hereunder by the assessing authority, appellate authority or the Commissioner shall be called in question in any Court and save as is provided in Sections 11 and 12 no appeal or application for revision shall lie against any such assessment or order." In the unanimous judgment of this Court it was observed:

".....jurisdiction of the civil court is all-embracing except to the extent it is excluded expressly by clear intent arising from such law."

Referring to Mask and Co.'s case, 67 Ind App 222 = (AIR 1940 PC 105) (supra) and Raleigh Investment Co.'s case, 74

Ind App 50 = (AIR 1947 PC 78) (supra) it was said that:

"Both these cases thus appear to be decided on the basis of provisions in the relevant Acts for the correction, modification and setting aside of assessments and the express bar of the jurisdiction of the civil courts. The presence of a section barring the jurisdiction was the main reason and the existence of an adequate machinery for the same relief was the supplementary reason."

Referring to the dicta in *Circo's Coffee Co. v. State of Mysore*, (1967) 19 STC 66 (SC) and *C. T. Santhulanathan Chettiar v. State of Madras*, Civil A. No. 1045 of 1966, D/- 20-7-1967 (SC) the learned Chief Justice observed:

".....the question of validity of the taxing laws is always open to the civil courts for it cannot be the implication of any provision to make such a decision final or that even void or invalid laws must be enforced without any remedy."

240. The result of the enquiry into the views expressed by this Court in a large number of cases was summed up at pages 682-683 (of SCR) = (at pp. 89, 90 of AIR) in seven propositions. It is not necessary to set out the propositions as they all relate to exclusion of jurisdiction of the civil court by express provisions of law or clear implications therefrom.

241. But a constitutional provision of the kind of Art. 363 transcends this kind of consideration. All that the Court has to see is whether the dispute falls within either limb of the article. If the dispute is so covered the court is precluded from examining whether the contention of the party asserting a right was genuine or of real substance. Equally the bar will apply where a party denying the right asserted or contesting the claim put forward is guilty of action which on the face of things appears to be arbitrary if there be some scope for raising the plea in denial or contradiction. I have taken the view that the President's power or right or duty or obligation to recognise a person as a Ruler arises not merely out of the provisions in Article 366 (22) but also the covenants, Merger agreements or Instruments of Accession the dispute is one which arises out of a provision of the Constitution relating to a treaty, agreement, covenant etc. in terms of Article 363 of the Constitution. A dispute as to right to privy

purse, as already examined, attracts the same bar.

242. With regard to Art. 366 (22) read with Article 363 it may be safely asserted that it could have never crossed the minds of the makers of the Constitution that in devising a key for the recognition of the Rulers and at the same time protecting them and the Government of India from disputes based on or about pre-Constitution covenants, agreements etc. they were forging a weapon with which the Government of the day could destroy them all and seek shelter behind a total embargo on litigation to vindicate their rights. The debates of the Constituent Assembly to which reference has already been made show that Article 363 was inserted for the purpose of giving a quietus to any dispute which anyone might seek to raise on the basis of covenants and Merger agreements or rights flowing therefrom. In my opinion, the object was as much to save the Rulers who had entered into covenants or agreements etc. from their rivals or kinsmen coming to court to upset the covenants, agreements etc. as to shield the Government of India from attempts on the part of rulers to rip open the covenants, agreements or to seek recourse to law for establishing their rights.

243. I also take the opportunity of remarking that if ever there was an occasion for the President to make a reference to this Court the present was eminently suited to the purpose. Notwithstanding the wide sweep of the provision for ousting the jurisdiction of courts as regards disputes covered by it Article 363 gave express power to the President to have the opinion of this Court to guide himself by and when disputes of such public importance were agitating the minds of members of Parliament and of the Cabinet it was not only his right but his duty to consult this Court.

244. I do not think it necessary to express any opinion on the rights or privileges covered by Article 362 of the Constitution because prima facie they are relatable to the guarantees or assurances given under the covenants or agreements referred to in Article 291. How much regard Parliament or Legislature of States are to pay to such guarantees or assurances is for the appropriate Legislatures to consider. I may only add that the Constitution-makers could not have contemplated exemption from the im-

sitions such as those under the Wealth Tax Act and the Gift Tax Act inasmuch as such taxing provisions probably were not contemplated at the time. The Government of India in its graciousness saw fit to exempt the Rulers from the operation of these and many other statutes which are still on the statute book. The occasion for considering such statutes has not arisen yet and they may be left for future consideration.

245. Mr. Palkhivala's plea that the act of the President resulted in the destruction of the institution of Rulers and as such was invalid does not bear scrutiny. The orders if valid would operate in the case of each Ruler and have been challenged by the petitioning Rulers in their individual capacity. No body of persons known to law can be called an institution of Rulers. According to the figures given by Mr. Palkhivala himself Rulership of over one hundred States has lapsed during the last twenty years and the process may go on till no Rulers are left. In this case we are concerned with the rights of individual Rulers and not of them as a class.

246. In the result I have to hold that this series of petitions is not maintainable remarking, at the same time, that the action of the President appears to be unjustified. The President may, if he chooses, guide himself by the exposition of the law as made above. What a stroke of the pen has done may be undone by another stroke of it. "Because right is right", the President it is hoped, would "follow right" as "wisdom in the scorn of consequence". I would leave the parties to bear their own costs.

HEGDE, J.:— 247. These petitions under Article 32 of the Constitution present for decision common questions of law. In each of these petitions the petitioner therein prays for the following reliefs:—

(1) a writ, direction or order declaring the order of the President dated the 6th September, 1970 to be unconstitutional, ultra vires and void and further to quash the same;

(2) a writ, direction or order declaring that the petitioner continues to be the Ruler and as such continues to be entitled to the Privy Purse and to his personal rights and privileges as a Ruler;

(3) a writ, direction or order directing the Union of India to continue to pay to the petitioner the Privy Purse to

which the petitioner is entitled and to continue to recognize his Rulership and the personal rights and privileges and to implement and observe the provisions of the Covenant/Merger Agreement entered into between the Ruler of Gwalior and the Government of India; and

(4) such other further orders as the nature and circumstances of the case may require.

248. For pronouncing on the questions arising for decision it is sufficient if I refer to the facts pleaded in any one of the cases. Hence I shall deal with the facts and pleas put forward in Writ Petition No. 376 of 1970. Therein the petitioner's case is as follows:

249. His father was the Ruler of Gwalior prior to August, 15, 1947. He signed the Instrument of Accession on August 15, 1947. The same was accepted by the Governor General of India on August 16, 1947. Under the Instrument of Accession, he made over to the Dominion of India three subjects viz., Defence, External Affairs and Communications. On April 24, 1948, he signed a Covenant with several other Rulers as a result of which the State of Madhya Bharat came to be formed on June 15, 1948. Thereafter Madhya Bharat merged with the Union of India. After the Constitution of India came into force, the President recognised the father of the petitioner under Article 366 (22) of the Constitution as the Ruler of Gwalior. After the death of the petitioner's father, the petitioner succeeded to the Gaddi on July 16, 1961 and thereafter he was duly recognised by the President under Article 366 (22). Ever since the merger of the State with the Union of India, the petitioner's father and later on the petitioner was being paid the Privy Purse guaranteed under Art. 291 of the Constitution. The petitioner is entitled to Privy Purse of Rs. 10 lacs per year. He is also entitled to other rights and privileges arising from the Covenants.

250. Prior to August 15, 1947, the Ruler of Gwalior was a Sovereign though his sovereignty was subject to the paramountcy of the British Crown; but that paramountcy lapsed on August 15, 1947 as a result of the Indian Independence Act, 1947. Consequently the Ruler of Gwalior as well as other Rulers became absolute Sovereigns. In law they were free to accede to either of the two Dominions of India and Pakistan or to remain independent. But by stages the

Indian States adjoining the Dominion of India merged in the Dominion of India. After their merger the Rulers of those States had no ruling powers. They had only such rights and privileges as were recognized or created under the Covenants entered into by them with the Government of India and those embodied in the Constitution. On the coming into force of the Constitution all the former Rulers of the Indian States that had merged with the Dominion of India as well as their quondam subjects became citizens of India having all the rights and duties of citizens of this country. From about 1967, there was a move in the ruling party to abolish the privy purses guaranteed to the Rulers under the Constitution as well as the privileges guaranteed to them under the Covenants and agreements recognised in Article 362. Consequently the Government moved in the Lok Sabha on September 2, 1970, the Constitution (Twenty-fourth) Amendment Bill, 1970 to delete certain provisions of the Constitution relating to the guarantees given to the Rulers about their privy purses as well as privileges. That bill was passed in the Lok Sabha but it failed to get the requisite majority in the Rajya Sabha. The motion for consideration of the bill was rejected at about 4-30 p.m. on September 5, 1970. The same evening the Union Cabinet met and decided to advise the President to withdraw the recognition of the Rulers so that the privy purses and privileges guaranteed to the Rulers may be abolished. On the same night, the President purporting to act under Cl. (22) of Article 366 of the Constitution signed in his Camp at Hyderabad an Instrument or Instruments withdrawing recognition of all the Rulers. After obtaining his signatures, the concerned document or documents were flown back to Delhi the same night and the impugned orders issued on September 6, 1970. On the strength of these orders, the Government of India asserts that all the Rulers in India had been de-recognized and consequently none of them is entitled to the rights and privileges to which they were entitled as **Rulers**.

251. It is contended on behalf of the petitioners that in exercise of his powers under Article 366 (22) of the Constitution, the President is not competent to abolish Rulers as a class and therefore the impugned orders are nullity. The further contention of the petitioners is that the rights conferred on them under

Articles 291 and 362 of the Constitution as well as under various statutory provisions or rules having the force of law are fundamental rights and as such they cannot be abolished by an executive order. It is said the impugned orders contravene Articles 19 (1) (f), 21, 31 (1), 31 (2), 51 (3) and 73 (1) of the Constitution. According to the petitioners Article 291 is a mandatory provision and it is not open to the Government to refuse to obey the mandate of the Constitution. The petitioners also complain that in making the impugned orders, the President not only acted outside the scope of Article 366 (22) of the Constitution but he also thereby violated Articles 53 (1) 60, 73 (1), 362, 291, 112 to 114 of the Constitution. The petitioners' further grievance is that under various statutes as well as under the Merger Covenants they are entitled to certain privileges; the President by purporting to take away those privileges has contravened Arts. 14 and 21 of the Constitution. It is also said that the Council of Ministers were guilty of mala fides in advising the President for making the impugned orders for collateral reasons and for the sake of political exigencies. According to the petitioners, Article 363 of the Constitution does not bar the jurisdiction of the Court in granting the reliefs prayed for by them.

252. The respondent in its reply does not deny that the object of the impugned orders was to abolish the Rulers as a class. It contends that the present policy of the Government is not to have any Rulers in this country or to allow them any rights or privileges as Rulers. It is contended that the respondent has right to abolish Rulership in exercise of its power under Art. 366 (22) which power according to it is a sovereign power; the decision of the Government to abolish Rulership is a political decision and as such the same is not open to be questioned in municipal courts; the rights conferred under the relevant Covenants are not perennial and are inherently temporary in character and are liable to be varied or repudiated in accordance with the State Policy in the interests of the people. It is further pleaded that a fiduciary duty is cast upon the Government not to continue feudal institutions and anachronistic systems against the interests of the people; to respect and give effect to the needs and wishes of the people and to the will of the representatives of the

people, the impugned orders have been passed. According to the respondent this Court is precluded from going into the validity of the impugned orders in view of Article 363. As regards Article 291, the plea taken by the respondent is that it confers no legal right on the Rulers. That Article merely lays down the source and method of payment of the Privy Purses. The respondent takes the stand that this Court cannot go into the scope or effect of Article 291, in view of Article 363. So far as the Covenants and Agreements are concerned it is urged on its behalf that the rights, liabilities or obligations arising therefrom are outside the jurisdiction of this Court firstly because they arise from political agreements between High Contracting Parties and secondly because of the bar under Article 363. It is next contended on behalf of the respondent that neither under the Covenants nor under any of the provisions of the Constitution any fundamental right was conferred on any Ruler and hence the petition under Article 32 is not maintainable. It is also urged on behalf of the respondent that Article 362 of the Constitution does not confer any right on the Rulers and any failure to obey the direction given in that Article, does not lead to any violation of the provisions of the Constitution.

253. From the pleadings, the following issues arise for decision:

(1) What is the scope of Clause (22) of Article 366? Does it confer on the President power to abolish Rulership? Are the impugned orders invalid for any of the reasons mentioned in the Writ Petitions?

(2) Does Article 291 impose any mandatory duty on the Government and confer corresponding rights on the Rulers?

(3) What is the scope of Article 362?

(4) Does Article 363 exclude the jurisdiction of this Court from considering whether the impugned orders are ultra vires the powers of the President and whether there has been any violation of Articles 291 and 362 of the Constitution?

(5) Are these petitions under Art. 32 of the Constitution maintainable? What fundamental rights of the petitioners, if any, have been infringed and

(6) What relief, if any, the petitioners are entitled to in these petitions?

254. Before proceeding to consider and pronounce on the issues formu-

lated above it would be useful to briefly refer to the historical background leading to the merger of the Indian States in the Indian Union as both the petitioners and the respondent have laid great stress on the same. During the time of the British rule, there were over 500 Indian States possessing varying degrees of sovereignty. In the matter of internal administration, most of the Rulers had complete freedom. But their sovereignty was subject to the treaties, engagements and sanads entered into by them with the British Crown and also the paramountcy of the British Crown. Paramountcy was an undefined concept. It was an all pervading power. The Butler Committee declined to define its scope but said that "paramountcy was paramount". Paramountcy meant just what the British Government chose it to mean. It was a convenient fiction devised by the imperial power to further its imperial interest. Paramountcy did not flow from treaties or international law. The sanction behind it was the British military strength. Subject to the Imperial needs the Rulers of Indian States were left free to govern their States as they thought best though in few cases, when the Rulers were guilty of gross atrocities the paramount power intervened even in their internal administration. Government of India Act, 1935 visualised a Federation consisting of provinces as well as Indian States. The States were expected to accede to the Federation on limited number of subjects retaining their sovereignty in respect of other subjects. But the States were so jealous of their rights that it was not possible to persuade them to join the Federation. Hence the Federal part of the Constitution visualised by the Government of India Act, 1935 did not come into being. After World War II when it became inevitable for the British Government to grant freedom to this country, the question as to the future relationship of the Indian States with the Dominion of India assumed importance. As there was no agreement between the concerned parties, the British Government under the Independence Act, 1947 divided the then British India into two parts, India and Pakistan. So far as the Indian States were concerned, it allowed its paramountcy to lapse and those States were asked, if they so chose, to enter into new relationship with one or the other of the Dominions or remain independent. The paramountcy of the

British Crown was not inherited either by India or by Pakistan. It was allowed to lapse. This situation created a crisis. There was an imminent threat to the unity of India, politically as well as economically. The situation called for the highest degree of statesmanship on the part of our leaders. Naturally the Rulers of the Indian States were anxious to remain as independent sovereigns but they could not have been oblivious of the internal and external dangers to their authority. It was a highly explosive situation. Sardar Vallabhbhai Patel with his political sagacity and pragmatic approach, availing himself of the co-operation of Lord Mountbatten and the assistance of his energetic and tactful Secretary, V. P. Menon first persuaded practically all the Rulers to accede to India on three subjects viz. Defence, External Affairs and Communications and thereafter stage by stage drew them closer to the Dominion of India and finally persuaded them to merge with the Dominion of India. All this was done in the course of about two years, a feat unparalleled in history. The saga of the integration of the Indian States into the Dominion of India will remain the most exciting and most glorious chapter in the history of our country. This mighty achievement could not have been had peacefully but for the patriotism and far-sightedness of many of the Rulers of the Indian States. Sardar Patel told the Constituent Assembly that the Rulers of the Indian States were the co-architects of India's unity.

255. But it was said on behalf of the respondent that the Rulers merged their States in the Dominion out of sheer necessity and not out of any patriotism, they were not in a position to resist the compulsion of geography and pressure of their subjects in favour of self-Government and therefore they merely made a virtue of necessity. It may be that they acted in self-interest. But there can be no doubt that it was enlightened self-interest. Sardar Patel told the Constituent Assembly on October 12, 1949:

"There was nothing to compel or induce the Rulers to merge the identity of their States. Any use of force would have not only been against our professed principle but would have also caused serious repercussions. If the Rulers had elected to stay out, they would have continued to draw the heavy civil list which they were drawing before

and in large number of cases they could have continued to enjoy unrestricted use of the State revenues. The minimum which we could offer to them as *quid pro quo* for parting with their ruling powers was to guarantee to them Privy purses and certain privileges on a reasonable and defined basis." Proceeding further the Sardar exhorted the Constituent Assembly.

"The capacity for mischief and trouble on the part of the Rulers if the settlement with them would not have been reached on a negotiated basis was far greater than could be imagined at this stage. Let us do justice to them, let us place ourselves in their position and then assess the value of their sacrifice. The Rulers have now discharged their part of the obligations by transferring all the ruling powers and by agreeing to the integration of their States. The main part of our obligation under these Agreements is to ensure that the guarantees given by us in respect of Privy Purses are fully implemented. Our failure to do so would be a breach of faith and seriously prejudice the stabilisation of the new order."

Even quite recently both our President and the Home Minister acknowledged with gratitude the sacrifice made by the Indian Rulers. But it was argued on behalf of the respondent that we should not take those utterances at their face value. It was indirectly suggested that those expressions were platitudes intended to achieve some political purposes. If that be so, all that one can say is, mysterious are the ways of politics.

256. The respondent in its counter-affidavit has taken the stand that the people of this country having become conscious of their social and economic rights would not tolerate any longer the concept of Rulership or the Privy Purse or any of the privileges incorporated in the Covenants and Merger Agreements. Therefore it was the duty of the Government to give effect to the will of the people. It has also taken the stand that the concept of Rulership, Privy Purse and the privileges guaranteed to the Rulers without any relatable function and responsibility have become incompatible with democracy, equity and social justice in the context of India of today. These contentions raise political issues. This Court is not the forum for going into these issues nor is it concerned with the political passions surrounding the issues

for decision in this case. Our primary function in this case is to interpret the relevant provisions of the Constitution and to see whether the complaint of the petitioners that some of their fundamental rights have been infringed is correct.

257. It is also not for this Court, except to the extent it bears on the question of interpretation of the Constitution to go into the historical background of any constitutional provision. If the meaning of a provision is plain and unambiguous, its historical background becomes irrelevant. But if there is any ambiguity, in interpreting the same, it is permissible for the Court to take into consideration the object intended to be achieved by that provision as well as the surrounding circumstances which may bring out the intention of the Constituent Assembly.

258. The respondent, though in a somewhat vague way, has raised the plea of State policy. That plea appears to me to be irrelevant in the context of this case. If the Constitution has laid down a policy, as is contended on behalf of the petitioners, with respect to matters with which we are concerned, that policy cannot be departed from either by the legislature or by the executive. Neither the legislature nor the executive can have a policy which runs counter to the policy laid down by the Constitution. In this country the voice of the Constitution is paramount. On matters on which the Constitution speaks, no one else can speak. Every organ of the State in this country has to function within the limits prescribed by the Constitution. It has no power *de-hors* that conferred on it by the Constitution. Its powers are only those derived from the Constitution.

259. The learned Attorney General in the course of his arguments, time and again, tried to impress on us that the will of the people has to be respected and as it is the desire of the people that Rulership should be abolished, it had become imperative for the Government to advise the President to make the impugned orders. The petitioners deny that there is any such public opinion. We are not in a position to go into this controversy. Our duty is to obey the Constitution. The question of public opinion is not relevant for our purpose. Many of the safeguards provided in the Constitution are for the benefit of the minorities.

The Government might have acted with the best of intentions. But the real question is whether it has acted within the powers conferred on it by the Constitution. In this connection it would be worthwhile to borrow and adapt some of the observations of Chief Justice Patanjali Sastri in *State of Madras v. V. G. Row*, 1952 SCR 597 at p. 605 = (AIR 1952 SC 196 at p. 199). If the Court in this country face up to important and none too easy task of declaring void any of the important policy decisions taken by the Government it is not out of any desire to tilt at executive authority in a crusader's spirit, but in the discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights, as to which this Court has been assigned the role of a sentinel on the *qui vive*. In these cases as in other cases we do not seek to sit in judgment on Government's policies. They are the concern of the legislative and the executive organs of the State. But the Constitution has imposed a special duty on this Court to preserve and protect the Constitution — we only seek to discharge that duty.

260. Now coming to the scope of Clause (22) of Article 366; it is necessary to notice that Article 366 is an article which defines 30 expressions appearing in one or more of the articles in the Constitution. That article starts by saying that

"In this Constitution, unless the context otherwise requires, the following expressions have the meanings hereby respectively assigned to them."

261. From this it is clear that the meanings given to the expressions mentioned in that article are only for the purpose of the Constitution and not for any other purpose as held by this Court in *Pravir Chandra Bhanj Deo v. State of Madhya Pradesh*, (1961) 2 SCR 501 = (AIR 1961 SC 775). Clause (15) of Article 366 defines an "Indian State" as meaning "any territory which the Government of the Dominion of India recognised as such a State". It may be noted that no "Indian State" as such exists after the Constitution came into force. But yet as that expression has been used in the Constitution in some places for certain purposes, it became necessary to define that expression and not because that there is an Indian State now. Similarly Rulers of Indian States disappeared as soon as their territories were merged in

India and all those quondam Rulers became citizens of India — see *Bhanj Deo's case*, (1961) 2 SCR 501 = (AIR 1961 SC 775) (*supra*) and *H. H. Maharaja of Udaipur v. State of Rajasthan* (1964) 5 SCR 1 = (AIR 1964 SC 444). The Rulers referred to in Article 366 (22) have no kingdom or subjects to rule. They have no ruling power. They do not have dual capacity firstly as citizens of India and secondly as Rulers. Their rulership is merely a status entitling them to privy purse and certain privileges. As Articles 291, 362, 366 (21) (a) and (b) (before its deletion) as well as Entry 34 of List I of Sch. VII refer to Rulers, it became necessary to define that expression.

262. Article 366 (22) defines "Ruler" thus:

" "Ruler" in relation to an Indian State means the Prince, Chief or other person by whom any such covenant or agreement as is referred to in clause (I) of Article 291 was entered into and who for the time being is recognised by the President as the Ruler of the State and includes any person who for the time being is recognised by the President as the successor of such Ruler."

262A. This clause has two parts namely:

(1) the Prince, Chief or other person of an Indian State who had entered into any Covenant or Agreement as is referred to in Clause (I) of Article 291 and who is for the time being recognised by the President as the Ruler of the State; and

(2) any person who for the time being is recognised by the President as the successor of such a Ruler namely the Ruler who entered into the Covenant or Agreement referred to earlier and recognised by the President.

263. The words "other person" in the first part of Article 366 (22) means someone analogous to a Prince or Chief of a former Indian State who had entered into the Covenant or Agreement referred to in that clause. It cannot be some third person because no person other than a Ruler of an Indian State had entered into any Covenant or Agreement with the Dominion of India. The words "other persons" should be read *eiusdem generis* with the words "Prince, Chief" preceding the words "other person". Indian Rulers were known by various names such as Maharana, Maharao. Maharaja, Nizam etc. To avoid listing all those names in Article 366 (22),

the draftsman has used the words "other person" but the meaning of those words has been made clear by the words accompanying the words "other person" viz., by whom any such agreement as is referred to in Cl. (1) of Article 291 was entered into and who for the time being is recognised by the President as Ruler. Now coming to the second part of that clause, here again the words "any person" refers to the person who at the relevant time is the successor of the person who entered into the Covenant or Agreement. This is made clear by the expression "for the time being is recognised by the President as the successor of such Ruler", such Ruler being the Ruler referred to in the first limb of the Clause. Article 366 (22) contemplates two classes of persons who are to be recognised by the President as Rulers. The first group consists of those persons who entered into the Covenant or Agreement with the Dominion of India and the second group their successors. Coming to the first group, the President has no power to recognise any one other than who had entered into the Covenant or Agreement and so far as the second group is concerned, he can only recognise the successor of the person who had entered into the Covenant or the Agreement. "Successor" is a term of law. Succession is regulated by law or custom. It is no doubt true that it is for the President to decide as to who is the successor for the time being of the person who had entered into the Covenant or Agreement. The President cannot create a successor. He can only recognise the successor. His power is only to find out who is the successor at the relevant time of the Ruler who entered into the Covenant or Agreement. Recognition is not the same thing as appointment. Recognition means the power to locate and not a power to create. Hence the power conferred on the President under the second part of Article 366 (22) is a very limited power. That power is no doubt an executive power but the same has to be exercised in accordance with law. In other words it has to be exercised as a quasi-judicial power. So far as the first part is concerned, the President has no power to recognise any person other than the Ruler who entered into the Covenant or Agreement with the Dominion of India. We shall presently

see that he has a constitutional duty to recognise the Ruler of an Indian State. Hence the words "for the time being" in the first part of Article 366 can only come into play if there was any error in locating the person who entered into the Covenant or Agreement, the condition for the recognition being that the person recognised must be the person who entered into the Covenant or Agreement. So far as the second part is concerned the expression "for the time being" is relevant as the question of recognition of a new Ruler arises on the death of each Ruler. On each of those occasions, the President has to find out as to who is the successor according to law and in the absence of law, according to custom, of the Ruler who entered into the Covenant or Agreement. The procedure of recognition of Rulers appears to have been intended as a status symbol and also to avoid the necessity of hunting up Covenants and Agreements at the time of payment of privy purses and while affording other privileges and rights.

264. Article 366 (22) contemplates that for each Indian State there shall be a Ruler at any given point of time. That Article does not say that the President may recognise a Ruler. On the other hand it speaks of the Ruler who "for the time being is recognised by the President", an expression which contemplates the continuity of Rulership and not merely of its possible existence. A Rulership of an Indian State can only disappear if both the original Ruler who entered into the Covenant or Agreement as well as his successors cease to exist as in that case President cannot recognise any one as the Ruler of that State. From the above discussion it follows that the power of the President under Article 366 (22) is fully regulated.

265. In this context we may refer to the definition of the "Ruler" in Section 311 (1) of the Government of India Act, 1935 which says "Ruler" in relation to an Indian State means the Prince, Chief or other person recognised by His Majesty as the Ruler of the State". The power to recognise given to His Majesty under this section is blanket power. It is subject to no limitation. Under that section any one could have been recognised as the Ruler of an Indian State. No

such power is conferred on the President under Article 366 (22).

266. I shall now, proceed to consider whether the President has power to say that he will not recognise a Ruler for an Indian State. It was urged on behalf of the respondent that a power to recognise includes a power not to recognise. Evidently this contention is based on Section 21 of the General Clauses Act which says:

"Where, by any Central Act or Regulation, a power to issue notifications, orders, rules or bye-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions if any, to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued".

267. In view of Article 367 of the Constitution unless the context otherwise requires, the General Clauses Act, subject to any adaptations and modifications made therein under Article 372 applies for the interpretation of the Constitution as it applies for the interpretation of an Act of the legislature of the Dominion of India. I have not thought it necessary to go into the question whether the recognition referred to in Article 366 (22) can be considered as a power to issue notifications or orders as in my opinion that clause imposes a Constitutional duty on the President. No discretion is left to the President to recognise or not to recognise the Ruler of an Indian State. In that view, Section 21 of the General Clauses Act, 1897 is irrelevant. We have already seen that Article 366 (22) contemplates that each Indian State must have a Ruler at all times so long as the Ruler who entered into the Covenant or Agreement or a successor of his is in existence otherwise Articles 291 and 362 will become meaningless. They will be empty shells. "Ruler" referred to in Article 291 (b), Article 362 and Entry 34 of List I of the Seventh Schedule must necessarily be that person who is recognised as Ruler by the President under Article 366 (22). If the President fails to or declines to discharge his function under Article 366 (22), Arts. 291 and 362 would become inoperative. In effect the benefit conferred by those Articles will be denied to the person entitled to be re-

cognised as a Ruler of a particular Indian State. Further the legislative power given under Entry 34 of List I of the Seventh Schedule would disappear. It is to give meaning to Articles 291, 362 and Entry 34 of List I of the Seventh Schedule, a duty is imposed on the President to recognise the Ruler of each Indian State. In my opinion Article 366 (22) imposes a constitutional duty on the President. To enable him to discharge that duty, certain limited powers are conferred on him. While discharging his duty under the first part of Article 366 (22), he has to locate the person who according to law can be said to have entered into the Covenants or Agreements and under the second limb his duty is to find out the successor of the Ruler coming within the scope of the first limb. As mentioned earlier the recognition of the Ruler who executed the Covenant or Agreement is a mere formality. So far as the recognition of the successor of that Ruler is concerned, in case of dispute, it becomes the duty of the President to decide as to who is the successor of the Ruler who executed the Covenant or Agreement at the relevant time. Evidently the Constitution-makers were of the opinion that any dispute as to who is the "Ruler" for the purpose of the Constitution should not be left to be decided by Courts of law because such a procedure would involve years of delay in determining the person who is entitled to the benefit of the privy purse and the privileges. Hence that question was left to the exclusive decision of the President. Despite the fact that exclusive power was given to the President to recognise the successor of the original Ruler, the procedure that invariably adopted in case of disputed succession was to act on the basis of the recommendation of either of a High Court Judge who had enquired into the matter or of a committee presided over by a High Court Judge, set up for that purpose. That is what happened when disputes arose as to the succession to the Rulers of the States of Sirohi and Dholpur. In my opinion Article 366 (22) imposes a duty on the President and for that purpose has conferred on him certain powers. In other words the power conferred on the President under that provision is one coupled with duty. There are similar powers

conferred on the President under the Constitution. Under Chap. XVI of the Constitution certain special provisions were made for the benefit of the Scheduled Castes and Scheduled Tribes. Seats were reserved for them both in the Parliament as well as in the State Assemblies. Certain other benefits were also secured to them in the matter of appointments to services and posts in connection with the affairs of the Union or of a State. But the Constitution did not specify which castes were Scheduled Castes and which Tribes were Scheduled Tribes. Under Articles 341 (1) and 342 (1) of the Constitution, the President was given power to specify the castes which he considered to be Scheduled Castes and the Tribes which he considered to be Scheduled Tribes. Though both the Arts. say the President "may" specify the Castes which he considers as Scheduled and Tribes which he considers Scheduled, it is clear that a constitutional duty was imposed on him to specify which castes were Scheduled Castes and which Tribes were Scheduled Tribes for the purpose of the Constitution. The word "may" in those clauses must be read as "must" because if he had failed or declined to specify the Castes and Tribes, Articles 330, 332, 334, 335, 338 and 340 would have become inoperative and the constitutional guarantees given to the Scheduled Castes and Scheduled Tribes would have become meaningless. At this stage it may be noted that under Article 366 (24) and (25) Scheduled Castes and Scheduled Tribes are defined as such Castes, races, tribes, tribal communities or their parts or groups within them as are deemed under Articles 341 and 342 respectively. Again under Clause (7) of Article 366, the President is given power to determine for the purpose of the Constitution the "corresponding Provinces", "corresponding Indian State" or "corresponding State" in case of doubt. This again is a duty imposed on the President. He cannot refuse to discharge that duty.

268. Now coming to the contention that power to recognise the Rulers includes power not to recognise we shall test the correctness of that contention with reference to some other Arts. in the Constitution which deal with certain constitutional duties

of the President. The power to appoint the Election Commissioner is that of the President. The Election Commission alone can hold the elections of the President, Vice-President, members of the Parliament and the State legislatures. The President cannot decline to appoint the Election Commissioners. It is not in the power of the cabinet to advise the President not to appoint one or more of Election Commissioners even if some future cabinet should think that the elections are trappings of feudalism. Similarly the cabinet cannot advise the President not to appoint a Governor and thus destroy the federal structure of our Constitution or not to appoint the Chief Justice of Supreme Court or of the High Courts and thereby remove those Courts and thus make a mockery of the fundamental rights.

269. The President cannot do indirectly, what the legislature cannot do directly. It is wrong to mistake a duty for a right. Ruler as referred to in some of the provisions of the Constitution is an entity created by the Constitution to further certain purposes recognised by the Constitution. That entity cannot be abolished either by the executive or by the legislature. Therefore the argument advanced on behalf of the respondent that the power to recognise the Ruler includes within itself the power not to recognise is clearly a fallacious one. It is not necessary for our present purpose to go into the question whether a Ruler once recognised can be de-recognised by the President and if so under what circumstances. We were told that there was one instance of de-recognition of a recognised Ruler namely that of the former Ruler of Baroda. That de-recognition was not challenged before any Court. Hence, its validity remains undecided. In this case we are concerned not with de-recognition of one or more Rulers for some reason or other but of the abolition of Rulership. For the reasons mentioned earlier, it is not possible to spell out a power to abolish the Rulership under Article 366 (22).

270. It was strenuously argued by the learned Attorney General that the power of recognition of the Rulers found in Article 366 (22) is a fact of the paramountcy enjoyed by the British Crown before the 15th August.

1947. No such plea was taken in the counter-affidavit. The argument of the learned Attorney General on this point was somewhat indefinite. He was hesitant to call the power embodied in Article 366 (22) as a paramount power but yet he was repeatedly asserting that it contains certain aspects of paramountcy. It is strange that the learned Attorney General representing the Union of India should have claimed that the Government of India inherited any aspects of the paramountcy exercised by the British Crown. Paramountcy as claimed by the British Rulers was one of the manifestations of imperialism. It is surprising that the Government of this country whose people had fought imperialism for years and who are even today supporting both morally as well as materially the countries which are fighting imperialism should claim to have inherited even a fraction of imperialism. Rule of law is the bedrock of our Constitution. Paramountcy is the very antithesis of rule of law. It was a power exercised by a superior sovereign over the subordinate sovereigns. I fail to see how the Government of India can consider itself as a superior power in its relationship with the citizens of this country. The doctrine of paramountcy, even during the days of the Imperial rule had nothing to do with the British Government's relationship with its subjects. Herein we are concerned with the power exercisable by the President under a provision of the Constitution. Nature and scope of that power must be spelled out from the language of the provision and from the purpose intended to be served by that provision. It is an insult to our Constitution to say that any facet of imperialism has crept into it. One should have thought that paramountcy so far as this country was concerned was dead and was deeply buried as far back as on the 15th August, 1947. Its resurrection in any form is repugnant to our Constitution. It is true that even after August, 1947, on some occasions some of our leaders referred to the existence of paramountcy. But that reference is not to the paramountcy which was the insignia of imperialism but the paramountcy of geographical compulsions, economic compulsions, the compulsion of public opinion and need for common

defence, all operating in favour of the unity of India. The effect of these forces was pithily described as a sort of paramountcy. But that paramountcy has nothing to do with paramountcy claimed by the British.

271. The impugned orders are also unconstitutional for the reason that the power conferred under Article 366 (22) is exercised for a collateral purpose. As seen earlier, power to recognise Rulers was conferred for the purpose of implementing some of the provisions of the Constitution and not for denuding the contents of those provisions. We have earlier seen how the impugned orders came to be made. The Government of India sought to amend the Constitution by deleting Articles 291, 362 and Clause 22 of Article 366. But as the bill seeking the amendment of the Constitution failed to get the required majority in the Rajya Sabha, that attempt failed. Within hours after the said bill was rejected, the cabinet met and advised the President to pass the impugned orders. This is clearly an attempt to do indirectly what the Government could not do directly. Such an exercise of power is impermissible under Article 366 (22). Exercise of a Constitutional power for collateral reasons has been considered by this Court in several decisions as a fraud on that power—see *Balaji v. State of Mysore*, (1963) Supp 1 SCR 439 = (AIR 1963 SC 649). Breach of any of the constitutional provisions even if made to further a popular cause is bound to be a dangerous precedent. Disrespect to the Constitution is bound to be broadened from precedent to precedent and before long the entire Constitution may be treated with contempt and held up to ridicule. That is what happened to the Weimar Constitution. If the Constitution or any of its provisions have ceased to serve the needs of the people, ways must be found to change them but it is impermissible to bypass the Constitution or its provisions. Every contravention of the letter or the spirit of the Constitution is bound to have chain reaction. For that reason also the impugned orders must be held to be ultra vires Art. 366 (22).

272. The impugned orders also violate Arts. 53 (1) of the Constitution which directs the President that

the executive power of the Union shall be exercised by him either directly or through the officers subordinate to him "in accordance with the Constitution." Further Art. 73 (1) prescribes that the executive power of the Union must be exercised subject to the provisions of the Constitution. The executive is bound to obey this mandate. It has no competence to exercise the executive power in violation of the mandates given by the Constitution. Art. 291 gives a mandate to the executive to pay the Privy Purses guaranteed to the Rulers exempt from all taxes on income. Article 366 (22) imposes a constitutional duty on the President to recognise the Rulers of the Indian States. Article 362 requires the executive that due regard should be given to the guarantees and assurances given under the Agreements or Covenants entered into with the former Rulers of the Indian States. The President on the advice of the cabinet has disregarded the mandate of Articles 53 (1), 73 (1), 291, 362 and 366 (22). That being so his order must be held to be ultra vires the Constitution, hence a nullity.

273. It was urged on behalf of the petitioners that the members of the cabinet who advised the President to issue the impugned orders were bound by their oath to bear true faith and allegiance to the Constitution; but they have shown scant respect for their oath, treating the same as a mere formality; they have thereby not only broken their oath but have damaged the Constitution as well. It is not necessary to pronounce on this contention.

274. In my opinion it is not open to the executive or for that matter to any of the organs of the State to disregard the provisions of the Constitution merely because those provisions do not accord with its views. The mandate of every provision of the Constitution is a binding mandate. No one has power to depart from that mandate or circumvent it, whatever his views about the appropriateness of the mandates may be. If the Constitution or any part of it has now become out of tune with the present day society of ours, appropriate steps may be taken to alter the Constitution. It is no virtue to uphold the Constitution when it suits us. What is important,

may necessary, is to uphold it even when it is inconvenient to do so.

275. It was contended on behalf of the respondent that the impugned orders were made in exercise of the political power of the State which according to it, is an incident of the sovereignty. In support of that contention reliance was placed on the decision of this Court in (1970) 2 SCR 631 = (AIR 1970 SC 1946). The facts of that case are:

After the death of the previous Ruler of Dholpur who had been recognised by the President under Art. 366 (22), there was dispute as regards his successor. That dispute was enquired into by a committee presided over by the Chief Justice of the Rajasthan High Court. On the recommendation of that committee, the President was pleased to recognise Maharaja Rana Shri Hemant Singh as the successor of the previous Ruler. Kr. Shri Vir Rajendra Singh challenged that decision by means of a writ petition under Art. 226 of the Constitution. That petition was dismissed by the High Court. In appeal this Court affirmed the decision of the High Court. I was a party to that decision. In that decision, it was held that the recognition granted by the President under Article 366 (22) could not be challenged in court of law. The only point in dispute in that case was as to who was the successor to the deceased Ruler. This Court came to the conclusion that under the circumstances of that case the decision of the President was not open to challenge. In the course of the judgment it was observed:

"The recognition of the Ruler is a right to succeed to the gaddi of the Ruler. This recognition of Rulership by the President is an exercise of political power vested in the President and is thus an instance of purely executive jurisdiction of the President."

276. What is said in that case is that the President while acting under Art. 366 (22) is exercising his executive jurisdiction and that jurisdiction was described as "political power". That expression may be inappropriate but that is not the ratio of the decision. It was a casual observation. There is nothing like a political power under our Constitution in the matter of relationship between the executive and the citizens. Our Constitution recognises only three powers viz. the

legislative power, the judicial power and the executive power. It does not recognise any other power. In our country the executive cannot exercise any sovereignty over the citizens. The legal sovereignty in this country vests with the Constitution and the political sovereignty is with the people of this country. The executive possesses no sovereignty. There is no analogy between our President and the British Crown. The President is a creature of the Constitution. He can only act in accordance with the Constitution. It is true that some aspect of the executive power of the Government is for the sake of convenience called political power but it is none-the-less an executive power derived from the Constitution.

277. It was next urged that we cannot go into the validity of the impugned orders or even as to the scope of Art. 366 (22) in view of Article 363. We shall, while examining the ambit of Art. 363 see the hollowness of this contention.

278. Earlier, I have in a general way, referred to some of the political events that took place in the years 1947 to 1949. In order to consider some of the contentions raised by the Counsel for the parties, relating to the scope and effect of Art. 291, it is now necessary to refer in some detail to some aspects of those events. I have earlier referred to the Instruments of Accession, executed by various Rulers of Indian States. By means of those Instruments the concerned Indian States became federating units of the Dominion of India though under those Instruments, powers were conferred on the Dominion legislature, executive and judiciary only in respect of three subjects viz. Defence, External Affairs and Communications. But none-the-less as a result of the accession, the concerned Indian States became parts of the Dominion of India. At the time those Instruments were executed, no question of either guaranteeing the Privy Purses to Rulers or preserving their privileges arose. Hence those Instruments did not refer to any rights and privileges of the Rulers. Very soon after the execution of the Instruments of Accession, other developments took place in quick succession. Most of the small Indian States fully merged in the Dominion of India. Under the Merger Agree-

ment the privileges then enjoyed by the Rulers, their right to get the Privy Purses fixed under the agreement as well as some of the rights of the third parties referred to in the agreements were guaranteed. Excepting in the case of Bhopal, the Privy Purses to be paid to the Rulers were to be paid from out of the revenues of their former States. Under the Merger Agreement entered into between the Governor-General and the Nawab of Bhopal, the Nawab was entitled to receive the privy purse stipulated therein from the Government of India. It is not stated in the agreement that the same has to come out from the revenues of Bhopal State. The Privy Purses payable to all those Rulers were free of all taxes. In some of the Merger Agreements rights were also created in favour of the third parties such as guaranteeing the continuity of the services of the permanent members of the Public Service of those States as well as the payment of pensions due to the retired civil servants. In several of the Merger Agreements it is provided that if there was any dispute as to whether a particular item of property is the private property of the Ruler or the property of the States, that dispute was to be decided by an authority to be appointed as provided in those agreements. In most of those agreements, it is provided that the succession to the Rulership should be according to law and custom. That provision was a redundant provision as succession means succession according to law or custom. No one can succeed to a deceased person excepting according to law or custom. Those agreements also provide that no enquiry should be made by or under the authority of the Government of India and no proceedings should be taken in any court in their former States in respect of anything done or omitted to be done by the Rulers or under their authority, whether in a personal capacity or otherwise during the period of their administration of their States. In those agreements, it is further provided that no suit should be brought against the Rulers of the merged States in any of the Courts in the Dominion except with the previous sanction of the Government of India.

279. Under the Merger Agreement executed by the Ruler of Bilaspur, the Ruler was entitled to a Privy

Purse of Rs. 70,000 per year but that included a sum of Rs. 10,000 as allowance to the Yuvraj. Under the Merger Agreement executed by the Nawab of Bhopal, the State of Bhopal was merged into the Dominion of India for a period of five years only. Art. IV of the Merger Agreement provided that the income derived annually from the share of the Nawab in the original investment by Qudsia Begum in the Bhopal State Railway, which share was agreed to be Rupees five lakhs and fifty-five thousand, shall be treated as the personal income of the Nawab and shall be paid by the Government of India to the Nawab, and his successors. Article VII of the Agreement provided that the succession to the Throne of Bhopal State shall be governed by and regulated in accordance with the provisions of the Act known as 'the Succession to the Throne of Bhopal Act of 1947' which was in force in the State at the time of the agreement. Under the Merger Agreement entered into by the Maharaja of Manipur, he was given a right to the use of the Residences known as 'Redlands' and 'Les Chatalettes' in Shillong and the property in the town of Gauhati known as 'Manipuri Basti' though all those properties were considered as the State's properties. Then came the States Merger (Governors' Provinces) Order 1949, an order made under Section 290-A of the Government of India Act, 1935. Under this Order, several of the States that had merged in the Dominion of India were added on to one or the other of the Provinces. Thereafter those States became a part of those Provinces. Section 7 (1) of that Order provides:

'All liabilities in respect of such loans, guarantees and other financial obligations of the Dominion Government as arise out of the governance of a merged State, including in particular the liability for the payment of any sums to the Ruler of the merged State on account of his Privy Purse or to other persons in the merged State on account of political pensions and the like, shall as from the appointed day, be liabilities of the absorbing province, unless the loan, guarantee or other financial obligation is relatable to central purposes.'

280. This Order was made on July 27, 1949. Under this Order fifty-five Indian States merged in the Bom-

bay Province, three in Madras, two in Bihar, fifteen in Central Provinces and Berar, three in East Punjab and twenty-four in Orissa. It was not disputed that the Merger Order is a legislative measure. Its validity was not challenged before us. In view of that Order, the liability to pay the Privy Purses of the Rulers whose former States had been added to any particular Province, became the liability of that Province, — a liability imposed by law. Whatever might have been the nature of the liability undertaken by the Government of the Dominion of India under the various Merger Agreements those liabilities came to be recognised by law and made a part of the Municipal law and thereafter they became enforceable as against the concerned Province. It may be noted that this Order was made long before the Constitution came into force. This Order was subsequently amended and a few more Indian States were included in one or the other of the Provinces. From the foregoing, it is seen that before the Constitution came into force, the liability to pay the Privy Purses to several of the Rulers whose States had directly merged with the Dominion of India became that of some of the Provinces and ceased to be that of the Dominion of India. Under the Merger Agreements excepting in the case of Bhopal, the Privy Purses to the former Rulers were payable from the revenues of their former States. But after the Merger Order they became payable from the revenues of the concerned provinces. At this stage we may also note that under the Merger Agreements, the Privy Purses payable to the Rulers were free of all taxes. We may further note that under the Merger Agreements, there were several other rights created either in favour of the concerned Rulers or in favour of the third parties. The Merger Order is silent about those rights.

281. Now we come to those States which formed unions. There were five such unions namely:

1. United States of Kathiawar;
2. United States of Gwalior, Indore and Malwa (Madhya Bharat).
3. Patiala and East Punjab States Union.
4. United States of Rajasthan and

5. United States of Travancore and Cochin.

282. Those unions were formed on regional basis. Various Indian States in a particular region merged together and formed a union. The concerned States entered into a Covenant under which the union was formed. To those Covenants, the Dominion of India was not a party. Under those covenants, the covenanting States agreed to entrust to the Constituent Assembly to be formed in accordance with the provisions of the covenant the work of framing a Constitution for the union. Each of those unions were to have a Rajpramukh, who was to be the head of the union. There were provisions in those covenants for the formation of a Council of Ministers to aid and advise the Rajpramukh in the exercise of some of his functions. Under those covenants, the Ruler of each of the covenanting State was entitled to receive a fixed Privy Purse annually from the revenues of the concerned union. That amount was to be free of all taxes, whether imposed by the Government of the concerned union or by the Government of India. In the matter of raising, maintaining and administering the military force of the concerned union, the Rajpramukh was to act subject to any directions and instructions that may from time to time be given by the Government of India. The covenants provided that the Rulers of the covenanting States as also the members of their families should continue to be entitled to all their personal privileges, dignities and titles enjoyed by them. The succession to the Gaddis was to take place according to law and custom. Questions of disputed succession in regard to covenanting Salute State were to be decided by the Council of Rulers on the recommendation of a Judicial Tribunal to be constituted in accordance with the provisions of the covenants. The Secretary Ministry of States on behalf of the Government of India concurred to the covenants and guaranteed to all its provisions. The concurrence of the Government of India to the covenants was necessary as the covenanting States had earlier acceded to the Dominion of India. In view of the formation of unions, in the place of old Indian States new units were to come into existence and therefore it was necessary for them to execute fresh

Instruments of Accession and that could be done only with consent of the Dominion of India. So far as the guaranteeing of these covenants is concerned it could only mean a political guarantee and not a guarantee in the sense of undertaking any financial obligations. What the Dominion of India guaranteed was the provisions of the covenant which included provisions relating to the formation of the Constituent Assembly, the appointment of Council of Ministers, etc. Under the covenants the liability to pay the Privy Purses of the covenanting Rulers was that of the concerned union and not that of the Dominion of India. Further the privy purses to be paid to the Rulers were to be paid free of all taxes. From these it is seen that before Arts. 291, 362, 363 and 366 (22) came into force, the Dominion Government had no liability in the matter of payment of Privy Purses to Rulers of the covenanting States. Even in the matter of deciding any dispute as regards succession, the Dominion of India had no responsibility. That had to be decided by the agencies created under the covenants. Under some of the covenants, some of the covenanting Rulers were given special rights e.g. under Article XVIII of the covenant under which Madhya Bharat union was formed, it was provided:

"Notwithstanding anything in the preceding provisions of this covenant, the Rulers of Gwalior and Indore shall continue to have and exercise their present powers of suspension, remission or commutation of death sentences in respect of any person who may have been or is hereinafter, sentenced to death for a capital offence committed within the territories of Gwalior or of Indore, as the case may be."

283. Under Art. VIII of the covenant entered into by the Rulers of Travancore and Cochin forming the United State of Travancore and Cochin it was provided that the obligation of the covenanting State of Travancore to contribute from its general revenue a sum of Rs. 50 lakhs every year to the Devaswom fund shall from the appointed day be the obligation of the United State and the said amounts shall be payable therefrom and the Raj Pramukh shall cause the said amount to be paid every year to the Travancore Devaswom Board and the

Executive Officer referred to in sub-clause (b) of that article respectively.

284. In respect of the administration of Padamanabhaswamy Temple the right of the Ruler of Travancore was preserved under Article VIII (b) of the covenant. Similarly the existing rights of the Rulers of Travancore and Cochin as regards the management of certain temples and funds were preserved. They were also given a right to nominate some members to some of the statutory Boards. From the foregoing it is seen that under the various covenants, several rights in addition to the right of receiving privy purses had been created in favour of the Rulers of some of the covenanting States.

285. In the draft Constitution, there were no articles similar to Articles 291, 362, 363 and 366 (22). Some time before October 14, 1949 the Ministry of States, which was instrumental in bringing about the merger of the States with the Union of India wrote to the drafting committee that the guarantees given to the Rulers in regard to Privy Purses should be given constitutional sanction. Further it desired that so far as the privileges and other rights of the Rulers are concerned, the same must find recognition in the Constitution though it may not be possible to give any constitutional guarantee in respect of them. It is in pursuance of this request the drafting committee introduced Article 267 (A) (present Article 291), Article 302-A (present Article 362) on October 13, 1949 Article 303 (1) (present Article 366 (22)) on October 14, 1949 and Article 302 (AA) (present Article 363) on October 16, 1949 into the draft Constitution.

286. Article 291 of the Constitution as it now stands after its amendment by the 7th Amendment Act reads:

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as privy purse—

(a) such sums shall be charged on, and paid out of the Consolidated Fund of India; and

(b) the sums so paid to any Ruler shall be exempt from all taxes on income."

287. Dealing with Art. 291, this is what the White Paper says in paragraph 238:

"Article 291, thus, embodies constitutional sanction for the due fulfilment of the Government of India's guarantees and assurances in respect of privy purses and provides for the necessary adjustments in respect of Privy Purse payments necessitated by changed conditions."

Art. 291, has four principal ingredients namely:

(1) the conditions giving rise to the liability to pay the Privy Purses;

(2) charging of the Privy Purses payable on the Consolidated Fund of India;

(3) the payment of the same from out of the Consolidated Fund and

(4) the sums so paid to any Ruler to be exempt from all taxes on income.

288. According to Mr. Palkhiwala, learned Counsel for some of the petitioners, Art. 291 guarantees the payment of Privy Purses referred to in various Merger Agreements and Covenants to the concerned Rulers, charges the same on the Consolidated Fund of India and makes them payable out of that fund to the Rulers, exempt from all taxes on income. He contended that Article 291 confers a legal right on a Ruler to claim the Privy Purse to which he is entitled to, from the Dominion of India. He asserts that the right created in favour of the Rulers is enforceable in court of law. But according to the learned Attorney-General, Art. 291 does not create any legal right in favour of the Rulers. That Art. merely gives a moral assurance to the Rulers that the Privy Purses guaranteed under the Covenants and Agreements will be paid by the Union of India. He further contended that Art. 291 merely recognises the obligation undertaken by the Dominion of India either under the Merger Agreements or under the Covenants and it does not create any new right or obligation. According to him the expression that "such fund shall be charged on the Consolidated Fund of India" does not mean that a lien on the Consolidated Fund is created for the payment of Privy Purses; it only means that the amount payable as

Privy Purses is not votable. He asserted that the expression "paid out of" in cl. (b) of Art. 291 merely refers to the Fund out of which the payment is to be made and not that it should be paid to any person. Clause (b) of Article 291 does not according to him give any direction to the Union Government to pay to the Rulers the agreed Privy Purse but it merely says that the Privy Purse, if and when paid to any Ruler will be exempt from all taxes on income.

289. In my opinion the contentions advanced by the learned Attorney General are fallacious. The liability undertaken under Art. 291 is a new liability and not an affirmation of an existing liability. As seen earlier, the liability to pay the Privy Purses of most of the Rulers who merged their States with the Dominion of India had been transferred to one or the other provinces. The liability to pay Privy Purses to the Rulers who entered into Covenants for forming unions was that of the concerned union and not that of the Dominion of India. In the case of most of the Rulers of States which merged in the Dominion of India until Art. 291 came into force, the Dominion of India had no liability to pay the Privy Purses.

290. For the first time after Art. 291 came into force, the Privy Purses were made payable from out of the Consolidated Fund of India. Till then they were payable firstly out of the revenues of the concerned State which merged into the Dominion of India and later on by one or the other provinces from out of its revenues and in the case of the covenanting States, the Privy Purses payable to the covenanting Rulers were payable from out of the revenues of the concerned union. As seen earlier, the Privy Purses payable either to the Rulers of the merged States or to those of the covenanting States, were free of all taxes. But the Privy Purses payable under Art. 291 are only exempt from all taxes on income and not all taxes. To summarize, under Article 291, the Union of India for the first time undertook the liability to pay the Privy Purses in respect of most of the Rulers of the Indian States. The fund from which the Privy Purses are made payable under Article 291 is different from those from which they were payable earlier. The

terms of payment, to some extent are also different inasmuch as the Privy Purses provided under the Merger Agreements and Covenants were free of all taxes but the Privy Purses guaranteed under Art. 291 are exempt only from tax on income.

291. In support of his contention that the liability undertaken under Art. 291, is merely a continuation of the earlier liability, the learned Attorney General strongly relied on the first part of Art. 291 which says:

"Where under any covenant or agreement entered into by the Ruler of any Indian State before the commencement of this Constitution, the payment of any sums, free of tax, has been guaranteed or assured by the Government of the Dominion of India to any Ruler of such State as Privy Purse. . ."

292. From this he wants us to conclude that the liability undertaken under Art. 291 is nothing but a continuation of the liability arising under the Covenants and Agreements. Here again the learned Attorney-General is not correct. That part of Article 291 does not create any liability. It is only a legislation by incorporation. That part of the Art. points out the person who is entitled to the Privy Purse and the amount payable to him. It was a legislative device adopted for the convenience of drafting. It would have been a cumbersome process to list all the names of the Rulers who are entitled to Privy Purses and the amount payable to each of them. To avoid that difficulty, relevant portions of Agreements and Covenants were bodily lifted from those documents and incorporated into Art. 291. This is a well-known drafting device. Article 291. is in no way linked with the Agreements and Covenants. The Covenants and Agreements only continue as evidence as to matters mentioned in the first part of Art. 291. After Art. 291 came into force, there is no legal relationship between the Covenants and Agreements and that Art. That Art. read with Art. 366 (22) constitutes a self-contained code in the matter of payment of Privy Purses. Those Arts. operate on their own force. In several provisions of the Constitution, the device of legislating by incorporation has been adopted — see Art. 105 (3), Art. 106, cls. 2, 3, 7, 8, 9 (5) and 12 (3) of the second Schedule.

293. I am also unable to accept the contention of the learned Attorney-General that the expression "charged on... the Consolidated Fund of India" in Art. 291 merely means that the amounts payable as Privy purse are not votable and that expression neither creates a right in favour of the person in whose benefit the charge is created nor is the Consolidated Fund pledged for the payment of the Privy Purse. The Constitution does not define the word "charge". Therefore we must understand that word as it is understood in law. According to law the creation of a charge over a fund in respect of an item of payment to a person means a conferment of a legal right on that person to get the amount in question on the pledge of the fund. If an item of expenditure charged on the consolidated fund merely means that that expenditure is non-votable then there was no need to provide in Art. 113 that "so much of the estimate as relates to expenditure charged upon the Consolidated Fund of India shall not be submitted to the vote of Parliament." That part of Art. 113 (1) was evidently enacted to make effective the statutory lien over the Consolidated Fund created in favour of the person to whom the payment has to be made. It emphasises the fact that the pledge created in favour of the person for whose benefit the charge is created by the Constitution cannot be taken away even by the Parliament.

294. The learned Attorney-General and Mr. Mohan Kumaramangalam read to us passages from May's Parliamentary Practice and other treatises on Parliamentary Practice and Procedure to show how the practice of charging certain items of expenditure on the Consolidated Fund of England came into being. They also invited our attention to some of the statutes passed by the British Parliament. Neither the treatises on which they relied nor any of the statutes to which they referred show that the charging of an item of expenditure on the Consolidated Fund in favour of a person does not create a legal right in him to get that amount or that the same does not pledge the Consolidated Fund for the payment of that amount. In fact some of the statutes referred to by them do show that some of the items

of expenditure charged on the Consolidated Fund were required to be paid in preference to the other items. On the other hand Mr. Palkhiwala referred to us to the Dictionary of English law by Earl Jowitt (1959 Ed.) Vol. 1, page 459, wherein the meaning of the expression 'charged on the consolidated fund' is explained thus:

"Consolidated Fund, a repository of public money which now comprises the produce of custom, excise stamps and several other taxes, and some small receipts from the royal hereditary revenue, surrendered to the public use. It constitutes almost the whole of the public income of the United Kingdom (Consolidated Fund Act, 1816). This fund is pledged for the payment of the whole of the interest of the national debt of Great Britain and Northern Ireland (National Debt Act, 1870 — Section 6); and besides this, is liable to several other specific charges imposed upon it at various periods by Act of Parliament, such as the civil list, and the salaries of the Judges and ambassadors and other high official persons; after payment of which the surplus is to be indiscriminately applied to the service of the United Kingdom under the direction of Parliament".

Section 6 of the National Debt Act, 1870 reads:

"6. Stock charged on consolidated fund. — The annuities and dividends aforesaid shall continue to be charged on and payable out of the consolidated fund".

295. The language of this section is similar to that of Article 291 so far as the creation of "charge" is concerned. Section 6 of the National Debt Act, 1870 according to Earl Jowitt pledges the consolidated fund of Great Britain and Northern Ireland for the payment of the whole of the interest of the national debt of Great Britain and Northern Ireland. If that is the true effect of Section 6 of the National Debt Act, 1870, the same must be the position under Article 291. From the passage quoted above from the Dictionary of English law by Earl Jowitt, it is seen that as soon as an item of expenditure is charged on the consolidated fund, the said act creates a legal obligation to pay out of the consolidated fund that item of expenditure to the person for whose

benefit the charge is created. Secondly that item has to be paid before paying the non-charged item of expenditure, and lastly the charge created, pledges the consolidated fund for the payment of that item of expenditure. The practice of creating charges on the consolidated fund was started for the first time in this country under the Government of India Act, 1935 which Act was passed by the British Parliament evidently following the British practice. Articles 112 to 115 of the Constitution are similar to the corresponding Sections in the Government of India Act, 1935.

296. The contention of the learned Attorney General that the expression "paid out of" in Clause (a) of Article 291 refers to the fund out of which it is to be paid out and not to the person to whom it is payable is also not correct. Under Article 291 as it now stands, there is only one fund and that is the Consolidated Fund of India. Therefore there is no question of pointing out the fund from out of which the payment is to be made. If some amount is required to be paid out of the Consolidated Fund of India, it must be paid out to somebody. There cannot be any paying out in abstract. To whom that payment is to be made is made clear by Clause (b) of Article 291. It is to be paid to the Ruler as defined in Article 366 (22).

297. Even before Article 291 (2) was deleted the privy purses were to be paid out of the Consolidated Fund of India though some of the States had a liability to reimburse the Union to a certain extent. According to the learned Attorney General on the date when Article 291 came into force, no Ruler had been recognised under Article 366 (22). Therefore we cannot spell out any commitment under Article 291. We have earlier seen while discussing the scope of Article 366 (22) that the President has a constitutional duty to recognise a Ruler. Article 291 proceeds on the basis that the President has to recognise a Ruler to each one of the Indian States contemplated by Article 366 (15). By recognising the President merely locates the Ruler. He does not appoint or create a Ruler. No sooner the President recognises the Ruler of an Indian State, he becomes entitled to the privy purse guaranteed

under Article 291 from the date the Constitution came into force. We are told that as a fact most of the Rulers who entered into the Covenants and Agreements were recognised only in the year 1952 but yet they were being paid the amounts agreed to be paid as privy purses ever since the Constitution came into force and the privileges guaranteed to them were also extended to them even before they were recognised. Similarly, we were told that in the case of successors of the Rulers when there was no dispute as to succession, they were treated as Rulers for all purposes though they were recognised several months after they succeeded to the Gaddi. This shows that the recognition under Article 366 (22) was considered as a mere formality except in the case of disputed succession.

298. To my mind Article 291 is plain and unambiguous. It says in the clearest possible language that the privy purses payable to the Rulers under the Merger Agreements as well as under the Covenants are charged on the Consolidated Fund of India and that they shall be paid out to the Rulers exempt from all taxes on income. No provision of a Statute much less a provision of a constitutional statute should be read in a pedantic way. Nor is it justifiable to hair-split the clauses in a provision and quibble about their words. A constitutional provision is not to be interpreted by taking the words of the provisions in the one hand and the dictionary in the other or by taking the meaning given in a decision to a word in different setting. Each provision must be read as a whole and its meaning understood.

299. We have earlier seen that under the Merger Agreements and Covenants, various rights, liabilities and obligations were created. What the Constituent Assembly did was to separate two obligations out of them and give those obligations constitutional sanction or guarantee. As seen earlier, under the Covenants entered into by the Rulers of Travancore and Cochin certain contribution was to be made every year to the Devaswom Fund. This payment is guaranteed under Article 290-A. Under Article 291 the payment of the privy purses is similarly guaranteed, Articles 290-A

and 291 are more or less similarly worded.

300. If the mandate contained in Article 291 is an unenforceable mandate, similar would be the position so far as Article 290-A is concerned. If the mandates contained in these Articles are unenforceable these Arts. can only have ornamental value. It is difficult to believe that the Constituent Assembly would have indulged in an exercise in futility. We repeatedly asked the learned Attorney General that if Article 291 did not create a legal right, what purpose that article was intended to serve and why did the Constituent Assembly put that article in the Constitution. His answer was that under Article 291 while the payment of privy purse received a constitutional sanction, it received no constitutional guarantee. This distinction to my mind appears to be a distinction without difference. Every constitutional sanction for payment is necessarily a mandate to pay if that sanction relates to the discharge of an obligation. It is an enforceable mandate. As seen earlier that a fair reading of Article 291 shows that there is a direction to pay the privy purses to the Rulers. The contention of learned Attorney General was that by Article 291 the Constituent Assembly merely wanted to give some sort of assurance to the Rulers about the payment of privy purses to them in future so as to allay their apprehensions that they may not be paid privy purses in future but in reality, no legal rights were created in favour of the Rulers nor any binding obligation imposed on the Union of India. It is difficult to understand this argument. It will be an uncharitable insinuation to make against the founding fathers that all that they wanted was to create an illusion in the mind of the Rulers while in reality giving them no guarantee as regards the future payment of the privy purses. If all that the Constituent Assembly desired was to give some assurance about the payment of privy purses in the future then Article 362 would have served that purpose. In a general sense the words "personal rights" include privy purse. Even if the Constituent Assembly wanted to make things clear they could have easily said in Article 362 "personal rights including privy purse" instead of wasting a

whole article. Further there was no purpose in charging the privy purses on the Consolidated Fund or giving a constitutional exemption from payment of all taxes on income in respect of privy purse. No word in the Constitution can be considered as superfluous.

301. During the hearing some of the members of the Bench felt that it may not be necessary to go into the scope and effect of Article 291 in the present proceedings. It was felt that if the Court came to the conclusion that the impugned orders are valid orders then there is an end of the matter. If on the other hand, the Court came to the conclusion that those orders are violative of the Constitution then status quo ante would be restored. But both the learned Attorney General and Mr. Palkhiwala insisted that we should pronounce on the scope and effect of Article 291, each one for his own reason. The learned Attorney General repeatedly made it plain to us that even if we come to the conclusion that the impugned orders are invalid, the privy purses will not be paid by the Government unless we hold that the right given to the Rulers under Article 291 is an enforceable one. This is a strange stand particularly in view of the fact that even according to him the Constitution has recognised the liability to pay the privy purses to the Rulers and the obligation in question has received constitutional sanction. It is clear from the stand taken by him that the Government will not respect the mandate of the Constitution if that mandate is not enforceable by law.

302. We have to proceed on the basis that the learned Attorney General made that submission on the strength of the instructions received by him from the respondent. But yet, it is difficult to believe that the executive which is a creature of the Constitution, whose head (the President) and the members of the cabinet had taken the oath of allegiance to the Constitution would take the stand that they will not respect a mandate of the Constitution unless that mandate is enforceable in a Court of law. The enforceability of a constitutional mandate is one thing, the existence of such a mandate is another. Whether a particular constitutional mandate

is enforceable or not, it is all the same binding on all the organs of the State. No organ of the State can choose to disregard any of the mandates of the Constitution. There are many mandates in the Constitution which are not enforceable through Courts of law. If the executive or the legislature or the judiciary refuse to comply with those mandates they will be not only breaking the oath taken by them but they will be breaking the Constitution itself. I doubt whether the grave implications of the stand taken on behalf of the Government have been realised.

303. I shall now proceed to Article 362. That Art. reads:

"In the exercise of the power of Parliament or of the legislature of a State to make laws or in the exercise of the executive power of the Union or of a State, due regard shall be had to the guarantee or assurance given under any such covenant or agreement as is referred to in Article 291 with respect to the personal rights, privileges and dignities of the Ruler of an Indian State".

304. This article clearly links itself with the Agreements and Covenants. It has no independent existence apart from the Agreements and Covenants. Mr. Palkhiwala conceded that Article 362 is a provision of the Constitution relating to the Agreements and Covenants. Therefore, it follows that if any dispute arises in respect of any right accruing under or any liability or obligation arising out of Article 362 then the same would be covered by the second part of Article 363. But Mr. Palkhiwala sought to place his own interpretation on the word "dispute" found in Article 363. It is not necessary for us in this case to decide what controversy relating to Article 362 can be considered as a "dispute" under Article 363. At present we have no concrete complaint before us relating to the contravention of Article 362. It is not proper to decide the scope of an article in the Constitution in abstract. The scope of Article 362 as well as the meaning of the expression "dispute" in Article 363 can be best considered when a proper case comes up for decision. In this view, I have not thought it necessary to go into the scope of Article 362.

305. This takes me to Article 363 (1). That Article reads:

"Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement, or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument".

306. Under Clause (2) of that article "Indian State" is defined for the purpose of that article as meaning any territory recognised before the commencement of the Constitution by His Majesty or the Government of the Dominion of India as being such a State, and the "Ruler" for the purpose of that article is defined thus:

"Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State".

307. Article 363 has two parts: the first part deals with disputes arising out of any provisions of a treaty, agreement or covenant etc., and the second part with dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution, relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

308. Dealing with Articles 362 and 363 this is what the White Paper says in paragraph 240 (at p. 125):

"Guarantees regarding rights and privileges.—

Guarantees have been given to the Rulers under the various Agreements and Covenants for the continuation of their rights, dignities and privileges. The rights enjoyed by the Rulers vary from State to State and

are exercisable both within and without the States. They cover a variety of matters ranging from the use of the red plates on cars to immunity from Civil and Criminal jurisdiction and exemptions from customs duties etc. Even in the past it was neither considered desirable nor practicable to draw up an exhaustive list of all these rights. During the negotiations following the introduction of the scheme embodied in the Government of India Act, 1935, the Crown Department had taken the position that no more could be done in respect of the rights and privileges enjoyed by the Rulers than a general assurance of the intention of the Government of India to continue them. Obviously, it would have been a source of perpetual regret if all these matters had been made as justiciable. Article 363 has, therefore, been embodied in the Constitution which excludes specifically the Agreements of Merger and the Covenants from the jurisdiction of Courts except in cases which may be referred to the Supreme Court by the President. At the same time, the Government of India considered it necessary that constitutional recognition should be given to the guarantees and assurances which the Government of India have given in respect of the rights and privileges of Rulers. This is contained in Article 362, which provides that in the exercise of their legislative and executive authority, the legislative and executive organs of the Union and States will have due regard to the guarantees given to the Rulers with respect to their personal rights, privileges and dignities".

309. From the above passage, it is clear that according to the Government's understanding of Article 363, that article merely deals with matters coming under Article 362. That is also the contention of the petitioners. But according to the learned Attorney General that article excludes from the jurisdiction of all Courts including this Court not merely those matters that fall within the scope of Article 362 but also the right arising from Article 291. It was urged by him that Article 291 also protects only a personal right. Therefore it is a matter that falls within the scope of Article 362. Consequently any dispute relating thereto is excluded from the jurisdiction of this Court

under Article 363. Privy purse was taken out for special treatment by the Constitution under Article 291. Therefore it is excluded from the general provision in Article 362. Articles 291 and 362 have to be construed harmoniously. It is a well-known rule of construction that a special provision excludes the general provision. Hence I have to reject the contention that Article 363 includes the right to get privy purses because it also comes within the scope of Article 362. If it is otherwise, there was no need to enact Article 291. Further there was no purpose in guaranteeing the payment of privy purses under Article 291 and then taking away the right to recover them under Article 363. We have earlier seen that in the case of most of the Rulers, the right to receive privy purse was an enforceable right even before Article 291 came into force. It is not easy to accept the contention that what was an enforceable right was made unenforceable under the Constitution. If the contention advanced on behalf of the respondent is correct the purpose of Article 291 was to take away an existing enforceable right, at any rate in the case of several Rulers and substitute the same by a recognition, devoid of all legal contents. To say that is to be cynical about the august body i. e., the Constituent Assembly. The Constituent Assembly could not have enacted Article 291 to show its contempt for the Rulers of Indian States as well as for the recommendation of the States Ministry headed by Sardar Patel, the maker of modern India. If two or more provisions in the Constitution deal with one group of topics, those provisions have to be read together and interpreted harmoniously. It is not proper to say that the Constitution is speaking in two voices, as the learned Attorney General wants us to do or that it takes away by the right hand what it gave by the left hand. Therefore we have to read Article 363 harmoniously with Article 291. That is equally true of Articles 363 and 366 (22). The rule of harmonious construction is a well known rule. If the aforementioned articles are harmoniously interpreted then the position becomes clear. The purpose of Article 363 is made clear in the White Paper. Under the Merger Agreements as well as under

the Covenants, various rights were conferred and privileges assured to the Rulers. Some of the agreements entered into between the former Rulers and his Majesty's Government or the Dominion of India are undoubtedly acts of State. So far as the Covenants are concerned, the question whether they were acts of State or constitutional documents is a highly debatable question. Rights accruing as well as liabilities and obligations arising under acts of State were not enforceable in the municipal Courts unless they were recognised by the new sovereign. For the purpose of giving necessary direction to the Union and State executives as well as to the State and Union legislatures, the Constitution recognised the rights accruing and liabilities and obligations arising under various Agreements and Covenants which recognition made those rights, liabilities and obligations enforceable. But the Constituent Assembly did not want to open up the Pandora's box. Without Article 363, Article 362 would have opened the floodgates of litigation. The Constituent Assembly evidently wanted to avoid that situation. That appears to have been the main reason for enacting Article 363. Evidently there were other reasons also for enacting Article 363. Some of the Rulers who had entered into Merger Agreements were challenging the validity of those agreements, even before the draft of the Constitution was finalised. Some of them were contending that the agreements were taken from them by intimidation; some others were contending that there were blanks in the agreements signed by them and those blanks had been filled in without their knowledge and to their prejudice. The merger process went on hurriedly. The Constitution makers could not have ignored the possibility of future challenge to the validity of the Merger Agreements. Naturally they would have been anxious to avoid challenge to various provisions in the Constitution which are directly linked with the Merger Agreements.

310. As seen earlier Article 363 has two parts. The first part relates to disputes arising out of the Agreements and Covenants etc. The jurisdiction of this Court as well as of other Courts is clearly barred in respect of disputes falling within that

part. Then comes the second part of Article 363 which refers to disputes in respect of any right accruing under or any liability or obligation arising out of any of the provisions of the Constitution relating to any agreement, covenant etc. We are concerned with this part of Article 363. Before a dispute can be held to come within the scope of that part, that dispute must be in respect of a right accruing under or liability or obligation arising out of a provision of the Constitution and that provision of the Constitution must relate to agreements, covenants, etc.

311. The principal dispute with which we are concerned in these cases is whether the President has the power to abolish all Rulers under Article 366 (22). Quite plainly this dispute cannot be held to be dispute in respect of a right accruing or a liability or obligation arising under any provision of the Constitution. Herein we are (Sic—not?) concerned with any right, liability or obligation. We are concerned with powers of the President under Article 366 (22). What is in dispute is the true scope of the power of the President under Article 366 (22). That dispute does not fall within Article 363. Power is not the same thing as right. Power is an authority whereas a right in the context in which it is used in Article 363, signifies property. The fact that the Court's decision about the scope of the power of the President under Article 366 (22) may incidentally bear on certain rights does not make the dispute, a dispute relating to any right accruing under any provision of the Constitution. A dispute as regards the interpretation of a provision of the Constitution is not a dispute within the contemplation of the second part of Article 363 as it is not a dispute in respect of any right, liability or obligation. The contention of the petitioners is that the impugned orders are ultra vires the powers of the President, hence null and void. Such a dispute does not come within Article 363.

312. It cannot be said that Article 366 (22) is a provision relating to Merger Agreements and Covenants. The word "relating to" is a word of wide import but in the context in which it is used in Article 363 it must

receive a narrower meaning; otherwise all rights accruing or liabilities and obligations arising under one or other of the provisions of the Constitution to the former Rulers of Indian States as well as to their subjects have to be held to come within the mischief of Article 363 because they became Indian citizens as a result of the merger of the Indian States in the Dominion of India in pursuance of Merger Agreements. Nothing so startling could have been intended by the Constituent Assembly. If it is otherwise, the life, liberty and property of that section of our citizens would be under the mercy of our Government because if they complain against any high-handedness on the part of the Government, the Government can seek shelter under Article 363. The word 'relating' in Article 363, in my judgment means "to bring into relation" or "establish relation between". In other words the provision of the Constitution in question must be linked with the Merger Agreements or Covenants directly and immediately. It must have no independent existence. That is not the position under Article 366 (22). It is an independent provision. It has nothing to do with the Agreements and Covenants. It does not take any strength from the Covenants and Agreements. The power to recognise the Rulers is a new power conferred on the President by the Constitution. There was no such power under the Agreements and Covenants. Between 1947 and 25th of January, 1950 there was no question of recognising the Rulers of Indian States. In respect of several of the Indian States, the Dominion of India had no right to decide the question of successorship. The provision in the Merger Agreements that succession will be according to law and custom is merely a statement of the legal position. The same cannot be considered as a part of the Agreement. The reference to Agreements and Covenants through Art. 291 is a convenient drafting device. Even if all the Agreements and the Covenants are abrogated the provision will stand intact.

313. Mr. Mohan Kumaramanglam, appearing on behalf of the respondent contended that Articles 291, 362 and 363 should be considered as one group of Articles which group together relates to Agreements

and Covenants; Article 366 (22) was enacted to effectuate Articles 291 and 362. Articles 291 and 362 are related to Agreements and Covenants; therefore Article 366 (22) must also be held to be related to Agreements and Covenants. I have earlier considered the meaning of the word 'relating' in Article 363. Further I have held that Article 291 is not related to Article 363 as it is not linked with the Agreements and Covenants; it is an independent provision. I have also held that the definition of "Ruler" in Article 366 (22) is not merely for the purpose of Article 291 and Article 362 but also for the purpose of supplying contents for the legislative entry 34 of List VI of Sch. VII of the Constitution. Hence the group relation theory ingenuously advanced by Mr. Mohan Kumaramanglam cannot be accepted. Article 363 speaks of "any provision of the Constitution relating" to Agreements and Covenants. If the contention of Mr. Mohan Kumaramanglam is analysed, it means that Article 366 (22) is related to the Agreements and Covenants through Articles 291 and 362. In other words that Art. is a relation of the relations of the Agreements and Covenants. That is not the type of relationship contemplated by Article 363. That article contemplates direct relationship between the concerned articles and the Agreements and Covenants. The further contention of Mr. Mohan Kumaramanglam that in finding out whether an article is related to Agreements and Covenants, we should look to its origin or genesis, is not correct. If it is otherwise it must be held that all the articles of the Constitution in so far as they deal with the former Rulers of Indian States and their subjects are concerned are related to Agreements and Covenants as they had their origin or genesis in the Agreements and Covenants. If that is so Article 363 becomes all pervasive. We have earlier noticed the far reaching implications of such a conclusion.

314. The petitioners contend that the plea of the respondent that Article 291 does not confer a legal right on the Rulers to get privy purses cannot be considered as raising a genuine dispute and that contention is a mere manoeuvre to oust the jurisdiction of this Court and hence the same cannot be considered as dispute

within Article 363. According to the petitioners the said plea of the respondent is a mere pretence and not a dispute because dispute in law means a triable issue and not an assertion which is ex-facie untenable. It is not necessary to examine these contentions.

315. The basic issue arising for decision in these cases is of far greater significance than it appears at first sight. The question whether the Rulers can be derecognised by the President is of secondary importance. What is of utmost importance for the future of our democracy is whether the executive in this country can flout the mandates of the Constitution and set at naught legislative enactments at its discretion. If it is held that it can then our hitherto held assumption that in this country we are ruled by laws and not by men and women must be given up as erroneous.

316. Before proceeding to consider the decisions relied on by the learned Attorney General and Mr. Kumaramangalam in support of their contention that the disputes with which we are concerned in these cases are disputes falling within the ambit of Article 363, it is necessary to mention at the very outset that the question whether the orders similar to the impugned orders are within the powers of the President under Article 366 (22) did never come before this Court for decision. No such orders had been passed by the President in the past. There was just one derecognition in the past i. e., that of the former Ruler of Baroda. That matter did not come before Courts. Hence there was no occasion for this Court or for that matter any Court in this country to consider the scope of Article 366 (22). The observations made by this Court in Rajendra Singh's case, (1970) 2 SCR 631 = (AIR 1970 SC 1946) (supra) had been considered by me earlier. Even the scope of Article 291 had not directly arisen for consideration in any of the decisions of this Court. It is true that there are a few observations in some of the decisions to which I shall presently refer about the nature of the right guaranteed under that Article 291 and the impact of Article 363 on that right.

317. Let me now consider the decisions relied on by the learned

Attorney General. The first decision relied on by him is, (1951) SCR 474 = (AIR 1951 SC 253). Therein certain States which had acceded to the Dominion of India and which had merged in the Province of Bihar and were administered as part of that Province instituted suits in the Federal Court of India before the 26th January 1950, for a declaration that various orders under which States came to be administered as part of Bihar and the laws under which those orders were made were ultra vires and void and the Province of Bihar had accordingly no authority to carry on the administration of the States. Those suits stood transferred to the Supreme Court of India under Article 374 (2) of the Constitution after the Constitution came into force. In those suits the principal question that fell for decision was whether the dispute as regards the validity of the merger could be gone into by this Court in view of Article 363 of the Constitution. This Court held that as the suits were really to enforce the plaintiffs' right under the instruments of accession and the dispute between the parties really arose out of those instruments, in view of Article 363 (1) this Court had no jurisdiction to hear the suits. The principal controversy in that case came squarely within the ambit of the first part of Article 363 (1). Hence that decision is not relevant for our present purpose.

318. The next case referred to is Viswashwar Rao v. State of Madhya Pradesh, (1952) SCR 1020 = (AIR 1952 SC 252). Therein the dispute was about the validity of some of the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates Mahals, Alienated lands) Act (1 of 1951). One of the contentions advanced on behalf of the petitioner in that case was that by the terms of the Merger Agreement the properties concerned in that case were declared as the petitioner's private properties and were protected from State legislation by the guarantee given under Article 363 of the Constitution and hence the impugned Act was bad as that contravened the provisions of that Article. The Court rejected that contention with these observations:

"It is true that by the covenant of merger the properties of the peti-

tioner became his private properties as distinguished from properties of the State but in respect of them he is in no better position than any other owner possessing private property. Article 362 does not prohibit the acquisition of properties declared as private properties by the covenant of merger and does not guarantee their perpetual existence. The guarantee contained in the article is of a limited extent only. It assures that the Rulers' properties declared as their private properties will not be claimed as State properties. The guarantee has no greater scope than this. That guarantee has been fully respected by the impugned statute, as it treats those properties as their private properties and seeks to acquire them on that assumption; moreover it seems to me that in view of the comprehensive language of Article 363 this issue is not justifiable".

319. From this it is clear that the decision in question does not bear on the points in controversy in these cases. The learned Attorney-General next relied on the decision in *Sri Sudhansu Shekher Singh Deo v. The State of Orissa*, (1961) 1 SCR 779 = (AIR 1961 SC 196). Therein a former Ruler of an Indian State challenged the levy of agricultural income-tax on his agricultural properties under the Orissa Agricultural Income-tax Act, 1947 (Orissa Act 24 of 1947). He contended that in view of the guarantees given to him under Clauses (4) and (5) of the merger agreement entered into between him and the Dominion of India, no agricultural income-tax can be levied on the income from his private agricultural properties. That contention was repelled by this Court holding that the privileges granted under Clauses (4) and (5) of the Agreement of Merger were his personal privileges as an ex-Ruler and those privileges did not extend to his private properties and that the claim made by him of immunity from taxation relying upon the Agreement of Merger was not justiciable. The ratio of that decision is of no assistance in these cases. But the learned Attorney-General relied on the observations found at pp. 785 and 786 (of SCR) = (at p. 199 of AIR) of the Report. Those observations are:

"Even though Article 362 is not restricted in its recommendation to

agreements relating to the privy purse and covers all agreements and covenants entered into by the Rulers of Indian States before the commencement of the Constitution whereby the personal rights, privileges and dignities of the Ruler of an Indian State were guaranteed, it does not import any legal obligation enforceable at the instance of the erstwhile Ruler of a former Indian State. If, despite the recommendation that due regard shall be had to the guarantee or assurance given under the covenant or agreement, the Parliament or the Legislature of a State makes laws inconsistent with the personal rights, privileges and dignities of the Ruler of an Indian State, the exercise of the legislative authority cannot, relying upon the agreement or covenant, be questioned in any Court and that is so expressly provided by Article 363 of the Constitution".

320. The only remark in the above observation relevant for the purpose of the present cases is: "Even though Article 362 is not restricted in its recommendation to agreements relating to the privy purse" thereby meaning that guarantee as regards the privy purse also comes within the scope of Article 362. This is a casual remark. In that case the Court had no occasion to consider the scope of Article 291 or Article 362.

321. The decision of this Court in (1964) 5 SCR 1 = (AIR 1964 SC 444) referred to by the learned Attorney General during the course of his arguments does not in the least bear on the point under consideration. Therein Shah J. speaking for the Court merely set out the arguments of the parties as to the scope of Articles 291, 362 and 363 but declined to go into them as those Articles had not been relied on in the High Court.

322. The next decision relied on by the learned Attorney General is the decision of this Court in *State of Gujarat v. Vora Fiddali Badruddin Mithibarwala*, (1964) 6 SCR 461 = (AIR 1964 SC 1043). The material facts of that case were that the Ruler of the State of Sant had issued a Tharao dated 12th March, 1948 granting full right and authority to the jagirdars over the forest in their respective villages. Pursuant to the agreement dated March 19, 1948 the State

of Sant merged with the Dominion of India. At the time of the merger, it was expressly agreed that no order passed or action taken by the Maharana before the day of April 1, 1948 would be questioned but after the merger the Government of Bombay in which province the former State of Sant had merged in consultation with the Government of India cancelled the Tharao in question holding that it was not a bona fide grant. The jagirdars challenged the validity of that order and in support of their case they relied on the relevant clauses in the Merger Agreement. This Court held that the guarantees given under the Merger Agreements cannot be relied on by the Municipal Courts in view of Article 363.

323. The last case relied on by the learned Attorney General is (1965) 3 SCR 201 = (AIR 1965 SC 1798). In that case a creditor of a former Ruler sought to attach the Privy Purse payable to the Ruler under Art. 291. The Ruler objected to the same on the ground that attachment is invalid in view of cl. (g) to the Proviso of S. 60 (1). C. P. C. which provision says that political pensions are not liable to be attached. The word "pension" in Section 60 (1) (g) implies periodical payment of money by the Government to the pensioners — see *Nawab Bahadur of Murshidabad v. Karanani Industrial Bank Ltd.* 58 Ind App 215 = (AIR 1931 PC 160). In *Bishambhar Nath v. Nawab Imdad Ali Khan*, (1890) 17 Ind App 181 (PC) Lord Watson observed:

"A Pension which the Government of India has given a guarantee that it will pay, by a treaty obligation contracted with another sovereign power, appears to their Lordships to be, in the strictest sense a political pension. The obligation to pay as well as the actual payment of the pension, must in such circumstances, be ascribed to reasons of State policy."

324. Relying on these decisions and taking into consideration the nature of the liability in relation to the payment of Privy Purse, this Court held that Privy Purse is a political pension and as such, the same is not liable to be attached. This, in short is the ratio of the decision. If the decision had said nothing more it would not have advanced the case of the respondent. But in the course of the judgment Bacha-

wat J. who spoke for the Court after summarising Arts. 291, 362 and 363 observed as follows:

"On the coming into force of the Constitution of India the guarantee for the payment of periodical sums as Privy Purse is continued by Art. 291 of the Constitution but its essential political character is preserved by Article 363 of the Constitution, and the obligation under this guarantee cannot be enforced in any municipal court. Moreover, if the President refuse to recognise the person by whom the covenant was entered into as the Ruler of the State, he would not be entitled to the amount payable as Privy Purse under Art. 291. Now, the periodical payment of money by the Government to a Ruler of a former Indian State as Privy Purse on political considerations and under political sanctions and not under a right legally enforceable in any municipal court is strictly a political pension within the meaning of S. 60 (1) (g) of the Code of Civil Procedure."

325. But these observations are obiter. The learned judges in that case had no occasion to consider nor did they go into the scope of Art. 291 or Art. 363. Every observation of this Court is no doubt entitled to weight but an obiter cannot take the place of the ratio. Judges are not oracles. In the very nature of things, it is not possible to give the same attention to incidental matters as is given to the actual issues arising for decision. Further much depends on the way the case is presented to them.

326. In the State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154 = (AIR 1968 SC 647) dealing with the question as to the importance to be attached to the observations found in the judgments of this Court, this is what this Court observed:

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury LC said in *Quinn v. Leathem* (1901) AC 495:

'Now before discussing the case of *Allen v. Flood* (1898) AC 1 and what was decided therein, there are two observations of a general charac-

ter which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all'. It is not a portable task to extract a sentence here and there from a judgment and to build upon it."

327. In my opinion none of the questions of law arising for decision excepting that relating to the petitioners' right to move this Court under Art. 32 is *res integra*.

328. The only question remaining for consideration is whether the petitioners have been able to establish any contravention of their fundamental rights in order to entitle them to move this Court under Art. 32. This question need not detain us for long. The petitioners have complained that the rights under Arts. 14, 19, 21 and 31 have been contravened. As I am satisfied that the rights under Articles 31 and 19 (1) (f) have been contravened it is not necessary to examine the alleged contravention of other rights.

329. I have earlier come to the conclusion that the right to get the Privy Purse under Art. 291 is a legal right. From that it follows that it is a right enforceable through the courts of law. That right is undoubtedly a property. A right to receive cash grants annually has been considered by this Court to be a property—see (1968) 3 SCR 489 = (AIR 1968 SC 1053). Even if it is considered as a pension as the same is payable under law namely Art. 291, the same is property—see (1961) 1 SCR 957 = (AIR 1961 SC 298).

330. We have also earlier seen that certain benefits have been conferred on the Rulers under the

Wealth Tax Act. As a result of the impugned orders, all those benefits are purported to have been taken away. The denial of those benefits which had been afforded to the Rulers under law is again a contravention of the petitioners' fundamental right to property. It was conceded by the learned Attorney General that an illegal deprivation of any pecuniary benefit to which a person is entitled under any law is a deprivation of his fundamental right. In view of this concession it is not necessary to refer to decided cases.

331. For the reasons mentioned above, I allow these petitions with costs, quash the impugned orders which means that the status quo ante is restored. The declaration asked for in relief No. 2 is unnecessary. There is no need at present to go into the other reliefs asked for.

RAY, J.: 332. These are eight petitions. The petitioners are described as Rulers of Gwalior, Udaipur, Nabha, Nalagarh, Kutch, Dhrangadhra, Patna and Banaras.

333. On 6 September, 1970 in exercise of the powers vested in the President under Article 366 (22) of the Constitution, the President directed that with effect from the date of the said order His Highness Maharajadhiraja Madhav Rao Jiawaji Rao Scindia Bahadur do cease to be recognised as a Ruler of Gwalior.

334. Similar orders were made by the President in regard to the other seven petitioners.

335. All the petitions are in substance the same. It will not, therefore, be necessary to refer to all the petitions separately. The case of the petitioner in Writ Petition No. 376 of 1970 can be treated as typical of the others.

336. The petitioner challenges the aforementioned order (hereinafter referred to as the order) as violative of Articles 14, 19 (1) (f) and 31 (1) and (2) of the Constitution. The order is also challenged to be unconstitutional, ultra vires, void, inoperative, arbitrary mala fide and a fraud on the Constitution.

337. The grounds for challenge alleged in the petition are these:

338. First, the Privy Purses have been guaranteed under Merger Agreements and Covenants. Merger

Agreements and Covenants are inextricably linked up with Instrument of Accession. The pledge to pay Privy Purses and the guarantee regarding privileges are inseparable from accession and merger. The obligation to pay Privy Purse and the guarantee regarding privileges cannot be abolished by an executive order. The whole purpose of the order is to deprive the petitioner of Privy Purse and privileges guaranteed under the Covenants and Merger Agreements and also guaranteed and assured by Articles 291 and 362 of the Constitution. The whole object of the order is to override and overrule the Constitution on the point of Rulers' rights, privileges and Privy Purses after the rejection of the Constitution (24th Amendment) Bill by the Rajya Sabha.

339. Secondly, derecognition of all Rulers en masse is itself the clearest possible proof that the whole object is to abolish the institution of Rulership altogether and the rights and privileges attached thereto including the right to Privy Purse. Under the Merger Agreements and Covenants a Ruler is entitled to Privy Purse, rights and privileges enjoyed before 15th August 1947 and succession to the gaddi in accordance with the law and custom of the family. The Government of India in discharge of the obligation to ensure the fulfilment of these rights has been recognising successors to Rulers and paying Privy Purses to the Rulers and to their successors. The procedure of recognition of the persons, so entitled, by the President for the purpose of Articles 291 and 362 has to be read with the contractual obligation which still survived between the Union of India and the Ruler. Once the President has recognised a person who is entitled to receive Privy Purse and to be accorded rights and privileges as a Ruler, there can be no interference with the right to receive Privy Purse.

340. Thirdly, there is no substantive provision in the Constitution conferring on the President a right to recognise or not to recognise a Ruler or to withdraw recognition. Once the procedure of recognition has been exhausted the President becomes *functus officio* and has no further authority to withdraw the recognition which he has accorded. In recognising a Ruler the President has to conform to the fact

of a certain person being Ruler or to the fact of succession in accordance with the position under the Covenants and Merger Agreements and in accordance with law and custom of the family. Article 366 (22) imposes a constitutional duty on the President to recognise an existing fact in accordance with the provisions of the Covenants and Merger Agreements and the President has no independent power or authority independent of such facts. The President is bound by contractual obligations in the Covenants and Merger Agreements and by the Constitutional duty imposed upon him to recognise a person entitled to receive Privy Purse. The order derecognising Rulers en masse brings the institution of Rulership to an end. The order is in contravention of Articles 291, 362, 366 (22) and 53 (1).

341. Fourthly, the order violates Article 14, because it singles out the Rulers for hostile discrimination and deprives them of their valuable rights to property without compensation and violates solemn agreements and the express provisions of the Constitution. There is deliberate defiance of the Constitution by wilful repudiation of contractual obligations against a class of citizens.

342. Fifthly, the right to receive Privy Purse and other rights constitutes property within Arts. 19 (1) (f) and 31 and the order seeks to deprive the petitioner of his right to Privy Purse and other rights in violation of Article 19 (1) (f). The right to tax free Privy Purse and other rights are properties of the petitioner and the petitioner is deprived of the same without authority of law in violation of Article 31 (1). The Privy Purse is in substance and in reality compensation for the transfer by Rulers of *inter alia* their properties and it is not competent to the Government to abolish the right without compensation in the form of Privy Purse.

343. Sixthly, the Rulers, it is alleged, acted on the faith of the undertaking and guarantee given by the Government of India regarding Privy Purses and preservation of Rulership and of personal rights and privileges. The Rulers acted to their detriment by giving away vast properties. The Government is, therefore, estopped by the doctrine of promissory estoppel from refusing to pay the Privy Purse. A

fiduciary duty is cast on the Government of India to respect and implement the provisions of the Merger Agreements and the Covenants. The Government is bound by its pledged words to pay Privy Purse and to recognise Rulership. Alternatively, the order leaves the Merger Agreements and Covenants untouched and the Union is bound to pay Privy Purse and to recognise the personal rights and privileges and to discharge all obligations under the Covenants and Merger Agreements and the Constitution.

344. Finally, the petitioner alleged that Article 363 does not cover the case of a policy to abolish the institution of Rulership and rights and privileges and Privy Purse of Rulers. The questions whether en masse derecognition of Rulers is ultra vires Article 366 (22) and whether the Government by executive action can abolish the institution of Rulership and wipe out Articles 291 and 362 by policy decisions are said to be outside Article 362.

345. On these allegations in the petition the petitioner seeks three declarations; First that the order is ultra vires; secondly, that the petitioner continues to be a Ruler and continues to be entitled to Privy Purse and privileges, and thirdly, a writ under Article 32 directing the Government to pay Privy purse, recognise Rulership and pay compensation.

346. The respondent denies that the petitioner is legally entitled to Privy Purse and privileges or that the Government is bound to pay Privy Purse and accord the privileges by reason of the Covenants or Merger Agreements. The Government denies that the petitioner is entitled to Privy Purse or to privileges or that the Government is bound to pay Privy Purse or accord privileges under Articles 291 and 362 respectively. The Government denies that the alleged obligation to pay Privy Purse or the alleged guarantee regarding privileges cannot be abolished by executive order. The Government denies that independently of Article 366 (22) the petitioner is entitled to Privy Purse or to privileges. The Government denies that the President is bound by contractual obligations or constitutional duty to recognise a person to be entitled to Privy Purse. The Government denies that the Government has no right to refuse

to pay Privy Purse or to derecognise Rulers. The Government denies that the order violates Articles 19 and 31 or that the petitioner has been deprived of Privy Purse or privileges because of the grounds alleged. The Government denies that Article 366 (22) imposes any duty on the President to recognise any existing fact in accordance with the Covenants or that any existing Ruler is an existing fact for recognition. The Government denies that the order is ultra vires or there is any institution of Rulership. Finally, the Government denies that derecognition is outside Article 363 or that questions of abolition of Rulership or wiping out Articles 291 and 362 are outside Article 363.

347. The Attorney General raised the plea of the bar of jurisdiction of this Court under Article 363 at the threshold. Article 363 is as follows:

"363 (1) Notwithstanding anything in this Constitution but subject to the provisions of Article 143, neither the Supreme Court nor any other court shall have jurisdiction in any dispute arising out of any provision of a treaty, agreement, covenant, engagement, sanad or other similar instrument which was entered into or executed before the commencement of this Constitution by any Ruler of an Indian State and to which the Government of the Dominion of India or any of its predecessor Governments was a party and which has or has been continued in operation after such commencement or in any dispute in respect of any right accruing under or any liability or obligation arising out of any of the provisions of this Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instrument.

(2) In this Article—

(a) "Indian State" means any territory recognised before the commencement of this Constitution by His Majesty or the Government of the Dominion of India as being such a State; and

(b) "Ruler" includes the Prince, Chief or other person recognised before such commencement by His Majesty or the Government of the Dominion of India as the Ruler of any Indian State".

348. The first bar is in respect of any dispute arising out of any pro-

vision of a treaty, agreement, covenant entered into before the commencement of the Constitution and which has continued in operation after such commencement. The second bar is in any dispute in respect of any right accruing under or any liability or obligation arising out of any provision of the Constitution relating to any treaty, agreement, covenant, engagement, sanad and other similar instruments.

349. It is, therefore vitally necessary to ascertain first whether there are disputes; secondly, as to what those disputes are; and, thirdly, whether the disputes fall within Article 363.

350. The reason why I referred to the rival allegations is to indicate the nature and character of disputes. Mr. Palkhivala on behalf of the petitioner contended that there was no dispute as to Privy Purse or to recognition of a Ruler and the only contention was that the order of the President was a nullity. It is indisputable that no one comes to a Court of law unless disputes have arisen. When the petitioner alleges that the order is a nullity and the Government alleges that the order is valid a dispute arises at once.

351. Mr. Palkhivala contended that the first limb of Article 363 was clearly not applicable because there is no dispute arising out of any Covenant or Merger Agreement and the bar under the second limb was not attracted for four reasons. First rights, liabilities and obligations are not to be confused with powers or jurisdiction or limits of legislative or executive powers or jurisdiction. Any executive or legislative action which goes beyond the scope of Article 366 (22) or violates Article 291 or Article 362 would raise a question as to the limits of executive or legislative competence and it cannot be said to raise a dispute as to any right, liability or obligation. It was emphasised that the only dispute is whether the President's order is a nullity and it is a dispute as to the limits of the President's jurisdiction and not a dispute in respect of any right, liability or obligation. Secondly, it was said that Articles 291 and 362 are mandatory Articles and if the Government chose to raise disputes about those Articles it would amount to saying that the Government was disputing the very obligation enacted by those

Articles in the Constitution. Dispute in Article 363 was said not to cover a dispute the raising of which was expressly prohibited by the other provisions of the Constitution. Thirdly, any executive action in violation of Articles 291 and 362 or beyond the ambit of Article 366 (22) would be a violation of Articles 53 and 73 of the Constitution and the latter Articles did not at all relate to Covenants or Merger Agreements. The refusal to pay Privy Purse was said to be in violation of Articles 112, 113 and 114. Again it was said that if a law was passed in violation of Art. 291 or Article 362 it would be a breach of Articles 245 and 246 which Articles were not related to Covenants or Merger Agreements at all. Fourthly an executive action which is ultra vires or mala fide is a nullity and the bar of jurisdiction under Article 363 would apply only where the action is bona fide and cannot apply where the order is ultra vires and nullity.

352. Article 363 bars the jurisdiction of all courts in respect of any dispute covered by the Article. It is seriously challenged and controverted by the Government that Articles 291 and 362 have any mandatory character as alleged by the petitioner. It is disputed that the order is a nullity. It is equally disputed that there cannot be any dispute as to rights or liabilities or obligations under the Articles aforesaid. If both parties say that an order is bona fide there can be no dispute. It is only when one party alleged the order to be a nullity and the other party affirms the order to be valid that parties will have a dispute. The petitioner's contentions bristle with disputes which in the ultimate analysis resolve into keenly debated disputes as to rights of Rulership and Privy Purse. The dispute as to jurisdiction of the President under Article 366 (22) is not in vacuo but is a dispute as to rights of recognition of Ruler for the purposes of payment of Privy Purse and enjoyment of rights and privileges. Mr. Palkhivala submitted that he did not want any relief as to Privy Purse now and if the petitioner succeeded in getting a declaration that the order is nullity and if the Government thereafter did not pay Privy Purse the petitioner would then apply for that relief. This position indicates beyond any doubt that the

heart of the matter is dispute as to Privy Purse which is stopped by the order of the President. The order is for purposes of payment of Privy Purse and that is what the petitioner is seeking to enforce.

353. In order to appreciate the true scope and content of Article 363 it is necessary to find out as to why this Article and Articles 291, 362, 366 (22) (hereinafter referred to collectively as the allied Articles) found place in the Constitution. These allied Articles deal with Privy Purses, princely privileges guaranteed under the Covenants and Merger Agreements entered into by Rulers of Indian States and recognition of Rulers by the President under Article 366 (22). The roots of these Articles lie deep in the past. Therefore, the history and chronicle of events will have to be told. The transition from the British Rule to the Indian Independence and the establishment of the Republic of our country is a great constitutional development. The Constitution which was evolved represented the national ethos forged by the aims and aspirations of the people throughout the length and breadth of our country. A great problem which awaited solution on the eve of our independence was the relation between our country and the Indian States. The British Cabinet Mission came to India in the month of March, 1946. The Mission came to bring about a change in the British policy towards India. Imperialism was crumbling after the Second World War. The Cabinet Mission in no uncertain terms said that when India was going to be an independent country it was not only necessary but also desirable that the Indian States should combine with free India for security, stability and solidarity. The Rulers of Indian States also realised the importance of such a measure in an advanced age when the leaders of our country impressed upon the Rulers the wisdom of such a course of action to avert the upheaval and upsurge of the people in the Indian States which were also tottering with the decline of British imperialism. It is in this background that the Cabinet Mission declared in May, 1946 that paramountcy of the British Crown which provided the basis of relations between British India and the Rulers of Indian States could neither be re-

tained by the British Crown nor transferred to the new Government of India. The paramount power in British India was derived from the Royal Prerogative. The rights which the paramount power claimed in exercise of the functions of the Crown in relation to the State covered both external and internal matters in the States. The Indian States had no international status. The paramount power under the British Regime recognised succession to the gaddi and settled disputes as to succession and imposed the duty of loyalty to the Crown. The Indian States Committee in 1927 had expressed the view that "paramountcy must remain paramount, it must fulfil its obligations, defining or adapting itself according to the shifting necessities of the time and the progressive development of the States". This was the essence of the doctrine of paramountcy in British India. Paramountcy could not be defined. It was an imperialist imposition on the Rulers of Indian States.

354. The Cabinet Mission issued a Memorandum dated 12 May, 1946 and announced a plan on 16 May, 1946 later on known as the Cabinet Mission Plan. In the memorandum the Cabinet Mission affirmed that the rights of the Indian States which flowed from their relations with the British Crown would no longer exist when the British would leave India and that the rights surrendered by the States to the paramount power would revert to these States. The Cabinet Mission Plan was a statement embodying suggestions and recommendations towards the speedy setting up of a new Constitution for India. Referring to the States, the Cabinet Mission Plan said that with the attainment of the Independence of our country, the relationship which had existed between the States and the British Crown would no longer be possible and paramountcy could neither be retained by the British nor transferred to the new Government. The Plan further said that the Rulers had given assurances that they were ready and willing to co-operate in the new development of India. On 3 June, 1947 the British Government superseded the Cabinet Mission Plan in so far as it referred to the States and made it clear that the decisions announced related only to British India and the British policy towards Indian

States contained in the Cabinet Mission memorandum of 12 May, 1946 remained unchanged.

355. As a prelude to the transfer of power from the British Crown to our country the Government of India decided to set up a Department called the States Department to conduct their relations with the States in matters of common concern. On 5 July, 1947 Sardar Patel defined the policy of the Government of India by stating that "the people of India were knit together by bonds of blood and feeling no less than of self-interest" and "no impassable barriers could be set up between us" and he said that the alternative to co-operation was anarchy and chaos. There was a special meeting of the Rulers on 25 July, 1947. The then Crown representative Lord Mountbatten in the course of his address to the Rulers advised them to accede to the appropriate Dominion in regard to three subjects of Defence, External Affairs and Communications and assured them that their accession on these subjects would involve no financial liability and in other matters there would be no encroachment on their internal sovereignty. Barring three States the other Indian States acceded to the Dominion of India by 15 August, 1947.

356. The Indian Independence Act was to come into existence on 15 August, 1947. Section 7 of the Indian Independence Act, 1947 provided that with the lapse of suzerainty of the Crown over Indian States all treaties and agreements between the Crown and the Rulers of Indian States, all functions exercisable by the Crown with respect to Indian States, all obligations of the Crown towards Indian States or Rulers thereof and all powers rights authority or jurisdiction exercisable by the Crown on that date in or in relation to Indian States by treaty, grant, usage, suzerainty or otherwise would also lapse. The proviso to section 7 of the Indian Independence Act, 1947 was that notwithstanding the lapse of suzerainty and lapse of treaties, effect shall, as nearly as might be, continue to be given to the provisions of any such agreement referred to in section 7 (b) of the Act which related to customs, transit, communications, posts and telegraphs or other like matters until the provisions in question were denounced by the Ruler

of the Indian State or by the Dominion or Province or were superseded by subsequent agreements.

357. The Instruments of Accession executed by the Rulers of Indian States declared accession to the Dominion of India on three subjects, viz., Defence, External Affairs and Communications. In the Instruments of Accession the Rulers provided that nothing in the instrument was to be deemed to commit the Ruler in any way to acceptance of any future Constitution of India or to fetter a Ruler's discretion to enter into arrangements with the Government of India under any such future Constitution. The Instrument concluded by stating that nothing in the Instrument would affect the continuance of the Ruler's sovereignty in and over the State or save as provided by or under the Instrument, the exercise of any powers, authority and rights then enjoyed by him as a Ruler of the State or the validity of any law then in force in his State.

358. The Instrument of Accession was followed by Stand-still Agreement. The Stand Still Agreement between the Ruler and the Dominion of India provided that until new agreements were made all agreements and administrative arrangements as to matters of common concern then existing between the Crown and the Indian States should, in so far as might be appropriate, continue as between the Dominion of India or as the case might be, the part thereof, and the State. In a Schedule were enumerated the various matters of common concern. The important matters were, inter alia, Air Communications, Arms and Equipment, Currency and Coinage, Customs, Indian States Forces, External Affairs, Extradition, Import and Export Control, Irrigation and Electric Power, Motor Vehicles, National Highways, Posts, Telegraphs and Telephones, Railways, Salt, Central Excises and Wireless.

359. The pattern of integration of Indian States was not uniform in all cases. There were 562 Indian States whereof 216 merged in Provinces, 61 were taken over as centrally administered areas and 275 integrated in different Unions of States. The Merger Agreements were entered into by the Rulers with the Dominion of India. The two important clauses in the Merger Agreements were one whereby the

Ruler was to be entitled to receive from the revenues of the State annually for his Privy Purse the sum mentioned therein free of taxes and the other whereby the Dominion Government guaranteed succession according to law and custom to the gaddi of the State and to the Ruler's personal rights, privileges, dignities and titles. These two principal clauses are to be found in all Merger Agreements. There were differences in the Merger Agreements as to the amount of Privy Purse and in some cases as to the rights of successors to Rulers with regard to Privy Purses. The Rulers of Centrally merged States also entered into similar agreements with the Dominion of India. Those agreements also had two similar principal clauses for Privy Purse the sum mentioned free of taxes and guaranteed succession according to law and custom to the gaddi of the State and to the Ruler's personal rights, privileges, dignities and titles. The third type of integration was the formation of a Union of States whereby certain States described as the Covenanting States entered into a Union of States with a common executive, legislature and judiciary. These Covenants provided for a Council of Rulers with the Rajpramukh as the President of the Council. These Covenants also had similar provisions with regard to Privy Purses and succession. The Ruler of each Covenanting State was to be entitled to receive annually from the revenues of the United State for his Privy Purse, the amount mentioned free of all taxes. The succession according to law and custom to the gaddi of each Covenanting State and to the personal rights, privileges, dignities and titles to the Rulers was guaranteed. The Government of India concurred in the Covenants and guaranteed all the provisions. The Covenant for the United State of Madhya Bharat came into existence in the month of April, 1948. The other Union also came into existence near about the same time. The Merger Agreements came into existence near about the months of April and May, 1948

360. In the month of September, 1948 the Rulers of Covenanting States executed Revised Instruments of Accession, and these were signed by the Rajpramukhs of the different Unions of States. These Unions accepted all matters enumerated in List

I and List III of the Seventh Schedule of the Government of India Act, 1935 as matters in respect of which the Dominion Legislature might make laws for the Union of States other than items relating to any tax or duty in the territories of the United State. These Revised Instruments of Accession were accepted by the Governor-General on behalf of the Dominion of India. In the month of November, 1948 the Unions of States by their Rajpramukhs issued proclamations accepting the Constitution of India.

361. The Government of India Act, 1935 was amended in the year 1947 to effect necessary changes on the passing of the Indian Independence Act, 1947. Sections 5 and 6 of the Government of India Act, 1935 as amended in 1947 provided first for the accession of Indian States to the Dominion and secondly that an Indian State was to be deemed to have acceded to the Dominion if the Governor-General signified his acceptance of an instrument of accession making a declaration in terms of section 6 thereof. Accession was to be subject to the terms of the instrument. It has already been noticed earlier that all Rulers of Indian States executed Instruments of Accession but some Indian States thereafter merged with the Governors' Provinces and some were centrally administered areas after merger and some formed Unions of States.

362. It should be noticed that the Government of India Act, 1935 did not provide for any Merger Agreement. These Merger Agreements in the case of Provincially merged and Centrally merged States did not have any legal basis and sanction under the Government of India Act, 1935. The Extra Provincial Jurisdiction Act was therefore passed in the year 1947 giving power to the Central Government to exercise extra provincial jurisdiction over a Provincially merged or a Centrally merged State only if the Centre had by treaty, agreement, acquired full and exclusive authority and jurisdiction and power for and in relation to the governance of the State. The administration of the merged Indian States could not be done either under the Government of India Act, 1935 or the Instrument of Accession. The Extra Provincial Juris-

diction Act, 1947 was passed for exercising powers of administration and legislation in regard to provincially merged and centrally merged States. The Extra Provincial Jurisdiction Act was really a half way house between complete separateness and full integration. A law passed by the Dominion Parliament did not automatically apply to the merged States but had to be made applicable by a notification under the Extra Provincial Jurisdiction Act, 1947. That is why sections 290A and 290B were inserted by the Government of India Act Amendment Act, 1949 into the Government of India Act, 1935 for effecting integration of merged States.

363. Section 290A of the Government of India Act, 1935 provided for administration of certain Acceding States as Chief Commissioners' Provinces or as part of a Governor's or Chief Commissioner's Province. Section 290B provided for administration of areas included within a Governor's Province or a Chief Commissioner's Province by an Acceding State. Under the said section 290A there came into existence the States Merger (Governors' Provinces) Order, 1949 issued on 27th July, 1949. This order was applied to the provincially merged States with effect from 1 August, 1949. Under the States Merger (Governors' Provinces) Order, 1949 the provincially merged States were to be administered in all respects as if they formed part of the absorbing Provinces and all laws including orders made under the Extra Provincial Jurisdiction Act, 1947 were to continue in force until repealed or modified. Under the States Merger Order, 1949 provision was made for representation of the merged States in the Legislature of the absorbing Province, the apportionment of assets and liabilities as between the Centre and the Provinces and the institution of suits and other proceedings against the Government and the continuance of pending proceedings. A similar order known as the States' Merger (Chief Commissioners' Provinces) Order 1949 was made applicable to the centrally merged States with effect from 1 August, 1949. The provisions of the States' Merger (Chief Commissioners' Provinces) Order, 1949 were similar to the States Merger (Governors' Provinces) Order, 1949. With the issue of the States Merger

(Governors' Provinces) and States Merger (Chief Commissioners' Provinces) Orders, 1949 the position of the provincially merged States became to all intents and purposes, the same as that of the provinces. Similar progress was also made in the direction of improving the administrative machinery of the Chief Commissioners' Provinces which assimilated the centrally merged States.

364. Mr. Palkhivala on behalf of the petitioner contended that the developments and integration of Indian States on the basis of the Instruments of Accession and the Covenants and Merger Agreements were constitutional developments and provided constitutional obligations. The Attorney General on the other hand rightly contended that the entire relationship of the Dominion of India vis-a-vis the Indian States was in the domain of Acts of States and the Instruments, Merger Agreements and Covenants did not have any constitutional sanction and obligation and were totally unenforceable in Municipal Courts. The British Crown as Sovereign State dealt with the Indian States and either conquered or annexed their territories or Rulers of the States ceded their territories or some Rulers entered into alliances with the British Crown. Such action of the British Crown was held by long series of decisions to be an Act of State and treaties and stipulations arising out of Acts of State could not be enforced in Municipal Courts. This Court has in several decisions held that Covenants and Merger Agreements with the Indian States are Acts of State and not enforceable under Municipal law. (See 1951 SCR 474 = (AIR 1951 SC 253); (1955) 1 SCR 415 = (AIR 1954 SC 447); 1959 SCR 729 = (AIR 1958 SC 816); (1960) 1 SCR 537 = (AIR 1959 SC 1383); (1964) 6 SCR 461 = (AIR 1964 SC 1043) and (1965) 3 SCR 201 = (AIR 1965 SC 1798)).

365. Mr. Palkhivala contended that on the accession of Indian States there could be no Act of State between the Dominion of India and the Rulers who acceded to the Dominion and thereafter between the Republic of India and the Rulers who were citizens. This argument is also fallacious. This Court in the same case, (1964) 6 SCR 461 = (AIR 1964 SC

1043) (supra).

"interpreted the integration of Indian States with the Dominion of India as an Act of State and has applied the law relating to an Act of State as laid down by the Privy Council in a long series of cases The Act of State comes to an end only when the new sovereign recognises either expressly or impliedly the right of the aliens"

This Court further said:

"we are not concerned with succession of India from the British Crown but with State succession between Sant State and India and there was no second succession in 1950. Whatever had happened had already happened in 1948, when Sant State merged with the Dominion of India. The Act of State which began in 1948 could continue uninterrupted even beyond 1950 and it did not lapse or get replaced by another Act of State". In (1964) 6 SCR 461 = (AIR 1964 SC 1043) (supra) the citizen claimed right on the basis of a Tharao granted by the Ruler before the merger. Apart from the fact that the Government of Bombay cancelled the right this Court held that the right granted by the Ruler was not recognised before 1950 and the Constitution gave support to those rights which were extant on 26th January, 1950. Fiddali failed on both the grounds of recognition and existing law. The Act of State is illustrated by the making of peace and war, the annexation or cession of territory, the recognition of a new State or new Government of an old State. Such acts have been held not to form the basis of action because they form the subject of political action in an Act of State. The sanction of an Act of State is political to all sovereign powers and that is why Municipal Courts accepted that position.

366. It is in this background that the Attorney General described Article 363 as embodying the concept of paramountcy being recreated in the form of a constitutional provision excluding interference by Courts in disputes relating to Instruments of Accession, Covenants and Merger Agreements. The Attorney General did not submit that there was any paramountcy between the Republic and its citizens nor that there was any doctrine of paramountcy subsisting in our country after 1950 or that it survived as a constitutional provision.

Article 363 and the other allied Articles really reflect what the Makers of the Constitution picked up from the historical past and inserted in the Constitution. The Constitution provided for recognition of Rulers by the President. This recognition was necessary because without it the Rulers could not be paid privy purses or enjoy their rights and privileges.

367. These four Articles in the Constitution appear to be slightly unrealistic or anachronistic in a Republican Constitution as it deals with citizens and the sovereignty of the people being reposed in the Republic. The founding fathers inserted these four allied Articles as rich hangings in a homely house. The real basis for Article 363 was that when the Constitution recognised the guarantee of privy purses and succession to the gaddi in the Merger Agreements and Covenants it was appreciated that if any dispute in regard to such agreements or covenants or any dispute as to any right accruing under or any obligation arising out of any provision of the Constitution relating to such covenants or agreements were allowed to be brought in a Court of law, the entire political relationship of the Dominion of India with the Indian States in an aegis of Act of State might be upset and upturned by such litigation in Municipal Courts and there would be room for regret on many counts. If Article 363 were not inserted litigations would have gone on endlessly as some of the Orissa Rulers commenced in the State of Seraikella case, 1951 SCR 174 = (AIR 1951 SC 253) to undo the Orissa merger agreements.

368. The Constitution contemplated political power of the President to recognise Rulers. If people or disgruntled contenders for Rulership were allowed to litigate by challenging either the recognition or by preferring a claim of recognition, the Courts would not be capable of adjudicating these disputes because the character and content of the President's power of recognition of Rulers is political and is not limited by the personal law of succession. Again, if the President withdrew recognition of a Ruler and the latter came to a Court of law it would be equally impossible for Courts to decide in an area which was consigned to the

President as an inheritance of political power from the domain of Acts of State and privilege of Paramountcy. That is why Article 363 really embodied the principles of Acts of State which regulated and guided the rights and obligations under the covenants or merger agreements by incorporating the doctrine of unenforceability of covenants or merger agreements coming into existence as Acts of State.

369. The other reason for insertion of Article 363 was that the rights accruing under or obligations arising out of provisions of the Constitution relating to covenants or merger agreements were imperfect rights. A question was posed that if there were rights as to succession, privy purse and privileges there should be a remedy. In the first place, there are no legal rights as to recognition of Rulership, payment of privy purse and enjoyment of rights and privileges. Prior to the Constitution, the Rulers of Indian States could not start proceedings in Municipal Courts to enforce agreements or obligations arising out of covenants or merger agreements because such rights and obligations were unenforceable on the ground of dealings under Acts of State. The Constitution gave recognition to guarantees under covenants and agreements by the allied Articles 291, 363 and 366 (22). The Attorney General characterised the payment of privy purse, enjoyment of rights and privileges and the recognition of Rulership as imperfect rights and obligations. Whatever rights and obligations are to be found in the merger agreements and covenants were recognised by the Constitution in relation to those covenants and agreements. But the Constitution made such rights unenforceable in a Court of law. That is why these rights and obligations are called imperfect rights and imperfect obligations. Examples can be found of such imperfect legal rights when claims are barred by lapse of time or claims are unenforceable because of lack of registration. These imperfect rights and obligations are described in Salmond on Jurisprudence, 12th Ed. at pages 233-234 to be exceptions to the maxim *ubi jus ubi remedium* because "the customary union between the rights and the rights of action has been for some special reasons severed". Salmond

warns against confusing obligatoriness with enforceability. It is "because of unenforceability" that "these rights are sometimes termed imperfect". Take for instance an ordinary contract of a merchant with the Government. If the contract is not in compliance with Article 299 it is unenforceable. The merchant has a mere imperfect right.

"The ordinary imperfect right is unenforceable because some rule of law declares it to be so. One's rights against the State are unenforceable, not in this legal sense, but in the sense that the strength of the law is none other than the strength of the State and cannot be turned or used against the State whose strength it is". Imperfect rights are not based on morality. Many rights are wrecked on the rock of unenforceability. Act of indemnity is one illustration. Duty is legal, when sanction is attached to its breach. Sanction means the appointed consequences of disobedience. Sanctionless duties are imperfect obligations. Really speaking imperfect rights and obligations are what authors of Jurisprudence describe as no claim in the jural opposites of claim and no claim". A statute barred debt cannot be recovered in a Court of law but if for some reason the debtor pays it he cannot later sue to recover it. The creditor (sic) had no liability but only liberty to pay. Liberty or privilege begins where duty ends and no right exists. These imperfect rights are thus in the category of "no claim" because of lack of legal sanction for enforcement by the bar of unenforceability laid down in the Constitution.

370. In our Constitution Article 363 is a positive Rule of unenforceability of certain rights and obligations. The Constitution is supreme and the provisions cannot be circumvented. This Court held in the *Seraikella* case, 1951 SCR 174 = (AIR 1951 SC 253) (supra) that Article 363 is a bar in any dispute relating to covenants and merger agreement. In (1964) 6 SCR 461 = (AIR 1964 SC 1043) (supra) this Court held that Article 363 precluded the Municipal Courts from considering and adjudicating upon any right under the Merger Agreement and guarantees were matters for the political department of the State and were thus outside the jurisdiction of this Court.

371. Again, in Usman Ali Khan's case, (1965) 3 SCR 201 = (AIR 1965 SC 1798) (supra) this Court held that the privy purse was a political pension and the payment was in relation to covenants and Merger Agreements, and, therefore, Art. 363 was a bar. In a recent decision of this Court in (1970) 2 SCR 631 = (AIR 1970 SC 1946), it has been held that the recognition of rulership by the President is not an indicia of property but it entitles the Rulers to the enjoyment of Privy Purse contemplated in Article 291 and the personal rights, privileges and dignities mentioned in Article 362 of the Constitution. It was also held that the recognition of rulership by the President was an executive and political power and Article 363 constitutes a bar to interference by Courts in a dispute arising by reason of recognition of rulership.

372. Mr. Palkhivala submitted that there was no political power of the President who had only executive power. The words "political power" denote power belonging to the State, its Government and policy. The Executive power has the political facet in many cases. To illustrate, the exercise of rights, authority and jurisdiction by virtue of any treaty or agreement (Article 73); Foreign Affairs (Entry 10 in List I of the Seventh Schedule); Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and conventions in foreign countries (Entry 14 in List I of the Seventh Schedule); War and Peace (Entry 15 in List I of the Seventh Schedule) and Foreign jurisdiction. (Entry 16 in List I of the Seventh Schedule). The power of recognition of Rulership is political because it is exercised by the President in relation to Prince or Chief by whom any Covenant or Merger Agreement was entered into and the necessity for recognition arises from the Covenants and Merger Agreements. It is a political power because it is not limited only to the law of succession or custom. The reasons of State policy will enter the field. It is also a political power because it is not a compulsive power. If the scope of the power permits the President to recognise some one who is not entitled by law and custom then law and custom does not control it. By political power is meant that the

consideration which moves the President is a matter on which the Court will find no standard for resolving it judicially. "There is no judicial process to adjudicate upon such political consideration".

373. Article 363 is a non obstante clause. It is a constitutional mandate. The prefatory words in Art. 363 "notwithstanding anything in the Constitution" exclude all other provisions of the Constitution from being attracted in disputes which fall within Article 363. There have been decisions of this Court on the meaning of the words "notwithstanding anything in this Constitution" occurring in Article 363 and in Article 329. In the State of Seraikella case, 1951 SCR 174 = (AIR 1951 SC 253) (supra) this Court held that Article 363 overrides all provisions of the Constitution. In N. P. Ponnuswami v. Returning Officer, Namakkal Constituency, 1952 SCR 218 = (AIR 1952 SC 64), Article 329 was construed to mean that the jurisdiction of the High Court under Article 226 to interfere in regard to rejection of a nomination paper could not be challenged by a writ of certiorari to quash the proceedings. This Court observed the difference between the words "subject to the provisions of this Constitution" occurring in Article 328 and "notwithstanding anything in this Constitution" occurring in Article 329 and held that the words in Article 328 could not exclude the jurisdiction of the High Court. The effect of a non obstante clause was also considered by this Court in Aswini Kumar Ghosh v. Arbind Bose, 1953 SCR 1 = (AIR 1952 SC 369). In that case Section 2 of the Supreme Court Advocates Act, 1951 provided that notwithstanding anything contained in the Bar Councils Act, 1926 or in any other law regulating the conditions subject to which a person not entered in the roll of Advocates of a High Court might be permitted to practise in that High Court every Advocate of the High Court shall be entitled as of right to practise in any High Court whether or not he is an Advocate of that High Court. The petitioner in that case insisted on the right to practise as an Advocate in the High Court at Calcutta by virtue of his being an Advocate of the Supreme Court. He made an application under Article 226.

The High Court of Calcutta rejected the application. There was an appeal as well as a writ petition under Article 32. This Court observed that the High Court had not correctly approached the construction of Section 2 by enquiring what the provisions were which that section sought to supersede and then place upon the section such a construction as would make the rights conferred by it co-extensive with the disability imposed by the superseded provisions. This Court observed that first it would be ascertained as to what the enacting part of the section provides on a fair construction of the words used according to the natural and ordinary meaning and the non obstante clause was to be understood as operating to set aside as no longer valid anything contained in relevant existing laws which were inconsistent with the new enactment.

374. The non obstante clause must be allowed to operate with full vigour in its own field. In *Dominion of India v. Shrinbai A. Irani*, (1955) 1 SCR 206 = (AIR 1954 SC 596) Section 3 of Ordinance No. 19 of 1946 contained a non obstante clause with the words:

"notwithstanding the expiration of the Defence of India Act, 1939, and the rules made thereunder, all requisitioned lands shall continue to be subject to requisition until the expiry of this Ordinance and the appropriate Government may use or deal with any requisitioned land in such manner as may appear to it to be expedient".

The non obstante clause was invoked in support of the submission that only those orders which would have ceased to be operative and come to an end on the expiration of the Defence of India Act and the Rules were the orders which were intended to be continued under Section 3 of the Ordinance. This Court held that although ordinarily there should be a close approximation between the non obstante clause and the operative part of the section, the non obstante clause need not necessarily and always be co-extensive with the operative part, so as to have the effect of cutting down the clear terms of an enactment. The non obstante clause was held not to cut down the construction and restrict the scope of the operation of the enactment, but was to be understood

to have been incorporated in the enactment by way of abundant caution and not by way of limiting the ambit and scope of the operative part of the enactment. The result was that all immovable properties which when the Defence of India Act expired were subject to any requisition effected under the Defence of India Act and Rules thereunder were to continue to be subject to requisition until the expiry of the Ordinance.

375. Mr. Palkhivala submitted that the petitioner's contention that the order of the President was a nullity was not a dispute within Article 363. The ordinary meaning of dispute is a contention, a controversy, a difference of opinion, a conflict of claims, and assertion of right on one side and the denial of it by the other. In *Stroud Judicial Dictionary* it will appear that a dispute as to whether a thing is ultra vires is nonetheless as dispute within an arbitration clause. In *United Provinces v. Governor-General in Council*, 1939 FCR 124 = (AIR 1939 FC 58) the plaintiff asked for a declaration that certain provisions of the Cantonments Act, 1924 were ultra vires. The Governor-General in Council denied that the provisions were invalid and further contended that the dispute was not justiciable before the Court. It was held that Section 204 (1) of the Government of India Act, 1935 conferred exclusive jurisdiction on the Federal Court in any dispute between the Governor-General in Council and any province if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends. The law in that case was challenged to be ultra vires. The plaintiff denied the validity of the law and the respondent asserted its validity. It was, therefore, a dispute on which the existence of a legal right depended. In the present case the dispute is whether the President has or has not the power to make the order impugned in these proceedings.

376. The next question which falls for consideration is the meaning of the words "right accruing under", "any liability or obligation arising out of", "any of the provisions of the Constitution". It is obvious that if any right is said to accrue under or liability is said to arise out of any

provision of the Constitution, the matter ends, there as far as those words are concerned. The contention of the petitioner that the President has no power under Article 366 (22) to make an order for derecognition is a right asserted by the petitioner under the provisions of the Constitution and it is also the petitioner's contention that the President has no right arising out of Article 366 (22) not to make an order of derecognition. It is necessary to have recourse to Article 366 (22) and Article 291 to find out the nature of the petitioner's claim, the extent of the petitioner's right on the one hand and the nature of the order of the President and the extent of the right of the President on the other.

377. The most crucial words in Article 363 are "the provisions of the Constitution relating to any such treaty, agreement, covenant, engagement, sanad or other similar instruments". Mr. Palkhivala's contention was that the order of the President under Article 366 (22) did not give rise to a dispute in respect of a right accruing under the provisions of the Constitution relating to any agreement or covenant. Ordinarily, the word "relate" means to bring a thing or person in relation to another, to connect, establish a relation between, to have reference to, to be related, having relation to and to stand in some relation to another thing. This is the dictionary meaning. Mr. Palkhivala submitted that the provisions of the Constitution, viz., Articles 366 (22), 291 and 362 might have reference to the Covenant but were not related to the Covenant. That is a mere verbal subterfuge because the word 'relate' is synonymous with the word refer.

378. When Article 366 (22) was introduced in the Constituent Assembly as will appear from the Constituent Assembly Debates, Vol. 10 it was said that "the form in which the Rulers find recognition in the new Constitution in no way impairs the democratic set up of the States." Recognition of a Ruler was necessary for the limited purpose of payment out of privy purse and it had no other reference. In *Maharaja Pravir Chandra Bhanj Deo Kakatiya v. State of Madhya Pradesh*, (1961) 2 SCR 501 = (AIR 1961 SC 775) the Ruler of the State Bastar con-

tended that he was still a sovereign Ruler and an absolute owner of certain villages and that the provisions of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act did not apply to him. The Ruler of Bastar ceded to the Government of India full and exclusive authority in relation to the governance of the State and this Court held that the effect of the merger agreement was that a Ruler ceased to be a Ruler of an Indian State and under Article 366 (22) of the Constitution a Ruler was recognised for the purpose of privy purse guaranteed under Article 291. In the Dholpur case, (1970) 2 SCR 631 = (AIR 1970 SC 1946) (supra) the claim to recognition of Rulership is said to be neither a matter of inheritance nor a matter of descent by devolution. This power of recognition of Rulership is not traceable to any statutory authority and it is not a power vested in the executive by virtue of a statute. This power is political power in the field of paramountcy to which the Dominion Government, thereafter the Union Government succeeded. Between the execution of the covenants and the commencement of the Constitution the Rajpramukh exercised the power of recognition upon political consideration. (See *Umrao Singh Ajit Singh Ji v. Bhagwati Singh Balbir Singh*, AIR 1956 SC 15). The Constitution does not mention any right to be recognised nor any obligation to recognise Ruler. In Article 366 (22) which is a definition clause is embedded only the political power to recognise a Ruler.

379. Succession to Rulership is not automatic in the sense that one who claims succession by law or custom is bound to be recognised. If it were so, the Constitution would have provided. Again, the words "for the time being" indicate that the recognition is neither for any fixed duration nor even for the lifetime of any person nor is a line of succession perpetuated.

380. The power of recognition of Rulers existed during the British days. Between the Indian Independence Act, 1947 and the coming into effect of the Constitution Rulers were so described in covenants and agreements which were unenforceable in municipal courts on the ground of those being Acts of State. It cannot be said that there is any right to Rulership because the Constitution does not enact

that there shall be Rulers or that the President shall recognise Rulers. Therefore there is no constitutional mandate of what was contended by the petitioner to be an institution of Rulership. There cannot be said to be a legal right to recognition because the power of the President to recognise for the time being repels any concept of a legal right to Rulership. The claim to recognition can only arise from the covenant or the Constitution. The claim to recognition arises from the covenants and merger agreements and not from Art. 366 (22), because the covenants and merger agreements were signed by the Rulers and guaranteed by the Government. Under Article 366 (22) it was that Ruler or his successor who could be recognised. The guarantee regarding succession to the gaddi according to law and custom is in the covenants and agreements. Such succession can only mean succession to the Ruler who signed the covenant. When the covenant guaranteed the succession, it was guarantee of succession to the Ruler who signed the covenant. Therefore, the obligation to recognise a Ruler arises only from the covenants and agreements. There is no legal enforceable right to recognition under the covenant. No legal right to Rulership arises under Article 366 (22) either. If there were legal right, Article 366 (22) would have said that a Ruler means the Prince by whom any covenant was entered into and who shall be recognised by the President as a Ruler.

381. The recognition of Rulership does not exist in splendid isolation. The recognition of Rulership is intended only for the purpose of Article 291 and Article 362 in relation to covenants and merger agreements and for no other purpose. Therefore, Article 366 (22) is a necessary and ancillary provision relating to Articles 291 and 362. Without recognition of a Ruler under Article 366 (22) no effect can be given to payment of privy purse, guaranteed in the covenants and agreements.

382. When counsel for the petitioner submitted that the order of the President was intended to abolish

the concept of Rulership, he was reading into the Constitution, a permanent constitutional mandate for continuance of Rulers under the rubric of recognition of Rulers. Analogies between the President, Vice-President, the Chief Justice and the Judges of this Court, the Judges of the High Court, the Public Service Commission and the Election Commission and the Rulers were drawn to support the theory that Rulership was an institution like the offices mentioned by way of illustration. These are constitutional offices recognised by the Constitution. The sanction of these offices is the Constitution. It is sophistry to speak of Rulership as an institution. When institutions are recognised the Constitution has specifically designated and recognised them by names, like Devaswom in Article 290-A, the National Library, the Indian Museum in List I Entry 62 of the Seventh Schedule, the Banaras Hindu University, the Aligarh Muslim University, the Delhi University in List I Entry 63 of the Seventh Schedule. Article 366 (22) has no significance apart from Articles 291 and 362. Inasmuch as there is no legal right to recognition it makes no difference whether there is derecognition of one Ruler or derecognition of all the Rulers. It was said that there is no power of derecognition. This Court has held in the Dholpur case, (1970) 2 SCR 631 = (AIR 1970 SC 1946) (supra) that there is power to derecognise. The Constitution does not say that the President is bound to recognise a Ruler. It follows therefore that after derecognition he is not equally bound to recognise another person as Ruler.

383. The second limb of Article 363 speaks of rights accruing under or liability or obligation arising out of the provision of the Constitution relating to covenants or agreements. It is, therefore, to be seen whether Article 366 (22) relates to covenants or agreements. No person can be recognised as a Ruler under Article 366 (22) until first he entered into a covenant referred to in Article 291 or secondly he is recognised by the President as the successor of the Ruler recognised under the first part of Article 366 (22). Therefore, the claim to be recognised as a Ruler can only arise if he or his predecessor signed the covenant. There is express and direct

relation to covenants. Counsel for the petitioner submitted that if the dominant and immediate purpose was not the enforcement of the covenant neither Article 291 nor Article 366 (22) could be said to be related to the covenants or merger agreements. These words "dominant and immediate purpose of enforcement of the covenant" are new words and therefore these words can neither be read into the Constitution nor the meaning of the words "relate to" be allowed to have such a constricted meaning by the introduction of alien words.

384. It was said that the covenants and merger agreements were meant only for the purpose of identifying the Rulers. Article 366 (22) has been put in relation to Article 291 and Article 362 and one cannot abstract Article 366 (22) from the collocation of those Articles. All these three Articles 291, 362 and 366 (22) stem from the covenants and merger agreements and but for the covenants and merger agreements these Articles would have not been there in the Constitution. The entire concept of recognition comes from the covenants and merger agreements, and cannot be divorced from Articles 291 and 362. The object of Article 366 (22) was to subserve Articles 291 and 362 for understanding and giving effect to them. Ruler in Article 366 (22) is description of the person referred to in Articles 291 and 362. If the petitioner challenges the power of the President to derecognise him he claims that he has a right to continue as a Ruler which is a right related to covenants.

385. It was said that if the President derecognises one the President was bound to recognise another person as his successor. In 1956 the Ruler of Baudh in Orissa died. The President decided not to recognise any successor to the Ruler. The widow was granted an allowance and a suitable residence was allotted to her use for her lifetime. Again in 1958 when Mahant Digvijay Das of Nandgaon died the Rulership of Nandgaon was allowed to lapse. The widow was granted allowance. No successor to the Ruler was recognised. In the year 1968 when the Ruler of Delath died no successor to the Ruler was recognised. In the month of August, 1970 the

Rulership of Malpur was also allowed to lapse. In the case of Baroda the Ruler was derecognised and during his lifetime his successor was recognised as a Ruler. That was on grounds of misconduct. These cases indicate that no legal right to Rulership was asserted. The President in recognising a Ruler need not follow law of succession and above all there is no legal obligation on the President to appoint a Ruler. The Attorney General and Mr. Mohan Kumarmangalam rightly said that the character and quality of recognition by the President was such that no duty was cast on the President to recognise any person as Ruler after he derecognised one since Article 366 (22) did not contain words of compulsion that a Ruler must be recognised for each State and there must always be a Ruler for each State.

386. It was said that the power of the President was used after the Constitution Amendment Bill was rejected by the Rajya Sabha. That is a totally irrelevant consideration and cannot prejudice or alter the Constitution. If the President has the power to derecognise, the power will speak and hold good.

387. Mr. Palkhivala relied on the decisions of this Court as also the recent decision of the House of Lords in support of the proposition that if the order was a nullity there was no bar of jurisdiction. The decisions are Smt. Ujjam Bai v. State of Uttar Pradesh, (1963) 1 SCR 778 = (AIR 1962 SC 1621); (1964) 4 SCR 733 = (AIR 1964 SC 72); (1964) 4 SCR 797 = (AIR 1964 SC 381); 1966-2 SCR 553 = (AIR 1966 SC 893) and Anisminie Ltd. v. Foreign Compensation Commission, 1969-2 AC 147. It is a general rule that where Parliament has created new rights and duties and has appointed a specific Tribunal for their enforcement recourse must be had to that Tribunal alone. The jurisdiction of the Courts of law in those cases is ousted until statutory process has been completed except in so far as the Courts may prohibit the Tribunal from proceeding on the ground that it had no jurisdiction to determine a particular matter. In situations, where the Courts have no jurisdiction to intervene, they nevertheless review the validity of the final determination by the chosen Tribunal either on the ground that the autho-

urity was not the one designated by the Act or where it was empowered to determine an issue it did not address itself to the matter committed to it or where it violated the rule of natural justice. All the decisions relied on by Mr. Palkhivala dealt with the power of the Court to interfere where a statute is impeached as *ultra vires* or action under the statute is said to be without jurisdiction or where action is said to be procedurally *ultra vires* as in the case of *Ujjam Bai*, (1963) 1 SCR 778 = (AIR 1962 SC 1621) (supra) or where the executive act was *mala fide* and for alien purpose as in *Pratap Singh's* case, (1964) 4 SCR 797 = (AIR 1964 SC 72) (supra) or where an order of detention under the Defence of India Act was challenged in violation of the Act and also on the ground that it was *mala fide* as in *Makhan Singh's* case, (1964) 4 SCR 797 = (AIR 1964 SC 381) (supra). The decision of this Court in (1969) 3 SCR 662 = (AIR 1969 SC 78) on which Counsel for the petitioner relied is again illustrative of the type of cases where Courts have interfered on the ground that the appointed Tribunal did not comply with provisions of the statute or exceeded jurisdiction or failed to observe principles of natural justice.

388. The decision of the House of Lords in the Foreign Compensation Commission case, 1969-2 AC 147 (Supra) on which the petitioner relied contained a clause in a statute called the Foreign Compensation (Determination and Registration of Claims) Order which provided for determination of compensation by the Commission and contained a section that the determination by the Commission of any application made to them under the Act was not to be called in question in any court of law. It was held that a finality clause of the nature in that statute protected determination which was not a nullity. The English Company owned property in Egypt. The property was sequestrated under the provisions of a proclamation by the Egyptian Authorities. The plaintiff company sold the sequestrated property to an Egyptian organisation. The English Company made an application to the Foreign Compensation Commission and claimed that they were entitled in the Egyptian Compensation Fund in respect of their

sequestrated property. The Commission made a determination that the plaintiff company failed to establish a claim. The plaintiff company then brought an action for a declaration that the determination was a nullity by contending that the Commission had misconstrued the order in finding that the Egyptian organisation to whom the plaintiff had sold the property was the plaintiff's successors in title. The House of Lords held that the word "determination" was not to be construed as including everything which purported to be a determination but was not in fact a determination because the Commission had misconstrued the provisions of the order defining their jurisdiction. The ratio of the decision of the House of Lords was not whether the Foreign Compensation Commission made a wrong decision but whether the Commission enquired into and decided a matter which they had no right to consider. The Foreign Compensation Commission in that case held that the Egyptian organisation to whom the plaintiff company had sold the property was the successor-in-title and as the Egyptian organisation was not a British National, the Commission rejected the claim of the English Company. These decisions deal with the jurisdiction of the appointed Tribunal, viz., whether the Tribunal has exceeded its jurisdiction or has failed to exercise its jurisdiction.

389. In the present case, the question for consideration is the provision of the Constitution which under some Articles confer jurisdiction on this Court and in another Article excludes the jurisdiction of the Court. A private clause of this nature in the Constitution stands on an entirely different footing from a clause of that nature in other statutes. In ordinary statutes, statutory authorities are entrusted with powers and duties. When a finality clause appears in such statutes, the courts interfere with acts or decisions of such statutory bodies or authorities, by issuing writs of mandamus, prohibition or certiorari, on the grounds of commanding them to exercise their jurisdiction or not to exceed their jurisdiction or not to usurp any jurisdiction they do not possess or to observe the principles of natural justice or where the courts find that the acts or decisions are

tainted by extraneous consideration or collateral reasons or mala fide or fraud.

390. In the present case, the petitioners have invoked the jurisdiction of this Court under Article 32. Article 32, is excluded by the opening words in Article 363. It was said by counsel for the petitioner that the order of the President was a nullity the petitioner's property rights were invaded, and, therefore, the jurisdiction of this Court was attracted. The fallacy of the petitioner's submission is in totally overlooking the provisions of Article 363 which exclude in express and unambiguous terms the jurisdiction of this Court notwithstanding any provision of the Constitution. The Courts normally lean in favour of stretching the jurisdiction but when the Constitution which invests this Court with jurisdiction with one hand divests it of jurisdiction with another in specifically designated disputes the attempt to overreach the Article which bars jurisdiction of courts will be totally impermissible. It is at this stage that the words of Holmes C. J. in *Communications Assns. v. Douds*, (1949) 339 US 382 will throw light. "The provisions of the Constitution are not mathematical formulae having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital, not formal, it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of growth".

Therefore, if the Constitution has placed a restriction on the jurisdiction of this Court, it will be trifling and tinkering with the Constitution if this Court interfered in matters which were excluded from jurisdiction. It is well settled that what is forbidden directly cannot be achieved indirectly.

391. In interpreting these four allied Articles when this Court finds that it has no jurisdiction it will say so and in saying so, the jurisdiction of this Court is not whittled down in any manner. The jurisdiction of this Court is all pervasive and all embracing in regard to fundamental rights of citizens. The petitioners are citizens but the rights they claim are recognition of rulership, payment of Privy Purse and enjoyment of princely privileges

which are not fundamental rights on account of unenforceability. These special rights belong to a world of their own and that is why the makers of the Constitution intertwined Article 363 with the allied Articles 291, 363, 366 (22) as the forbidden frontiers of Courts.

392. It is now to be found out whether there are disputes with regard to payment of Privy Purses and whether such disputes can be said to arise out of the provisions of this Constitution, and thirdly whether the provisions of the Constitution in Article 291 relate to covenants and merger agreements. Mr. Palkhivala contended that there were no disputes as to payment of privy purses. This submission is unacceptable. The petitioner's claim in the petition to continue to be recognised a Ruler is for the purpose of payment of Privy Purse. It is not suggested that a recognition of Ruler is in the abstract. A recognition of a Ruler is not by itself property. When there has been an order of recognition of a Ruler the Ruler then becomes entitled to payment of Privy Purse and enjoyment of other rights and privileges mentioned in Arts. 291 and 362 respectively. For days there were discussions, debates and disputes at the Bar as to whether there were disputes as to Privy Purses. The pleading and the affidavit evidence point with unerring accuracy that the petitioners claim Privy Purse, assert title to Privy Purse and insist on payment of Privy Purse guaranteed in covenants and merger agreements and recognised in Article 291 and by reason of provisions contained in Article 366 (22) which speaks of recognition of Rulers they ask for relief with regard to continuance of recognition of Rulers and payment of Privy Purses. It is indisputable that the merger agreements and covenants not only speak of payment of Privy Purse but also mention guarantee of the Government in that behalf. These covenants and merger agreements were totally unenforceable prior to the Constitution. Article 291 is a constitutional recognition of the guarantee regarding Privy Purse mentioned in the covenants and agreements. Article 291 does not create any new and independent right of payment of Privy Purse. Article 291 is related to the covenant and is not unrelated to the covenants and merger agreements.

393. When Article 291 was introduced in the Constituent Assembly as Article 267 it was said to give constitutional recognition to those guarantees and to provide for the expenses being charged on the central revenues subject to such recoveries as might be made from time to time from the States in respect of these payments. Article 291 (2) as it stood at the time of the commencement of the Constitution indicated that where territories of any Indian State are comprised within a State specified in Part A or Part B of the First Schedule, there shall be charged on and paid out of the consolidated fund of that State such contribution, if any, in respect of the payments made by the Government of India under clause (1) and for such period as may, subject to any agreement entered into in that behalf under clause (1) of Article 278 be determined by order of the President. Article 278 of the Constitution as it stood in 1950 provided that the Government of India might, subject to the provisions of clause (2) of Art. 278, enter into an agreement with the Government of the State specified in Part B of the First Schedule with respect to inter alia the contribution by such State in respect of any payment by the Government of India under cl. (1) of Article 291 and when an agreement was so entered into the provisions of Chapter I of Part XII of the Constitution (Articles 264 to 291 under the title Finance) shall in relation to such States have effect subject to the terms of such agreement. Article 278 and Article 291 (2) were omitted by the Constitution (Seventh Amendment) Act, 1956 in the year 1956. By the same Constitution (Seventh Amendment) Act, 1956 the First Schedule to the Constitution as it originally stood consisting of Parts A, B and C in regard to the States and the territories of India was repealed and substituted by the First Schedule containing the States and the Union territories. These provisions in the Constitution as they stood in 1950 indicated that Article 291 embodied the constitutional recognition for the fulfilment of the guarantees and assurances given by the Government of India in respect of Privy Purses and provided for necessary adjustments in respect of Privy Purse entailed by changed circumstances and conditions.

394. This Court has held in (1964) 5 SCR 1 = (AIR 1964 SC 444) that in order to give constitutional recognition to the guarantees and assurances under the Covenants and Merger Agreements Articles 362, 363, 131 proviso and 291 were incorporated in the Constitution. The Covenants and Merger Agreements did not have any legal sanction inasmuch as neither the Government of India Act, 1935 provided for the same nor were these enforceable in municipal courts. The sanction of the Covenants and Merger Agreements was purely political. The treaties in the United States are enforced as law. It is not so in our Constitution nor is it so under the British law. During the British Rule in India political pensions were given to persons in Indian States. They were given because of reasons of State policy. When the Constitution came into force the guarantee for the payment of the sums of money as Privy Purse contained in the Covenants and Agreements was continued by Article 291 but the essential political character of the Privy Purse was preserved by Article 363 by enacting that the guarantee could not be enforced in municipal courts.

395. It might be asked here as to whether any Ruler of an Indian State without being recognised a Ruler by the President could prefer any claim to Privy Purse under Article 291. The answer would be in the negative, because the words of Article 291 in the Constitution predicate that where under any agreement or covenant entered into by the Ruler of an Indian State before the commencement of the Constitution the payment of any sum free of tax has been guaranteed or assured to any Ruler of such State as Privy Purse (a) such sums shall be charged on and paid out of the consolidated fund of India and (b) the sums so paid to any Ruler shall be exempt from all taxes on income. The Ruler of an Indian State mentioned in the first part of Article 291 is different to the Ruler mentioned in Article 291 (b). The latter refers to the Ruler defined under Article 366 (22) and recognised by the President. At once the provisions of Article 366 (22) are attracted to find out as to who that Ruler is. It is a Ruler who is recognised by the President as the Ruler of the State. It is because of the combin-

ed effect of Articles 291, 366 (22) and 363 that this Court in 1965-3 SCR 201 = (AIR 1965 SC 1798) (supra) held that Privy Purse was paid for political consideration and was not a right legally enforceable in any municipal court and the political character was preserved by Article 363 by taking Privy Purse beyond the reach of courts of law. In 1961-1 SCR 779 = (AIR 1961 SC 196) this Court said on a consideration of Articles 291 and 362 that if in disregard of the guarantee or assurance given under the covenant or agreement any legislation were made it could not be questioned in Court because of Article 363. It is true that Article 362 speaks of guarantee of rights other than that of Privy Purse.

396. It was said on behalf of the petitioner that the words "Charged on and paid out of the Consolidated Fund" in Article 291 meant that a security was created in favour of the petitioner in respect of privy purse, and, therefore, a new and independent right was created. It was said that Article 291 was a self-sustaining or self-ordaining provision. Article 291 draws its sustenance and vitality from covenants and merger agreements. If payment has not been guaranteed under the covenants or merger agreements, Article 291 does not come into operation at all. Under Article 291 effect is to be given to the covenants and merger agreements where payment of any sum has been guaranteed. Each covenant has to be examined and construed to give effect to the guarantee mentioned in the covenant and recognised in the Article. It will be utterly wrong to equate the words "charged on the Consolidated Fund" with "a charge by way of security", because Art. 291 only gives effect to guarantees in the covenants and agreements by charging the payment on the Consolidated Fund. Article 291 cannot be said to create a new right or a new obligation by charging the sum on the Consolidated Fund because the charge is only in respect of the right and obligation under the covenant and it is therefore neither a new nor an independent right. It was said that the covenants and merger agreements were merely to be referred to for the purpose of identifying the Rulers and the privy purse. The identification is a verbal subterfuge. Assuming Article 291 were a right enforceable a Ruler would have to prove first that he was a Ruler who was recognised by the President and

thus entitled to privy purse the payment whereof was guaranteed by the covenant or the merger agreement. Secondly, he would have to prove the covenant whereby he claimed a privy purse. For that again he would have to prove on the strength of the covenant or the merger agreement. Proof is in aid of title. Proof is not dissociated from claim. Claim will fail without proof. Therefore, covenants and merger agreements are indissolubly bound up with Article 291.

397. Again, there were different merger agreements with different Rulers providing for different sums for payment to the Rulers and also in some cases for payment of different sums to successors. The Orissa and Chattisgarh Merger Agreement did not mention about payment of privy purse to the successors to Rulers. The Tehri Garhwal Merger Agreement mentioned also the heirs and successors of the Maharaja for payment of privy purse. The Rampur Merger Agreement mentioned certain amount as privy purse for the Nawab and a different sum for payment to the successors. The Bhopal Merger Agreement mentioned a certain sum for the Nawab and a different sum for his successor. The Agreement of Himachal Pradesh Rulers mentioned a certain sum for the Ruler but did not mention about successors. The Bilaspur Merger Agreement mentioned a certain sum as privy purse of the Raja which was to include the allowances of the Yuvraja but did not mention anything about successors. These differences illustrate that Article 291 is vitally related to the covenants and merger agreements and draw sustenance from them.

398. The words "charged on and paid out of the Consolidated Fund" in Article 291 mean that the sum shall not be submitted to the vote of Parliament, and Article 113 (1) makes a provision to that effect. Article 291 does not by itself create any independent right of any Ruler to be paid any sum out of any charged fund. If it were a charge, it would be a debt which would be assignable. If a Ruler were to assign or mortgage or create a charge in respect of his privy purse in favour of another person there would have been no legal validity for such assignment and mortgage or charge. The reason is that there is no vested legal right in praesenti in favour of a Ruler. Again, a privy purse is a payment of a political character and is legally unenforceable. There is no right

either in rem or in personam in favour of a Ruler in regard to payment of privy purse. Supposing the privy purse were reduced would it be competent to a Ruler to maintain an action for payment of the entire sum. Article 363 would be an impediment and no court would be able to adjudicate the question. The words "charged on and paid out of the Consolidated Fund" are technical Parliamentary expression for payment out of public revenues. These words have been borrowed from English Parliamentary Practice. These words have a specific legal history since 1816 when Consolidated Fund Act was passed in England and in 1854 the English Act provided in 2 Schedules as charges payable out of the Consolidated Fund and other charges upon which vote would lie.

399. Prior to 1935 the system of presenting accounts before the legislature was under four heads, i.e. transferred subjects, reserved subjects voted and non-voted items. In 1935 the Government of India Act, 1935 used the expression "charged" in replacement of the expression "voted". After the Constitution came into existence the same system continued for presentation of the Annual Financial Statement under Article 112 (2) and Appropriation Bill under Article 114 (1). The Estimates under Article 113 (1) were (a) sums required to meet the expenses as expenditure charged upon the Consolidated Fund and (b) the sum required to meet the other expenditure proposed to be met from the Consolidated Fund. The Appropriation Bill means (a) the grants made by the House of the People; and (b) the expenditure charged on the consolidated fund but not exceeding in any case the amount shown in the statement previously laid before Parliament. Article 113 says that so much of the estimates as relates to expenditure charged upon the consolidated fund shall not be submitted to the vote of Parliament but there is nothing to prevent discussion in either House of Parliament of any of these estimates. The expenditure is charged and removed from the vote of Parliament.

400. In the English Parliamentary Practice what is charged is the expenditure that is to be made without vote of Parliament. These are first, a sum appropriated to a particular service which cannot be spent on another service, secondly, the sum appropriated is the maxi-

mum sum, and thirdly, it is available only in respect of charges which have arisen during one of the years to which the relevant Appropriation Act applies (See May Parliamentary Practice, 17th Ed. 713). The tests used to determine whether the expenditure involves a charge on the consolidated fund are that a charge must be new and distinct, that it must be payable out of the exchequer and it is to be effectively imposed. In England it will appear that the Ministers of the Crown Act, 1937 in Section 4 enacts that a pension under that section is payable as of right. Section 7 of that English Act of 1937 used the expression "shall be charged and payable out of the Consolidated Fund." These provisions in the English Act show first that the right to be paid is under S. 4 and the creation of a charge on the consolidated fund is under Section 7.

401. The words "charged on the consolidated fund" in Article 291 mean that the expenditure is non-votable and these are terms of public finance. Charge on the Consolidated Fund is an accounting arrangement before Parliament. Certain expenditure is authorised out of public revenue as independent of Parliamentary control. Charge is meant for expenditure. The words "paid out of the consolidated fund" denote the source from which the expenditure will be met. The words "charged and paid out of the consolidated fund" do not create any legal right in a party. The right to payment arises de hors the charge on the consolidated fund. The charge on the Consolidated Fund is for purposes of payment in accordance with the guarantee and assurance of payment under the covenants and merger agreements. The right to payment of privy purse arises from recognition by Art. 291 of guarantee payment of privy purse under a covenant. The scheme of Article 291 is similar to Article 290 where the expenses of any court or commission or pension payable to any person who served before or after the commencement of the Constitution in connection with the affairs of the Union or the State are charged on the Consolidated Fund. Article 290-A which speaks of a sum of Rs. 46,50,000 to be charged on and paid out of the Consolidated Fund of the State of Kerala every year to the Travancore Devaswom Fund is a different provision because it speaks of payment to a designated person as a part of the Constitution. No such comparable

words are to be found in Article 291, namely, that the sums shall be paid to the Rulers. The reasons are twofold. First, payment of Privy Purses is under covenants or merger agreements and secondly these payments were charged on the Consolidated Fund of India because the payment was not out of the Consolidated Fund of any State.

402. Originally, Article 291 contained the expression "paid out of" in both sub-clause (a) of clause (1) and Clause (2) of Article 291 for the purpose of integration of finances, assets, and liabilities of the new Constitution as between Federal Government at the Centre and the Indian States which guaranteed payment of Privy Purse under covenants and merger agreements. The original Article 291 was the result of the decision of the Constituent Assembly regarding sharing between the Consolidated Fund of India and the Consolidated Fund of Part A and Part B States regarding Privy Purse.

403. Counsel on behalf of the petitioner submitted that unless the words "charged on and paid out of the consolidated fund" mean security and right to be paid neither the President nor the Chairman or Deputy Chairman, nor the Speaker and the Deputy Speaker, nor the Judges of the Supreme Court, nor the Comptroller and Auditor-General would have security as to payments. But, these persons do not derive their right to be paid from any covenant or merger agreement. Secondly, these persons hold offices under the Constitution whereas the Rulers do not. Thirdly, Articles 59 (3), 97, 125, 148 (3) indicate in no uncertain terms that they shall be entitled to such emoluments and allowances and privileges as may be determined by Parliament by law. In the case of the President, the Chairman, the Deputy Chairman of the Council of States, the Speaker and the Deputy Speaker of the House of the People Articles 59 (3) and 97 provide that there shall be paid to them such allowances and salaries as may be fixed by Parliament, by law and until the provision in that behalf is so made such salaries and allowances as are specified in the Second Schedule. As for the Judges of this Court Article 125 (1) enacts that there shall be paid to the Judges of this Court such salaries as are specified in the Second Schedule. Article 148 (3) enacts that the salaries and other conditions of

the Comptroller and Auditor General shall be such as may be determined by Parliament and until they are so determined, shall be as specified in the Second Schedule. Therefore, it was an unfortunate comparison made by Mr. Palkhivala between these persons and the Rulers. To illustrate, some of these persons become entitled to salaries by virtue of provisions in the Constitution, e.g. Article 125 directing payment of their salaries and therefore the charge on the Consolidated Fund in respect of such salaries e. g. in Article 112 (d) (i) cannot be intended again as a direction for payment.

404. It was said on behalf of the petitioner that in the covenants and merger agreements, the payment of Privy Purse was to be from all taxes whereas under the Constitution Privy Purse was to be exempt free of all taxes on income and therefore there was a new right. This is totally misreading Article 291 (b) where it is said that "the sums so paid to any Ruler shall be exempted from all taxes on income." The words "so paid" relate to the sum guaranteed under the covenants and the agreements and to the same sum charged on the Consolidated Fund. It is only when payment is made to a Ruler that it shall be exempt from taxes on income. That is why the words "so paid to any Ruler" in Article 291 (b) indicate that when the sums are paid to a Ruler out of the Consolidated Fund the sums shall be exempt from all taxes. The Constitution does not mention payment of Privy Purse to any particular person. One has to turn to the covenant and the merger agreement to have all the particulars of persons, sums guaranteed and assured. Article 291 does not create any new and independent right but it merely gives constitutional recognition to guarantees under covenants and merger agreements which were and are unenforceable as those arise out of Acts of State. (See 1964-6 SCR 461 = (AIR 1964 SC 1043), (supra).) Article 291 is strung with the covenants because such sums in Article 291 (a) mean the sums guaranteed under covenants and merger agreements. The fons et origo is the guarantee contained in the Covenants and Agreements.

405. Another argument was advanced on behalf of the petitioner that there was a substitution of rights under covenants and merger agreements by

Article 291. The rights guaranteed under the covenants and merger agreements are matters to which Article 291 relates. The guarantee of payment under the covenants and merger agreements is recognised under Article 291. This Article gives effect to the covenants and agreements and it is related to these.

406. There were some arguments that if the amount charged on the consolidated fund on account of Privy Purse were not paid, the same would be carried over in the Consolidated Fund from year to year. That is not so because any sum charged on the consolidated fund is not carried to the next year but it lapses.

407. Article 362 has been held by this Court in Udaipur case, 1964-5 SCR 1 = (AIR 1964 SC 444) (supra) to fall within Article 363. Article 291 has also been held by this Court to fall within the bar of Article 363 in Nawab Usman Ali Khan's case 1965-3 SCR 201 = (AIR 1965 SC 1798) (supra). It was suggested that the only Article which could fall within Article 363 was Article 362 which was in closest proximity. That would be an erroneous approach to interpret the Constitution. Article 363 uses the words "provisions of the Constitution". The word "provisions" indicates more than one Article. Even at the risk of repetition it has to be stated that Articles 291, 362 and 366 (2) have a most direct and visible relation to Article 363.

408. Mr. Palkhivala contended that the petitioner had existing rights to Privy Purse and privileges prior to the Constitution and that such existing rights were incorporated in the Constitution by Articles 294 (b) and 295 (1) (b) of the Constitution. It has been consistently held by this Court that till recognition, either express or implied, is granted by the new sovereign, the Act of State continues [See 1964-6 SCR 461 = (AIR 1964 SC 1043) (supra)]. Therefore, the covenants and merger agreements were outside the jurisdiction of municipal Courts. The administration of the provincially merged and centrally merged States was by reason of the Extra Provincial Jurisdiction Act, 1947 which applied the laws of the Dominion of India to those merged States. It was only by reason of the merger agreement that the Dominion of India exercised such extra provincial jurisdiction. The Instruments of Accession did not confer

such authority. Even when Sections 290A and 290B were introduced in the Government of India Act, 1935 administration in the provincially merged States was still carried on on the strength of the merger agreement. [See Seraikella case 1951 SCR 174 = (AIR 1951 SC 253) (supra)]. The merged States were not yet completely integrated with India.

409. The States Merger (Governor's Provinces) Order, 1949 stated that as from the appointed day, i.e., the date of the commencement of the order 1 August, 1949, the States specified in the Schedule "shall be administered in all respects as if they form part of the provinces specified in the heading of the Schedule." Again in Section 7 of the States Merger (Governor's Provinces) Order, 1949 it is stated that all liabilities in respect of loans, guarantees and other financial obligations of the Dominion Government as arise out of covenants of a merged State, including in particular the liability for the payment of any sums to the Ruler of the merged State on account of his Privy Purse or to persons in the merged State on account of political pensions and the like shall as from the appointed day be liabilities of the absorbing Provinces unless the loan, guarantee or other financial obligation is relatable to central purpose. The Privy Purse is mentioned separately to and independently of loans, guarantees and other financial obligations. The character of the liability regarding Privy Purse is not changed by the States Merger (Governor's Provinces) Order, 1949. The Act of State which commenced with the Instruments of Accession continued even after the merger agreements as has been held by this Court in Vohra Fiddali's case 1964-6 SCR 461 = (AIR 1964 SC 1043) (supra).

410. The liabilities in Arts. 294 (b) and 295 (1) (b) of the Constitution refer to other legal rights which were enforceable in court of law. Privy Purse under the covenants and merger agreements were no such legal rights enforceable in a court of law for the obvious reason that if prior to be enforced in a municipal court the Government would have demurred on the plea of act of State that plea in bar would be available to the Government of India as a defence to any claim under Articles 294 (b) and 295 (1) (b). (See Union of India v. Gwa-

lior Rayon Silk Mfg. (Wvg.) Co. Ltd., 1964-7 SCR 892 at p. 908 = (AIR 1964 SC 1903 at p. 1913). Furthermore, Article 295 (1) (b) cannot apply because neither Privy Purse nor privileges are matters enumerated in the Union List. Articles 291 and 362 are special provisions dealing with Privy Purse and privileges. Articles 294 (b) and 295 (1) (b) deal with devolution of liabilities of the Dominion and Part B States respectively. The Constitution has dealt with Privy Purse and privileges in separate Articles. Therefore, Articles 294 (b) and 295 (1) (b) can have no application to Privy Purse and privileges. (See the South India Corpn. P) Ltd. v. The Secretary, Board of Revenue, Trivandrum, 1964-4 SCR 280 at p. 297 = (AIR 1964 SC 207 at p. 215) where this Court held that Article 372 was a general provision and Art. 277 was a special provision and a special provision was to be given effect to the extent of its scope, leaving the general provision to control cases where the special provision does not apply.) The petitioner's contention on existing rights prior to the Constitution as well as continuance thereof fails.

411. Agreement to pay privy purses and to continue privileges of the Princes which were guaranteed by the Government of India before the Constitution were all political agreements born out of political bargains to achieve integration of Indian States with the Dominion of India. This political bargain was carried into the Constitution by the insertion of Article 291 for payment of Privy Purse, Article 362 for continuance of privileges and Article 366 (22) for recognition of Princes, and the political character was preserved by inserting Article 363 which bars the jurisdiction of the court in respect of disputes arising out of covenants and agreements and these Articles which are related to the covenants and agreements.

412. Mr. Palkhivala contended that the order affected the rights of the petitioner under the Wealth Tax Act, the Income-tax Act, the Gift Tax Act, the Hindu Succession Act, the Estates Duty Act, Customs Regulation, Code of Civil Procedure, Code of Criminal Procedure and Madhya Bharat Gangajali Trust Fund Act, 1954. The Wealth Tax Act, 1957 defines a Ruler as defined in clause (22) of Article 366 of the Constitution and enacts certain

exemptions in respect of certain assets, namely the official residence in the occupation of the Ruler. The right of the petitioner under the Wealth Tax Act is dependent on being recognised as a Ruler by the President under Article 366 (22). If the order cannot be challenged for the reasons given above, the petitioner can have no right under the Wealth Tax Act, because the right under the Wealth Tax Act is derived only from his recognition as a Ruler under Article 366 (22). Under the Income-tax Act, 1922 (Section 4 (3) (x)) and the Income-tax Act, 1961, S. 10 (19), amount received by a Ruler as Privy Purse is not included as income. Under Income Tax Part B States Taxation Concessions Order, 1950 the bona fide annual value of the palaces declared by the Central Government as official residence of the Ruler is exempted from taxation. Therefore, if the rights are derived from recognition of Rulership by the President under Article 366 (22) and if the recognition cannot be impeached no right arises. Under the Gift Tax Act, tax is not leviable on gifts out of Privy Purse for maintenance of relatives or for performance of official ceremonies. If no Privy Purse is paid no question of any gift out of Privy Purse arises. Under the Hindu Succession Act the Act shall not apply to any estate which descends to a single heir by the terms of any covenant or agreement. Succession is a right which can be claimed by heirs of the petitioners. The petitioners cannot have any fundamental right of any such right under the Hindu Succession Act. Under the Estates Duty Act, exemption is given in respect of any one building in the occupation of a Ruler declared by the Central Government as his official residence. If the petitioner disposes of his property he will not be affected. The duty will have to be paid by someone who will inherit or succeed. As for the Customs Regulations exemption is available only to Rulers recognised by the President. When he ceases to be recognised no exemption applies. The trust properties arise only in the case of Madhya Bharat Gangajali Fund Trust Act, 1954. The Ruler of Gwalior is one of the trustees and is the President. The trust will not fail. The trustees will continue and the Act may have to be amended in a suitable manner. The Civil Procedure Code

grants exemption to Rulers from being sued. Exemption from being sued is not personal liberty within the meaning of Art. 21. Exemption from being sued is procedural advantage which will no longer be available. Again, section 197 of the Code of Criminal Procedure is a procedural advantage. In all these cases the petitioner cannot complain in this Court because the position is derived from the recognition of Rulership and Article 363 is an insurmountable and impenetrable bar.

413. Recognition of Rulership is not a legal right. It is not a right to property. Privy Purse is not a legal right to property. There is no fundamental right to Privy Purse. There is no fundamental right to Rulership.

414. A series of decisions of this Court have held that Article 363 is a bar to rights to Privy Purse, personal rights and privileges, recognition of Rulership from being agitated in courts. These decisions have spoken the words of the Constitution.

415. The petitions, therefore, fail and are dismissed. Each party will pay and bear its own costs.

ORDER

416. In accordance with the opinion of the majority the Petitions are allowed and writs will issue declaring that the orders made by the President on September 6, 1970, challenged here, were illegal and on that account inoperative and the petitioners will be entitled to all their pre-existing rights and privileges including the right to privy purses, as if the orders have not been made. The petitioners will get their costs of the petitions. One hearing fee in those petitions in which the petitioners have appeared through the same counsel.

Petitions allowed.

AIR 1971 SUPREME COURT 658 (V 58 C 121)

(From Madras: AIR 1962 Mad 490)

J. M. SHELAT AND
C. A. VAIDIALINGAM, JJ.

A. Rangaswamy Iyengar, Appellant v. Pattammal and another, Respondents.

Civil Appeals Nos. 1049 and 1050 of 1967, D/- 11-1-1971.

AO/BO/A118/71/HGP/C

Constitution of India, Article 133 (1) — Single Judge of High Court is a Court immediately below Division Bench of that High Court hearing Letters Patent appeal — When Division Bench sets aside judgment of Single Judge it is a judgment of reversal and High Court cannot refuse certificate of fitness for leave to appeal to the Supreme Court if other conditions of Article 133 (1) (a) and (b) are satisfied. AIR 1962 Mad 490, Reversed; AIR 1963 SC 1279 and AIR 1963 SC 1322, Rel. on. (Para 7)

Cases Referred: Chronological Paras (1963) AIR 1963 SC 1279 (V 50)

= (1964) 1 SCR 270, Laddi Prasad Jaiswal v. Karnal Distillery Co. Ltd. 6

(1963) AIR 1963 SC 1322 (V 50)

= (1964) 1 SCR 475, Shri Durga Prasad v. The Banaras Bank Ltd. 6

Mr. K. Jayaram, Advocate, for Appellant.

The following Judgment of the Court was delivered by

SHELAT, J.: — The 1st respondent is the wife of the appellant and the mother of the 2nd respondent.

2. The two respondents obtained a decree for maintenance against the appellant. On the appellant's failure to pay the maintenance provided under the decree, the respondents took out execution proceedings which ended in an order for sale of the appellant's property at which the 1st respondent, who also acted as the guardian of the 2nd respondent, then a minor, became the auction purchaser. The 1st respondent had been previously granted leave by the Court to bid at the said auction sale. The amount of maintenance due till then to the respondents was set off against the purchase price.

3. Two applications were then filed by the appellant for setting aside the sale. The reasons urged in the applications were that the decree for maintenance provided separate maintenance for the two respondents, that it was accordingly not a joint decree, that the 1st respondent, therefore, could not set off the whole of the arrears of maintenance due to her and respondent 2, and consequently, was bound to deposit in the Court the balance of auction price after deducting therefrom arrears due to her. The applications were dismissed by the

execution Court. The appellant thereupon filed appeals in the High Court against the said orders of dismissal. A learned Single Judge of the High Court upheld the appellant's contentions and allowed the appeals. In letters patent appeals filed by the respondents, a Division Bench of the High Court reversed the order passed by the learned Single Judge and allowed the appeals filed by the respondents. The appellant thereupon applied for a certificate to file an appeal to this Court under Art. 133 (1) of the Constitution urging that he was entitled to a certificate as the judgment of the Letters Patent Bench was one of reversal and the matter satisfied the test of pecuniary value, namely, Rs. 10,000/-, which was the relevant value for the purposes of the instant matter.

4. The Division Bench which heard the application for certificate dismissed it holding that a Single Judge of the High Court exercising its appellate jurisdiction was not "a Court immediately below" the Division Bench of the same High Court which heard the letters patent appeals, and that the judgment of the letters patent Bench against which leave to appeal to the Supreme Court was sought for "was in effect so far as this High Court is concerned one of affirmance" because as the only effective judgment of the High Court, it restored the order of the Court of the first instance upholding the execution sale.

5. The appellant then obtained special leave from this Court, which, however, was confined to the question whether a single Judge of a High Court is a Court immediately below a Division Bench of the same High Court which hears and disposes of a letters patent appeal provided under the Letters Patent of such a High Court.

6. The question whether a Single Judge of a High Court trying a matter, either in exercise of the original jurisdiction of the High Court or its appellate jurisdiction, is a Court immediately below a Division Bench of that same High Court as provided in Article 133 (1) is now covered by two decisions of this Court, and therefore, it is no longer necessary for us to go into any enquiry about such a question. In *Ladli Prasad Jaiswal v. Karnal Distillery Co. Ltd.*, (1964) 1

SCR 270 = (AIR 1963 SC 1279), a bench of five Judges disapproving the decisions relied on by the High Court in this case held that the expressions "a Court immediately below" and "a Court subordinate to the High Court" had different meanings, and were, therefore, not one and the same. This Court held that the test for determining whether an aggrieved party has a right to appeal, other conditions being fulfilled, is not whether the judgment is of a Court subordinate to the High Court but whether the judgment is of a Court immediately below and that a single Judge of the High Court hearing a proceeding either as a Court of original jurisdiction or in exercise of appellate jurisdiction is a Court immediately below the Division Bench which hears an appeal against his judgment under the relevant clause of the Letters Patent. (See also *Shri Durga Prasad v. The Banaras Bank Ltd.*, (1964) 1 SCR 475 = (AIR 1963 SC 1322)).

7. Accordingly, the High Court was not right in refusing the certificate, if other conditions of Article 133 (1) (a) or (b) were satisfied, on the ground that the judgment of the Division Bench was not one of reversal as the learned Single Judge of the High Court was not a Court immediately below the Division Bench of that High Court. The appeals, therefore, have to be allowed which we do, but in the circumstances, there will not be any order as to costs. The cases will go back to the High Court and will be dealt with by the High Court in accordance with law and the observations made hereinabove.

Order accordingly.

AIR 1971 SUPREME COURT 659
(V 58 C 122)

(From: Bombay)*

J. M. SHELAT AND

C. A. VAIDIALINGAM JJ.

Gauri Shankar Chittarmal Gupta,
Appellant v. Smt. Gangabai Tokersey,
Respondent.

Civil Appeal No. 366 of 1967, D/-
8-1-1971.

*(Revn. Appln. No. 888 of 1965, D/-
10-1-1967 — Bom.)

AO/BO/A116/71/CWM/C

(A) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12 (2) — Demand notice is not invalid merely because it does not give break-up of the sum which was claimed as due per month. (Paras 13, 14, 16)

Thus where the tenant is in doubt or requires clarification in respect of the sum which is claimed per month in the notice as due it was held that he should have called for information on those points from the landlord especially when he was sending replies through a lawyer to the notices issued by the landlord. The mere statement by the tenant in his reply to the notice that the claim was excessive was not enough. It was clear from his conduct that he was fully aware that the amount represented the standard rent with the permitted increases under the Act. Under such circumstances it cannot be held that there was dispute between the landlord and tenant regarding the amount of standard rent or permitted increases so as to attract Section 12 (3) (b).

(Paras 13, 14 and 16)

(B) Houses and Rents — Bombay Rents, Hotel and Lodging House Rates Control Act (57 of 1947), Section 12 (2) — Demand notice by landlord for permitted increases as due under the Act is not effective only from date of notice. (Para 15)

There is nothing in the Act necessitating landlord to give first a notice under Section 10 or Section 10-C for permitted increases and then a further notice under Section 12. It is enough that the landlord charges the tenant at a higher rate and makes a demand at that rate. The date from which the demand would be effective would not be the date of intimation.

Thus it could not be said that the question of tenant's being in default should have been considered only for the period subsequent to that date.

(Para 15)

Mr. V. S. Desai, Sr. Advocate, (Mr. S. S. Shukla, Advocate, with him), for Appellant; Mr. V. M. Tarkunde and Dr. W. S. Barlingay, Sr. Advocates (M/s. Ramesh Malik and Ganpat Rai Advocates, with them), for Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: — This appeal, by special leave, by the tenant

of a residential building, is directed against the order of the Bombay High Court dated January 9/10, 1967 in Civil Revision Application No. 888 of 1965.

2. The short question that arises for consideration is whether the High Court was justified in holding that the respondent landlord was entitled to seek eviction of the appellant on the ground that the latter had failed to pay the standard rent including the permitted increases for over a period of six months. Incidentally the question also arises whether the notice issued by the respondent on June 15, 1955 is a valid one under Section 12 (2) of the Bombay Rents, Hotel and Lodging House Rates Control Act, 1947 (Bombay Act 57 of 1947), (hereinafter to be referred as the Rent Act). The facts in so far as they are material are as follows:

A building known as Lal Bungalow situate in Kurla Road, Andheri, originally belonged to the respondent and one Ratanbai. The appellant had taken on rent two rooms in the ground-floor in the said building in or about 1940, agreeing to pay monthly rent of Rs. 25.50. In 1943 the entire ground-floor including the two rooms, already occupied by the appellant were taken on a fresh lease by him on a monthly rent of Rs. 45/-. As disputes arose between the co-owners of the building, resulting in the institution of a suit, a Receiver was appointed to take possession of the suit premises. The Receiver went on collecting rent from the appellant at Rs. 45/- per month till March 1954 and subsequently at Rs. 48/2/9. In or about November, 1964 the co-owners settled their disputes and the suit house was allotted to the share of the respondent. The respondent sent a notice through her lawyer on December 21, 1954 to the appellant demanding a sum of Rs. 240/7/6, being the increments in the Municipal Tax in respect of the building from March 1, 1950 to November 30, 1954 at -/1/6 per rupee per month. It was mentioned by the respondent that the said increments were made by the Parle-Andheri Municipality in the years 1945 to 1947. Certain further claims were also made in respect of water charges, but we are now not concerned with that claim in these proceedings. By the said notice the respon-

dent landlord also called upon the appellant to vacate and deliver peaceful possession of the premises by the end of January, 1955. The appellant replied through his lawyer on January 27, 1955. He called upon the respondent to prove her title to the property in respect of which the claim was being made. He pleaded that he had paid to the Receiver all his dues till November, 1954, as also all legitimate increments payable by him. He declined to comply with the request for surrender of possession of the premises on the ground that the said demand was illegal. The respondent by letter of March 24, 1955 sent through her counsel, again reiterated her demand for payment of the increments in the municipal tax. She also gave notice to the appellant terminating his tenancy and called upon him to deliver peaceful vacant possession by the end of April, 1955. There was some further correspondence between the parties and ultimately on June 15, 1955 the respondent sent a lawyer's notice calling upon the appellant to pay a sum of Rs. 315/9/- within the period mentioned therein. The appellant was informed that the said amount represented: (a) Rs. 262/15/6 'being the arrears of rent, including the amount of the increment in Municipal taxes due by you for five months from 1st December, 1954 to 30th April, 1955 at Rs. 52.9.6 per month', and (b) Rs. 52/9/6 'as compensation for use and occupation of the suit premises for the month of May, 1955.

3. It will be noted that in this notice the respondent claimed arrears of rent including the amount of increment in municipal taxes and that the total amount per month was at Rs. 52/9/6. Claim by way of arrears of rent including the increments in municipal taxes was for a period of five months from December 1, 1954 to April 30, 1955 and compensation was further claimed for one month. The appellant again sent a reply through his counsel on July 1, 1955. In this reply he had stated that the claim contained in the notice, dated June 15, 1955 was very much in excess of what was actually due by him. It was further stated that the monthly rent of the premises was only Rs. 45/- and that the municipal tax recoverable was also only Rs. 2/13/- per month. He, however, admitted that from April

1, 1954 there was an addition to the rent according to law, but he stated that he has paid rent at Rs. 48/2/9 including all taxes from April 1, 1954. Admitting that he was in arrears of rent with all charges from December 1, 1954, he stated that he was prepared to remit the dues till June, 1955 though the demand was only for the period ending May, 1955. It was further stated that a cheque for Rs. 337/3/3 representing the arrears at Rs. 48/2/9 for seven months from December 1, 1954 to June 30, 1955 was also being enclosed along with the reply. It is seen from the further letter sent by the respondent on July 12, 1955 that the cheque, received along with the reply, was dishonoured. In consequence the appellant was again called upon to remit the amount as per the notice of June 15, 1955 together with an additional sum of Rs. 52/9/6 as compensation for the month of June, 1955. The appellant again replied on July 21, 1955 requesting the respondent to return the cheque and promising to send the amount in cash. The appellant has further stated in his reply that the amount claimed as due till the end of June, 1955 was excessive and illegal.

4. The respondent instituted on October 9, 1955 in the Court of Small Causes, Bombay, the suit, out of which the present proceedings arise, for evicting the appellant from the suit premises. The respondent averred that the appellant's tenancy had been terminated by the notice of March 24, 1955. One of the grounds for ejectment was stated to be that the appellant had failed to pay the full and due amount of rent in respect of the suit premises at Rs. 52/9/6 per month from April 1, 1954. The break up of this amount has been given as: (a) monthly rent Rs. 45/-; (b) Rs. 3/6/- on account of increase in rent at 7½% from April 1, 1954 plus Rs. 4/3/6 per month on account of permitted increases due to increase in municipal taxes. The respondent also relied on certain additional grounds for seeking ejectment, such as non-payment of water charges and converting an open verandah into a room without the consent of the landlord. However, in view of the findings of the Courts below, these additional grounds no longer survive.

5. The appellant contested the suit pleading that there has been no termination of the tenancy and that no valid and legal demand has been made regarding arrears of rent and permitted increases. In fact he pleaded that the demand made was in excess of the actual amount payable by him. He further pleaded that the respondent was not entitled to ask for his eviction from the premises.

6. The Court of Small Causes by its judgment of February 26, 1959 dismissed the suit holding that the demand of rent made in the notice of June 15, 1955 was not a proper demand and as such the landlord was not entitled to ask for eviction on the ground of non-payment of rent. The Court, however, recorded a concession made on behalf of the appellant that the notice dated June 15, 1955 should be treated as a notice under Section 12 (2) of the Act and the rate at which the arrears were claimed, namely, Rs. 52/9/6 per month for the period from December 1, 1954 to May 31, 1955 was correct as per the break up of figures given in the claim made in the suit. The further concession that the rent, according to the demand, was not paid till the filing of the suit, was also noted by the Court. However, the Small Causes Court took the view that before a tenant could be made liable to pay the permitted increases and in consequence to treat him as a defaulter for non-payment of such amount, it was obligatory on the part of the landlord to have made a demand for the payment of the permitted increases. In this case, the demand having been made only on June 15, 1955, the tenant was bound to pay the permitted increases only from that date and not for any period anterior thereto and hence the tenant cannot be considered to be a defaulter so as to give a right to the landlord to ask for eviction. The appeal filed by the respondent before the Appellate Bench of the Small Cause Court was summarily rejected on November 27, 1964. However, on revision, the High Court set aside the order of dismissal passed by the Appellate Bench and remanded the appeal for disposal after giving reasons. After remand, the Appellate Bench by its judgment dated April 6, 1965 differed from the view of the Trial Judge and decreed the respondent's suit. The

Appellate Bench held that there has been a proper notice to quit issued by the respondent. It further held that the notice dated June 15, 1955 was a valid one and as the appellant was in arrears for six months, and not having paid the amount demanded within one month, the landlord was entitled to an order for evicting the appellant. In fact the Appellate Bench was of the view that in view of the concessions made by the counsel for the appellant and noted by the Small Cause Court, it was not open to the appellant to contend that the rate at which the rent was claimed, namely, Rs. 52/9/6 per month was not the correct amount payable by him.

7. The appellant carried the matter before the High Court in Civil Revision Application No. 888 of 1965 which was dismissed by the order dated January 9/10, 1967, holding that the demand made by the respondent was legal and that the notice dated June 15, 1955 was a valid notice under Section 12 (2) of the Act. The High Court has held that the claim of the respondent comes under Section 12 (3) (a) of the Act and as such he was entitled to have a decree in his favour for eviction of the appellant.

8. Mr. V. S. Desai, learned counsel for the appellant, has raised two contentions: (i) the respondent having issued the notice on June 15, 1955 demanding the permitted increases, the question of appellant's being in default should have been considered only for the period subsequent to that date and as no such default has been established, the order for eviction is not legal; (ii) in any event the appellant having contested the demand of the respondent, the position in law is that there is a dispute regarding the standard rent and permitted increases between the landlord and the tenant and, therefore, Section 12 (3) (a) does not apply so as to entitle the respondent to have an order for eviction. A minor contention was also raised by Mr. Desai that the notice dated June 15, 1955 does not satisfy the requirement of Section 12 (2) and hence the suit for eviction was not maintainable.

9. In our opinion, none of these contentions has any substance and all of them can be disposed of together.

10. It is now necessary to advert to certain provisions of the Act.

Section 5 cl. (7) defines "permitted increase" as meaning an increase in rent permitted under the provisions of the Act. Clause (10) defines "standard rent" in relation to a premises. Section 7 puts an embargo against a landlord receiving any rent higher than the standard rent except in the circumstances mentioned therein. One such circumstance is when the landlord is entitled to recover such increase under the provisions of the Act. Section 10 permits the landlord to make an increase in rent by an amount not exceeding the increase paid by him to a local authority, any rate, cess or tax imposed or levied.

11. Section 10-C again permits the landlord to make an increase in the rent of the premises referred to in column (1) which were let on or before September 1, 1940 by an addition to the rent at the rates specified in column (2). In this case the finding of the Courts is that the premises in question is covered by item No. 2, in Column (1) "dealing with residential premises, rent of which exceeds Rs. 20/- per month, but does not exceed Rs. 80/- per month". Therefore, it follows that the respondent was entitled to claim an increase in the rent by an amount not exceeding $7\frac{1}{2}\%$ of the standard rent. It may be mentioned that Section 10-C was added by the Bombay Act 61 of 1953. Section 11 enables the Court to fix standard rent and permitted increases in the circumstances mentioned therein. Sub-sections (1), (2), (3) (a) and (3) (b) of Section 12, which are material for the present purpose are as follows:

"Section 12 (1): A landlord shall not be entitled to the recovery of possession of any premises so long as the tenant pays, or is ready and willing to pay, the amount of the standard rent and permitted increases, if any, and observes and performs the other conditions of the tenancy, in so far as they are consistent with the provisions of this Act.

(2) No suit for recovery of possession shall be instituted by a landlord against a tenant on the ground of non-payment of the standard rent or permitted increases due, until the expiration of one month next after notice in writing of the demand of the standard rent or permitted increases has been served upon the tenant in

the manner provided in Section 106 of the Transfer of Property Act, 1882.

(3) (a) where the rent is payable by the month and there is no dispute regarding the amount of standard rent or permitted increases, if such rent or increases are in arrears for a period of six months or more and the tenant neglects to make payment thereof until the expiration of the period of one month after notice referred to in sub-section (2), the Court shall pass a decree for eviction in any such suit for recovery of possession.

(b) In any other case, no decree for eviction shall be passed in any such suit if, on the first day of hearing of the suit or on or before such other date as the Court may fix, the tenant pays or tenders in Court the standard rent and permitted increases then due and thereafter continues to pay or tender in Court regularly such rent and permitted increase till the suit is finally decided and also pays costs of the suit as directed by the Court".

12. The contention raised by Mr. Desai is that in this case the notice dated June 15, 1955 is not valid and in accordance with Section 12 (2) of the Act as no particulars have been given so as to make the appellant know how the amount of a sum of Rs. 52/9/6 has been arrived at. The counsel further contended that when the appellant replied stating that the claim is excessive it follows that there is a dispute regarding the permitted increases and therefore, the matter should have been dealt with under Section 12 (3) (b) and not under Section 12 (3) (a) of the Act. We are not inclined to accept this contention.

13. No doubt the notice dated June 15, 1955 does not give the break up for the sum of Rs. 52/9/6, which was being claimed per month. We have already referred to the concession made by the counsel for the appellant before the Small Cause Court that the break up given in the claim made by the respondent is correct and that the sum demanded under the notice is the proper amount that the landlord was entitled to claim. Normally, this concession is enough to come to a conclusion that the appellant was perfectly aware about the nature and quantum of the permitted increases that were being demanded by the notice dated June 15, 1955.

14. Even otherwise if the appellant was in any manner of doubt on this point or required any clarification from the respondent, normally, he should have called for information on those points especially when he was sending replies through a lawyer to the notices issued by the respondent. Excepting baldly saying that the claim was excessive, he never cared to ask for any particulars. The appellant must have been well aware that the standard rent in this case is Rs. 45/- per month and that the respondent was entitled to an increase not exceeding $7\frac{1}{2}\%$ under Section 10-C. Further he must also be well aware that the respondent was further entitled to claim increases on account of payment of municipal taxes to a local authority under Section 10 of the Act. That the appellant was well aware of this is clear from his reply dated July 1, 1955 wherein he has stated that the municipal tax is only Rs. 2/13/- and that he has been paying the same to the Receiver; That the increases that the respondent was entitled to get under Sections 10 and 10C were Rs. 4/3/6 and Rs. 3/6/- respectively, is not challenged. Adding these two items to the standard rent of Rs. 45/- it follows that the total monthly amount claimed in the sum of Rs. 52/9/6 was perfectly correct.

15. We are not inclined to accept the contention of Mr. Desai that the permitted increases demanded by the landlord will take effect only from June 15, 1955. We are of the opinion that it is sufficient if the landlord charges the tenant at a higher rate and makes a demand at that rate and that the date from which the demand would be effective would not be the date of intimation. So far as we could see there is nothing in law to prevent the landlord making the increase at the time of giving the notice. Section 12 (3) (a) itself gives the tenant a period of one month for complying with the demand for arrears of rent for a period of six months or more and it is only if the amount is not paid within that period, the landlord is entitled to file a suit. There is nothing in the Act which requires a landlord to give first a notice under Section 10 or 10C and then a further notice under Section 12. In this case the landlord has given a notice on June 15, 1955 calling upon the appellant to pay the arrears due from December 1, 1954. There is no controversy that the amount was not

paid till the institution of the suit. When that is so, it follows that the appellant was in arrears for a period of six months or more and that he had further neglected to make the payment until the expiration of one month after the notice dated June 15, 1955. That this notice was one under Section 12 (2) of the Act, has been admitted before the Small Cause Court on behalf of the appellant. The mere fact that the said notice does not give the break up for the claim of Rs. 52/9/6 does not make it also invalid notice under Section 12 (2).

16. We have already referred to the correspondence between the parties and pointed out that the appellant at no stage asked for any clarification or further particulars from the respondent. Except making an allegation that the claim of the respondent is excessive, the appellant was not prepared to squarely face the issue, if he had any doubt, by calling upon the respondent to give particulars as to how the sum of Rs. 52/9/6 was made up. This conduct clearly shows that the appellant full well knew that the said amount represents the standard rent with the permitted increases under the Act. Under these circumstances, it cannot be considered that in this case there was a dispute between the landlord and the tenant either regarding the amount of the standard rent or permitted increases. We are in agreement with the reasoning of the High Court on this aspect.

17. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 664
(V 58 C 123)

(From Calcutta)*

J. M. SHELAT AND

C. A. VAIDIALINGAM, JJ.

Ram Gobinda Daw and others,
(In all the Appeals) Appellants v. Smt.
H. Bhakta Bala Dassi etc., Respondents.

Civil Appeals Nos. 436 and 437 of
1967, D/- 8-1-1971.

Civil P. C. (1908), S. 11 — Suit
dismissed by trial Court for default or

*(First Appeals Nos. 311 and 312 of
1956, D/- 27-3-1962 — Cal)

AO/BO/A117/71/DVT/M

for want of jurisdiction does not operate as res judicata in subsequent suit. (Case law discussed).

(Paras 20, 24, 25)

The test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved in the two cases but the previous decision must be one on a title in respect of which a dispute has been raised and which dispute was heard and finally decided by the Court. Once the decision on question of title becomes final it operates as res judicata even if the value of the subject-matter on which the former decision was pronounced was comparatively very trifling. When the decision was given by trial Court after contest it operates as res judicata even if appeal therefrom might have been dismissed on some preliminary grounds like limitation. (Case law discussed.) (Paras 20, 24, 25)

Cases Referred: Chronological Paras
(1967) AIR 1967 SC 591 (V 54)

= (1964) 2 SCR 310, Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao 23

(1966) AIR 1966 SC 1332 (V 53)
= (1966) 3 SCR 300, Sheodan Singh v. Smt. Daryao Kunwar 24

(1953) AIR 1953 SC 33 (V 40)
= (1953) SCR 154, Raj Lakshmi Dasi v. Banamali Sen 19

Mr. D. N. Mukherjee, Advocate, for Appellants, (In all the Appeals).

The following Judgment of the Court was delivered by

VAIDIALINGAM J.: — These two appeals on certificate are directed against the judgment of the Calcutta High Court dated March 27, 1962 in First Appeals from the Original Decree Nos. 311 and 312 of 1956.

2. Two plots of land bearing No. 936 of Mouza Asansol and plot No. 9202 of Mouza Asansol Municipality were acquired under the Land Acquisition Act. The notification under Section 4 of the Land Acquisition Act dated December 13, 1947 was published in the Calcutta Gazette of 25th December, 1947. The declaration under Section 6 dated December 30, 1947 was published in the Calcutta Gazette on 8th January, 1948. For plot No. 936 of Mouza Asansol measuring about 31 acres, the Land Acquisition Collector awarded a total compensation of Rs. 1707/- including

Rs. 13/1/6 on account of the landlord's interest. The entire compensation in respect of this plot was directed to be paid to Bhaktbala Dasi, the sole respondent in Civil Appeal No. 436 of 1967. In respect of plot No. 9202 of Mouza Asansol Municipality, the Land Acquisition Officer awarded as compensation a sum of Rs. 825/15/6 including Rs. 6/5/6 on account of the landlord's interest. This entire amount of compensation was directed to be paid to Bhaktbala Dasi and her sister Subasini Dasi.

3. It may be mentioned that Bhaktbala Dasi is the first respondent and on the death of Subasini Dasi, her son Sunil Kumar Roy, who has been impleaded in the proceedings is the second respondent in Civil Appeal No. 437 of 1967. Before the Land Acquisition Collector, in respect of both these plots, one Kashi Nath Dawn claimed title to the land and as such to the entire compensation amount. The appellants in these two appeals are the legal representatives of Kashi Nath Dawn.

4. The case of Kashi Nath Dawn was that both the plots of land belonged to Panchanan Roy, husband of Subasini Dasi, against whom a money decree had been obtained by one Jatin Kumar Roy. In execution of the money decree (Execution Case No. 120 of 1929, Subordinate Judge's Court, Asansol), the decree-holder brought these two items and certain other properties to sale. Kashi Nath Dawn claimed to have purchased these items in the Court sale and obtained the sale certificate Ex. 2. The sale was confirmed on November 27, 1930 and delivery of possession was also taken on December 10, 1930. It was on the strength of this purchase in Court auction that Kashi Nath Dawn claimed title to the two plots.

5. The case of Bhaktabala Dasi, who alone contested the claim of Kashi Nath Dawn was briefly as follows: Panchanan Roy had no title to the properties and that on the other hand they belonged to Ramanugraha Roy, who died leaving his widow Manmohini and three daughters, Santabala, Subasini and Bhaktabala. On the death of Ramanugraha Roy, his widow Manmohini succeeded to the property as life estate holder. As Santabala died shortly after her father's death, the properties devolved

on the other two sisters namely, Subasini and Bhaktabala, on the death of Manmohini, Panchanan Roy had married Santabala and on her death he married her sister Subasini, Panchanan Roy during the lifetime of his mother-in-law Manmohini was allowed to manage the properties. In the settlement proceedings of 1918-21 he surreptitiously got his name recorded as owner of one-half share in the estate of his father-in-law in Mouza Asansol and of the entire interest in Mouza Asansol Municipality. Panchanan Roy was never in possession and enjoyment of the properties whereas Manmohini Dasi during her lifetime and on her death her daughters Subasini and Bhaktabala were in possession and enjoyment. There was a partition between the two sisters of Mouza Asansol property and in consequence plot No. 936 of Mouza Asansol was obtained as her share by Bhaktabala Dasi. It was on this basis that Bhaktabala Dasi claimed exclusive title to plot No. 936 and the right to receive the entire compensation amount for that land. She claimed that in respect of plot No. 9202 of Mouza Asansol Municipality, she and her sister Subasini Dasi, had a title to half share each and asserted, the right to receive compensation on that basis.

6. In view of the dispute regarding right to receive the compensation amount, the Land Acquisition Collector referred the matter to the Additional District Judge, Burdwan for determination of the said dispute. The stand taken before the Land Acquisition Collector was reiterated before the learned Additional District Judge. With reference to plot No. 936 of Mouza Asansol, the learned Additional District Judge held that Panchanan Roy had wrongfully and fraudulently got recorded his name as owner of the half share when he was managing the property on behalf of his mother-in-law Manmohini widow of Ramanugraha Roy. The Court further held that Panchanan Roy was never in possession and enjoyment of both the plots in question. Regarding plot No. 9202 of Mouza Asansol Municipality, it was held that long before the sale in Execution Case No. 120 of 1929, the Katiyans and the maps had been published and they conclusively show that Mouza Asansol Municipality was a Mouza different from Mouza Asansol

with different J. L. number. The sale certificate Ex. 2 under which Kashi Nath Dawn claimed title was scrutinized by the Court which held that the description of the various items clearly showed that no land of Mouza Asansol Municipality was included therein. The Court did not also accept the claim of Kashi Nath Dawn that for the purpose of C. S. operation only the lands within Mouza Asansol Municipality were separately recorded and that they were also included within Mouza Asansol. In this view the learned Additional District Judge held that Kashi Nath Dawn did not purchase in the Court sale any plot of land within Mouza Asansol Municipality and as such he had no title to plot No. 9202. The Court accepted the plea of Bhaktabala Dasi that she and her sister Subasini Dasi were entitled to the compensation amount in equal shares. Finally the Additional District Judge held that Kashi Nath Dawn was not entitled to claim any portion of the compensation amount in respect of the two plots.

7. Kashi Nath Dawn filed two appeals before the Calcutta High Court, being First Appeals Nos. 311 and 312 of 1956. As the Land Acquisition Collector had made separate references in respect of each of the plots and as the two references were disposed of separately, though by a common judgment, two appeals were filed in the High Court. The First Appeal No. 311 of 1956 related to plot No. 936 and First Appeal No. 312 of 1956 related to plot No. 9202. At this stage it may be mentioned that Civil Appeals Nos. 436 and 437 of 1967 are against the decision of the High Court in First Appeals Nos. 311 and 312 of 1956 respectively. The High Court did not agree with the learned Additional District Judge that Panchanan Roy had fraudulently got his name entered in the settlement register as owner of half share in plot No. 936. It is the view of the High Court that the plea set up by Bhaktabala Dasi that she was absolutely entitled to the said item has not been substantiated. The High Court held that the settlement register established that Panchanan Roy's name has been recorded as owner of half share and Manmohini as the owner of another half share in the properties owned by Ramanugraha Roy in Mouza Asansol and that there was no fraud

on the part of Panchanan Roy in having his name so entered. The High Court further held that in the Court sale, Kashi Nath Dawn had purchased the half share owned by Panchanan Roy in Mouza Asansol and as such he had title to half share in plot No. 936 notwithstanding the fact that Kashi Nath Dawn was not able to establish that Panchanan Roy was in possession and actual enjoyment of his half share. In this view the High Court modified the decree of the learned Additional District Judge and held that in respect of plot No. 936 both Kashi Nath Dawn and Bhaktabala Dasi were entitled to half share each and in that proportion were also entitled to the compensation amount. As the full right of Kashi Nath Dawn in Plot No. 936 was not recognised by the High Court, Civil Appeal No. 436 of 1967 has been filed.

8. Regarding plot No. 9202 the High Court agreed with the Land Acquisition Court and held that in the Court sale, Kashi Nath Dawn had not purchased any property in Mouza Asansol Municipality and therefore he had no title thereto. The claim that Panchanan Roy was in possession of this plot was also rejected. A plea of *res judicata* raised by Kashi Nath Dawn based upon Ex. 7, the decree of the Land Acquisition Case No. 242 of 1938, with reference to plot No. 9202, was also rejected by the High Court. The request for adducing additional evidence made on behalf of Kashi Nath Dawn was also rejected by the High Court. In consequence First Appeal No. 312 of 1956 was dismissed against which Civil Appeal No. 457 of 1967 has been filed.

9. We will first take up the claim of full ownership made by Kashi Nath Dawn in respect of plot No. 936 of Mouza Asansol, which is the subject of Civil Appeal No. 436 of 1967.

10. Mr. D. N. Mukherjee, learned counsel for the appellants, who, as we have stated earlier, are the legal representatives of deceased Kashi Nath Dawn, urged that the High Court should have accepted the plea made by Kashi Nath Dawn that he was entitled to the full ownership of this plot. The counsel urged that the relevant entries in the settlement registers have not been properly construed by the High Court. According

to him all the rights which Ramanugraha Roy had in plot No. 936 of Mouza Asansol had accrued to Panchanan Roy, whose rights had been purchased by Kashi Nath Dawn in Court sale. The High Court having held that there was no fraud perpetrated by Panchanan Roy in having his name entered in the settlement registers, the full rights of Panchanan Roy in plot No. 936 as the original owner and of Kashi Nath Dawn as purchaser in Court sale should have been upheld.

11. We are not inclined to accept this contention of the learned counsel. No doubt, the learned District Judge held that Panchanan Roy fraudulently got his name entered in the settlement registers when he was in management of the properties during the lifetime of Manmohini, widow of Ramanugraha Roy. This finding was not accepted by the High Court. The High Court has considered the recitals in Ex. A, the Settlement Khatian No. 16 of Mouza Asansol which is also a khatian in respect of the permanent tenure Jagir Nakari Ramkrishna Roy. The High Court has adverted to the fact that in Ex. A the holders are divided into 17 groups but the holders of 'ka' group were described as Manmohini wife of Ramanugraha Roy and Panchanan Roy s/o Umesh Chandra Roy. These two persons were also described as being entitled to 8 g. 1 k. 15 tils each. Plot No. 936 has also been found to be one of the plots recorded as in khas possession of 'ka' group in Ex. A. It is on this basis that the High Court differing from the learned District Judge held that Panchanan Roy had been the owner of half share in this plot and Kashi Nath Dawn as purchaser of this half share of Panchanan Roy was entitled to half of the compensation amount. Mr. Mukherjee was not able to satisfy as to how Kashi Nath Dawn was entitled to full ownership of plot No. 936. We are in agreement with the decision of the High Court on this point; and as such hold that there is no merit in Civil Appeal No. 436 of 1967.

12. Coming to plot No. 9202 of Mouza Asansol Municipality Mr. D. N. Mukherjee raised two contentions: (i) the High Court was in error in holding that Ex. 2, the sale certificate does not take in this item and (ii) the claim

of the respondent was barred by res judicata, by the decree of the Land Acquisition Court Ex. 7 and the High Court was again in error in holding that there is no bar of res judicata.

13. So far as the first contention is concerned, it is an attack on a finding of fact recorded by the High Court. We have already pointed out that even the Land Acquisition Court held that Kashi Nath Dawn did not purchase in the Court sale any property of Panchanan Roy in Mouza Asansol Municipality. The High Court has agreed with this finding. The entire claim of title in respect of both the items was based on the sale certificate Ex. 2. Both the District Judge and the High Court have held that what was sold in Court sale was only the interest of Panchanan Roy in the permanent tenure in respect of Mouza Asansol and not in respect of any other Mouza. The High Court has further held that Mouza Asansol Municipality and Mouza Asansol were different entities even from about 1896 and the Court sale which took place in or about 1930 related only to the properties in Mouza Asansol. The description of the properties given in the sale certificate Ex. 2, according to the High Court, clearly establishes that what was sold in Court auction and purchased by Kashi Nath Dawn was only the property that was situated in Mouza Asansol as defined by the District Settlement Operations and not a different Mouza Asansol as it might have existed prior to 1896. The High Court has gone more elaborately into this aspect than the District Court and held that Kashi Nath Dawn did not purchase in the Court auction any property of Panchanan Roy in Mouza Asansol Municipality. We find no flaw in the finding of the High Court. Therefore, on this finding it follows that Kashi Nath Dawn, through whom the appellants claimed, had no right, title or interest in plot No. 9202.

14. Faced with this situation Mr. Mukherjee raised his second contention that the claims of Bhaktabala Dasi and her sister Subasini Dasi were barred by res judicata.

15. The bar of res judicata is pleaded as follows: Certain other plots in Mouza Asansol Municipality were acquired under the Land Acquisition Act and there was a

dispute regarding the persons entitled to compensation amount. Kashi Nath Dawn made a claim for payment of the full compensation as the owner of those plots. That claim was resisted by Subasini Dasi and her sons and they claimed in turn to be entitled to the compensation amount. But the Land Acquisition Court upheld the claim of Kashi Nath Dawn and that decree has become final. Under Ex. 7 the title of Kashi Nath Dawn in the properties of Mouza Asansol Municipality having been recognised, it was no longer open to the respondents herein to urge that Kashi Nath Dawn had no title to plot No. 9202, which is situated in Mouza Asansol Municipality. The High Court had rejected this plea on the ground that the claims of Subasini Dasi in the prior land acquisition proceedings having been dismissed for default, would not prevent her from claiming title to other plots pertaining to the same interest inasmuch as the question of ownership of the interest as a whole was not heard and decided.

16. Mr. Mukherjee, learned counsel for the appellants attacks this reasoning of the High Court as fallacious. He urged that Subasini Dasi and her sons having made a claim before the Land Acquisition Court for payment of compensation on the basis of their title, which was rejected are not entitled to put forward any further claim to this item. This plea of res judicata raised by Mr. Mukherjee has to be approached from two points of view: (i) as a bar against Bhaktabala Dasi and (ii) as a bar against Subasini Dasi. We have already referred to the case set up by Bhaktabala Dasi regarding the interest of herself and her sister Subasini Dasi in plot No. 9202. This case has been accepted by both the Courts. From the nature of the claim it is clear that Bhaktabala Dasi was not claiming any title through Subasini Dasi, on the other hand she was claiming half share in her own right as the daughter of Ramanugraha Roy and according to her, her sister Subasini Dasi was also entitled to an equal share. Bhaktabala Dasi, it is admitted, was not a party to the decree Ex. 7. If that is so, there is no question of any bar of res judicata so far as half share of Bhaktabala Dasi is concerned. Then the question is whether the claim of Subasini Dasi

to half share in this item is barred by Ex. 7. If the appellants' contention in this regard is accepted, they will be entitled to at least claim the half share of Subasini Dasi in Plot No. 9202. Now it is necessary to refer to the nature of the proceedings covered by Ex. 7. Nine plots of land referred to therein and situate in Mouza Asansol Municipality, appear to have been acquired under the Land Acquisition Act for the expansion of a road level crossing. There appear to have been disputes amongst various parties with regard to right to receive compensation and therefore the matter was referred to the Court of the District Judge, Burdwan in Land Acquisition Case No. 242 of 1938. Neither the actual pleadings in order to ascertain the nature of the claim that was made by the parties nor the judgment in the land acquisition case have been filed in these proceedings. The only document that has been filed is the decree Ex. 7. From the decree it is seen that Kashi Nath Dawn was party No. 7 and Subasini Dasi and her sons were parties Nos. 9 to 12. Parties Nos. 9 to 12 claimed compensation amount as against party No. 7, and the claim of Subasini Dasi was dismissed for default by the learned District Judge under Ex. 7 dated March 3, 1939 and the result of the decision was that the claim of Kashi Nath Dawn was upheld and that of Subasini Dasi and her sons was rejected, though on default.

17. Mr. Mukherjee, learned counsel for the appellants has urged that the same title to the property which was in dispute and decided in Ex. 7 in favour of Kashi Nath Dawn again arises for consideration in these proceedings. The title of Subasini Dasi having been once rejected by the Court cannot again be the subject-matter of a fresh adjudication. We are not inclined to accept the contention of Mr. Mukherjee that Ex. 7 operates as *res judicata* in respect of the claim even of Subasini Dasi and her sons in respect of half share claimed in plot No. 9202. Though it is true that Subasini Dasi appears to have contested the claim of Kashi Nath Dawn in the proceedings leading upto Ex. 7, in our opinion, it cannot be said that in those proceedings the issue as to title was heard and finally decided. We have already pointed out that the

claim of Subasini Dasi was dismissed for default.

18. Mr. Mukherjee drew our attention to certain decisions and urged that the decision of the Land Acquisition Court operates as *res judicata*. He further urged that even though the property in the previous land acquisition proceedings may have been of a very small extent, when once the title to the compensation amount which really relates to the nature of the title to the property has been raised and decided, that decision will operate as *res judicata*. The proposition enunciated by Mr. Mukherjee and set out above as such are beyond controversy but we are of the opinion that the facts before us are totally different.

19. We will now advert to the decisions cited by Mr. Mukherjee. In *Raj Lakshmi Dasi v. Eanamali Sen*, (1953) SCR 154 = (AIR 1953 SC 33), this Court had to consider the question whether a previous decision on title in land acquisition proceedings operated as *res judicata* in a subsequent suit between the same parties when the question of title was again raised. The facts in that case were briefly as follows: Certain properties were acquired in land acquisition proceedings and there was a triangular contest about the right to receive compensation between A and B, the rival claimants and C, a mortgagee from B. All the parties required the question of apportionment to be referred to the Land Acquisition Court. The court decided the question of title in favour of B after contest. This decision was confirmed by the High Court on appeal. That means that the title of B and his mortgagee C to receive compensation amount was upheld by the Land Acquisition Court and the High Court. A took the matter to the Privy Council, which reversed the decision of the High Court and the Land Acquisition Court and the titles of B and C were negatived. In a subsequent suit between the same parties the question of title was again raised and this Court held that the decision of the Privy Council operated as *res judicata* in respect of the subsequent proceedings notwithstanding the fact that B and his mortgagee C did not appear before the Privy Council and their claim was rejected in default. Considerable reliance has been placed by Mr. Mukherjee on this decision in support of his con-

tention that Ex. 7, though a decision given against Subasini Dasi and her sons in default of their appearance, operates as res judicata.

20. In our opinion, the decision of this Court referred to above does not assist the appellants. It is now well established that where a dispute as to title to receive compensation amount has been referred to a Court, a decree thereon not appealed from renders the question of title res judicata in a suit between the same parties to the dispute. A party in such circumstances cannot be heard to say that the value of the subject-matter on which the former decision was pronounced was comparatively so trifling that it was not worth their while to appeal from it. It is true that the test of res judicata is the identity of title in the two litigations and not the identity of the actual property involved in the two cases but the previous decision must be one on a title in respect of which a dispute has been raised and which dispute was heard and finally decided by the Court.

21. It is interesting to note that though it was urged that the decision of the Privy Council was given in default of appearance of B and his mortgagee C and therefore the said decision will not operate as res judicata, this Court did not hold that a decision given even in the first instance in default of appearance of a party will operate as res judicata. On the other hand, this Court categorically held that C, the mortgagee had fought out the title of mortgagor B, both before the Land Acquisition Court and the High Court and had obtained a judgment in his favour after a full contest.

22. It is the view of this Court that the mere fact that the mortgagee did not choose to appear before the Privy Council and the decision of the Privy Council was given in the absence of the mortgagee, is of no consequence as the decisions of the High Court and the District Court have been given after contest. Therefore it will be seen that the decision of this Court relied on by Mr. Mukherjee is no authority for the wide proposition that even if there has been no hearing and final decision by any Court, at any stage, after contest, the decision will operate as res judicata.

23. For an earlier decision to operate as res judicata it has been held by this Court in *Pulavarthi Venkata Subba Rao v. Valluri Jagannadha Rao*, (1964) 2 SCR 310 = (AIR 1967 SC 591) that the same must have been on a matter which was 'heard and finally decided'.

24. In *Sheodan Singh v. Smt. Daryao Kumar*, (1966) 3 SCR 300 = (AIR 1966 SC 1332) the question whether a decision given by the High Court dismissing certain appeal on the ground of limitation or on the ground that the party had not taken steps to prosecute the appeal operates as res judicata, was considered by this Court. In that case A had instituted against B two suits asserting title to a certain property. B contested those claims and also instituted two other suits to establish his title to the same property as against A. A's suits were decreed and B's suits were dismissed. B filed four appeals, two appeals against the decision given in A's suits and two appeals against the dismissal of his two suits. It is seen that all the appeals were taken on the file of the High Court but the two appeals filed by B against the decision in the suits instituted by him were dismissed by the High Court on the grounds that one was filed beyond the period of limitation and the other for non-prosecution. At the final hearing the High Court took the view that the dismissal of B's two appeals, referred to above, operated as res judicata in the two appeals filed by B against the decision in A's suits on the question of title to the property. It was urged before this Court on behalf of B that the dismissal of his appeals on the grounds of limitation and non-prosecution by the High Court does not operate as res judicata as the High Court cannot be considered to have 'heard and finally decided' the question of title. This contention was not accepted. This Court referred to instances where a former suit was dismissed by a trial Court for want of jurisdiction or for default of plaintiff's appearance etc., and pointed out that in respect of such class of cases, the decision not being on merits, would not be res judicata in a subsequent suit. It was further pointed out that none of those considerations apply to a case where a decision is given on the merits by the trial Court and the matter is taken in

appeal and the appeal is dismissed on some preliminary ground, like limitation or default in printing. It was held that such dismissal by an appellate Court has the effect of confirming the decision of the trial Court on merits, and that it "amounts to the appeal being heard and finally decided on the merits whatever may be the ground for dismissal of the appeal".

25. It will be seen from the above reasoning that in order to operate as *res judicata*, the previous decision must have been given after the matter was heard and finally decided on merits. This Court has further held that the High Court, in that case, when it dismissed the two appeals in question, though on a preliminary ground of limitation or default in printing, must be considered to have heard and finally decided on merits. Far from supporting Mr. Mukherjee's contention that a decision given in default of appearance under any circumstance, operates as *res judicata*, the above decision lays down clearly that a previous decision to operate as *res judicata* must be one in a case heard and finally decided on merits.

26. To conclude Ex. 7, in our opinion, does not operate as *res judicata* even against the claim of Subasini Dasi and her sons inasmuch as the matter was not heard and finally decided on merits after contest by the Land Acquisition Court. We have already pointed out that if the plea of *res judicata* is not accepted the decision of the two Courts regarding Subasini Dasi's having in plot No. 9202 half share will have also to be sustained.

27. In the result the appeals fail and are dismissed. As there is no appearance for the respondents, there will be no order as to costs.

Appeals dismissed.

AIR 1971 SUPREME COURT 671 (V 58 C 124)

(From Orissa: AIR 1963 Orissa 11)
J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Tulsiram Sangnaria and another, Appellants v. Shrimati Annibai (dead) by her legal representatives and others, etc., Respondents.

AO/BO/A113/71/LGC/M

Civil Appeals Nos. 1001 to 1003 of 1965, D/- 7-1-1971.

Income Tax Act (1922), Section 54 (1) — Assessment order, though a confidential document under Section 54, would be admissible in evidence if produced by an assessee or his representative-in-interest. (X ref — Evidence Act (1872), Sections 65 (e) and 74). Case law discussed. AIR 1963 Orissa 11, Affirmed. (Para 6)

Cases Referred: Chronological Paras

(1962) AIR 1962 SC 1119 (V 49)	
= (1962) 2 SCR 833, Charu Chandra Kundu v. Gurupada Ghosh	6
(1946) AIR 1946 Nag 377 (V 33)	
= (1947) 15 ITR 150, Buchibai v. Nagpur University	6
(1944) AIR 1944 All 114 (V 31)	
= (1945) 13 ITR 13, Suraj Narain v. Seth Jhabhu Lal	6
(1942) AIR 1942 Bom 289 (V 29)	
= (1942) 10 ITR 429, Emperor v. Osman Chatani	6
(1940) AIR 1940 Cal 187 (V 27)	
= (1939) 7 ITR 187, Promatha Nath Pramanick v. Nirode Chandra Ghose	5
(1940) AIR 1940 Mad 161 (V 27)	
= (1939) 7 ITR 657, Mythili Ammal v. Janaki Ammal	5
(1940) AIR 1940 Mad 768 (FB)	
(V 27) = (1940) 8 ITR 450, Rama Rao v. Venkataramayya	5

Mr. Bishan Narain, Sr. Advocate, (Mr. P. C. Bhartari, Advocate for M/s J. B. Dadachanji and Co. with him), for Appellants. (In All the Appeals); Mr. B. P. Maheshwari, Advocate, for Respondent No. 1 (In C. A. No. 1002 of 1965); M/s Sadhu Singh and Jagmohan Khanna, Advocates, for Respondents. Nos. 1 to 5 (In C. A. No. 1003 of 1965).

The following Judgment of the Court was delivered by

GROVER, J.: — These appeals have been brought by certificate from a common judgment of the Orissa High Court.

2. Five different suits were filed against certain defendants on the foot of five different pronotes. All the five suits were heard together and were decreed by the trial Judge. In respect of two suits the valuation being low the appeals were preferred before the District Judge and in three suits the appeals were filed in the High Court. The High Court dismissed the

appeals. It is altogether unnecessary to refer to the points in controversy between the parties because the sole question which has been agitated before us relates to the admissibility of certain assessment orders on which reliance has been placed for deciding whether the contesting defendants were the partners of firm Surajmal Manilal on whose behalf the pronotes had been executed. The learned subordinate Judge had found that the suit transactions were genuine and execution on behalf of the firm as well as the passing of consideration had been proved. He had further found that the contesting defendants were joint with their uncle Manilal in 1949 and that they were the partners of the firm Surajmal Manilal — being members of a trading family, and therefore they were liable to the extent of the assets of the joint family in their hands. It appears that the assessment orders were produced not by the contesting defendants but by the son of Manilal who was the assessee. After examining Section 54 of the Income-tax Act, 1922 and the various decisions of the High Courts the learned Judges of the High Court came to the conclusion that the general consensus was that if a copy of the assessment order or a certified copy thereof was produced by the assessee waiving his privilege it would be admissible in evidence.

3. Section 54 (1) of the Act was in the following terms:

S. 54 (1) "All particulars contained in any statement made, return furnished or accounts or documents produced under the provisions of this Act, or in any evidence given, or affidavit or deposition made, in the course of any proceedings under this Act other than proceedings under this Chapter, or in any record of any assessment proceeding, or any proceeding relating to the recovery of a demand, prepared for the purposes of this Act, shall be treated as confidential, and notwithstanding anything contained in the Indian Evidence Act, 1872 (I of 1872), no Court shall, save as provided in this Act, be entitled to require any public servant to produce before it any such return, accounts, documents or record or any part of any such record, or to give evidence before it in respect thereof."

Under sub-section (2) if a public

servant disclosed any particulars contained in a statement, return etc. mentioned in sub-section (1) he was liable to punishment with imprisonment as well as fine. The prohibition against disclosure was not applicable to the facts and particulars in such cases and circumstances as were set out in sub-section (3).

4. Now it is quite clear that Section 54 created a complete bar to the production by officials and other servants of the Income-tax Department of any such documents which were mentioned in Sub-ss. (1) and (2). It also made it obligatory on them to treat as confidential the records and documents mentioned in the sub-sections. They were further prohibited from giving any evidence relating to them. The question which came up for consideration before the Courts was if the documents could be given without requiring a public servant to produce them could the Court allow them to be tendered and admitted into evidence?

5. The Madras High Court held in *Mythili Ammal v. Janaki Ammal*, 7 ITR 657 = (AIR 1940 Mad 161) that statements made in income-tax returns could not be brought up in Court against the person making them or against any one else nor could the income returns be proved by secondary evidence under Section 64 of the Indian Evidence Act. The Calcutta High Court in *Promatha Nath Pramanick v. Nirode Chandra Ghose*, 7 ITR 570 = (AIR 1940 Cal 187) considered it startling that when an assessment order was to be treated as confidential under Section 54 of the Act a joint assessee could be permitted the use of the copy of such an order to the detriment of his co-assessee in contentious proceedings between them. A Full Bench of the Madras High Court, however, held in *Rama Rao v. Venkataramayya*, 8 ITR 450 = (AIR 1940 Mad 768 (FB)) that a return was confidential and could not be disclosed to a third party but there could be no objection to the maker of a return having a copy for his own purposes if he so desired and he was not bound to treat the document as confidential. In other words he could produce that document as evidence in Court.

6. It is unnecessary for the purposes of this case to go into the

larger question of production of the documents covered by Section 54 (1) by third parties as it was the son of Manilal the assessee who had produced the assessment orders which are in dispute. There is an overwhelming weight of authority in favour of the view that assessment orders could be produced by the assessee or his representative-in-interest; see *Emperor v. Osman Chotatni*, 10 ITR 429 = (AIR 1942 Bom 289), *Suraj Narain v. Seth Jhabhu Lal*, 13 ITR 13 = (AIR 1944 All 114) and *Buchibai v. Nagpur University*, 15 ITR 150 = (AIR 1946 Nag 377). In our opinion the law laid down by these cases on the admissibility of evidence of assessment orders produced by an assessee or his representative-in-interest is unexceptionable. We may refer to a decision of this Court in *Charu Chandra Kundu v. Gurupada Ghosh*, (1962) 2 SCR 833 = (AIR 1962 SC 1119) on which reliance was placed on behalf of the appellants. There the appellant had applied to the trial Court praying that the Commissioner of Income-tax be directed to arrange for the production before the Court of the record of the statement made by the respondent therein. In that situation it was held that the prohibition imposed under Section 54 of the Act was absolute and the operation of the section was not obliterated by any waiver by the assessee in whose assessment the evidence was tendered, documents produced or record prepared. It is apparent that in that case the question of production of an assessment order by the assessee himself did not come up for consideration.

7. These appeals fail and are dismissed with costs. One hearing fee. Appeal dismissed.

AIR 1971 SUPREME COURT 673
(V 58 C 125)

(From: Allahabad)*

J. C. SHAH, C. J., K. S. HEGDE AND A. N. GROVER, JJ.

Ram Das and another, Appellants
v. Deputy Director of Consolidation,
Ballia and others, Respondents.

Civil Appeal No. 1190 of 1970, D/-
7-1-1971.

*(Spl. Appeal No. 47 of 1968, D/- 30-
7-1968 — All.)

AO/BO/A119/71/RGC/C

1971 S. C./43 IV G—2

(A) Tenancy Laws — U. P. Zamindari Abolition and Land Reforms Act (1 of 1951), Section 20 (b) — A person cannot claim adhivasi rights under Section 20 (b) when his name is entered in the record as occupant in the year 1356 Fasli surreptitiously, fraudulently or fictitiously. Decision in S. A. No. 47 of 1968 (All), Reversed — Decision in W. P. No. 508 of 1956, D/- 1-5-1957 (All), Held, no longer good law in view of AIR 1968 SC 466. (Para 2)

(B) Civil P. C. (1908), Order 22, Rule 4 — Appeal will not abate if all legal representatives are impleaded on record except one for want of his particulars. He can be subsequently impleaded. (Para 3)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 466 (V 55) =

(1968) 1 SCR 617, *Sonavati v.*

Sri Ram

2

(1957) W. P. No. 508 of 1956, D/-

1-5-1957 (All), *Hukam Singh*

v. Board of Revenue U. P.

1

M/s. A. P. Singh Chauhan and A. D. Mathur, Advocates, for Appellants; Mr. S. K. Bagga and Mrs. S. Bagga, Advocates, for Respondents Nos. 4 to 10.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal from a judgment of the Allahabad High Court dismissing a writ petition which had been filed by the appellants. The facts lie in a narrow compass. The appellants were recorded as Sir Khudkasht holders of the plots in dispute. Respondents 4 to 6 were entered as sub-tenants in respect of those plots in the year 1356 Fasli. The appellants filed a suit for a declaration that the respondents were adhivasis. The suit was decreed ex parte. The ex parte order, however was set aside upon the application of the respondents. The suit was subsequently withdrawn with liberty to file a fresh suit. It appears that in 1960 three suits were filed. The principal allegation in the suits was that the entry in the revenue records on the basis of which the respondents claimed adhivasi rights was fictitious. The parties then entered into a compromise in which it was admitted by the respondents that the appellants were Bhoomidars and that the respondents had no interest in the disputed property. It was also admitted that the

entry in the revenue records in favour of the respondents was fictitious. The suits were consequently decreed. Subsequently the respondents applied for setting aside the decrees on the ground that they had been obtained fraudulently. These applications were pending when proceedings commenced for the consolidation of holdings under the U. P. Consolidation of Holdings Act, 1953, hereinafter called the "Act". The consolidation authorities held that the suits under Section 229 (c) of the U. P. Zamindari Abolition and Land Reforms Act, 1951, hereinafter called the "Zamindari Act" were not maintainable because on the date on which the suits were filed the respondents had become Sirdars. In the alternative it was held that the admission of the respondents that they were not adhivasis could not operate against the statute inasmuch as Section 20 (b) of the aforesaid Act provided that a person recorded as an occupant in the year 1356 Fasli would become an adhivasi. The appellants filed a petition under Article 226 of the Constitution challenging the orders made by the consolidation authorities. A learned single judge of the High Court following a Bench decision of Desai and Baig JJ. in *Hukam Singh v. Board of Revenue*, U. P., (1957) W. P. No. 508 of 1956, D/- 1-5-1957 (All), held that even if an entry was fictitious it would be ignored for the purpose of applying Section 20 (b) of the Zamindari Act. The only conclusion possible, therefore, was that the respondents, who were recorded as occupants in khasras and khataunis of 1356 Fasli, became adhivasis of the disputed land. If they were adhivasis then the land was held in that capacity and on October 30, 1954 the appellants ceased to be Bhoomidars by reason of Section 240 (a) of the Zamindari Act. The appeal against the judgment of the learned single Judge to a division bench was dismissed in limine.

2. This appeal must succeed on the short ground that the view of the Allahabad High Court mentioned above is no longer good law. In *Sonavati v. Sri Ram*, (1968) 1 SCR 617 = (AIR 1968 SC 466), this Court had occasion to deal with the scope and ambit of Section 20 (b) of the Act. According to this decision the entry in the record alone is relevant for the purpose of the aforesaid statutory

provision but an exception appears to have been made in a case where the name has been entered surreptitiously or fraudulently. In other words if there was evidence which showed that the entry was fictitious the person whose name was entered on the record on the material date could not claim the right of an adhivasi. Following that decision the judgment of the High Court must be set aside.

3. An objection was raised on behalf of the contesting respondents that all the legal representatives of Sheo Tahal, who had been impleaded as a respondent but who had died, had not been impleaded. A Civil Miscellaneous Petition dated April 20, 1970 was filed by the appellants saying that two of the daughters of Sheo Tahal, namely, Smt. Biafi and Smt. Maini who were living in the village where he died had already been impleaded as the legal representatives of the deceased but that Smt. Parmeshwari the third daughter was living elsewhere and information was not available in time about her and therefore she could not be impleaded earlier. It was prayed that she might be added as a party. When two of the legal representatives of the deceased were already on the record the name of the third legal representative could certainly be brought on the record. In our opinion the appeal could not be dismissed as having abated for Smt. Parmeshwari not having been impleaded in time.

4. In the result the appeal is allowed and the judgment of the High Court is hereby reversed. The matter shall go back to the High Court for a fresh decision in accordance with law. Costs shall abide the event.

Order accordingly.

AIR 1971 SUPREME COURT 674
(V 58 C 126)

(From: Assam and Nagaland)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

The State of Assam and others,
Appellants v. Rameshwar Agarwala
and others, Respondents.

Civil Appeal No. 658 of 1967, D/-
6-1-1971.

*(Civil Rule No. 296 of 1964, D/- 28-6-
1966 — Assam and Nagaland.)

AO/BO/A110/71/YPB/M

Tenancy Laws — Assam Land Revenue Regulations (1 of 1886) — Rules framed under Rule 40 — The State Government can fix the rate of premium to be paid in respect of an individual tea garden having regard to its commercial value even without first fixing a general rate for a region larger than the tea garden — Civil Rule No. 296/1964, D/- 28-6-1966 (Assam and Nagaland), Reversed. (Paras 4, 5)

Mr. Naunit Lal, Advocate, for Appellants; Mr. Sarjoo Prasad, Sr. Advocate, (Mr. S. N. Prasad, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, C. J.: — On October 24, 1957 Rameshwar Agarwala — hereinafter called 'the respondent' — applied to the Deputy Commissioner, Lakhimpur, for settlement of a tea garden for "special cultivation of tea". By order dated March 11, 1964 the Government of Assam permitted settlement of the tea garden for special tea cultivation on payment of Rs. 3,86,008 as premium. The respondent failed to pay the amount demanded. The State of Assam then put up the tea garden for auction. The respondent moved a petition in the High Court of Assam for an order declaring that in fixing the amount of the premium at Rs. 3,86,008/- the State acted illegally, and that the order was void and unenforceable at law because in fixing the amount of the premium the State acted without jurisdiction and the order directing auction of the tea garden for not depositing the amount demanded was also illegal. The High Court upheld the contention and ordered the State of Assam not to give effect to the order dated March 31, 1964 calling upon the respondent to pay the amount due within two months of the order and the order dated November 26, 1964 directing that the tea garden be put up for auction. With certificate granted by the High Court, the State of Assam has appealed to this Court.

2. The tea garden belonged to the State of Assam. The Government of Assam in the absence of any binding statutory provision, could settle the tea garden on such commercial terms it could reasonably obtain. The respondent applied to the Deputy

Commissioner for settlement of the tea garden and requesting the State Government for early fixation of the amount of premium. When the premium was fixed by the Government the respondent protested, contending that the action of the State was illegal. Before the High Court it was contended by the respondent that the power of the State Government to fix the premium for which it could lease the tea garden was restricted by Rule 40 framed under the Assam Land Revenue Regulations. The Rule reads:

"In addition to the land-revenue payable under Rule 17 and value of the timber assessed under Rule 37, an applicant to whom a lease for special cultivation is granted shall be liable to pay premium. The rate of premium shall be fixed by the State Government from time to time for each locality. x x x x"

3. The reasons which persuaded the High Court to uphold the plea raised by the respondent may be set out in their own words:

"The only power which the Government has got, is to fix the rate of premium under Rule 40 of the Rules under the Land Revenue Regulation and the question for us to consider is whether the order of the Government fixing the premium for settlement of this land for special cultivation is an order in conformity with Rule 40, x x x x. In our opinion, what Rule 40 provides is to confer upon the Government power to fix the rate of premium in every case which shall be payable for the settlement and it is only the Deputy Commissioner that is authorised to settle the land. The whole purpose of Rule 40 is to confer power on the Government to fix the rate of premium which will be valid for a particular locality and that the Deputy Commissioner has to make the settlement. He is given the power to realise the premium fixed by the Government from time to time and that no document of lease is to be issued before the premium has been paid by the intending holder. But Rule 40 does empower, in our opinion, the State Government to fix the amount of premium in the case of a particular settlement in a particular locality. x x x x x x"

.....The power under Rule 40 is a general power for fixing the rate of

premium for a particular locality and the Legislature when framing the rules never intended that the Government should be empowered to fix the total amount of premium payable by the intending holder. In our opinion, therefore, the order passed by the Government directing the authorities to offer the land for settlement in case the petitioners pay Rs. 3,86,000 is not in conformity with Rule 40 and this order cannot be given effect to".

4. The expression "locality" is not defined in the Act or in the Rules. We see no warrant for the assumption made by the High Court that in settling the premium to be fixed in respect of its own property, the Government is bound to fix the premium generally in respect of a region. The Government is by the Act or the Rules not disqualified from fixing the premium to be paid in respect of an individual tea garden. In the absence of any indication to the contrary a tea garden may in our judgment be appropriately regarded as a locality within the meaning of Rule 40. The power to settle a tea garden on payment of land revenue, value of the timber and premium is to be exercised according to the Rules. The rate of premium may be fixed by the State Government according to its commercial value. In the absence of any restriction imposed upon the State Government requiring that a general rate shall be fixed covering a specified area larger than a tea garden there is nothing which prohibits the State Government from fixing the rate of premium having regard to the commercial value of the tea garden. In the present case the Sub-Divisional Officer reported that the price of the land of the Dirpai tea garden be valued at Rs. 500/- per bigha and on that basis the State Government computed the premium to be paid in respect of the entire Jokai Tea Garden.

5. Fixation of a rate of Rs. 500 per bigha in respect of the entire area of the tea garden may be regarded as a premium fixed for the locality of the tea garden. The matter rested entirely in contract between the Respondent and the State Government. There was an offer by the respondent for settlement of the tea garden. He agreed to pay the land revenue payable under Rule 17. He also agreed to pay the value of the timber assess-

ed under Rule 37. For settlement of the tea garden for special cultivation the respondent was also liable to pay premium. The quantum of liability to pay land revenue was governed by Rule 17 and value of the timber was governed by Rule 37. The liability to pay premium had to be fixed by the State Government. In the absence of any restriction placed by the Rules upon the power of the State Government, we do not think that the High Court had any jurisdiction to compel the State to enter into a contract to settle the tea garden upon the respondent on payment of premium after determining a general rate for a region larger than the tea garden.

6. The High Court was in error in setting aside the order passed by the Government of Assam and in declaring that the offer to settle the land of the Dirpai Tea Garden on payment of Rs. 3,86,008/- was not in conformity with Rule 40. The High Court also erred in directing that auction of the land for non-payment of the premium shall be set aside.

7. The appeal is allowed and the petition filed by the respondent will be dismissed. The respondent will pay the costs in this Court and in the High Court.

Appeal allowed.
Petition dismissed.

AIR 1971 SUPREME COURT 676
(V 58 C 127)

(From: Allahabad)*

J. C. SHAH, C. J. AND
A. N. GROVER, J.

Rampal Singh, Appellant v. Kr. Satyavir and another, Respondents.

Civil Appeal No. 6 of 1970, D/- 6-1-1971.

Representation of the People Act (1951), Section 123 (6) — Conclusion regarding corrupt practice drawn on unreliable fabricated and manipulated evidence is not sustainable. (X-Ref. Section 77 (3).) — Election Petition No. 32 of 1969, D/- 8-12-1969 (All), Reversed. (Para 9)

*(Election Petition No. 32 of 1969, D/- 8-12-1969 — All.)

AO/BO/A111/71/GKC/M

Mr. A. K. Sen, Sr. Advocate, (Mr. S. S. Shukla and Miss. Krishna Sen, Advocates, with him), for Appellant; Mr. S. V. Gupte, Sr Advocate, (M/s. K. K. Jain, Narain Kishore and Bishamber Lal, Advocates, with him), for Respondent No. 1.

The following Judgment of the Court was delivered by

GROVER, J.: — This appeal from a judgment of the Allahabad High Court arises out of an election petition filed by the defeated candidate Satyavir challenging the election of Rampal Singh to the Uttar Pradesh Legislative Assembly from the Bijnor constituency. The High Court has set aside the election of Rampal Singh on the ground that the total expenditure incurred by him on his election exceeded the maximum limit of Rs. 9,000/- prescribed under Rule 90 (2) of the Conduct of Election Rules and he had committed a corrupt practice as defined in Section 123 (6) read with Section 77 (3) of the Representation of the People Act, 1951, hereinafter called the 'Act'.

2. The appellant, who belongs to the Bhartiya Karanti Dal party, contested the seat to the legislative assembly from No. 22 Bijnor General constituency. Respondent No. 1 also contested the election from the same constituency as a candidate of the Congress Party. Respondent No. 2 was put up by the Muslim Majlis. Five others contested the same seat. The poll was held on February 9, 1969 and the counting of votes took place on the following day. The appellant secured 28,766 votes, respondent No. 1 20,569 and respondent No. 2 15,896 votes. The remaining candidates secured a negligible number of votes. The appellant was declared duly elected.

3. Although in the election petition corrupt practices of bribery and intimidation of voters had also been alleged, the learned counsel for respondent No. 1 abandoned any attempt to press them. He confined his case to the ground of excessive and unauthorised expenditure. The only item which was pressed before the High Court related to the expenditure on motor fuel purchased by the appellant for his election campaign from the Vijay Engineering Corporation of Bijnor. The allegation in para 9A (i) of the petition was that the appellant

had shown an expenditure for the period from January 1, 1969 to January 22, 1969 under the head "fuel for vehicles-petrol, diesel, of a sum of Rs. 1760 only". (The High Court found that the correct amount was Rs. 1700.60), the payment having been made to Vijay Engineering Corporation. But in fact the amount of fuel purchased by the appellant between the said date from the said Corporation was worth Rs. 8,233.91. Vouchers and entries in the credit sale register in respect of these purchases were entered into the account of the aforesaid Corporation in the name of the appellant but later on purchases for a sum of Rs. 4,000/- out of the total amount mentioned above, were shown in conspiracy with the said Corporation and by tampering with the credit vouchers and credit sale register entries in the name of Mahipal Singh who was an agent, worker and friend of the appellant. This had been done by scoring out the name of the appellant from the said documents and substituting the name of Mahipal Singh by his name. In this way the appellant had concealed an expenditure to the tune of Rs. 6473.91. Adding this amount to the election expenses included in the return filed by the appellant they exceeded the prescribed limit by Rs. 4157.67. In paragraphs 13 to 20 of the written statement all the allegations made in paragraph 9-A (i) of the petition were specifically denied by reference to each allegation.

4. The learned Judge considered the evidence relating to the accounts of the Vijay Engineering Corporation. A large number of ledger sale registers, credit memos and bill books had been summoned from that firm and these were duly produced in Court on September 29, 1969 by Budhmal Gupta P.W. 1 in-charge sales. After he had been examined only one ledger (1968-69), one bill book from February 1, 1969 to April 1, 1969 and seven credit memo books (December 29, 1968 to March 4, 1969) were retained and the rest were given back for being taken away. Subsequently learned counsel for the election petitioner applied for the production of firm's bill books, credit memo books, credit sales register and many receipt books covering the period from September 1, 1968 to October 1, 1969 for November 3, 1969. On that date Bu-

dhmal Gupta stated that all these books and documents had been stolen away from the railway compartment while he was travelling from Bijnor to Allahabad. The learned Judge did not believe the story of theft and the loss of the account books and documents and was of the opinion that they had been purposely withheld because they were damaging to the appellant's case. He was largely influenced by the extensive forgeries which had been committed with regard to the accounts shown in the names of Mohinderpal Singh (from January 24, 1969 to February 5, 1969) and Mahipal Singh (from February 6, 1969 onwards) which, according to respondent No. 1, related to the purchases made by the appellant. The learned Judge went into details about the credit memos of Mohinderpal Singh and Mahipal Singh which were 13 and 10 respectively in number and considered that it was apparent that none of them were the original memos belonging to the books in which they were found. According to the learned Judge the credit memos of Mohinderpal Singh and Mahipal Singh were not the original ones that existed in the memo books in the first instance; but were forgeries which had been prepared and inserted in the books subsequently. He found similar indications of the forgeries in the bill books. He referred to certain bills and found that they had been fabricated. The learned Judge went to the extent of even finding the bill submitted on March 11, 1969 by Rampal Singh along with his return of election expenses for Rs. 1700.60 as a forged one. This is what he observed:

"It is a bill of the same type as those in the bill book containing bills Nos. 0201 to 0300. But its perforation line is intact and it has none of the holes that must be produced by stitching the bills together in the form of a book. Obviously this bill was never torn out of a bill book in the normal way but must have been obtained from the press in the form of a single sheet".

5. The learned Judge proceeded to hold that the ledger which had been filed appeared to have been forged in its entirety. Mahipal Singh R. W. 2 had been produced by the appellant for showing that purchases totalling Rs. 2183.04 stated to have

been made between February 6, 1969 and February 19, 1969 according to the accounts of Vijay Engineering Corporation that had gone on the record were genuinely made by him. The learned Judge was of the view that the explanations tendered by this witness for buying so much fuel on the crucial date from February 6, 1969 upto and including the polling day February 9, 1969 were hopelessly unconvincing and inadequate. The learned Judge was struck by the strange coincidence that the appellant purchased motor fuel from the Vijay Engineering Corporation on every day without fail from January 1, 1969 upto January 23, 1969 and then he abruptly stopped purchasing motor fuel from that concern. The very next day, namely, January 24, 1969 an account was opened in the name of Mohinderpal Singh who also made purchases every day upto February 5, 1969 when his account too was closed and on the next day i. e., February 6, 1969 Mahipal's account was opened and he purchased fuel every day without a break upto February 12, 1969. The obvious inference, according to the learned Judge, from these three successive khatahs was that they were in reality all part of one single account, namely, of the appellant.

6. The case of the appellant was that he had closed the account with Vijay Engineering Corporation on January 23, 1969 and that he made subsequent purchase of fuel from the Hitesh Automobiles Corporation only. The learned Judge compared the figures of the purchases made from that firm with the purchases made during the early period from the Vijay Engineering Corporation and found the figures of purchases from the Hitesh Automobiles incredibly low. He was further influenced by the improbability or falsity of the version of the appellant that he had made part payment of the bill of Vijay Engineering Corporation to the extent of Rs. 810.20 on February 21, 1969. This was towards the satisfaction of the bill Exhibit A-4 for Rs. 1700.60 dated February 1, 1969, the balance having been alleged to have made on March 10, 1969. The learned Judge proceeded to say:—

"I have already pointed out the clear signs of forgery in the bill (Exh. A-4) for Rs. 1700.60, which was

submitted by Rampal Singh along with his return of election expenses and this forged bill, coming from the custody of Rampal Singh and passed off by him as genuine, provides convincing proof that he was a party to the falsification of the Vijay Engineering Corporation's accounts."

So he was of the opinion that even without considering the oral testimony there was ample material to warrant the finding that the figures which were present in the accounts of the firm were made for the benefit of no one else but the appellant and that the motor fuel shown in the khata of Mohinderpal Singh from January 24, 1969 to February 5, 1969 and Mahipal Singh from February 6, 1969 onwards had been actually purchased by him. There were certain other pieces of evidence on which the learned Judge also relied. One of these was Exhibit 3 which was a copy of the relevant khatas which Vimal Sarup Sharma P. W. 6 the secretary of respondent No. 1 had made in March (probably on 13th or 14th) after Budhmal Gupta of the Vijay Engineering Corporation had allowed him to inspect the ledger. According to Vimal Sarup Sharma, Budhmal Gupta had shown him some chits signed by the appellant or his helpers for the purchase of petrol between February 4, 1969 and February 8, 1969 and allowed him to make notes of these which were filed in Court as Exhibit-4. The learned Judge was satisfied that Budhmal Gupta had played "an ambiguous role" in the case siding first with the one party and then with the other and that he was a thoroughly unreliable witness. The learned Judge believed Vimal Sarup Sharma that he had inspected the books of Vijay Engineering Corporation and made out copies Exhibits P-3 and P-4 as deposed to by him. He accepted P-3 as a true copy of the khata of the appellant and Mahipal as they existed in the firm's account in March 1969. We shall presently refer to the evidence relating to the original chits which, in our judgment, formed an essential link in the entire chain of the circumstantial and other evidence produced by respondent No. 1. The learned Judge has relied on the evidence of Bal Krishan Khanna P. W. 10 — a lawyer, who admittedly was a friend of respondent No. 1 and according to whom Budhmal Gupta had brought these chits relating to the

purchase of petrol between 4th and 10th February which according to him had been signed by the appellant. These chits had also been shown to Vishwa Mitter P. W. 11 — a lawyer of Allahabad, who was related to respondent No. 1 when he visited Bijnor in May 1969. Strangely enough the original chits were stated to have disappeared from the office of Bal Krishan Khanna in July 1969. Even though the learned Judge was satisfied that the original chits existed he found it difficult to exclude the possibility that they might not have been signed by the appellant.

7. Now indisputably the facts and circumstances which have been found by the learned Judge create a good deal of suspicion that it was at the instance of or in complicity with the appellant that the various books etc., of the Vijay Engineering Corporation were manipulated for his benefit. But the most decisive piece of evidence would have been the original chits which are stated to have disappeared from the office of Khanna — the lawyer and friend of respondent No. 1. We shall presently consider his statement of the circumstances in which the chits were brought to him and how they disappeared. We find it extremely difficult to accept the testimony of Khanna relating to the disappearance of the chits. Admittedly Gupta had been won over for consideration or otherwise by respondent's secretary Vimal Sarup Sharma. It is impossible to believe that Gupta would have otherwise placed all the books of account of the Vijay Engineering Corporation relating to the account of the appellant, of Mohinderpal Singh and Mahipal Singh at the disposal of Sharma who was even allowed to make out verbatim copies. This was allowed in a most secretive and surreptitious manner as Sharma went to him at night, Gupta having told him to come at 10 or 11 p. m. to the place where the accounts were kept. Sharma's story was that Gupta gave original parchas or chits signed by Rampal Singh of which he made a note. He showed that note to Khanna and respondent No. 1. Khanna directed him to get the original chits. He approached Gupta who expressed his inability to give the original to him. However, Gupta said that he would take them to Khanna and show them

to him. This was done by him and the chits were shown to Khanna in Sharma's presence. Khanna then asked Gupta to leave the documents with him and he would return them after seeing them. Gupta left the original chits with Khanna which were forty in number. Khanna put them in a drawer and later after studying them told respondent No. 1 that he had a strong case because most of the chits had been signed by the appellant. Sharma could not say where those chits were when he gave evidence in Court. When asked about the date on which Gupta gave Khanna those original chits Sharma stated that they were shown to him on April 15 or 16, 1969 after the petition had been prepared. Khanna who appeared as P. W. 10 stated that Gupta was his class fellow. He gave those original chits to him some of which were signed by the appellant, some by Parveen Singh Pradhan and some by Mangal Singh. According to him the chits had been lost and although he made a search for them he could not find them. It was in the month of July that he discovered the loss. He had put them in his table drawer in his chamber, in Gupta's presence, which was not locked. He had separated the chits bearing the signatures of the appellant and the rest. The following part of his statement may be reproduced:—

"In July Satya Vir came and told me the parchis would be summoned in the High Court. Then I found them missing. I told him I could not find them. I told him to summon them from Budhmal, as I might be able to trace them after searching. I did not tell Budhmal that the parchis had disappeared. After that Satya Vir kept coming to ask if I had found them, I did not lodge any report with the police, as I could not be sure what had happened to them".

Gupta, as stated before, maintained that it was false to say that he had showed Sharma any original chits or that he went with him to Khanna. The learned Judge even allowed him to be cross-examined by counsel for respondent No. 1 for whom he was appearing as a witness for reasons which are not mentioned at all.

8. The above evidence relating to the disappearance of the original chits for the material period which,

it is alleged, bore the signatures of the appellant in the manner deposed to by Khanna creates a good deal of doubt in our mind about the soundness of the conclusion of the learned Judge which was based mainly on the falsity of the books of account of the Vijay Engineering Corporation and the other facts and circumstances which have been detailed before. It is difficult to accept the version of Khanna that the original chits had disappeared in the manner stated by him. It seems to us that the original chits were deliberately withheld after having been secreted away or taken from Gupta who was prepared to help respondent No. 1 in every way. The various persons concerned in this matter are also intimately connected. Gupta is an old class-fellow of Khanna who is not only a friend of respondent No. 1 but also his legal advisor in the matter of institution of the election petition. It seems to us that there has been a lot of manipulation of evidence which was not entirely for the benefit of the appellant. The very fact that the original chits disappeared or were withheld by the legal advisor of respondent No. 1 or other persons who were concerned with the conduct of his case showed that their disappearance could not have been for the benefit of the appellant. It is not shown that he had anything to gain by the disappearance of the original chits. On the contrary their production might have told a different story and completely demolished the whole case of respondent No. 1.

9. In the above view of the matter we consider it wholly unnecessary to examine the question whether Mahipal Singh was closely associated with the appellant or not and the effect of non-production of Mohinderpal Singh. We may, however, point out that the observations of the learned Judge with regard to the bill for Rs. 1700.60 which was produced along with the return of election expenses by the appellant and about the part payment of the bill made on February 21, 1969 which was not in round figures, are prompted mostly by the whole atmosphere of suspicion which was quite naturally generated owing to the forgeries which were found in the books of account, credit memos, bill books etc., of the Vijay Engineering Corporation. But the point which

is of real consequence is that the Court cannot be satisfied beyond a reasonable doubt that the manipulation of various accounts and documents was done by Gupta or some other employee of the said firm solely for the appellant's benefit. The only piece of evidence which would have concluded the matter, namely, the original chits was deliberately withheld or done away with not at the instance of the appellant but by those who were acting in the interest of respondent No. 1. In such a state of affairs it would not be safe to base the conclusion on a matter involving a corrupt practice which has serious consequences on such an unreliable, fabricated and manipulated evidence. The learned Judges unfortunately did not consider all these matters in their proper perspective.

10. We would accordingly allow the appeal and set aside the order of the High Court. The election petition shall stand dismissed. In view of the entire circumstances parties are left to bear their own costs throughout.

Appeal allowed.

AIR 1971 SUPREME COURT 681
(V 58 C 128)

(From: Bombay)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Dayaram and others, Appellants
v. Dawalatshah and another, Respondents.

Civil Appeal No. 2433 of 1966, D/-
8-1-1971.

(A) Constitution of India Art. 133
— Concurrent findings about genuineness or otherwise of a will are not interfered by Supreme Court in appeal in cases decided essentially on facts, leading to concurrence of conclusion.

(Paras 7, 8)

(B) Hindu Law — Succession — In determining single heir according to rule of primogeniture governing impartible estate when there are two or more equal claimants from common ancestor the eldest member in the senior most line will be preferred.

*(Appeal No. 113 of 1959, D/- 2-8-1965
— Bom. at Nagpur.)

AO/BÓ/A386/71/SSG/C

(1894) ILR 17 Mad 316, Foll.

(Paras 14, 15)

In determining a single heir according to rule of lineal primogeniture governing an impartible estate the class of heirs who will be entitled to succeed to the property if it were partible must be first ascertained and then the single heir applying the aforesaid special rule must be selected.

(Paras 15, 19)

(C) Deed — Construction — Wazib-ul-arz for Zamindari in Chanda District did not make Zamindar a mere life-tenant.

(Para 17)

Where the Governor under terms of the Wazib-ul-arz governing zamindari in Chanda District had power to take extraordinary steps to protect the zamindari by removal of the holder on breach of conditions of loyalty or of good police administration or of improvement of cultivation, the incidents of tenure were restrictions on estate of the Zamindar but these restrictions did not make him a mere life-tenant.

(Para 17)

(D) Natural Justice — Order by Governor exercising powers under Wazib-ul-arz incorporating conditions of Chanda Patent proprietary rights contemplates quasi-judicial inquiry and must be consistent with rules of natural justice and in accord with custom of family.

(Para 20)

(E) Evidence Act (1872), Sec. 35 — Order of Revenue Officer in mutation proceeding based on untrue piece of evidence has no evidentiary value in civil suit.

(Para 21)

(F) Civil P. C. (1908), Section 9 — Illegal order of Governor on question of succession of certain zamindari and that of revenue authorities in mutation proceedings do not exclude jurisdiction of Civil Court to decide question of kinship between parties to suit in respect of zamindari properties.

(Para 22)

(G) Tenancy Laws — M. P. Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act (1 of 1951), Section 14 — Civil Court and not the Compensation Officer has jurisdiction to determine competing claims of persons to proprietary rights to property vesting in Government under Section 3.

(Para 23)

Section 14 is intended to determine only proprietary rights in land qua State. In summary enquiry under that section, the Revenue Officer does

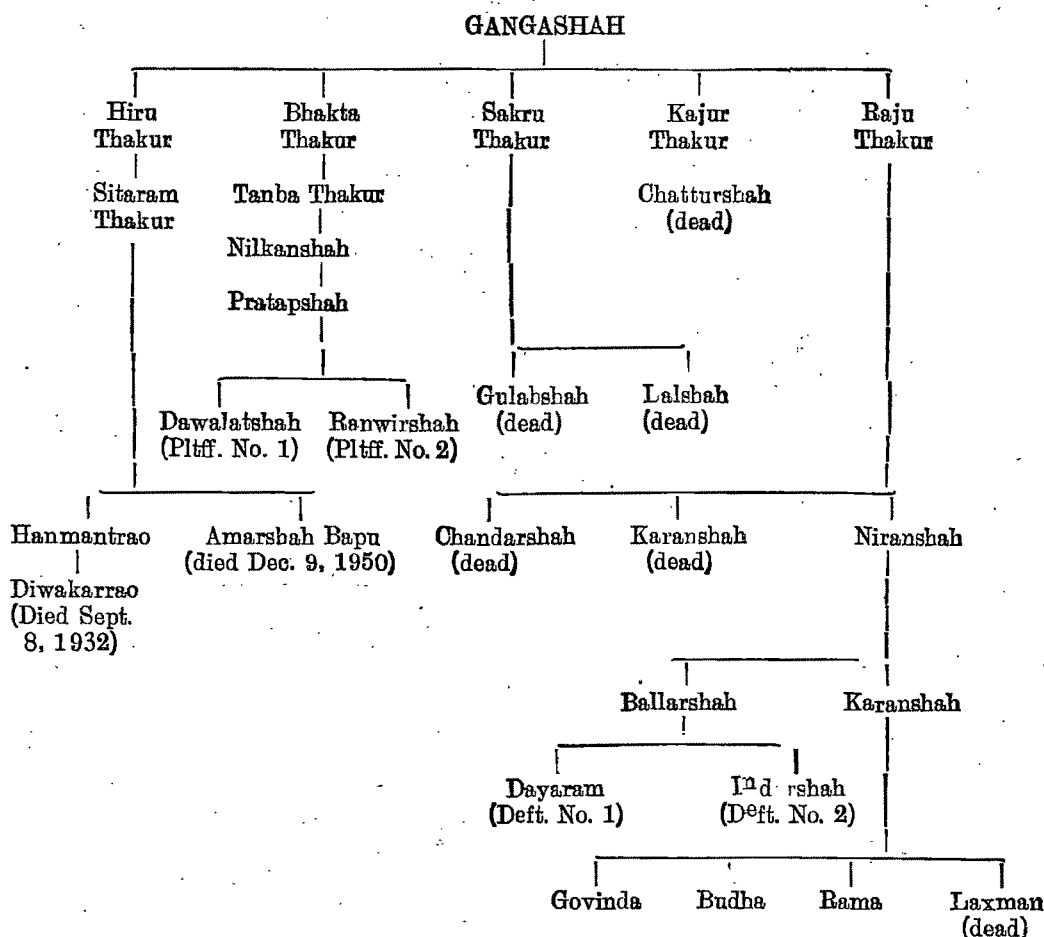
not determine the complicated questions of title. Thus where a suit is filed by rightful claimant raising disputed questions of title to compensation, the Civil Court is competent to entertain the suit even though the suit is filed beyond the period of two months from order of compensation officer under Section 14. (Para 23)

Cases Referred: Chronological Paras
(1894) ILR 17 Mad 316 = 4 Mad LJ 152, Subramanaya Pandya Chokka Talawar v. Sivasubramanya Pillai . 15

Mr. V. S. Desai, Sr. Advocate, (M/s. V. N. Swamy, K. Rajendra Chaudhuri and K. R. Choudhuri, Advocates with him), for Appellants; M/s M. N. Phadke and A. G. Ratnaparkhi Advocates, for Respondents.
(Contd. on Col. 2)

The following Judgment of the Court was delivered by

SHAH, C. J.: — Dawalatshah and Ranwirshah — sons of Pratapshah — instituted an action in the Court of the Additional District Judge, Chanda, for a decree for possession of property immovable (including the Zamindari of Dhanora) and movable specified in the Schedules annexed to the plaint, and for an order for payment of mesne profits and also for recovery of the amount of compensation in respect of certain lands received by the defendants from the Government of Madhya Pradesh and for an order declaring their right to receive the balance of compensation remaining to be paid. The plaintiffs relied upon the following genealogy:



2. The plaintiffs claimed that the property in suit originally belonged to Gangashah. Gangashah had five sons: Hiru, Bhakta, Sakru, Kajur and Raju. The branches of Sakru and Kajur became extinct a long time ago.

The branch of Hiru (who was the eldest among the five sons of Gangashah) became extinct with the death of Amarshah on December 9, 1950. The plaintiffs—sons of Pratapshah claimed the Zamindari held by Amarshah rely-

ing upon the rule of primogeniture, and the other estate of Amarshah as devisees under the will of Amarshah executed on December 3, 1950. They submitted that the Dhanora Zamindari was granted to Sitaram ancestor of Amarshah as an impartible estate, devolving by the rule of primogeniture; that the Zamindari on that account devolved on the death of Amarshah upon Pratapshah and that on the death of Pratapshah the Zamindari devolved upon the first plaintiff. The plaintiffs also claimed that the other property including Malguzari lands devolved upon them under a will executed on December 3, 1950 whereby Amarshah devised his estate in their favour. Accordingly the first plaintiff claimed that he was entitled to the Zamindari on the death of Pratapshah on January 27, 1951 and the plaintiffs claimed the other estate of Amarshah as devisees under his will. The plaintiffs submitted that Dayaram the first defendant took wrongful possession of the Zamindari and other property, movable and immovable of Amarshah.

3. The defendants by their written statement maintained that the genealogical table set up by the plaintiffs was incorrect, that by the order of the Governor of Madhya Pradesh dated November 9, 1951, the Zamindari was conferred upon the 1st defendant Dayaram as he was found suitable to hold the Zamindari and the decision of the Governor was binding upon the plaintiffs; that the decision of the Compensation Officer regarding Malguzari lands which vested in consequence of the enactment of the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1 of 1951, had become binding and conclusive against the plaintiffs because no suit challenging the decision was instituted within two months from the date thereof and the plaintiffs were on that account not entitled to claim the compensation paid or payable in respect of the Malguzari lands; that Amarshah did not execute the will set up by the plaintiffs; and that Amarshah had made a will dated December 8, 1950 under which his estate was devised in favour of the defendants.

4. The Trial Court held that the Dhanora Zamindari was impartible and was governed by the rule of

primogeniture and Pratapshah father of the plaintiffs being the eldest member of the senior-most branch from among the descendants of the common ancestor Gangashah was entitled to the Zamindari; that the plaintiffs were entitled to receive compensation in respect of the Malguzari lands and the decision of the Compensation Officer did not operate to deprive the plaintiff of the right to those lands or compensation payable in respect thereof; that the will set up by the plaintiffs dated December 3, 1950 was genuine and the plaintiffs were under the will entitled to the estate devised in their favour by Amarshah; that the will dated December 8, 1950, set up by the defendants was 'a fabricated will' and conferred no right or title upon the defendants; and that the genealogical table set up by the plaintiffs represented the true relationship between the descendants of Gangashah.

5. In appeal by the defendants, the High Court of Bombay confirmed the decree of the Trial Court with a slight modification. The High Court held that the genealogical table set up by the plaintiffs was correct, that according to the custom governing succession Dhanora Zamindari devolved upon Pratapshah on the death of Amarshah, and on the death of Pratapshah the first plaintiff became entitled to the Zamindari, that the order of the Governor recognising Dayaram as Zamindar was not binding and conclusive, for it was not shown that in making the order the Governor had acted in exercise of the power conferred by the Chanda Patent; that the order was contrary to the customs and the law governing the Zamindari; that the decision of the Governor did not oust the jurisdiction of the Civil Court; that the will dated December 8, 1950 set up by the defendants was not genuine and the will set up by the plaintiffs dated December 3, 1950, was genuine; and that the plaintiffs' suit with regard to Malguzari lands was not barred by the decision of the Compensation Officer. The High Court accordingly confirmed the decree passed by the Trial Court in respect of the Zamindari relying upon the rule of inheritance incorporated in the Wazib-ul-Arz of the Chanda District and by succession under the will dated December 3, 1950 in respect of the other property except as to certain occupancy lands held by Amarshah.

6. With certificate granted by the High Court the defendants have appealed to this Court.

7. Certain concurrent findings on which not much argument was advanced at the Bar may first be set out. The High Court agreeing with the trial Court on appreciation of evidence held that the genealogy set up by the plaintiffs represented the true relationship between the parties. Again the High Court agreeing with the Trial Court held that the will dated December 3, 1950 set up by the plaintiffs was genuine while the will dated December 8, 1950 set up by the defendants was not genuine. The argument that the High Court did not give due weight to certain important circumstances in reaching their conclusion relating to the will set up by the plaintiffs is without substance. The circumstances relied upon are that the writing instrument with which the body of the will was written and the writing instrument with which Amarshah, it was claimed, signed or executed the will were different, that the will was not registered, that the appearance of the will was suspicious, that the will was unnatural because it devised the estate in favour of the plaintiffs after giving a life interest in favour of the testator's widow Ratnabai, that the will had not been produced before the revenue authorities and before the Compensation Officer when disputes in relation to the estate of Amarshah were pending before those authorities, and that it was produced for the first time nearly seven years after the death of Amarshah, and that the scribe who wrote the will did not belong to the village to which Amarshah belonged. The Trial Court and the High Court have reached the conclusion that on the circumstances no suspicion as to the genuineness of the will dated December, 1950 arose. It may be noticed that the plaintiffs were, at the date of their father's (Pratapshah's) death minors, and soon after Pratapshah's death, their mother abandoned them and re-married. Thereafter no one attended to the pending litigation. Failure to produce the will before the revenue authorities was therefore not a circumstance, in the view of the High Court, which militated against the genuineness of the will. In the view of the Courts, absence of registration, appearance of the will, the con-

tents thereof, the dispositions thereunder, and the fact that the writer of the will belonged to another village did not in the circumstances of the case give rise to any suspicion. We do not think that sitting in appeal we would be justified in interfering with the conclusion recorded by the Trial Court and confirmed by the High Court on what is essentially a conclusion on a question of fact.

8. The will set up by the defendants is not proved to be a genuine will executed by Amarshah. This again is a concurrent finding of the two Courts and must be accepted in this Court. No argument has been advanced to persuade us to take a different view. The rights of the parties must be adjudged in the light of these findings.

9. The dispute between the parties relates to three set of properties —

- (a) Dhanora Zamindari
- (b) Malguzari lands;
- (c) Occupancy lands and Movables.

10. The ancestors of the parties held an extensive Zamindari in the Chanda District. After the advent of the British rule, in that region, the revenue authorities commenced settlement operations. An inquiry was held by the Settlement Officer in connection with the lands held by the family of the parties and statements of some members were recorded. Chattarshah s/o. Kajur stated that the Zamindari of Dhanora was standing in the name of his cousin Sitaram and that all the members of the family were joint and maintained themselves out of the income from the Zamindari. In his statement Sakru admitted that the rule of primogeniture prevailed in the family. He stated that Hiru was his eldest brother and Sitaram was the son of Hiru and the Zamindari was recorded in the name of Sitaram according to Awwal Haqq i.e. rule of primogeniture from ancient times, even though he was senior in age, and that there was no quarrel between him and Sitaram and that he and Sitaram were living jointly and were taking the income from the Zamindari.

11. The Settlement Officer made an order on November 2, 1867 that the "Zamindari is of ancient tenure and the present Zamindar Sitaram Thakur has proved his right

to be Zamindar. Subject to the conditions to be embodied in patent of proprietary right, I confer proprietary right in the Zamindari of Dhanora on Sitaram Thakur". The Settlement Officer observed that conferment of proprietary rights was subject to conditions to be embodied in a patent of proprietary rights. It may reasonably be inferred that a formal grant was made in favour of Sitaram. The form of the grant which is known as "Chanda Patent" is reproduced in Aitchison's "Collection of Treaties, Engagements and Sanads" Vol. II, pp. 573-574. Under the Chanda Patent it was declared that the tenure shall be indivisible, and non-transferable save to the nearest male heir the transfer in such case being subject to the approval of the Chief Commissioner) the land shall be held by one person, the Zamindar or Zamindarin for the time being and shall be held on conditions of (i) loyalty (ii) good police administration and (iii) improvement and cultivation of the estate. Clauses V, VI, VII of the grant relating to succession to the Zamindari held under the Patent:

"V. Subject to the provisions contained in Clause VI, the order of succession shall be as under:—

On the death of the Zamindar, the estate shall devolve upon his eldest son. In default of a son, and when adoption has not taken place, the succession should preferably devolve on the nearest male kinsman, the widow receiving a suitable maintenance.

VI. In the event of the first in order of succession being, in the opinion of the local Government, unfit to carry out the conditions of Clause IV, the Zamindaree shall devolve upon the nearest heir who possesses the required qualification.

VII. The Zamindar, in the case of gross misconduct, shall be liable to removal by the local Government and if such removal be ordered, the succession shall take place as if the Zamindar removed had died".

12. Tenure of the grant is entered in the Wajib-ul-arz. The relevant recitals in the Wajib-ul-arz are as follows:

PART I

Rights and liabilities of Zamindar in relation to Government.

(1) Watan: Zamindar's Watan is not partible and it cannot be given to

anyone other than quite close (the nearest) male heir. Changes taking place in this way should have sanction of the Governor-in-Council. The Zamindari shall be in the name of only one person and the Zamindari has been granted to the Zamindar in possession at present on the conditions of his remaining loyal to the Government, managing his estate properly and improving the cultivation.

(2) Heirs: On the death of the Zamindar the estate shall devolve upon his eldest son. If there is no legitimate or adopted son, it shall devolve upon a very close (the nearest) male relative. If there arises a dispute regarding right of inheritance, the Governor-in-Council will decide it in accordance, with the custom in that family. If the Governor-in-Council finds that the first heir is unable to abide by the conditions stated in BAB (clause), the Zamindari shall be granted to a quite close (the nearest) male heir possessing the necessary qualifications.

(3) Dispossessing the Zamindar and forfeiting his rights: Governor-in-Council may dispossess the Zamindar on account of his behaviour and bad administration. Such dispossession may be for a few days or permanent. If it is for a few days, the Deputy Commissioner will manage the Zamindari on behalf of the Zamindar and if the order of dispossession is permanent, the Zamindar shall so to say be deemed to have died and the heir will get the right. The entries in the Wajib-ul-Arz substantially reproduce the terms of the Chanda Patent as set out in Vol. II of Aitchison's "Collection of Treaties, Engagements and Sanads".

13. One Major C. B. Lucie Smith made a report relating to the Land Revenue Settlement of the Chanda District, Central Provinces, 1869. At pages 179 to 180, Major Lucie Smith has referred to the Zamindarees of the Chanda District. He has stated under the head "Zamindarees".

"The Zamindarees were settled by me; and in order to explain the principles of settlement adopted it will be necessary to touch first upon the questions of tenure and history.

The weight of testimony goes to show that the Zamindars are the descendants of men on whom were conferred tracts of country, more or less

wild with the object of their being brought under cultivation and order maintained. Naturally, x x while the law was weak and its administrators distant, the Zamindar, as the lord on the spot, exercised large powers but powers apparently never recognised by either the Gond or the Maratta Government. He was undoubtedly regarded as a noble, bound to furnish a small contingent when required by his sovereign; but there is nothing to warrant the supposition that he possessed an absolute right in the soil; indeed, as far as my experience goes, such a right is foreign to the ideas of the races of this part of India.

The rulers of the day evidently made and unmade Zamindars at their pleasure;

x x x x
 "Under these circumstances it appeared that the Chanda Chiefs, though the Nobles of the Country, possessed no absolute right in the soil, and that it rested with Government to confer it; and in conferring it, to prescribe such conditions as might be deemed fitting. A scheme of conditions to be embodied in the patent of proprietary right, and in the administration paper of the Zamindarees, was therefore drawn up, based upon the usages actually existing from ancient times; and, with one exception, the proposed arrangements were sanctioned in their entirety by the Government of India, who directed that they were to be taken as a general model for those to be applied to the Zamindarees of the Balaghat district and to the non-feudatory Zamindarees of Chutteesgurh.

The provision not approved was that on the death of a Zamindar, the estate should in default of a son, devolve upon his widow. This mode of succession has obtained among the Chanda Chiefs from time immemorial, and is the rule not only among them but among all classes of landholders in the district. It suits especially the character of the Gond Women x x x. Government, however, after weighing the arguments urged, decided that it was conducive to the interests of the Zamindarees that the succession should devolve only upon a male member of the family, and the clause was altered accordingly."

14. It is common ground that Pratapshah and the 1st defendant Dayaram were descendants of Gangashah and they were related to Ganga-

shah in the same degree. But Pratapshah was the descendant of Bhakta, and Dayaram was the descendant of Raju. Bhakta was the elder of the two brothers. It is recited in the Wajib-ul-arz that the Dhanora Zamindari is impartible, that on the death of the holder it devolves upon his eldest son and in the absence of a legitimate or an adopted son it devolves upon the nearest male relative. Devolution of the Zamindari class resemble the traditional rule of lineal primogeniture. If the holder dies leaving him surviving no son legitimate or adopted, the Zamindari devolves upon a descendant from the common ancestor of the nearest degree and in the event of there being more descendants from the common ancestor being in the same degree, the descendant in the senior line is preferred. Succession to the Zamindari is subject to the power of the Governor to dispossess a person found unfit to observe the conditions of loyalty, good police administration and improvement and cultivation of estate. But if the nearest in the line of succession is not selected the estate must be given to the nearest heir who had the prescribed qualifications and is a successor to the Zamindar. When the Zamindar is removed, succession takes place as if the Zamindar so removed had died. By the use of the expression "nearest male relative" the test of propinquity alone may be applied and when there are two or more claimants equally removed from the common ancestor the eldest male member in the senior most line will be preferred.* In adjudging the plaintiffs' claim the Court must determine whether Pratapshah—father of the plaintiff was the nearest male relative of Amarshah.

15. On the death of Amarshah there were two male relatives : they were Pratapshah father of the plaintiffs and the 1st defendant Dayaram. The contest between them had to be adjudged in the light of the rules of lineal primogeniture governing an impartible estate which are well established:

Succession is governed by the rules which govern succession to partible property subject to such modifications only as flow from the character of the impartible estate; the only modification which impartibility suggests in regard to the right of succession is the existence of a special

rule for the selection of a single heir when there are several heirs of the same class who would be entitled to succeed to the property if it were partible under the general Hindu law; and in the absence of a special custom, the rule of primogeniture furnishes a ground of preference.

Subramanya Pandya Chokka Talawar v. Siva Subramanya Pillai, (1894) 17 Mad 316 at p. 325. In determining a single heir according to the rule of primogeniture the class of heirs who would be entitled to succeed to the property if it were partible must be ascertained first, and then the single heir applying the special rule must be selected.

16. Counsel for the first defendant submitted that under the terms of the Chanda Patent the Zamindari devolves on the death of the holder on the male relative who is the senior most in age, and not on the eldest member in the senior line. There is nothing in the Chanda Patent which supports that contention. By the use of the expression "nearest male relative" the rule of primogeniture is prescribed, it is not intended to confer the estate upon the eldest male relative of the Zamindar.

17. Counsel also submitted that under the terms of the Chanda Patent and the terms recorded in the Wajib-ul-Arz the Governor having the right to determine inheritance and the right to remove a person who is not loyal or does not manage the property or does not improve the cultivation or who is guilty of bad behaviour or bad administration, it must be assumed that the holder of the Zamindari has merely a life interest and on the death of the holder, the Governor re-grants the land consistently with the rules of succession according to the law and custom amongst the members of the family but subject to the dominant purpose of good administration and loyalty to the Government. Counsel for the first defendant relied upon certain circumstances which he claimed established that the interest of the Zamindar was restricted to his life and on his death there was resumption and re-grant of the Zamindari by the Governor. Counsel submitted that the Zamindari was inpartible and devolved upon the nearest male heir, that the sanction of the Governor was necessary for transfer, and also for record-

ing inheritance, that loyalty, good management and improvement of cultivation were the conditions for holding the lands and that if the behaviour of the Zamindar was found unsatisfactory or that he was not capable of good administration he was liable to be removed. On that ground, said Counsel, the Government alone was competent to decide a dispute arising out of inheritance. But the power to take extraordinary steps to protect the Zamindari by the removal of the holder does not restrict the title of the Zamindar to a mere life interest. The incidents of the tenure are restrictions on the estate of the Zamindar, but those restrictions do not make him a mere life-tenant.

18. Under the Chanda Patent the lands of the Zamindar held by the family were confirmed in 1867 in favour of Sitaram. On his death they devolved upon Hanmantrao. There is no evidence that any fresh grant was made. On the death of Hanmantrao the lands devolved upon his son Diwakarrao who died on September 8, 1932. On the death of Diwakarrao dying without leaving any male descendant there arose a dispute between Pratapshah and Amarshah. Pratapshah claimed to be the adopted son of Diwakarrao and on that ground entitled to take the Zamindari. An inquiry was held and it was decided that Pratapshah failed to prove the adoption set up by him. On the death of Amarshah again without leaving any male lineal descendant disputes arose. The evidence is not clear as to whether any formal grant was issued in favour of Sitaram. There is no evidence that any recognition of the heirs of the successive Zamindar was accompanied by the issue of fresh patent or grant. Succession was merely recognised by the revenue authorities. The argument that the grant was for life of the grantee is therefore not supported by the terms of the Chanda Patent, nor by the entries in the Wajib-ul-Arz, nor by the history of the Zamindari. The right to determine inheritance it is true vests in the Governor but the power is exercisable in accordance with and not in violation of the custom of the family. In determining the heir the Governor is not granting afresh the Zamindari; he merely determines the successor in accordance with the custom of the

family. The right of the Governor to remove a holder who is disloyal or does not manage his estate properly or does not improve cultivation or is otherwise of "bad behaviour" or guilty of bad administration, does not involve a condition that the interest of the Zamindar is only for his life. When a holder of the Zamindari is removed, the Governor is bound to hand over the Zamindari to the next heir in the order of succession as if the Zamindar removed had died and the heir will get the right.

19. Counsel, then, contended that in any event the decision of the Governor in 1950 declaring Dayaram to be the successor on the death of Amar Shah was binding and conclusive and could not be reopened. Counsel urged that Pratapshah and the 1st defendant Dayaram were related to the common ancestor in the same degree, and it was open to the Governor to select one of the two members of the family related to the last holder in the same degree, even though the person selected did not belong to the senior-most line. But if succession to the Zamindari is governed by the rule of lineal primogeniture, selection of a member of a junior branch in preference to a member of the senior branch would be plainly illegal.

20. Again, the evidence does not warrant the view that the Governor purported to pass any order in pursuance of the provisions of the Chanda Patent or the rules of succession recorded in the Wajib-ul-Arz. The order of the Governor is in the form of a memorandum addressed to the Deputy Commissioner, Chanda, dated November 9, 1951 and it states that:

"Government are pleased to recognise Shri Dayaram Bapu son of Ballarshah Bapu Raj Gond as the Zamindar of Dhanora Zamindari in the Garchiroli tahsil of the Chanda District till the date of vesting of the Zamindari in the State Government". There is no evidence that the Governor made any enquiry to determine the successor of Amarshah. An order by the Governor purporting to exercise powers under the Chanda Patent contemplates a quasi-judicial inquiry. The order does not however show that any inquiry was made for determining the rights of the contesting claimants or that any notice was issued to them

or that they were heard before the Governor decided the issue. There is nothing in the pleadings in that behalf. The Governor is invested with quasi-judicial power, and if there be a dispute, the dispute must be decided after holding an inquiry, and the decision must be reached consistently with the rules of natural justice and in accordance with the custom of the family. A bald statement that the "Government are pleased to recognise Dayaram Bapu son of Ballarshah Bapu as the Zamindar of Dhanora Zamindari" does not disclose the reason for rejecting the claim of Pratapshah who according to the custom of the family was "the nearest male relative." There is no evidence on the record that the Governor was even aware that there were other claimants and if he was aware what their claims were and that the Governor had considered those claims before recognizing the claim of Dayaram. In the absence of any evidence that the order was made by the Governor in exercise of the power conferred by the Chanda Patent it is unnecessary to consider whether any order made by the Governor in exercise of the powers of the patent excludes the jurisdiction of the civil court. The decision of the Governor was apparently reached without any inquiry and was plainly contrary to the rules of Hindu Law and the custom of the family in the light of which alone the Governor was by the express mandate competent to adjudicate the claim.

21. It is true that there were mutation proceedings in regard to the Zamindari before the Naib Tahsildar Garchiroli Tahsil. The Naib Tahsildar by his order dated May 9, 1951 held that the dispute relating to the mutation was raised by Pratapshah, that Amarshah had died issueless, that the genealogical tree set up by Daulatshah son of Pratapshah was incorrect being unsupported by reliable evidence, that copies of settlement of 1867 were mere statements of interested persons, that the genealogical tree filed by Dayaram resembled the genealogical tree filed by Pratapshah and was held to be genuine, that Amarshah had clearly admitted in his statement that Dayaram was entitled to succeed to the Zamindari after him and that Dayaram was the nearest male kinsman to the deceased Amarshah. This

decision of the Naib Tahsildar proceeded upon a genealogy produced by Dayaram which on the findings of the Trial Court as well as the High Court in this case is incorrect. The decision of the Naib Tahsildar in a mutation proceeding even as a piece of evidence has little evidentiary value when it is founded on a material piece of evidence which was untrue. The proceedings were carried in appeal before the Deputy Commissioner. The Deputy Commissioner confirmed the order by his decision dated August 8, 1951. He also accepted the genealogy set up by Dayaram and held that there were no other nearer male descendants in the branch and that Pratapshah was one degree more removed than Dayaram. In view of the infirmity attaching to the genealogy relied upon by the Revenue Officer that decision has also little evidentiary value.

22. The orders passed by the Governor and the revenue authorities do not exclude the jurisdiction of the Civil Court to decide the question of kinship. In that view we agree with the High Court that the Zamindari originally confirmed in favour of Sitaram must according to the tenure as recorded in the Wajib-ul-Arz devolve upon the first plaintiff Dawalatshah to the exclusion of the first defendant Dayaram.

23. The right to Malguzari land was since the death of Amarsah extinguished by the Madhya Pradesh Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act 1 of 1951. The Malguzari lands are by the devise contained in the will dated December 3, 1950 given to the plaintiffs. Compensation in respect of the lands would therefore belong to the plaintiffs. But it is urged that notwithstanding the devise, because of the order of the Claim Officer under Section 14 of Act 1 of 1951 the plaintiffs were not entitled to agitate the question of heirship. It is enacted by Section 3 of the Act that on and from a date to be specified by a notification by the State Government in that behalf, all proprietary rights in an estate, mahal, alienated village or alienated land as the case may be, in the area specified in the notification, vesting in a proprietor of such estate, mahal, alienated village, alienated land, or in a person having interest in such proprietary right through the proprietor,

shall pass from such proprietor or such other person to and vest in the State for the purposes of the State free of all encumbrances. Section 4 sets out the consequences of the vesting of the land in the Government by virtue of the notification issued under Section 3. Section 8 provides for assessment of compensation payable to every proprietor, who is divested of proprietary rights. The compensation is to be determined in accordance with the rules contained in Schedule I. Section 12 requires that a proprietor who is divested of proprietary rights by virtue of a notification issued under Section 3 shall, within such period as may be prescribed, file a statement of claim in the prescribed form and specify the particulars mentioned therein. Section 13 authorises the Compensation Officer to determine the amount of compensation. Section 14 provides:

"(1) If, during the course of an enquiry by the Compensation Officer, any question is raised regarding the proprietary right in any property divested under S. 3 and such question has not already been determined by a Court of competent jurisdiction, the Compensation Officer shall proceed to enquire summarily into the merits of such question and pass such orders as he thinks fit".

(2) The order of the Compensation Officer under sub-section (1) shall not be subject to any appeal or revision, but any party may, within two months from the date of such order, institute a suit in the Civil Court to have the order set aside, and the decision of such Court shall be binding on the Compensation Officer, but subject to the result of such suit, if any, the Compensation Officer shall be final and conclusive".

Counsel for Dayaram urged that the Compensation Officer had decided by his Order dated August 30, 1951 that compensation in respect of the Malguzari land was payable to Dayaram and since no suit was filed by the plaintiffs for setting aside that decision, the order of the Compensation Officer became final and conclusive and could not be reopened in a suit filed more than six years after that date. We are unable to accept that contention. The Compensation Officer is entitled to decide a question only regarding the proprietary right in the pro-

perty divested under Section 3. He is not concerned with determination of any question relating to a private dispute between two or more persons who make competing claims in the matter of compensation, relying upon their respective titles. A question regarding the proprietary rights may in ordinary course be raised only in a claim against the State, and if that claim be decided against the claimant in a summary inquiry held by the Compensation Officer, a suit to set aside the decision must be filed within two months from that date and if no suit is filed, the order becomes final and conclusive. Section 14 was enacted with a view to put an end to disputes with regard to the claims to proprietary rights which by virtue of the notification issued under Section 3 are extinguished. It is not intended by an Order under Section 14 to determine complicated questions of title by the adjudication of a Revenue Officer in a summary inquiry without even a right of appeal and to make his adjudication conclusive unless a suit be filed within two months from the date of the order. That is also clear from the terms of Section 35 (7) of Act 1 of 1951 which provides:

"The payment of compensation under this Act to the creditors of a proprietor or to the proprietor in accordance with the prescribed manner shall be a full discharge of the State Government from all liability to pay compensation for the divesting of proprietary rights, but shall not prejudice any rights in respect of the said rights to which any other person may be entitled by due process of law to enforce against the person to whom compensation has been paid as aforesaid".

The Civil Court is declared competent to determine disputed questions with regard to title to the compensation. We agree with the High Court that Section 14 of Act 1 of 1951 does not invest the Compensation Officer with jurisdiction to determine competing claims of persons claiming proprietary rights to the property vesting in the Government by the operation of Section 3 of the Act. Section 14 is intended to determine only the proprietary rights in the land qua the State.

24. Finally it was urged that the Trial Court granted Rs. 10,000/- as mesne profits and even though the

High Court disallowed the claim of the plaintiffs with regard to certain items no reduction was made in the total amount of mesne profits awarded corresponding to the claim disallowed. Counsel for the plaintiffs concedes that the High Court was in error in not reducing the amount of mesne profits awardable to the plaintiffs. He agrees that instead of the figure of Rs. 10,000/- awardable to the plaintiff Rs. 8000/- should be substituted. We modify the mesne profits awarded. Subject to this modification, this appeal fails and is dismissed with costs.

Decree modified.

**AIR 1971 SUPREME COURT 690
(V 58 C 129)**

(From: Patna)*

J. C. SHAH, C. J. AND
A. N. GROVER, J.

Yogendra Prasad Shrivastava, Appellant v. Markandeshwar Singh, Respondent.

Civil Appeal No. 2236 of 1969, D/- 6-1-1971.

(A) Civil P. C. (1908), Order 26, Rule 8 — When there is evidence to prove that on the day on which the statement of a witness taken under a commission was admitted on the record and thereafter during the course of the inquiry the witness was unable to remain present in the Court, his statement is admissible under Rule 8.

(Para 10)

(B) Representation of the People Act (1951), Section 123 (4) — Publication of pamphlet at the instance of the returned candidate held, was "corrupt practice" within Section 123 (4) — Election Petition No. 1 of 1969, D/- 22-9-1969 (Pat), Affirmed.

(Para 12)

Where the allegations in a pamphlet related to the personal character and conduct of the rival candidate and were false and were reasonably calculated to prejudice the prospects of his election and it was also proved that it was published at the instance of the returned candidate and that the copies thereof were widely distributed; the returned candidate is

*(Election Petition No. 1 of 1969, D/- 22-9-1969 — Pat.)

AO/BO/A106/71/YPB/C

guilty of corrupt practice. Election Petition No. 1 of 1969, D/- 22-9-1969 (Pat), Affirmed. (Paras 3, 12)

Mr. M. C. Chagla, Sr. Advocate (Mr. A. K. Nag, Advocate, with him), for Appellant; Mr. S. V. Gupte, Sr. Advocate, (M/s. Birendra Prasad Sinha, U. P. Singh, S. B. N. Singh, Jira Lal Kapur and Hardev Singh, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, C. J.: — At the mid-term poll held on February 9, 1969 for electing a member to the Bihar Legislative Assembly from Dhanha Constituency there were four contesting candidates. Yogindra Prasad Shrivastava who stood "on the P. S. P. ticket", was declared elected by a majority of 2162 votes over his nearest rival — Markandeshwar Singh who stood "on the Congress ticket".

2. Markandeshwar Singh applied to the High Court of Patna for an order setting aside the election of Yogindra Prasad on the ground that the latter, his agents and his supporters with his consent had committed several corrupt practices at the election. Three principal corrupt practices set up in the petition were—

(1) that Yogindra Prasad procured the printing of a leaflet bearing the caption "SIDHA SAWAL" and containing false and malicious statements of fact, which he believed to be false, in relation to the personal character and conduct of Markandeshwar Singh in order to malign him and to lower him in the estimation of the voters. The statements were reasonably calculated to harm and prejudice the prospects of his election. Yogindra Prasad, his agents and supporters with his active consent and connivance distributed and circulated the leaflet in the Constituency during the election;

(2) that Yogindra Prasad also procured the printing of posters in different sizes containing false and malicious statements of fact in relation to the personal character and conduct of Markandeshwar Singh in order to malign him and lower him in the estimation of the voters, and the statements were reasonably calculated to harm his prospects of election. These posters were pasted on the walls at various places throughout the Constituency and were also displayed at

different places during the election; and

(3) that Yogindra Prasad had obtained and procured the assistance of persons in the service of the Government, such as, Dafadars, Law Clerks of the Forest Department, Compounders of Government Hospital, Headmasters and teachers of Government or Government aided Schools and Presiding Officers of different booths for furthering his prospects at the election, particulars in respect of which were set out in Sch. 3 annexed to the petition.

The High Court held that Yogindra Prasad had committed corrupt practices described in items (1) and (2) only. Since no appeal has been preferred against the order rejecting the plea relating to the commission of corrupt practice with respect to item (3) nothing more need be said in that behalf.

3. Item (1) related to the printing, publication and distribution of a pamphlet, in the course of the election campaign. The caption of the pamphlet was "Straight Question". The caption was preceded by the symbol of a hut which is the election symbol of the P. S. P. candidates and a couplet in Hindi which freely translated reads "the river bank contract and the free land will be snatched away by the people. The people will not tolerate the dacoity and murder under the mask of Congress". The caption "Straight Question" is followed by a statement that the people of Dhanha want an answer from Markandeshwar Singh. Then were set out thirteen questions. It is not disputed that the author of the pamphlet intended to malign Markandeshwar Singh. Serious allegations were made in the pamphlet relating to the personal conduct of Markandeshwar Singh. The pamphlet attributed acts of dacoity, murder and violence to Markandeshwar Singh. It is conceded that the allegations which related to the personal character and conduct of Markandeshwar Singh were false and were reasonably calculated to prejudice the prospects of his election.

4. A poster was also published. It contained an exhortation to the voters to vote for Yogindra Prasad who was described as the "Hope of the poor, Leader of the youth, Fearless socialist". The poster bore the

symbol of a hut. It was followed by a couplet in Hindi "The river bank contract and the free land will be snatched away by the people. The people will not tolerate the dacoity and murder under the mask of Congress". Markandeshwar Singh is a ferry contractor and in the pamphlet an allegation was made that Markandeshwar Singh was charging exorbitant rates for ferrying passengers, carts and goods. The couplet apparently refers to the ferry contract and threatens that the contract and the land given in that connection will be snatched away by the people. But by publishing this poster no corrupt practice within the meaning of Section 123 (4) of the Representation of the People Act, 1951 is committed. There was no statement of fact in the poster in relation to the personal character and conduct of any candidate, and the statement could not reasonably be calculated to prejudice his prospects at the election. The High Court held that Yogindra Prasad was responsible for publication of the pamphlet as well as the poster, and that the publication of the pamphlet and poster constituted a corrupt practice within the meaning of Section 123 (4) of the Representation of the People Act, 1951. The posters were printed at Shri Shymalal Press, Motihara and Yogindra Prasad admits that he got the poster printed. But since in our view publication of the poster does not amount to commission of a corrupt practice it is unnecessary to deal with the evidence relating to the affixing of and displaying those posters in the Constituency.

5. Mr. Chagla appearing for Yogindra Prasad concedes that the statements made in the pamphlet were false, that the person who made those statements believed them to be false or did not believe them to be true, that they related to the personal character and conduct of Markandeshwar Singh and that the statements were reasonably calculated to prejudice his prospects at the election. Counsel only contended that the appellant Yogindra Prasad Shrivastava had not published the pamphlet.

6. It is common ground that the pamphlet was printed at the Chitra Printing Press Padrauna. The bill relating to its printing is Ex. 8/7. According to the recitals in the bill

the order for printing the pamphlet with the caption "Notice (Straight Question)" of which 10,000 copies were printed, was given by one Janardan Tiwari. The pamphlet, some posters, ballot papers and another publication called Notice "keep watch" were also ordered to be printed by Janardan Tiwari. An advance of Rs. 100/- was given towards the printing charges and the balance of Rs. 229/- remained due. Gopal Prasad Sinha, proprietor of the Printing Press who was examined on commission deposed that on the order given by Janardan Tiwari for printing he printed the pamphlet at his Chitra Printing Press. The witness tendered the manuscript on the basis of which the pamphlet was printed. He also produced a document containing the signature of Janardan Tiwari on the manuscript and the order form. The witness also produced the bill, posters and other matters which were printed by him. The witness stated that the amount of the bill was paid by Yogindra Prasad and that Yogindra Prasad and other persons had taken away the printed pamphlets and posters. In cross-examination the witness stated that Janardan Tiwari had given him the order and the advance, and that when the order was given for printing the pamphlets, Yogindra Prasad was present and that Yogindra Prasad had taken delivery of the printed matter.

7. Yogindra Prasad denied that he had given the order or that he had made the payment or that he had taken delivery of the pamphlets. He admitted that he had appointed one Janardan Tiwari who was an Advocate practising in Bettiah as his counting agent, that he had made his appointment on the day of counting and before his appointment as counting agent, and that Janardan Tiwari was not asked to do and had not done any election work for him. He denied that Janardan Tiwari had accompanied him in his election tour of the constituency. He also denied that the pamphlet was distributed at his instance.

8. Janardan Tiwari was not examined as a witness before the Court. The High Court compared the signatures of Janardan Tiwari as subscribed on the various documents produced by Gopal Prasad Sinha with his signature on the document under which

Janardan Tiwari was appointed as counting agent. The High Court was satisfied that the person who had signed the documents produced by the printer Gopal Prasad Sinha was the same person who had signed in token of accepting appointment as counting agent.

9. Yogindra Prasad examined as a witness one Ambika Tiwari-uncle of Janardan Tiwari. The witness stated that Janardan Tiwari had not done any "propaganda work" at the election, that Janardan Tiwari was a practising lawyer at Bettiah, that at the time of election Janardan Tiwari did not go out of Bettiah except for the purpose of recording his vote. He denied that Janardan Tiwari was a counting agent of Yogindra Prasad. The witness had not been to Bettiah at the time of counting of votes and he was "not sure" if he "could identify the signature of Janardan Tiwari if shown" to him. The testimony of this witness was inconsistent even with the case of Yogindra Prasad and was unreliable.

10. Mr. Chagla appearing on behalf of the appellant however contended that the High Court was in error in taking on record the evidence of Gopal Prasad Sinha—the printer. The circumstances in which the evidence of this witness was brought on the record may first be set out. The hearing of the election petition commenced on July 15, 1969. On July 17, 1969 summons was ordered to be issued to Gopal Prasad Sinha requiring him to attend the Court for examination as a witness in support of the election petition. The summons was served on the witness. Gopal Prasad Sinha informed the Court that he was lying ill and was unable personally to present himself before the Court on the day fixed for recording his evidence. Markandeshwar Singh then applied for an order that the witness be examined on commission. The High Court passed an order on July 23, 1969 on the application ordering that a commission be issued. The statement of Gopal Prasad Sinha was recorded on July 27, 1969 and was duly certified. The Court on July 29, 1969 then passed an order that the papers filed by the Commissioner do form part of the record. No objection was raised on behalf of Yogindra Prasad against the admission of the statement. Mr. Chagla relying upon Order

26, Rules 7 and 8 of the Code of Civil Procedure, contends that in the absence of evidence to prove that on the day on which the statement of Gopal Prasad Sinha was admitted on the record, and thereafter during the course of the inquiry the witness was unable to remain present in Court his statement was inadmissible. Order 26, Rules 7 and 8 provide:

Rule 7—"Where a commission has been duly executed, it shall be returned, together with the evidence taken under it, to the Court from which it was issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall be returned in terms of such order; and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit.

Rule 8—Evidence taken under a commission shall not be read as evidence in the suit without the consent of the party against whom the same is offered, unless—

(a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness or infirmity to attend to be personally examined, or exempted from personal appearance in Court, or is a person in the service of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or

(b) the Court in its discretion dispenses with the proof of any of the circumstances mentioned in clause (a), and authorises the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same".

No order was made under clause (b) of Rule 8 by the Court. But no objection was raised by Yogindra Prasad to the admission of the recorded statement. The record of the statement was read with his consent. There was before the Court an application received a week before the date on which the commission was returned duly executed that Gopal Prasad Sinha was lying ill and was unable to attend the Court. The Court was satisfied of the truth of the grounds in that application and directed that the witness be

examined on commission. Correctness of the order issuing the commission for exemption of the witness is not challenged. There is no evidence that the sickness or infirmity which prevented the witness from attending the Court on or after July 22, 1969 did not persist till the case was finally disposed of, and on that account the evidence was inadmissible. The statement of Gopal Prasad Sinha was admitted to the record on the day on which the case of Markandeshwar Singh was closed. Thereafter the evidence of Yogindra Prasad was recorded. The last witness on behalf of Yogindra Prasad was examined on August 12, 1969 and there is no evidence that the witness Gopal Prasad Sinha could have attended the Court during the time the case was pending. We do not think that the statement of Gopal Prasad Sinha is inadmissible.

11. Mr. Chagla contended that a proceeding charging a person for committing corrupt practice is in the nature of a quasi-criminal proceeding and the charge must be established beyond reasonable doubt and since the only evidence against Yogindra Prasad is of a single witness not supported by any documentary evidence or any evidence establishing any connection between Yogindra Prasad and the printer of the document which is said to constitute a corrupt practice, the High Court was not justified in relying upon the oral testimony of Gopal Prasad Sinha in holding that Yogindra Prasad was responsible for publication of pamphlet Ext. 8/2. But the circumstances of the case in our judgment amply support the findings recorded by the High Court that Janardan Tiwari had given the order for printing the pamphlet. Gopal Prasad Sinha is not shown to be interested in the election petitioner. Genuineness of his record is not challenged. Janardan Tiwari the person who gave the order has signed several documents which are on the record. His signature accepting appointment by Yogindra Prasad as counting agent is before the Court and in the view of the High Court the signature on the form of acceptance of the counting agency is of the same person who gave the order. We have looked into the documents and we do not see any reason to disagree with the High Court. If it was the case of the appellant that Janardan

Tiwari was some person other than the counting agent appointed by him, he should have examined Janardan Tiwari, Advocate, as a witness. Ambika Tiwari deposed to a story which was palpably false. His testimony could not assist the case of Yogindra Prasad.

12. On the evidence we are unable to hold that the pamphlet was not got printed at the instance of the appellant by Janardan Tiwari, his counting agent. No rational explanation has even been suggested to us as to why a perfect stranger bearing the name of Janardan Tiwari may spend a substantial sum of money for getting printed pamphlets maligning Markandeshwar Singh. The evidence of the printer Gopal Prasad Sinha establishes that it was Yogindra Prasad-appellant here who took delivery of and paid for the pamphlet. We agree with the High Court that Yogindra Prasad was responsible for the printing of the pamphlet Ex. 8/2. It is not in controversy that copies of the pamphlet were widely distributed in the Constituency during the election campaign. There is no reason to disbelieve that Yogindra Prasad was responsible for distribution of the pamphlet.

13. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 694 (V 58 C 130)

(From: Assam and Nagaland)*

J. C. SHAH, C. J., K. S. HEGDE, A. N. GROVER, JJ.

The Divisional Forest Officer, South Kamrup Division, Gauhati and others, Appellants v. Moolchand Sarangi Jain, Respondent.

Civil Appeal No. 595 of 1967, D/- 6-1-1971.

Assam Forest Regulation (7 of 1891), S. 72, Rules framed under, R. 10 — Rule does not give rise to any liability to pay sum of money but merely imposes limitation on Forest Officers' power to grant leases in respect of certain forest produce. (Para 5)

*(Civil Rule No. 242 of 1964, D/- 28-7-1966 — Assam and Nagaland.)

AO/BO/A108/71/VSS/M

The amount of damages for breach of terms of sale notice in respect of monopoly rights to quarry stone for certain period from certain areas is not an amount due under Regulation or R. 10 and it cannot be recovered as an arrear of land revenue.

(Para 5)

Mr. Naunit Lal, Advocate, for Appellants; Mr. D. N. Mukherjee, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SHAH, C. J.: The Divisional Forest Officer, Kamrup Division, Assam invited tenders for the purchase of monopoly rights to quarry stone from certain areas, including Narangi Stone Quarry Mahal, for the period July 1, 1963 to June 30, 1964. Mool Chand Sarougi — hereinafter called 'the respondent' submitted a tender accompanied by the requisite deposit of Rs. 100/- as earnest money, and offered the rate of Rs. 5.25 per rupee of royalty. The tender submitted by the respondent was accepted and for the minimum quantity of 1,25,800 cft. of stone allotted to the respondent out of the quarry he was to pay Rupees 31,250/-. Intimation of acceptance of the tender was given to the respondent on July 13, 1963.

2. One Baputi Ram, a member of a Scheduled Tribe, appealed against the order of the Divisional Forest Officer accepting the tender, to the Government of Assam and obtained a stay order. After about three months he declined to prosecute the appeal and his appeal was dismissed. The respondent then declined to accept the settlement of the quarry.

3. The Divisional Forest Officer invited fresh tenders. The offers made were not however accepted and tenders were invited again. On January 10, 1964 a settlement was made for a minimum quantity of 50,000 cft. for the period from January 25, 1964 to June 30, 1964 for Rs. 10,000/-.

4. The Divisional Forest Officer, thereafter, sought to recover the amount of Rs. 31,250/- for which the tender of the respondent was accepted as arrears of land revenue in the manner provided by S. 75 of the Assam Forest Regulation VII of 1891. The respondent then moved a petition in the High Court of Assam for an order quashing the proceeding for recovery of the amount demanded. The High

Court held that the amount claimed was not recoverable under the provisions of the Assam Forest Regulation VII of 1891 and passed an order quashing the proceeding for recovery and issued a mandamus to the Divisional Forest Officer, Kamrup Division not to proceed with the recovery. The State of Assam has appealed to this Court with certificate granted by the High Court.

5. Section 75 of the Assam Forest Regulation VII of 1891 provides:

"All money, other than fines, payable to Crown under this Regulation, or under any rule made thereunder, or on account of the price of any forest produce, or of expenses incurred in the execution of this Regulation in respect of any forest produce, may, if not paid when due, be recovered under the law for the time being in force as if it were an arrear of land revenue".

The amount claimed to be due from the respondent is not on account of the price of any forest produce, or of expenses incurred in the execution for recovery of any forest produce. The amount is also not due in the execution of the Regulation. So far there is common ground. It was claimed, however, that the amount was due under rule 10 promulgated in exercise of power under the Regulation and on that account it was recoverable as an arrear of land revenue. Rule 10 provides:

"No lease for any fixed period giving the right of removing India rubber, cane, kutcha or cutch, lac, agar, ivory, or any other forest produce shall be given otherwise than in accordance with the general or special orders of the Conservator who is empowered to authorise sales in respect of such leases, by auction, tender or any other method at such rates as he may decide in his discretion."

The Rule in our judgment does not apply to recovery of the amount alleged to be due for failure to carry out the obligations of the tender by proceedings under the Assam Forest Regulation 1891. It is again difficult to hold that "stone" is forest produce within the meaning of the Act. In any event the Rule does not give rise to any liability to pay a sum of money. It merely imposes a limitation upon the power of the officers of the Forest Department to grant leases in respect

of certain forest produce. The lease may not be granted except in accordance with the general or special orders of the Conservator who alone is empowered to authorise a sale in respect of such a lease. It is a rule relating to the exercise of power to grant leases. The High Court was, in our judgment, right in observing that the amount of damages for breach of the terms of the sale notice is not an amount due under the Regulation, or rule 10 made thereunder.

6. The appeal accordingly fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 696 **(V 58 C 131)**

(From: Punjab)*

J. M. SHELAT,

C. A. VAIDIALINGAM,

P. JAGANMOHAN REDDY, JJ.

M/s. Allen Berry and Co. Private Ltd., Appellant v. The Union of India, Respondent.

Civil Appeal No. 2418 of 1966, D/- 5-1-1971.

Arbitration Act (1940), Section 30
— Mistake in award can be a ground of remission or setting it aside only when such mistake is apparent on the face of the award or forms a part of it. (Para 9)

As the parties choose their own arbitrator, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake. Mere reference to the contract in the award is not to be held as incorporating it. Case law discussed. (Para 9)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 288 (V 56),
Vidya Sagar Joshi v.
Surinder Nath Gautam 20

*(F. A. O. Appeal No. 123-D of 1961,
D/- 19-2-1963 — Punj. at Delhi.)

AO/BO/A105/71/BNP/C

(1968) C. A. No. 107 of 1966, D/-
5-12-1968 (SC) = 1969 SCD 9
262, Babu Ram v. Nanhemal
(1967) AIR 1967 SC 1032 (V 54)
= (1967) 1 SCR 324, Union of
India v. Bungo Steel Furniture
P. Ltd. 5
(1962) 2 All ER 53 = 3 WLR 512,
Giacomo Costa Fu Andrea v.
British Italian Trading Co.
Ltd. 8, 10
(1947) 2 All ER 260 = 1948 (1)
KB 11, Woolf v. Collis Re-
moval Service 20
(1933) 1933 AC 592 = 102 LJKB
648, F. R. Absalom Ltd. v.
Great Western (London) Garden
Village Society Ltd. 6, 8
(1923) AIR 1923 PC 66 (V 10)
= 1923 AC 430, Champsey
Bhara and Co. v. Jivraj Balloo,
Spinning and Weaving Co. Ltd. 7
(1923) 1923 AC 395 = 92 LJ Ch
307, Kelanton v. Duff Develop-
ment Co. 7, 16
(1915) 3 KB 167 = 84 LJKB 1091,
Monro v. Bognor Urban District
Council 20
(1905) 2 KB 184 = 53 WR 534,
Landauer v. Asser 6, 7, 8
(1857) 3 CB (NS) 189 = 140 ER
712, Hodgkinson v. Fernie 5, 10

M/s. R. L. Agarwal, K. L. Mehta,
S. K. Mehta, P. N. Chaddha, M. G.
Gupta and K. R. Nagaraja, Advocates,
for Appellant; Dr. L. M. Singhvi, Sr.
Advocate, (Mr. Badri Dass Sharma,
Advocate for Mr. S. P. Nayar, Advo-
cate, with him), for Respondent.

The following Judgment of the
Court was delivered by

SHELAT, J.: — By this appeal,
under special leave, the appellant-
company challenges the correctness of
the judgment of the High Court of
Punjab, dated February 19, 1963
refusing to set aside an umpire's
award, dated March 22, 1958. The
award was in respect of certain dis-
putes between the company and the
Union of India in the matter of dis-
posals of the United States surplus
war materials left by the Government
of the U. S. A. at the end of the last
World War. These surplus materials,
called the U. S. Surplus Stores, con-
sisted of vehicles and other stores.
It was said that these were sold to the
company by the Director-General,
Disposals through correspondence and
sale-notes. These contracts of sale
were subject to the General Conditions

of Contract (Form Con. 117). Clause 13 of these General Conditions provided that:

"In the event of any question or dispute arising under these conditions or any special conditions of contract or in connection with this contract — the same shall be referred to the award of an arbitrator to be nominated by the Director General and an arbitrator to be nominated by the contractor, or in the case of the said arbitrators not agreeing, then, to the award of an Umpire to be appointed by the arbitrators in writing before proceeding on the reference....."

Upon every and any such reference, the assessment of the costs incidental to the reference and award respectively shall be in the discretion of the arbitrators, or in the event of their not agreeing, of the Umpire appointed by them."

2. Disputes having arisen between the parties both as regards the contents and the quantity of the vehicles delivered under the contracts, they were referred, in the first instance to two arbitrators nominated by the parties, and ultimately to an umpire. The disputes were crystallized into nine claims by the appellant-company totalling Rs. 6,73,34,500/-, and several counter-claims by the Government of India. At the end of the arbitration, the umpire, by his said award, disallowed all the claims made by the company, except one for which he awarded Rs. 6,94,000/- and held, in respect of the counter-claims filed by the Government of India, that the appellant-company was liable to pay to the Government in all Rs. 36,23,682.50 P. and costs amounting to Rs. 5,40,544. In the result, after deducting the claim allowed to the appellant-company, the company was held liable to pay to the Government Rs. 34,70,226.50 P.

3. The award having been filed by the umpire in the Court of the District Judge, Delhi and the Government of India having thereupon applied for a decree in terms of the award, the company applied to the Court for setting aside the award urging several grounds for so doing. The District Judge by an elaborate judgment declined to set aside the award. He, however, held that the award suffered from an error apparent on the face of the award in respect of the

appellant's claim No. III (a), and further held that the counter-claims II, IV, V and VI made by the Government were not covered by the reference, and consequently, the umpire had no jurisdiction to go into them. Declining, however, to set aside the award, he remitted it for reconsideration of the aforesaid items and also for readjustment of the amount of costs in the event of enhanced compensation being awarded to the company in respect of its claim No. III (a). Dissatisfied with the judgment of the appellate Court, the company filed an appeal before the High Court. The Union of India also filed certain cross-objections. The High Court heard the appeal and the cross-objections together and by its aforesaid judgment dismissed both the appeal and the cross-objections and upheld the judgment of the District Judge.

4. In support of the claim that the award was liable to be set aside, counsel for the company submitted the following six propositions for our acceptance:

1. that the contracts of sale entered into by the company were misconstrued by the umpire and such misconstruction appears on the face of the award;

2. that the umpire, as also the High Court, failed to take into consideration several documents while deciding the scope of the sales;

3. that in respect of claim No. VI and counter-claim No. VI of the Government, the umpire acted beyond his jurisdiction as those questions did not fall within the scope of the reference;

4. that the umpire did not act according to law but acted as a conciliator and based his award on mere conjectures and surmises;

5. that his conclusion on ground rent awarded to the Government was based on no evidence; and

6. that the costs awarded to the Government were altogether disproportionate.

5. Before we proceed to consider these propositions, it is necessary to ascertain the scope of Section 30 of the Arbitration Act, 1940, and the principles underlying that section. The general rule in matters of arbitration awards is that where parties have agreed upon an arbitrator, thereby displacing a Court of law for a domes-

tic forum, they must accept the award as final for good or ill. In such cases the discretion of the Court either for remission or for setting aside the award will not be readily exercised and will be strictly confined to the specific grounds set out in Ss. 16 and 30 of the Act. In *Hodgkinson v. Fernie*, 1857 (3) CB (NS) 189, Williams, J., stated the principle as follows:—

"Where a cause or matters in difference are referred to an arbitrator, whether a lawyer or a layman, he is constituted the sole and final judge of all questions both of law and fact. ...The only exceptions to that rule are, cases where the award is the result of corruption or fraud, and one other, which though it is to be regretted, is now, I think, firmly established, viz., where the question of law necessarily arises on the face of the award, or upon some paper accompanying and forming part of the award."

This observation was recently cited with approval in *Union of India v. Bungo Steel Furniture Pvt. Ltd.*, (1967) 1 SCR 324 = (AIR 1967 SC 1032).

6. The principle is that the Court, while examining an award, will look at documents accompanying and forming part of the award. Thus, if an arbitrator were to refer to the pleadings of the parties so as to incorporate them into the award, the Court can look at them. In some cases, however, Courts extended the principle and set aside the award on a finding that the contract, though only referred to but not incorporated into the award as part of it, had been misconstrued and such misconception had been the basis of the award. Thus, in *Landauer v. Asser*, 1905 (2) KB 184, the dispute between buyers and sellers of goods was as to who was entitled to certain sums paid upon a policy of insurance upon the goods. This was referred to arbitration and the umpire made his award basing it on the construction he placed on the contract, namely, that as the parties to the contract were "by the terms thereof" principals, their interest and liability in insurance was defined to be the value of the invoice plus 5 per cent. On an application to set aside the award, the Court of Appeal held that inasmuch as the umpire had referred to the contract and the terms thereof, it was justified in looking at

the contract, and having done so, found that he had based his decision entirely upon the terms of the contract. It also found that since the contract, if properly construed, did not justify the decision, the award was bad on the face of it and was liable to be set aside. A similar view appears also to have been taken in *F. R. Absalom Ltd. v. Great Western (London) Garden Village Society Ltd.*, 1933 AC 592. Where the award set out the relevant words and Clause 30 of the contract and also the conclusion of law on the meaning of those words, Lord Russell said that since the award recited the contract and referred in terms to the provisions of Clause 30, thereby incorporating it into the award, and then stated the construction which the arbitrator placed upon that clause, the Court was entitled to look at that clause, to ascertain if the construction placed by the arbitrator was erroneous.

7. The correctness of the decision in 1905 (2) KB 184 was challenged before the Privy Council in *Champsey Bhara and Co. v. Jivraj Balloo Spinning and Weaving Co. Ltd.*, 1923 AC 480 = (AIR 1923 PC 66). Lord Dunedin, however, did not expressly overrule it but rested content by observing that that decision was not binding on the Board. But he, formulated the principle thus:

"An error in law on the face of the award means, — that you can find in the award or a document actually incorporated thereto, as for instance, a note appended by the arbitrator stating the reasons for his judgment, some legal proposition which is the basis of the award and which you can then say is erroneous. It does not mean that if in a narrative a reference is made to a contention of one party that opens the door to seeing first what that contention is, and then going to the contract on which the parties' rights depend to see if that contention is sound".

The Privy Council upheld the award stating that it was impossible to say what was the mistake on the face of the award which the arbitrators had made as they had not tied themselves down to any legal principle which was unsound. The mere fact that the Court would have construed a document differently than the arbitrator would not induce the Court to inter-

fere unless the construction given by the arbitrator is such that it is against the well-established principles of construction. (see *Kelanton v. Duff Development Co.*, 1923 AC 395).

8. In an illuminating analysis of a large number of earlier decisions, including *Landauer*, 1905 (2) KB 184 and *F. R. Absalom Ltd.*, 1933 AC 592, *Diplock, L. J.*, in *Giacomo Costa Fu Andrea v. British Italian Trading Co. Ltd.*, (1962) 2 All ER 53 recorded his conclusion thus:

"It seems to me, therefore, that, on the cases, there is none which compels us to hold that a mere reference to the contract in the award entitles us to look at the contract. It may be that in particular cases a specific reference to a particular clause of a contract may incorporate the contract, or that clause of it, in the award. I think that we are driven back to first principles in this matter, namely, that an award can only be set aside for error which is on its face. It is true that an award can incorporate another document so as to entitle one to read that document as part of the award and, by reading them together, find an error on the face of the award".

9. The question whether a contract or a clause of it is incorporated in the award is a question of construction of the award. The test is, does the arbitrator come to a finding on the wording of the contract. If he does, he can be said to have impliedly incorporated the contract or a clause in it whichever be the case. But a mere general reference to the contract in the award is not to be held as incorporating it. The principle of reading contracts or other documents into the award is not to be encouraged or extended. (see *Babu Ram v. Nanhemal, C. A. No. 107 of 1966, D/- 5-12-1968 (SC)*). The rule thus is that as the parties choose their own arbitrator to be the Judge in the dispute between them, they cannot, when the award is good on the face of it, object to the decision either upon the law or the facts. Therefore, even when an arbitrator commits a mistake either in law or in fact in determining the matters referred to him, but such mistake does not appear on the face of the award or in a document appended to or incorporated in it so as to form part of it, the award will neither be remitted nor set aside notwithstanding the mistake.

10. In the light of the principle above stated, the first question calling for determination is, is there an error apparent on the award, in the sense that the umpire misconstrued the contracts of sale inasmuch as though those contracts were contained in sale-notes as well as in several letters, he considered the sale-notes only as containing the contracts of sale disregarding the correspondence which had taken place between the company and the Director-General, Disposals and his officers? Such a question would undoubtedly be one of law. But the disputes referred to the umpire contained disputes both of fact and law. Ordinarily the decision of the umpire, even though it be on a question of law, would be binding on the parties. The Court would only interfere if the case falls within the exceptions mentioned by *Williams, J.* in (1857) 3 CB (NS) 189 and reaffirmed by *Diplock, L. J.*, in 1962 (2) All ER 53.

11. There were in all three separate sales to the appellant-company, which according to the respondents were incorporated in sale-notes Numbers 160, 161 and 197. Before the sale-note 160 was issued on July 11, 1946, it is a fact that the company had written a letter dated July 10, 1946 which was also endorsed by two officers of the Director-General, Disposals. The letter contained three clauses, the first of which stated that M/s. Allen Berry will buy the Moran Vehicles Depot 'as is where is' for Rs. 1,80,00,000/-. The two other clauses provided the manner and time of payment of the sale price. But the letter commenced with the following words:

"Pending detailed record of terms tomorrow the following are the broad heads of agreement, which will form the basis of sale of surplus vehicles:" The next day, i.e., July 11, 1946, the Department issued sale-note 160, which in clear terms stated that what was purchased were "all vehicles and trailers lying in Moran Depot", which meant that the vehicles sold were only those that were actually lying in that depot on July 11, 1946, and not those outside it or those borne on the records of that depot, as contended by the company. It, however, appears from the judgment of the Trial Court (Para 206) that on receipt of sale-note 160, the company wrote a letter on July 11, 1946 in which it contended

that "we have purchased the entire vehicle depot of Moran." It appears that in view of this difference of opinion, a meeting of representatives of the parties was held on July 23, 1946, the minutes of which, as recorded by the Assam Controller, U. S. A. S. S., read as follows:

"(2) (a) The vehicles and trailers sold to Messrs. Allen Berry and Co. Ltd., are deemed to include all vehicles which were or should have been held in Moran Depot on the 10th July, also those which have been issued on a Memorandum Receipt as follows:—

(i) To the Americans, left behind by them in various camps and depots and not yet turned in by us.

(ii) Vehicles issued on Memorandum Receipt to military units assisting the U.S.A. S. S. Organization.

(iii) Any surplus vehicles originally allotted to U.S.A. S. S. Units — for operational purposes and now no longer required by them."

On September 17, 1946, a secraphone message was sent from New Delhi to Calcutta which stated "We have sold U.S. Army surplus vehicles presumed to be borne on Moran list, that is those actually in Moran Vehicle Depot or those that were intended to be moved to that depot, which was meant to be parking depot for surplus U.S. vehicles in Assam area." On September 26, 1946, the Director-General, Disposals, wrote to the company that "The vehicles sold to you in Assam are those U.S. Army surplus vehicles actually in Moran Vehicle Depot or those that were intended to be moved to Moran Vehicle Depot. Any mobile engineering equipment, such as mobile cranes, tracked tractors are excluded from the sale to you." On December 10, 1946, the Controller issued a release order in respect of:

1. All vehicles and trailers lying in Moran Depot on 10th July 1946 including all United States Army Surplus Stores, excluding land and buildings lying within Moran Depot and transferred to the Government of India from the Government of the United States.

2. Vehicles in operational use in Calcutta and Assam as and when no longer required by the U.S.A.S.S. Organisation."

12. The question raised by counsel is that the umpire failed to consider all these documents while

considering the scope and content of the contract of sale and relied on only sale-note No. 160, dated July 11, 1946, that the contract was not contained in the said-note 160 alone, and that therefore, he misconstrued the contract, and that that misconstruction, which is a point of law, is apparent on the face of the award, as it was made the very basis of the award.

The first three issues raised by the umpire were:

(1) Whether the appellant was entitled to prove that any vehicles, stores etc. other than those mentioned in the sale-notes were sold to it;

(2) Whether the Government was bound by the clarifications, representations, explanations or assurances made or given by any officer or officers of the Department regarding the subject-matter of the contracts of sale except those necessarily implicit in the sale-notes; and

(3) Whether the Government sold any vehicles except those lying in Moran Depot on July 11, 1946, or those intended to be moved thereto.

13. The dispute between the parties, thus, clearly was that whereas the company claimed that the sale was of all vehicles borne on the records of Moran Depot, irrespective of whether they were actually lying there on July 11, 1946 or not, the Government claimed that the company was entitled to those actually lying in the Depot. According to the respondents, the contract of sale was to be found in the sale-note; and therefore, any subsequent explanations or assurances given by any officer or Officers of the Department could not vary or alter the term of the contract. These explanations and assurances were given only to remove the misunderstanding of the company over the question of the scope and extent of the sale made to it.

14. The umpire set out part of the sale-notes 160 and 197 in the award and then observed:

"the language used in these sale letters is to my mind perfectly clear, explicit and unambiguous and excludes the possibility of any vehicles, trailers or stores lying on the dates in question outside the locations specified in the sale letters having been included in the two sales. The contention that they in fact include all vehicular stores in Assam in one case and in Bengal area in the other has been made in all seriousness and a good

deal of evidence both oral and documentary has been produced in support of or against such contention. The point has also been argued at great length by learned counsel for the parties. I have given the whole matter my most serious and earnest consideration and my view is that apart from the language of the two sale-deeds being against such a contention, the evidence too considered as a whole does not support it. Accordingly, I hold that the stores sold to the claimants in the case of Assam were those actually located in Moran Depot on July 10, 1946 and in the case of Bengal those actually located in Jodhpur and other depots specified in the sale letter on July 31, 1946."

He next held:

"The alleged clarifications or representations made or explanations or assurances given by any officer or officers of the Disposals Department either verbally or in writing have been very carefully examined by me and I am of opinion that neither are they, considered as a whole, capable of the interpretation sought to be put upon them by the claimants nor are the respondents bound by them. They are not in accordance with law and do not amount to legal contracts binding the respondents."

These passages clearly show that the umpire had considered, besides the sale-notes, the oral and documentary evidence led by the parties as also the contentions urged on and as regards them by counsel for the company. It is impossible, therefore, to uphold the contention that the various documents, i.e., the letter of the company dated July 10, 1946, the subsequent correspondence, minutes of the meetings which took place after the sale-note 160 was issued etc. were not taken into consideration by the umpire while coming to his conclusion as to what actually was sold to the company.

15. The dispute, amongst other disputes, referred to the umpire and crystallized by him in the form of issues on the pleadings of the parties involved, as already stated, the question first as to what was sold, and secondly, arising out of that, the question whether besides the said sale-notes 160 and 197, the subsequent clarifications or explanations were binding on the Government. These were, no doubt, questions partly of

fact and partly of law. But questions both of fact and law were referred to the umpire and prima facie his findings on them would bind the parties unless, as explained earlier, the umpire has laid down any legal proposition, such as a construction which is made the basis of the award and is on the face of the award an error.

16. The point is, is this such a case? True it is that this is not a case where a question of law is specifically referred to. It is clearly a case falling in the category of cases, like 1923 AC 395 where in deciding the questions referred to him the umpire has to decide a point of law. In doing so, the umpire, no doubt, laid down the legal proposition that the clarifications or assurances given subsequent to the dates of the said sale-notes by an officer or officers of the department were not binding on the respondents nor could they affect the scope of the sales. That answer the umpire was entitled to give. But the fact that he answered a legal point does not mean that he has incorporated into the award or made part of the award a document or documents, the construction of which, right or wrong, is the basis of the award. The error, if any, in such a case cannot be said to be an error apparent on the face of the award entitling the court to consider the various documents placed in evidence before the umpire but not incorporated in the award so as to form part of it and then to make a search if they have been misconstrued by him. This, in our understanding, is the correct principle emerging from the decisions which counsel placed before us. In any event, this is not a case where the umpire, in the words of Lord Dunedin, "tied himself down to a legal proposition" which on the face of the award was unsound. The award makes it clear in so many words that he took into account the entire evidence, including the documents relied on by counsel and then only came to the conclusion that it did not assist the company in its contention as to the scope of the sales. Contentions 1 and 2 raised by Mr. Agarwal, therefore, cannot be upheld.

17. Contention No. 3 relates to 547 vehicles said to have been sold to the company under sale-note 197, dated August 2/6, 1946. There is no dispute that out of these vehicles the company removed 291 vehicles alleg-

ing that the delivery of the balance of 256 vehicles was withheld. The company made a claim being claim No. VI for the price of these 256 undelivered vehicles. The respondents' contention was that the sale to the company was confined only to the U.S.A. Surplus Stores, that these vehicles did not fall within that category, but were Reverse Land Lease vehicles belonging to the Government of India under an agreement between the U.S.A. and India. On these allegations the respondents laid counter-claim No. VI claiming the price of the 291 vehicles admittedly removed by the company when they were lying in Jodhpur Depot, Calcutta.

The umpire found that the expression "Reverse Land Lease" related to the reciprocal aid articles referred to in the said agreement. A reciprocal aid article, according to that agreement, meant an article transferred by the India Government to the U.S. Government under reciprocal aid under para 4-C of that agreement. The U.S.A. Government was deemed to have acquired as on September 2, 1945 full title over such articles except that such reciprocal aid articles incorporated into installations in India were deemed to have been returned to India Government from the date when the U. S. A. forces relinquished possession of such installations. From the inventories produced before him, the umpire held that these 547 vehicles were incorporated into installations in India, and therefore, ownership in them vested in India Government on and after the U.S.A. forces relinquished possession of those installations. They could not, therefore, be regarded as U.S. Surplus Stores which alone were and could be the subject-matter of sale-note 197. Consequently, the company was not entitled to remove the said 291 vehicles which it did, much less could the company claim compensation for 256 vehicles which it alleged were not delivered to it. In the result, the umpire allowed the Government's counter-claim No. VI, which was for the price of 291 vehicles unauthorisedly removed by the company from Jodhpur Depot.

18. The argument in connection with this part of the award was, firstly, that the findings of the umpire were vitiated as there was total lack of evidence on which they could be based, and secondly, that in any event,

the umpire had no jurisdiction to award compensation to the Government in respect of counter-claim No. VI. The first part of the argument need not detain us as the finding that these vehicles formed part of reciprocal aid articles, the ownership in which vested in the Government of India and were therefore not U. S. A. S. S. was based on the agreement between the two Governments and the inventories produced before the umpire from which he could hold that they belonged to the Government of India from the date when the installations in which they were incorporated were relinquished by the U. S. forces, and that therefore, they could not form the subject-matter of sale-note 197 which related only to the U. S. Surplus Stores.

19. The second part of the argument, however, requires consideration. The question is whether the arbitration clause included a dispute relating to compensation in respect of the said 291 vehicles unauthorisedly removed by the company. Clause 13 of the General Conditions of Contract, quoted earlier, provides for reference to arbitration of all questions or disputes "arising under these conditions" or "in connection with this contract."

20. Dr. Singhvi referred us to Clause 10 of these Conditions also but it is clear that it can in no sense apply to the dispute relating to compensation. But the words "arising under these conditions" and "in connection with this contract" are undoubtedly wide and comprehensive. It is, nonetheless, a question whether the dispute as to compensation on the ground of unauthorised appropriation of these vehicles by the company falls within Clause 13. In *Vidya Sagar Joshi v. Surinder Nath Gautam*, AIR 1969 SC 288 the words "expenditure in connection with election" used in Section 77 of the Representation of the People Act, 1951 were construed to mean "having to do with". An arbitration clause wherein the words "in relation to or in connection with the contract" were construed not to contemplate a dispute raised by a contractor that he could avoid the contract on the ground that it was obtained by a fraudulent misrepresentation. (see *Monro v. Bognor Urban District Council*, 1915 (3) KB 167). But a claim for damages on the ground of negligence

on the part of the defendant in removing the plaintiff's furniture against a clause for due diligence in removing it was held to fall within the arbitration clause. (*Woolf v. Collis Removal Service*, (1947) 2 All ER 260).

21. Counsel conceded that a dispute as to the interpretation of sale-note 197 would fall under the arbitration clause. If that is so, it must follow that the umpire was competent to decide whether the said 547 vehicles fell within the purview of the sale-note or not. If in determining that question he came to the conclusion that they did not, the obvious conclusion would be that the company was not entitled to take away 291 vehicles admittedly removed by it from the Depot. If the company did that, would the question as to the return or of compensation in lieu of such vehicles, to which it was not entitled under the sale, be a question which arises out of or in connection with the contract? Counsel went as far as to say that the umpire in deciding the company's claim No. VI and the Government's counter-claim No. VI could decide that the company was not entitled to these vehicles, but could not take the next step either to direct the return of them or payment of compensation in lieu of those vehicles. In our view, such an argument cannot be accepted. The reason is that once it is found that he was competent to decide the dispute as to whether the said 547 vehicles were not the subject-matter of the sale and 291 of them were removed unauthorisedly, he must to do justice between the parties in respect of disputes referred to him, order the company either to return them or to pay compensation for them. Since the first course was not possible after all these years, the second was the only and the obvious course. The dispute raised by the respondents that 291 vehicles were not included in the sale was co-extensive with and connected with the dispute that the company was bound to return them if it was found that they were not covered by the sale. On this reasoning it is not possible to say that the umpire went beyond his jurisdiction either in rejecting the company's claim No. VI or in accepting the corresponding counter-claim No. VI of the respondents.

22. Contention 4 relates to 600 vehicles which had been taken out of Moran Depot for operational purposes, but which the company claimed were part of the sale under sale-note 160. The umpire held (1) that these vehicles having been taken out of the Depot for operational purposes did not fall within the sale, and (2) in the alternative, that the evidence disclosed that a substantial number of vehicles in operational use were delivered to the company even though strictly speaking it was not entitled to them as they were not lying in the Depot on July 10, 1946. The umpire further held that if some of them per chance were not handed over, the respondents had sufficiently compensated the company by handing over several non-operational vehicles from outside the Depot to which the company was not entitled. Counsel argued that this part of the award was vague and without any evidence to support it, and therefore, the umpire behaved in this respect more like a conciliator than as an arbitrator.

23. Having held that sale-note 160 covered only those vehicles which were actually lying in Moran Depot on July 10, 1946, it was not incumbent on the umpire to decide the number of operational vehicles outside the Depot. Consequently, if he was satisfied that even though the company was not entitled to the said 600 vehicles claimed by it, yet the authorities had delivered a substantial number of them, and for any deficiency, had also delivered non-operational vehicles, there would be no purpose in going into the details of vehicles delivered to the company. Even though, as the judgment of the Trial Court discloses (para 223), there was evidence, both oral and documentary, that the company had collected a number of vehicles lying at places outside the Depot, and the vehicles so collected were recorded by the company, yet the company had withheld the production of those records. In view of these facts it is impossible to say that the umpire had acted without evidence, or that he behaved in the manner of a conciliator, or gave findings on conjectures and surmises.

24. Our interference was invited next on the question of ground rent on the ground that the amount of

such rent was fixed by the umpire without any evidence. There is hardly any substance in this contention. The sites, on which the various depots were situated, were requisitioned by the Government under the Defence of India Rules. The Government had a statutory obligation, therefore, to pay to the owners of those sites compensation as provided by those Rules. Under the contracts of sale the company was bound to pay to the Government ground rent and other charges which the Government in its turn was liable to pay. It is, therefore, not correct to say that the umpire could award only that amount which the Government had actually paid and that the umpire should, therefore, have taken an account from the Government. It was never the case of the company that the Government had claimed ground rent higher than the compensation it was liable to pay.

25. The last objection was that the amount of costs awarded by the umpire to the respondents was disproportionate. It appears from the award that the umpire fixed the amount of costs after considering the statements of expenses incurred by the parties for the hearing before him tendered by the respective counsel for the parties. Considering the huge amounts claimed by the parties, the volume of evidence, both oral and documentary, adduced by them, the number of days occupied in recording that evidence and in arguing the case, we are not prepared to say that the discretion which the umpire exercised in the matter of costs was exercised in breach of any legal provision or unreasonably which can justify the Court's intervention.

26. In our view, none of the six contentions urged by counsel can be upheld. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 704
(V 58 C 132)

(From: Govt. of India, Ministry of Finance Dept.)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

M/s. Bharat Barrel and Drum Mfg. Co. (P) Ltd., Appellant v. The Collector of Customs, Bombay and another, Respondents.

Civil Appeals Nos. 2445 to 2450 of 1966, D/- 6-1-1971.

(A) Imports and Exports (Control) Act (1947), Section 3 — Iron and Steel Controller's Public Notice No. 1/1-3/62, dated 6-12-1962 is not retrospective — Hence condition that sheets imported must be of "prime quality" cannot apply to sheets imported under licences issued before 6-12-1962.

(Paras 5, 6)

(B) Customs Act (1962), Sec. 131 — Where departmental authorities impose fine on licensee without proper investigation whether goods imported did not comply with terms of licence, Central Government in revision should consider case on merits and give adequate opportunity to licensee to prove his case.

(Para 10)

(C) Constitution of India, Article 136 — Where Collector's order imposed fine on licensee without proper investigation of terms of licence and Central Government in revision did not consider case on merits Supreme Court in appeal held should remand case to Central Government for disposal on merits instead of remitting fine itself.

(Para 11)

Mr. A. K. Sen, Sr. Advocate, (M/s. P. R. Mridul, S. Swarup and P. C. Bhartari, Advocates; and Mr. Ravinder Narain, Advocate of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. Niren De, Attorney-General for India (Mr. Ram Panjwani, Advocate and Mr. B. D. Sharma, Advocate for Mr. S. P. Nayar, Advocate with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, C. J. — These six appeals arise out of orders passed by the Central Government in a group of revision applications against the orders

*(Revenue and Insurance Revn. Appln. D/- 13-6-1966.)

AO/BO/A107/71/GNB/P

passed by the Collector of Customs, Bombay, and confirmed by the Central Board of Excise and Customs subject to certain modifications.

2. The appellant is a private limited company which carries on the business of manufacturing drums and barrels. For its manufacturing programme the appellant obtained in June, 1962 two licences for importing steel sheets. Under the first licence the appellant was authorised to import "Mild Steel Item — 18G Black Plain Sheets Drum Quality for manufacturing drums and containers," subject to the terms and conditions detailed in the annexures thereto. The total C. I. F. value of the licence was Rs. 40,00,000/-. The second licence was for "Steel Drum Sheets for Lubricating Oil Packing" of the total C. I. F. value of Rs. 50,30,000/-.

3. The appellant placed orders for import of steel sheets with a firm of manufacturers in the United States of America. The goods under the two licences reached the Bombay Port in twelve separate consignments. On arrival of the consignments, the appellant filed Bills of Entry for consumption of the goods. The Chief Customs Appraiser at Bombay did not allow clearance of the goods for the following reasons recorded by him:

(a) That under the Import Licence the appellants were entitled to import only prime quality sheets and no other sheets;

(b) that the quality of the sheets imported by the appellants appeared to be industrial scrap (sheet cuttings);

(c) that the sizes of the Steel Sheets appeared to be odd and not regular; and

(d) that the value of the invoices was not according to the prevailing prices for steel sheets in prime quality.

To avoid liability for heavy demurrage the appellant Company applied for and obtained an order for clearance of the goods lying in dock. A show cause notice was issued by the Collector of Customs requiring the appellant to show cause why the sheets imported be not forfeited. The appellant Company represented that it was engaged in the manufacture of drums and containers of various sizes and that although the sizes of steel sheets appeared to be odd, these were suitable for its manufacturing purposes.

The Company also pleaded that the sizes of sheets imported were not Industrial Scrap (sheet cutting) in terms of the definition of Industrial Scrap in the Iron and Steel Controller's Circular No. SIB/1/67/AS/60, dated July 15, 1963, and that in any event the licence did not lay down any definite quality of steel sheets to be imported.

4. The Collector rejected the representation made by the appellants. In his view the licence issued in the case was for "Prime Quality" sheets and the term "Prime Quality" meant that the sheets were of standard sizes and lengths, with uniform dimensions and without surface defects, but in the sheets imported there was "a percentage of defective sheets with clipped edges, surface grooves, sheering imperfections, etc., and the bulk of the sheets were of varying sizes and dimensions". On that account the sheets were not of "Prime quality", that the explanation of the Company was not satisfactory, and since the importers had no valid licence for importing the sheets actually imported, the importation was in contravention of the Import Control Order No. 17/55 of December 7, 1955 issued under Section 3 of the Imports and Exports (Control) Act, 1947, and punishable under Section 112 of the Customs Act, 1962. The Collector on that view passed an order imposing penalties for different amounts in respect of each of the consignments. The Company preferred appeals to the Central Board of Excise and Customs against the order passed by the Collector imposing penalties for importing twelve consignments. The Board held that only those sheets could be imported against the licences which fulfilled two conditions — (1) the sheets were suitable for manufacturing drums and (2) they were of "prime quality" material. The Board did not agree with the argument advanced on behalf of the appellant Company that the sheets were of drum quality and were permitted to be imported against the two import licences. The Board observed that the sheets imported varied in sizes and gauges in some packages; that while "certain sheets were of uniform size (i.e., length and width at both ends) the other sheets were of irregular shapes"; that gauges of sheets in some of the consignments varied between 11 and 13 and in others they varied be-

tween 18 and 24; that defects such as clipped edges, surface grooves and sheering imperfections were noticed in some sheets and that the examination report indicated that not only the sheets were not of "prime quality" but they were also unsuitable for the manufacture of drums, specially those which were of 11, 12 and 13 gauges. The Board rejected the contention of counsel for the appellants that the percentage of sheets of odd sizes and gauges 11, 12 and 13 was negligible and the presence of a small percentage of the consignment was "not representative of the nature" of the entirety of the sheets imported, and observed that even allowing "tolerances generally allowed in measurement of the sheets", all the sheets cannot be considered as of standard sizes, and in any case the fact remained that the sheets imported were not of uniform dimensions in "each skid" and on that account not of "prime quality", and not suitable for manufacturing drums. The Board accordingly upheld the action of the Collector in confiscating the goods but they reduced the fine in some cases.

5. Interrupting the narrative, it is necessary to point out at this stage two important matters: (1) that the difference in the conditions of the two licences was apparently not noticed by the Collector of Customs and by the Board and (2) that the condition that the goods should be of "prime quality" was not a condition of either licence. Under the first licence the sheets were to be of 18 gauge quality; under the second licence there was no such condition relating to thickness of the sheets. There was again no evidence that any part of the consignment was not fit for use in the manufacture of drums and barrels. By importing sheets of 11, 12 and 13 gauge or of gauges varying between 18 and 24 no breach of the conditions of the second licence was committed. The condition that the sheets imported must be of "prime quality" was imposed for the first time by the Iron and Steel Controller's Public Notice No. I/I-S/62, dated December 6, 1962 and could not obviously apply to the sheets imported under the two licences which were issued earlier. But the Collector as well as the Central Board of Excise and Customs decided the cases principally on the ground that

the goods were not of "prime quality". The Collector of Customs and the Central Board of Excise and Customs also did not keep the facts in respect of the twelve consignments distinct and decided them together as if there was no difference between the conditions of the two licences.

6. The revision applications filed before the Government of India were consolidated for the purpose of hearing and a single order was passed. The Officer who heard the revision applications on behalf of the Central Government was of the view, and rightly, that the Public Notice No. I/I-S/62, dated December 6, 1962 of the Iron and Steel Controller had no retrospective operation and the condition of "prime quality" could not be applied to the sheets imported under the licences issued before that date. But in his view, one of the two licences e.g., licence dated June 13, 1962, covering the consignments was issued specifically for 18 gauge sheets, while sheets of different sizes, including 18 (gauge) were imported against that licence and on that account consignments covered by that licence "had to be treated as unauthorised". He then proceeded to observe that the fine in lieu of confiscation of the goods covered by the Collector of Customs, Bombay Orders Nos. S/10-530/63LC, S/10-531/63LC, S/10-532/63LC, S/10-533/63LC, S/10-534/63LC and S/10-535/63LC all dated November 30, 1963 be remitted in full; that in respect of four consignments covered by the Collector's Orders Nos. S/10-443/63LC, S/10-444/63LC, S/10-445/63LC and S/10-446/63LC all dated October 5, 1963 the fine be reduced by half; and that the fines reduced by the Board in the cases covered by the Collector's Orders Nos. S/10-22/64LC and S/10-71/64LC both dated March 2, 1964 be further reduced as decided by them.

7. These six appeals relate to the orders made by the Government of India in respect of those consignments covered by the order in which the fines were not remitted in full. The order of the Collector of Customs proceeded principally upon the ground that the sheets imported were not of "prime quality". Whether the sheets imported were not according to the conditions of the licence because they did not comply with the condition as

to the size and gauge subject to the permissible tolerance was apparently not investigated by the Collector. The Board also did not investigate that question. In four orders passed by the Collector Nos. S/10-443/63LC, S/10-444/63LC, S/10-445/63LC and S/10-446/63LC dated October 5, 1963 the only ground given is that the goods were not of "prime quality". That conclusion was reached by him because "the materials were not of standard size, the dimensions were not uniform, the sheets were with surface defects and that a percentage of defective sheets had not only clipped edges, surface grooves, sheering imperfections but that the bulk of the sheets were of varying sizes and dimensions". All the defects in the view of the Collector justified the opinion that the sheets were not of "prime quality". We did not consider whether the goods imported were of 18 gauge size. Since the condition as to "prime quality" was imposed for the first time on December 6, 1962 the orders of the Collector were not sustainable.

8. In respect of the Order No. S/10-22/64LC and S/10-71/64LC dated March 2, 1964 the Collector observed that on examination of the goods in question the sheets were in random sizes of 19 & 20 gauge not permissible under the licence. He also observed that the licence issued in this case was valid for the "prime quality" sheets of 18 gauge only, and since the sheets imported were of varying sizes, with surface defects and of different gauges, the sheets were not of "prime quality" and were, therefore, not covered by the licence obtained by the Company. The basis of the judgment of the Collector in these cases was, that the goods were not of "prime quality".

9. The Central Board of Excise and Customs also did not deal with the different consignments separately and did not apparently consider whether on the ground that some sheets were not of the permitted gauge under the first licence the import may be regarded as unauthorised.

10. We are of the view that there was no proper investigation of the dispute by the Collector of Customs and the Central Board of Excise & Customs. We are also of the view that in view of the infirmities disclosed in the orders made by the de-

partmental authorities the Central Government in revision should have proceeded to consider the merits of the appeals relating to the six consignments in respect of which fine was not remitted in full. The Government should have given to the appellants adequate opportunity to prove that there had been no substantial deviation from the terms of the licence or for other reasons on which they claimed that the fine may be remitted in full.

11. On behalf of the Company it was urged that since the order of the Collector and the Central Board of Excise and Customs proceeded solely upon the finding that the consignments imported were not of "prime quality" and on no other ground in respect of four consignments we should not remand the cases dealt with under order dated October 5, 1963 and that we should set aside the order of the Central Government in respect of those four consignments and remit the fine in its entirety, leaving the Central Government free to hold an inquiry only with regard to the remaining two consignments covered by the Collector's Orders Nos. S/10-22/64LC and S/10-71/64LC dated March 2, 1964. For reasons already set out we do not feel justified in accepting that contention.

12. We set aside the order passed by the Central Government in respect of the six orders passed by the Collector, where fine has not been remitted in its entirety and direct that the Central Government do consider the revision applications on their merit. If the appellant desire to lead additional evidence to prove that the goods or a substantial part of the goods imported under the various consignments were subject to "the permissible tolerance" according to the terms of the licence, or for any other reason, the Central Government will give it an opportunity to do so. The inquiry will, however, be restricted to the question whether the consignments in respect of which fine has been imposed did or did not comply with the condition in the licence of the specification "subject to the permissible tolerance" relating to 18 gauge.

13. The order passed by the Central Government is set aside in these six appeals and the cases are

remanded for disposal according to law. There will be no order as to costs in these appeals.

Cases remanded.

**AIR 1971 SUPREME COURT 708
(V 58 C 133)**

(From: Allahabad)*

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

The State of U. P., Appellant v. Rajju and Ors. etc., Respondents.

Criminal Appeals Nos. 201 to 203 of 1969, D/- 6-1-1971.

(A) Evidence Act (1872), S. 9 — In absence of request from accused, State is not bound to hold identification parade when they were arrested on spot. (Para 13)

(B) Evidence — Appreciation of — Failure of prosecution to produce informer as witness does not weaken prosecution case especially when information is recorded in general diary. (Para 16)

Mr. O. P. Rana, Advocate, for Appellant (In all Appeals); M/s. R. K. Garg, S. C. Agarwala and D. P. Singh, Advocate of M/s. Ramamurthi and Co., and Mr. N. Netter and Miss S. Chakravarti, Advocates, for Respondent No. 1 (In Cr. A. No. 201 of 1969), M/s. B. P. Maurya, S. R. Agarwal and E. C. Agrawala, Advocates, for Respondents Nos. 3, 6, 7 (In Cr. A. No. 201 of 1969), and for Respondents Nos. 3 and 4 (In Cr. A. No. 202 of 1969).

The following Judgment of the Court was delivered by

SIKRI, J. : This appeal, by special leave, by the State of Uttar Pradesh is directed against the judgment and order of the High Court of Judicature at Allahabad allowing the appeals of the nine accused and setting aside the convictions recorded against them by the learned Sessions Judge, Banda, who had convicted them under Sections 399 and 402, I. P. C., and also five of them under Section 25 (a) of the Indian Arms Act.

2. Nine accused were sent up for trial. Out of them the State has filed appeal against eight. Chiri is

*(Cri. Appeals Nos. 654 and 97 of 1965, D/- 24-3-1967 — All.)

AO/BO/A112/71/GKC/M

reported to have expired and appeal against him has become infructuous. Bimla is reported to have been murdered and the appeal against him has also become infructuous. Sunwa is not traceable and the notice of the filing of the appeal has not been served on him yet. He is reported to be absconding. The appeal against him will be kept pending and will be disposed of when he has been served with the notice.

Accordingly, we are concerned with the appeal of the State against Rajju, original accused No. 2 in Sessions Trial No. 91 of 1964, Dharamraj alias Dharma, original accused No. 7, Chunnilal, original accused No. 3, Gaya Prasad, original accused No. 5, and Kappa, original accused No. 8.

3. The case of the prosecution is given by Abdul Nain Siddiqui, P. W. 1, who was S. O., Police Station Baberu. On April 11, 1964, he had gone to village Hardauli in connection with the investigation of another case. At about 3 p. m. an informer contacted him and told him that Chunnilal, accused No. 3, was bringing Bimla accused, since deceased, and members of his gang to his house in the evening with the intention of committing dacoity at the house of Keshav Maharaj situate in village Jugarhali at night. He promised to give further information later. On his return to the Police Station P. W. 1 made entry to this effect in the general diary. At 3.15 p. m. he telephoned the S. P., but he was not available at the headquarters. He, therefore, telephoned the Kotwali requesting for a police force. The force did not arrive by 5.17 p. m., at 8.15 p. m. the informer contacted him at the police station and reported that the gang had arrived at the baithak of Chunnilal, accused No. 3, and gave particulars of the members of the gang, and the arms with them. P. W. 1 asked the informer to meet him at about 10 p. m. on the same night outside the abadi of village Ahar. He made an entry to this effect in the general diary at 8.15 p. m. At 8.30 p. m., P. W. 1, with a number of persons, who were armed, left the police station. P. W. 1 also directed constable Sadiq Husain to reach Jugarhali and inform Keshav Maharaj that he should collect the members of V. D. S. and the licensees and keep watch. P. W. 1, with the

police force, then proceeded to village Ahar in a truck and they got down near the nallah outside the abadi about $1\frac{1}{2}$ furlongs from it and waited for the informer to contact them. Dinanath, constable, in the meantime had brought members of the V. D. S. and persons who were licensees of firearms. The informer contacted them and informed P. W. 1 and the other members of his party that the dacoits were having their meals and drinking wine and when the dacoits leave the place for committing dacoity he would come out first from the baithak of Chunnilal and would strike matchstick twice to indicate the departure of the dacoits towards Jugarhail. P. W. 1 then divided the police personnel and other persons into three parties and gave suitable instructions. It is not necessary to give details of the persons who were in each party. At about 11.30 p. m. the informer came out of the baithak of Chunnilal and struck a matchstick twice. On this P. W. 1 fired a shot from the V. L. Pistol and then one of the dacoits fired a shot from his gun, and P. W. 1 fired two shots from the double barrel gun in reply. Then the members of the three parties surrounded the accused and caught them there and then. The informer and the dacoit who had fired the shot disappeared.

4. Various arms and cartridges were recovered from the dacoits. A rifle, six cartridges and a torch were recovered from the accused Bimla, now deceased; a gun, a belt containing 11 cartridges and a torch were recovered from the accused Happa; a gun and four cartridges from the accused Dharamraj a gun and five cartridges from the accused Chiri, now deceased; from the accused Chunnilal one country made pistol, 3 live cartridges and a lathi; a pharsa from the accused Rajju; a pharsa from the accused Gaya Prasad; a lathi from the accused Sunwa and one alanskab (house breaking instrument) from the accused Matru. From the baithak of Chunnilal he recovered two empty bottles, one glass, donas, pieces of bidi and matchsticks. He brought the accused to the police station and prepared F. I. R., and also made an entry at 5 a. m. on April 12, 1964 in the general diary.

5. This story was supported by Jhallu Prasad, P. W. 5, Gangotri

Prasad, P. W. 6, and Ram Kirpal P. W. 3, who were members of the raiding party assembled by P. W. 1. The statement of P. W. 1 that an informer had contacted him finds support from the entries in the general diary and also in the evidence of Shiv Kumar Sharma, P. W. 7.

6. It was argued before the learned Sessions Judge that P. W. 1 was not able to give the number of the truck in which they travelled from Baberu to village Ahar. P. W. 1 explained it on the ground that he had not taken down the number, and the learned Sessions Judge rightly observed that "neither the fact whether the police party had travelled by truck or otherwise is in issue nor does it have any important bearing on this case inasmuch as it is not contended that the police party could not have reached village Ahar by that time."

7. The learned Sessions Judge then examined the defence of each accused. Accused Nappa had stated that he was arrested at the bus stand when he was coming to Court to present himself in connection with a quarrel between him and the members of his biradari in village Jorahra, P. W. Bissenda, and that P. W. 1 had implicated him in this case as he had not paid Rs. 800/- to him which he wanted in connection with another dacoity in which he was falsely involved and acquitted. The learned Sessions Judge rightly observed that there was no evidence on the record which substantiated his case.

8. Regarding Dharamraj's defence that the Police had arrested him from his house and the witnesses had deposed against him under the pressure of the police, the learned Sessions Judge again found that there was no evidence on record to substantiate his contention.

9. The case of Gaya Prasad, accused, that he was called by P. W. 1 and was falsely implicated in this case at the instance of Jagmohan of his village with whom he was on bad terms was not believed.

10. Chunnilal, accused, had stated that he and his brother, Matru, co-accused, were sentenced to 7 years' R. I. in connection with the murder of Nazar Mohammad, that two constables had taken him and Matru to the police station about noon and then they were implicated in this case. The learned Sessions Judge held that there was no

evidence on record which showed that he was called to the police station in connection with the other case and thereafter detained at the police station.

11. The defence of Rajju, accused, was that he had gone to the house of his cousin, Chunnilal, situate in village Ahar and that the constables had taken him from the baithak of Chunnilal to the police station at about 12 noon and he was falsely implicated in this case. No evidence was led by Rajju and the learned Sessions Judge held that it could not be said that the accused was not arrested at the time of the occurrence.

12. Sunwa, accused, stated that he had been engaged by Government to remove some earth from the fields of Raja Ram Pradhan and Ram Lal and that Raja Ram and Ram Lal had felt annoyed and they got him implicated. No evidence was produced by him to substantiate this and the learned Sessions Judge found that it could not be said that he was not arrested at the time of the occurrence or that he had been falsely implicated.

13. It was urged before the learned Sessions Judge that as no identification proceedings were held in the case it could not be said that the accused were the persons who were actually arrested at the spot. The learned Sessions Judge rightly held that it was not necessary for the State to hold identification parade when according to the prosecution they were arrested at the spot. If the accused felt that the witnesses would not be able to identify them they should have requested for an identification parade.

14. The learned Sessions Judge summarised the case thus:

"It would appear from the above that none of the accused has been able to show that he was arrested at a place other than the place of occurrence, that he had any enmity with any of these accused and that he had been implicated in this case due to it. The witnesses have also not been shown to be partisan witnesses or to have been under the influence of the police. Further there does not appear to be any inconsistency in their statements. There does not, therefore, appear to be any reason to disbelieve the statements of the witnesses, Sri Abdul Haieem Siddiqi, P. W. 1, Ram Kripal, P. W. 3, Jhallu Prasad, P. W. 5, and

Gangotri Prasad, P. W. 6. It would follow from it that all these accused were arrested outside the baithak of Chunni Lal, accused, at about 11.30 P. M. on the night between 11th and 12th of April, 1964 with the arms etc., which were recovered from them".

The learned Sessions Judge further found that except for Chunnilal and Matru, who belonged to village Ahar itself all the accused had come from villages situate at a distance varying from 2 miles to 20 miles. He further found that none of the accused had been able to give any reasonable explanation as to how he happened to be at the baithak of Chunnilal at that hour of the night. The learned Sessions Judge accordingly convicted the accused, as stated above.

15. The High Court, after mentioning the story given by the P. Ws. disposed of the appeal in the following para:

"I have heard the learned counsel for the parties. It is stated by the prosecution that Sri Siddiqi was informed at 8 P. M. that a dacoity was going to be committed at the house of Kesho Maharaj in village Jugarhali and that the dacoits had collected at the house of Chunnilal in village Ahar but it is strange that they did not take immediate steps to apprehend the dacoits. Moreover, the informer has not been produced. The informer would have been the best person to corroborate the story as given by Sri Siddiqi. It is correct that it is not necessary for the police to produce the informer, but, as mentioned above, he would have been the best person to corroborate the story of Sri Siddiqi. It is also the prosecution case that the dacoits were taking meals in the house of Chunnilal but it is strange that the police party did not rush into the house and arrest them while they were unarmed. It is not understood why the police waited for two hours to arrest them when they emerged out of the house. No injury has been caused to any one. It is difficult to convict the appellants on the sole testimony of Sri Siddiqi who does not remember the number of the truck in which they went to village Ahar. I therefore, find force in these appeals".

16. With great respect, the learned Judge has not given any good reason for disagreeing with the judgment of the learned Sessions Judge.

The fact that the informer has not been produced does not weaken the prosecution case, especially as P. W. 1 had recorded the information in the general diary. We are unable to find it strange, as the learned Judge did, that the police party did not rush into the house and arrest them while they were unarmed. It seems to us that the police had to wait for the dacoits to come out of the baithak of Chunnilal. We are of the opinion that the police were very wise in waiting outside and not rushing into the house for then it would have been argued that no preparation for dacoity had taken place and no offence had been made out. Further it would have involved more risk to the raiding party.

17. We find it difficult to appreciate the last reason given by the learned Judge that it would be difficult to convict the accused on the sole testimony of P. W. 1. The fact that he did not remember the number of the truck can hardly destroy his evidence. Secondly, his evidence was corroborated by a number of other witnesses. Therefore it is not correct to say that there was only the sole testimony of P. W. 1. The learned Judge had himself given a brief summary of the evidence of the other witnesses.

18. Mr. Garg, who appeared for the accused Rajju, says that he was a cousin of Chunnilal and if he was staying with Chunnilal the mere fact of his presence could not be sufficient to establish the charge under Section 399, I. P. C., against him. He says that the explanation of Rajju is reasonable, and although there is no evidence to establish it his explanation being probable should be accepted. There might have been some force in this argument if the party of the dacoits had not left the baithak of Chunnilal. It is only after the dacoits started coming out of the house that they were arrested. We may assume, although there is some dispute, that he was a cousin of Chunnilal, but even assuming this the fact that he was arrested outside the house destroys the version of Rajju that he was at the baithak of Chunnilal for innocent purposes. Moreover, a pharsa was recovered from his possession. We are unable to agree with Mr. Garg that on these facts the charge under Section 399, I. P. C., is not made out.

19. Mr. B. P. Mauriya, arguing on behalf of the accused Happa and

Dharamraj, first said that in the first information report there was no mention of the V. L. Pistol. It was pointed out to him that in the first information report it is mentioned by P. W. 1 that "one miscreant, Jaikaran of Tarai, whom I and the witnesses have recognised in the light of V. L. P. and torches, succeeded in running away with his arms". The second point he raised and which we have already dealt with is regarding the police party waiting outside the baithak of Chunnilal and not entering inside when the dacoits were unarmed. Lastly, he urged that three cartridges had not been produced although the V. L. Pistol cartridge was produced in Court. We are unable to attach any significance to these facts and draw any adverse inference against the prosecution.

20. The learned Sessions Judge had awarded the following sentences:

"Each of the accused Bimla @ Chunna, Rajju, Chunni Lal, Matru, Gaya Prasad, Sunuwa, Dharam Raj @ Dharma, Happa and Chiri is convicted under Sections 399 and 402, I. P. C. and each of them is sentenced to R. I. for Seven Years under Section 399, I. P. C., and to R. I. for Fives Years under Section 402, I. P. C. Each of the accused Bimla @ Chunna, Happa, Dharam Raj @ Dharma, Chiri and Chunni Lal is also convicted and sentenced to R. I. for two years under Section 25 (a) of the Indian Arms Act. All the accused are in Jail. They shall serve out the sentences awarded to them.

The sentences, which have been awarded to these accused under Sections 399 and 402 of the I. P. C. and under Section 25 (a) of the Indian Arms Act, shall run concurrently". These sentences seem reasonable. Accordingly we allow the appeal against the five contesting respondents and award the following sentences:

"Each of the accused Rajju, Chunnilal, Gaya Prasad, Dharam Raj @ Dharama and Happa is convicted under Sections 399 and 402, I. P. C., and each of them is sentenced to R. I. for seven years under Section 399, I. P. C. and to R. I. for five years under Section 402, I. P. C. Each of the accused Happa, Dharam Raj @ Dharma, and Chunnilal is also convicted and sentenced to R. I. for two years under Section 25 (a) of the Indian

712 S. C. (Pr. 20)-[Prs. 1-2] Puran Lal v. State of U. P. (P. J. Reddy J.) **A. I. R.**

Arms Act. The sentences shall run concurrently".

There will be no order on the appeals against Chiri and Bimla as the appeals have become infructuous due to their deaths. The appeal against Sunwa shall be heard when he is traced and arrested.

Order accordingly.

AIR 1971 SUPREME COURT 712
(V 58 C 134)

(From: Allahabad High Court)*

P. JAGANMOHAN REDDY AND I. D. DUA, JJ.

Puran Lal Sah, Appellant v. The State of U. P. Respondent.

Civil Appeal No. 1687 of 1966, D/- 21-1-1971.

Contract Act (1872), S. 73—Where work is done under a contract pursuant to the terms thereof no amount can be claimed by way of quantum meruit. AIR 1960 SC 588, Followed.

(Para 13)

The remedy under quantum meruit is available when the original contract has been discharged by the Defendant in such a way as to entitle the plaintiff to regard himself as discharged from any further performance and he must have elected to do so. The remedy is however, not available to the party who breaks the contract even though he may have partially performed part of his obligation. The remedy is a recompense for the value of the work done by the plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this regard it is different to a claim for damages which is a compensatory remedy aimed at placing the injured party, as near as may be in the position which he would have been in, had the other party performed the contract.

(Para 13)

Cases Referred: Chronological Paras
(1960) AIR 1960 SC 588 (V 47)=
1960-2 SCR 793, Alopī Parshad
and Sons Ltd. v. Union of
India 13

Mr. N. S. Bindra, Sr. Advocate
(Mr. P. C. Kapur, Advocate with him),

*(First Appeal No. 84 of 1954, D/- 8-3-1965 — All.)

BO/BO/A494/71/CWM/C

for Appellant; M/s. G. N. Dikshit and O. P. Rana, Advocates, for Respondents.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY J.: This appeal is by a Certificate under Article 133 (1) (a) of the Constitution against the Judgment and decree of the Allahabad High Court dated 8th March 1965 setting aside the decree of the Trial Court and dismissing the suit of the Plaintiff-Appellant.

2. The Appellant had submitted a tender to construct mile 3 of Nainital Bhowali Road at 13 per cent below the rates given in Schedule B to the Notice issued by the Government of the United Provinces on the 30th September, 1946. This tender was accepted and a contract was signed on 20th November 1946. It is alleged by the Appellant that the rates given in Schedule B were based on the calculation that stone required for the road construction work would be available at a distance of 26 Chains while as a matter of fact no stone was available within that distance. The Appellant had in fact to get stone from Gadhera and Bhumedar from a distance of 79 and 110 chains respectively. It is his contention that by reason of the non-availability of the stone and the definite understanding and assurance given by the local authorities of the P. W. D. that higher rates would be given for the extra work done over and above the work provided in the contract he carried on the work. It was also alleged that during the construction work on the road very hard shale rock came in the way not originally provided for in the contract, as such he was entitled to get the costs for the work so done at the current rates from the P. W. D. which was not paid to him. In respect of these items of work done as also due to his having done the work by bringing stone from a longer distance than was given in the estimates the Appellant claimed Rs. 48,840-0-0 due as balance together with interest by way of damages at 12% amounting to Rs. 17,582-0-0, making a total of Rs. 66,422-0-0. When this claim was rejected the Appellant gave notice under Section 80 of the C. P. C. and thereafter filed a suit for the above amount.

3. The Defendant-Respondent resisted the suit and pleaded that no assurance was given to the Appellant by officers of the PWD as alleged, that the quantity of very hard shale shown in the plaint was incorrect and at any rate the contractor, under paragraph 5 of the special instructions must be prepared to execute the work at the original tender rate in excess of the given quantities of work upto 30% and if an increase in excess of 30% is ordered over the work the contractor must intimate to the Engineer-in-charge in writing his willingness or refusal to do extra work at the original tendered rates. If he refuses to carry on at the original rates he is required to settle fresh rate for increased work over 30% before doing the work.

4. On these averments the Trial Court held issues 1, 2, 6 and 7 in favour of the Appellant while issues 3, 4 and 5 were decided against him. In the result a decree for a sum of Rs. 20,495/- for extra lead plus Rupees 1663-14-0 for extra work done under the item very hard shale and Rupees 4,155/- interest by way of damages on Rs. 22,158-14-0 making a total of Rs. 26,313-14-0 was passed with interest at 3% per annum. In appeal the High Court reversed the decree holding that (1) the employment of the figure 26 chains in the estimate was for no other purpose than that of calculation and if knowing that the same was available within 26 chains it (PWD) worked out its estimates on that basis, it could not be held to have extended any assurance much less guarantee to the contractors that they would get stone within that distance; (2) the Plaintiff-Appellant performed the work required of him without exercising his right under paragraph 5 of the special instructions which gives the option to do the extra work in excess of 30% but if he refuses to do the extra work at the originally tendered rates he should settle fresh rates for increased work over 30% before doing the work which he failed to do. In view of these findings against the appellant the appeal of the respondent was allowed and the suit dismissed but in the special circumstances of the case left the parties to bear their respective costs in both the Courts.

5. The two main questions in this Appeal are:

1) Whether the estimate of the PWD formed part of the contract so as

to be binding on both parties and whether any assurances were given to the Appellant that he would be given higher rates for bringing the stone from places situated at 79 Chains and 110 Chains respectively;

2) Whether clause 5 of the special conditions of the contract was applicable to the extra item of work contained in Ex. B3 and whether he was entitled on the assurances given by the local officers to higher rate for the extra work done. Shri Bindra, learned Advocate for the Appellant has referred us to clauses 8, 11 and 14 of the Notice calling for the tender as also to certain letters and passages in the evidence to substantiate his contention that the estimates of the PWD were part of the contract and that in any case assurances were given to the Appellant that when he could not get stone from distance of 26 Chains, to bring from Chains 79 and 110 for which higher rates would be paid. It may be stated that the PWD of the United Provinces, as it then was, had issued a tender notice consisting of 16 paragraphs and the appellant was required to sign this tender notice in token of his having received it because ultimately under clause 34 of the conditions of the contract all papers signed by the parties to the contract bond will be deemed to be part of the contract bond and have to be read as conditions to the contract. Clauses 8, 11 and 14 of the notice to which reference was made are as follows:

8. All tenders should be on percentage rates above or below the rates given in the Schedule 'B'.

11. Items not provided in the Schedule B will be paid at current schedule of rate plus or minus the percentage above or below as tendered by the contractor whose tender is accepted for this work.

14. Contractors are advised to see the estimate, plans, specifications, special condition prescribed and site of work before tendering.

6. It is obvious from these clauses that the rates are given in Schedule B on the basis of certain plans and specifications. The person intending to tender for the work was required to examine this material and also inspect the site before tendering. These instructions were designed to

make all those who were desirous of obtaining the contract responsible for their acts so that it cannot be said that any misrepresentation was made or they were misguided in any way. The contention of the learned Advocate for Appellant is that it was definitely stated in the estimates that stone was available at 26 Chains which representation was binding on the Respondents and if no stone was available within that distance he was entitled to claim higher rates if he had to get stone from places farther away. In fact the Appellant alleges that the Engineers assured him that he would be paid higher rates.

7. We may here observe that in none of the clauses of the notice or conditions of contract or in any other document is there any specific mention that stone will be available at 26 Chains nor is there any assurance that if stone was not available within that distance the contractor will be paid higher rates. The mere fact that the estimates were prepared by the PWD on the basis of the stone being available at 26 Chains which Respondents admitted as stated in the Judgment of Civil Judge, Nainital does not mean that there was any assurance or undertaking given that stone would be available at that place. In fact it is not denied that stone was available within the distance of 26 Chains but it was in the area belonging to the Cantonment, for the removal of which permission of the Cantonment authorities had to be taken. Evidently the contractor was not able to obtain that permission. In our view it was upto the contractor to have satisfied himself before entering into the contract that the Cantonment authorities would permit him to take stone from its jurisdiction just in the same way as permission will have to be taken from any private individual in whose land stone required for road building is found. If the contractor has failed successfully to negotiate with the owners of land from which he could bring stone it cannot be said that the estimate prepared by the PWD on the basis that the stone was available at 26 Chains was a statement which amounted to an assurance or constituted a condition of the contract.

8. The Appellant as P. W. 1 stated in his evidence: "Before giving offer I saw the estimates and plan. In

the estimate it was written that the stone would be found within 26 Chains. On this basis estimate was prepared through the PWD. I enquired this from the Asstt. Engineer also. He too informed that stone would be available within 26 Chains. On this basis I prepared the estimate. . In the beginning of the year 1947 I started work. I attempted to take out stones from within 26 Chains. The moment I started to take out stones, the Cantonment authorities checked me. For this act I was challaned, but I was acquitted. The entire area within 26 Chains was of the Cantonment." Furtheron he says "I have seen the tender notice and I had gone through it; after that I signed it. Schedule B was attached to the notice. I signed it after going through it. I submitted tender 13% less than the Scheduled rate ... before giving the tender I went to that place and found that the stones were available within 26 Chains, when I wanted to take them out, I learnt that this was within the Cantonment boundary, I sought permission to take out stones from the Cantonment authorities, but it was disallowed."

9. It is clear from this evidence that the Appellant before giving the tender inspected the site, went to the place where stone was said to be available and after satisfying himself that the stone was available he gave the tender. A perusal of the documentary evidence would also show that he actually commenced work after his request to allow him higher rate was rejected which was long after the time when under the contract he was required to start the work. In fact just before the date fixed for the completion of the work, he had under Ex. B-4 dated the 12th June 1947 made the following representation:

"That as agreed upon the contract deed of my contract Nainital Bhowali Motor Road Mile 3 the lead of stones for masonry work is given only about half a mile. On inspecting the place I find it very difficult to get a quarry there as there is no stone at all. I am getting the stones from near the K. M. Sanitorium which falls at a distance of two and a half mile from my place, as has already been brought to your and the C. E's kind notice. Therefore, you are requested kindly to allow me a lead of two and a half miles distance."

On this the concerned authorities seem to have made the endorsement: "As lead and royalty is provided in the schedule B of the tender, the request cannot be acceded to. Draft reply is put up". Accordingly by letter dated the 21st June '47 he was informed as follows:

"Reference your application dated 12th June 1947. Please refer to item Nos. 6, 7, 8 and 9 of Schedule B attached with your tender and on which basis you tendered your rate in this connection. As the rates noted therein provides all lead and royalty and there is no mention there that the rate contains a lead for 1/2 a mile, your request cannot be acceded to".

10. This correspondence shows that the Appellant's claim to have extra lead was definitely rejected as untenable even before he started the work under the contract, as is apparent from Ex. B2 dated the 19th July '47. In that letter the appellant was being informed as follows:

"Please note that since you have signed the contract for the above work, the work must be started now in consultation with the Overseer-in-charge, Nainital Section. The date of start and completion will be as follows:

Date of start — 20 November 1946

Date of completion — 19 July 1947".

11. It cannot therefore be said that the Appellant was in any way induced by any assurances given by the P. W. D. authorities that they would give a higher rate for the extra lead before he commenced work. The case of the Appellant in these letters was that no stone was available within half a mile while in his deposition he gave a contrary version altogether. Subsequently he seems to have become hopeful because in the letter of the Assistant Engineer dated 28th December, 1948 it is stated:

"In the estimate lead for 26 chains was provided on the assumption that stone will be available within the distance from the quarries in cantonment areas. Later on when the work was in progress the cantonment authorities objected to quarrying stones from cantonment land....."

No doubt the Executive Engineer in his letter dated 15th June, 1950, Ex. 22 has recommended the case of the Appellant for a higher rate as he says "when the stones were not available

from the cantonment area it seems that the contractor naturally was forced to bring them from quarries situated outside the cantonment area" and he further says "If these quarries are the places from where stones were actually obtained then naturally the contractor is entitled to get the lead for the full quantity of stones brought by him to complete different items requiring the use of stones".

12. This letter seems to be a recommendatory letter by a subordinate to the higher officer but it does not in any way establish the right of the Appellant to obtain a higher rate, nor does the evidence justify this conclusion. In our view neither the terms and conditions of the contract nor the oral or documentary evidence justify the conclusion that the Appellant was entitled to any extra lead.

13. Another argument was put forward by the learned Advocate for the Appellant which is also based on the same assumption that the availability of the stone at 26 Chains was a condition of the contract namely that once stone was not available at 26 Chains the contract was at an end and that because the Appellant had done the work he should be paid on the basis of quantum meruit. This in our view is a far-fetched argument and has no relation to the facts and circumstances of the case. Even assuming that the stand taken by the Appellant that the availability of stone at 26 Chains was a condition of the contract was justified, he had notwithstanding the rejection of his claim even before he started the work, acquiesced in the stand taken by the Respondents that he is not entitled to any higher rates, carried on and completed the contract as if there was no such condition. We, therefore, cannot understand the contention of the Appellant's Advocate as to how the contract came to an end and who put an end to it. Even if at that stage the contract had been put an end to by the Respondents which is no one's case, as the Appellant had not started the work no question of quantum meruit would arise. The principle of quantum meruit is rooted in English law under which there were certain procedural advantages in framing an action for compensation for work done. In order to avail of the remedy under quantum meruit, the original contract must

have been discharged by the Defendant in such a way as to entitle the Plaintiff to regard himself as discharged from any further performance and he must have elected to do so. The remedy it may be noticed is however, not available to the party who breaks the contract even though he may have partially performed part of his obligation. This remedy by way of quantum meruit is restitutory that is it is a recompense for the value of the work done by the Plaintiff in order to restore him to the position which he would have been in if the contract had never been entered into. In this regard it is different to a claim for damages which is a compensatory remedy aimed at placing the injured party, as near as may be in the position which he would have been in, had the other party performed the contract. This Court had in *Alopi Parshad and Sons Ltd. v. Union of India*, 1960-2 SCR 793 = (AIR 1960 SC 588) observed at p. 809 (of SCR) = (at p. 595 of AIR):

"Compensation quantum meruit is awarded for work done or services rendered when the price thereof is not fixed by a contract. For work done or services rendered pursuant to the terms of a contract compensation quantum meruit cannot be awarded where the contract provides for consideration payable in that behalf".

Though in that case the basis of the principle was not explained, it nonetheless lays down that where work is done under a contract pursuant to the terms thereof no amount can be claimed by way of quantum meruit. In the view we have taken on the facts of the case we do not propose to examine the decisions cited at the Bar in this behalf. The claim of the Appellant for higher rates which in fact was by way of damages has been rightly disallowed by the High Court.

14. On the second question also the Appellant cannot succeed because under clause 12 of the contract Ex. B1. the Plaintiff was bound to perform additional work which was required of him on the same terms and conditions on which he undertook to do the work for which he tendered. It appears that by a subsidiary contract entered into between the Appellant and the P. W. D. Ex. B3 on the 12th April, 1946, the Appellant undertook to execute some additional work for the Department. The quantity of work

which appellant actually performed was far in excess of what was mentioned in Ex. B3. The Appellant therefore claimed payment for the work done by him in excess of the quantity mentioned in the contract plus 30 per cent at the current rate as against the stipulated rates. It was submitted on behalf of the State of U. P. before the High Court that under clause 12 of the contract Ex. B1 and paragraph 5 of the special instructions the plaintiff was not entitled to any amount in excess of what he had already been paid. This contention was accepted because under the aforesaid clause 12 the contractor was bound to perform all additional work which was required of him on the same terms and conditions in which he undertook to do the main work. Paragraph 5 of the special instructions further provides as follows:

"Contractors must be prepared to do at their original tender rate work in excess of the given quantities of work upto 30 per cent; if an increase in excess of 30 per cent is ordered over the work the contractor must intimate to the Engineer Incharge in writing his willingness or refusal to do extra work at the originally tendered rates. In the latter case he should settle fresh rate for increased work over 30 per cent before doing the work".

These instructions being part and parcel of the original contract Ex. B1 would govern the parties. As such the Appellant unless he gave notice under that paragraph that he is not prepared to do the extra work over the 30% at normal rates, he cannot claim anything other than at the rates mentioned in the contract, unless he had settled fresh rates for that extra work. There is no evidence nor is it claimed by the Appellant that he had given any notice as required under paragraph 5 of special instructions and since he did the work without fulfilling these requirements he is not entitled to claim any amounts at a higher rate for the extra work done. As neither of the contentions have force the Appeal is dismissed but in the circumstances without costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 717
(V 58 C 135)

(From Gujarat: (1966) 2 ITJ 871)

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

The Commissioner of Income-Tax, Gujarat (In all the Appeals), Appellant v. M/s Bhanji Lavji Porbandar, (In all the Appeals), Respondent.

Civil Appeals Nos. 1181 to 1183 of 1967, D/- 21-1-1971.

Income Tax Act (1922), Section 34 (1) (a) — Where assessee has disclosed all primary facts in his return necessary for assessment, the Income Tax Officer is incompetent to start reassessment proceedings under Section 34 (1) (a) merely because he had dropped assessment proceeding on a wrong legal inference from facts disclosed — (1966) 2 ITJ 871 (Guj.), Affirmed.

(Para 6)

No duty is cast on assessee to instruct Income Tax Officer on questions of law. Assessee has not to satisfy him that there was no concealment with regard to any question. It is for the Income Tax Officer to establish that there was failure to disclose facts material to assessment of income which had escaped assessment.

(Paras 6, 7)

The filing of blank return form for 1949-50 with a statement that there was no income chargeable to tax in British India as in the two previous years, did not amount to non-disclosure of facts for purposes of Section 34 (1) (a) when the Income Tax Officer being fully aware of the previous assessments had cancelled the return form.

(Para 8)

Mr. S. T. Desai, Sr. Advocate, (M/s. S. K. Aiyar, R. N. Sachthey and B. D. Sharma, Advocate, with him), for Appellant (In all the Appeals); M/s. S. P. Mehta, R. R. Raya and D. R. Raiyani, Advocates, and Mr. O. C. Mathur, Advocate of M/s. J. B. Dadachanji and Co., for Respondent. (In all the Appeals).

The following Judgment of the Court was delivered by

SHAH, C. J.: — These appeals are filed with certificate granted by the High Court of Gujarat. They arise out of proceedings for re-assessment of income of the respondent relating to assessment years 1947-48, 1948-49

and 1949-50. The respondent — who will hereinafter be called 'the assessee' — carried on the business in ghee at Porbandar, which was at all material times relevant to the assessments in question outside the taxable territories. The Income-tax Officer C-III Ward, Bombay, initiated proceedings against the assessee as a non-resident for the assessment years, amongst others, 1947-48, 1948-49 and 1949-50. The assessee had in the relevant years of accounts a current account with the Bank of India Ltd., in Bombay and sale proceeds in respect of large quantities of ghee supplied outside taxable territories were credited in that account and were then transferred to Porbandar. The assessee had also a current account with the firm Shamji Kalidas and Company at Bombay and in this accounts Messrs. Shamji Kalidas and Company had paid interest to the assessee. The assessee being a non-resident, tax at the maximum rate was deducted by Messrs. Shamji Kalidas and Company, in respect of the interest paid to the assessee under Section 18 (3-A) of the Income-tax Act, 1922. The assessee disclosed those facts to the Income-tax Officer and contended that since the assessee had no business in the taxable territories nor any income taxable in the taxable territories (other than the income from Messrs. Shamji Kalidas and Company in respect of which certificates showing deduction at the maximum rate), the assessment proceedings initiated by the Income-tax Officer be discharged. The Income-tax Officer upheld the contention and made an order on December 30, 1948, for the assessment years 1947-48 and 1948-49 observing that there was no source of income taxable in British India and that the proceedings started should be dropped. In the assessment year 1949-50 the Income Tax Officer also passed an order that the proceeding be discharged.

2. In 1956 the Income-tax Officer, Porbandar, initiated proceedings under Section 34 (1) (a) of the Income-tax Act, 1922, for re-opening the assessment of the assessee for the assessment years 1947-48, 1948-49 and 1949-50, and served the requisite notices. The assessee challenged the jurisdiction of the Income-tax Officer to assess him on various grounds one of which

alone survives for consideration. The assessee submitted that it had disclosed fully and truly all the primary facts necessary for the purpose of assessment and on that account the Income-tax Officer had no jurisdiction to initiate re-assessment proceedings. The assessee contended that the Income-tax Officer could not commence re-assessment proceedings merely because he entertained a view different from the view of his predecessor. The Income-tax Officer rejected the plea raised by the assessee and brought the income which in his view had escaped assessment to tax. Appeals filed by the assessee to the Appellate Assistant Commissioner and to the Income-tax Appellate Tribunal were dismissed.

3. At the instance of the assessee, four questions were referred to the High Court of Gujarat as arising out of the order of the Tribunal. We are concerned with the third question:

"(3) Whether on the facts and circumstances of the case, the Tribunal was justified in upholding the action under Section 34 (1) (a) as valid in all the three assessment years?"

The High Court recorded on that question an answer in the negative. With certificate granted by the High Court, the Commissioner of Income-tax has appealed to this Court.

4. The High Court held that all primary facts relevant to the assessment of the income of the assessee were disclosed by the assessee. In respect of the notice for the first two years, viz. 1947-48 and 1948-49 the Income-tax Officer had by his order dropped the proceedings of assessment observing:

"In response to notice issued under Section 23 (2) of the Act Mr. A. V. Deshpande x x x attends on behalf of the assessee states that the assessee is a non-resident and has absolutely no business in British India. The assessee is doing ghee business at Porbandar and delivers goods at Porbandar to merchants who buy ghee from Indian Union. There is no office nor any agency of the non-resident in British India. The non-resident assessee has maintained a Bank account in British India but this is only for recovering from the merchants dues in respect of goods delivered at Porbandar. Bank Pass Books are produced. It appears that the cheques that are received from the merchants are

credited in this account and subsequently transferred to Porbandar. The assessee has, however, got a current account with Shamji Kalidas & Co., and receives interest on the amounts deposited in this firm. Mr. Deshpande, however, produces certificates of the taxes deducted at the maximum rate under Section 18 (3A) on interest received by the non-resident. The tax is regularly paid upto 1948-49 assessment years. As there is no source of income taxable in British India, I drop the proceedings already started."

In the proceeding for assessment of income for the assessment year 1949-50 the assessee submitted a blank return stating:

"With reference to your above, we have to return herewith the forms sent by you and have to inform that the income-tax is always paid by us at maximum scale in British India and that we have no other income therefore and hence the forms sent by you are returned herewith with a request to cancel the same."

After considering the representation the Income-tax Officer passed the following order:

"Return of income for assessment year 1949-50 was served on the assessee direct at Porbandar. The assessee is a non-resident and has absolutely no business in British India. The non-resident has interest income in British India on which tax is recovered at the maximum rate. Assessment proceedings in the previous year were also dropped after enquiries. I, therefore, cancel the return of income issued for assessment year 1949-50."

5. The assessee had in the course of the assessment proceedings shown his bank pass-books of his account with the Bank of India Ltd. He also disclosed the account with Messrs. Shamji Kalidas & Company. The Tribunal in dealing with the appeals relating to the assessment years 1947-48 and 1948-49 observed:

"The duty of the assessee is to disclose all the primary facts in his possession. In the present case, a considerable portion of the sale proceeds of ghee was received in Bombay. There is difference between accrual and receipt x x x and x x x it depended upon the opinion of the Income-tax Officer as to whether any profit had accrued in British India. Receipt of sale proceeds of ghee in British India,

however, stands on a different footing, and the question of full and true disclosure on the part of the assessee of all material facts should be examined with regard to the sale proceeds of ghee only. If the assessee could satisfy us that there was no concealment with regard to the said question, that should be enough for our purposes, and it would not be necessary further to examine the position with regard to the profits which are deemed to have accrued in British India under Ss. 42 (1) and 42 (3)."

The Tribunal proceeded to observe that the statements made by the assessee's representative only disclosed that the assessee was a non-resident, that it had no business in British India, that it had delivered ghee at Porbandar, and that it had no office or agency in British India. They also observed that the Bank Account and the Bank Pass Books of the assessee were produced and the Income-tax Officer was informed that the cheques received were "subsequently transferred to Porbandar", and the current account with Messrs. Shamji Kalidas & Company and the amounts deposited therein were also disclosed. In the view of the Tribunal, by these disclosures, the "assessee did not furnish any particulars about how the delivery was given" and "the all-important, question about the price of the goods was not mentioned", that on that account the statement must be regarded as incomplete: that it was the duty of the assessee's representative to disclose "the profits embedded in the price, but the sequence of the several statements was such that the assessee wished to show thereby that there was no office or agency in British India and whatever was done was done at Porbandar"; that the question of receipt of sale proceeds in British India was "thus by-passed"; that the Income-tax Officer was informed about the interest paid to the assessee but "no question was raised of any possible liability of the assessee to tax on other account"; that "all the statements taken together contained such a meagre presentation of the facts, that it was difficult to consider that there was a full and true disclosure of material facts"; and that "the material facts were not disclosed, whatever was disclosed was not fully disclosed, and in that sense there was no true disclosure". The Tribunal then observed:

"This is not a case where the Income-tax Officer drew a wrong legal inference from facts. This is a case where facts must be regarded as not fully or truly disclosed. x x x Even so, in this case, it is mainly the assessee who failed to carry out the obligation under the law, with the result that the income escaped assessment. The words "full" and "true" and "material facts" and the Explanation to S. 34 (1) (a) would lose all their meaning if the meagre statements by the assessee were to pass muster. Under those circumstances, we must hold that the initiation of action under S. 34 (1) (a) was valid."

6. In our judgment, the High Court was right in holding that the Tribunal misconceived the nature of the proceedings and the duty imposed upon the assessee by S. 34 (1) (a). It is not for the assessee to satisfy the Income-tax Officer that there was no concealment with regard to any question; it is for the Income-tax Officer, if that issue is raised, to establish that the assessee had failed to disclose fully and truly certain facts material to the assessment of income which had escaped assessment. Failure to disclose how the delivery of ghee was given at Porbandar was wholly irrelevant, and failure to furnish particulars in that behalf cannot assist the case of the Department. Observation relating to the failure to disclose the price of ghee supplied is not strictly accurate, for, it was disclosed by the assessee's representative that the cheques were delivered for payment of the dues for ghee supplied at Porbandar and that "they were subsequently transferred to Porbandar". It was again no duty of the assessee to disclose to or instruct the Income-tax Officer that there were "profits embedded in the receipt" of the money at Bombay. Section 34 (1) (a) does not cast any duty upon the assessee to instruct the Income-tax Officer on questions of law. The assessee had disclosed that ghee was delivered at Porbandar by him and the price in respect of those supplied was received in Bombay which was subsequently transferred to Porbandar. We are unable to accept the view of the Tribunal that the "question of receipt of sale proceeds in British India was thus by-passed". The assessee's representative had expressly stated that the assessee had maintained a Bank

account in British India in which "for recovering from merchants dues in respect of the goods delivered at Porbandar" were credited. The assessee also produced the Bank Pass Books. The finding that "the question of receipt of sale proceeds was by-passed" cannot be accepted as correct. The statement that the cheques were "subsequently transferred to Porbandar" only means that the amounts realized by encashment of the cheques were sent to Porbandar, and not that the cheques were sent to Porbandar. We do not think that any more detailed disclosure was necessary to comply with the requirements that the assessee had fully and truly disclosed all the material facts necessary for the purpose of assessment.

7. The Income-tax Officer may, if he is satisfied, that on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment, income has escaped assessment, he may assess or re-assess the income. But when the primary facts necessary for assessment are fully and truly disclosed, he is not entitled on change of opinion to commence proceedings for re-assessment. The Income-tax Officer was apprised of all the primary facts necessary for assessment, and he proceeded to "drop the assessment proceedings". He may have raised a wrong legal inference from the facts, disclosed but on that account he was not competent to commence re-assessment proceedings under Section 34 (1) (a) for the two assessment years 1947-48 and 1948-49.

8. Counsel for the Commissioner contended that in any event the assessee had in the assessment of income for the year 1949-50 not disclosed all the primary facts. Counsel contended that the statement before the Income-tax Officer was a bare statement about the receipt of interest from Messrs. Shamji Kalidas and Company and there was no reference to the account with the Bank of India Ltd. There is no substance in this contention. The assessee had invited the attention of the Income-tax Officer to the previous assessment proceedings and also had invited his attention to the fact that on the interest received tax at maximum rate was charged. In the Bank account there was no express reference. But we agree with the High

Court that since the factual position having remained unaltered in the assessment year 1949-50, there was no non-disclosure of material facts necessary for assessment of the income. The Income-tax Officer was fully aware of the assessment proceedings for the years 1947-48 and 1948-49, and in his order he expressly referred to those proceedings. Being aware of the earlier proceedings and the reasons for passing the previous order, if the Income-tax Officer passed an order in effect holding that there was no income of the assessee chargeable to tax, the Income-tax Officer cannot seek to re-assess the income on the ground of failure to disclose fully and truly the facts necessary for assessment. We do not think that any ground is made out for disagreeing with the High Court in respect of the validity of the order of re-assessment for the year 1949-50.

9. The appeals fail and are dismissed with costs. One hearing fee.
Appeals dismissed.

**AIR 1971 SUPREME COURT 720
(V 53 C 136)**

(From Madras: ILR (1965) 2 Mad. 233)

J. C. SHAH, Ag. C. J.,
K. S. HEGDE AND A. N.
GROVER, JJ.

M/s. Amarchand Sobhachand,
Appellant v. The Commissioner of Income-tax, Madras, Respondent.

Civil Appeal No. 949 of 1966, D/-
21-1-1971.

**Constitution of India, Article 136
— Finding of fact supported by evidence is binding on the Supreme Court. ILR (1965) 2 Mad 233, Affirmed.
(Para 4)**

Thus where the Income-tax Appellate Tribunal found that certain amount of money sent by the assessee to a firm was not loan made in the ordinary course of the business of the assessee and this finding was supported by evidence, the same was binding on the Supreme Court even if there was no proper discussion of the material. ILR (1965) 2 Mad 233, Affirmed. (Para 4)

Mr. M. C. Chagla, Senior Advocate, (M/s. G. L. Sanghi and Janendra Lal, Advocates, and Mr. B. R. Agar-

BO/BO/A487/71/YPB/C

wala, Advocate, of M/s. Gagrath and Co., with him), for Appellant; Mr. Jagadish Swarup, Solicitor-General of India, (M/s. G. C. Sharma, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: The appellant firm (which will hereinafter be referred to as the "assessee") carried on business in drugs, chemicals, mercury, camphor and art silk yarn as also in money-lending, over a number of years. The accounting year with which we are concerned in this appeal is Samvat year 2008 commencing from October 31, 1951 and ending on October, 18, 1952. The firm consisted of two partners, Mohanlal Bagmal and Seshmal Sobhachand. Two minors, Ramaniklal Sobhachand and Lakshmichand Sobhachand were admitted to the benefits of the partnership. The assessee had dealings for several years with a firm known as "Bhojaji Sobhachand" (to be hereinafter referred to as the Bombay Firm). Sobhachand Amarchand, a partner of the Bombay firm, is the father of Seshmal, Ramaniklal and Lakshmichand and he was having sixteen per cent share in the Bombay firm. That firm became insolvent in April 1952. The Bombay firm owed certain amount to the assessee. In the assessment of income-tax of the appellant for the assessment year 1952-53, relevant to the accounting year Samvat 2008, the assessee claimed a deduction of Rs. 2,68,385 as bad debt due from the Bombay firm, incurred by that firm in the course of business transactions. The Income-tax Officer disallowed that claim holding that "these transactions were mere accommodations which can have no bearing to the regular business carried on by the assessee. In appeal the Appellate Assistant Commissioner agreed with the Income-tax Officer. He held that the debt did not arise in the course of the assessee's business as Chemists and Druggists nor in the course of their money-lending business. On a further appeal taken by the assessee to the Income-tax Appellate Tribunal, the Tribunal confirmed the order of the Appellate Assistant Commissioner. The assessee thereafter applied to the Tribunal under Section 66 (1) of the Indian Income-tax Act, 1922 to submit a statement of the case with the question

"whether on the facts and in the circumstances of the case the disallowance of the bad debt of Rs. 2,68,385/- is right in law" to the High Court of Madras for its opinion. The Tribunal rejected that application but pursuant to an order of the High Court under Section 66 (2), the Tribunal submitted a statement of the case on the following question:

"Whether on the facts and in the circumstances of the case, the Tribunal was right in law in holding that the debt of Rs. 2,68,385/- was not one incurred in the course of money-lending business of the assessee".

2. The High Court opined that the debt in question was not a bad and doubtful debt in the assessee's money lending business nor a debt representing loss sustained in the other business. The question referred was, therefore, answered in the affirmative and against the assessee. Thereafter the present appeal was brought after obtaining special leave from this Court. At the hearing of the appeal this Court found that the Tribunal's order was very brief and that it gave no reasons in support of its conclusions. It also found that the statement submitted by the tribunal was inadequate. This Court took the view that the question framed at the instance of the High Court did not bring out the real question arising for decision. It accordingly reframed the question as follows:

"Whether on the facts and in the circumstances of the case the Appellate Tribunal erred in disallowing a sum of Rs. 2,68,385/- written off by the assessee in their books of accounts as irrecoverable?"

By its order dated July 29, 1969 this Court called upon the Tribunal to submit a supplementary statement of case on the reframed question. The tribunal accordingly submitted a fresh statement of the case on the question referred. But that statement merely catalogued the arguments advanced at the bar. The tribunal did not give any findings on the points arising for decision. Hence by its order dated April 7, 1970, this Court directed the tribunal to submit a further statement. The tribunal has accordingly submitted a further statement.

3. The facts found by the tribunal are found in paragraphs 11 and 12 of the statement. They read:

"11. We have taken into consideration the available materials and the rival submissions. The only facts in favour of the assessee are that incidental charges are debited to the Bombay firm in respect of some of the remittances and there is a flow of moneys to the Bombay firm up to 10-3-1952 when the last of the remittances was sent to it before the firm collapsed in or about April, 1952. On the other hand the narrations in the entries, as they stand, the failure to adjust interest in the account of the Bombay firm at the stage at which it became a debtor in Samvat year 2007, the manner in which the partner of the appellant-firm tried to explain the position in March, 1954 and the stand of the firm itself at all earlier stages support the case of the Department.

"12. Having considered all the circumstances of the case, we are of the opinion that the sums in question were not sent to the Bombay firm as loans made in the ordinary course of the money-lending business of the assessee nor in respect of any other business of the assessee. As this is the finding with regard to the whole of the amount of Rs. 2,68,385/-, there is no question of allocating any portion thereof as between the business of money lending or for any other purpose as referred to in para 7 above."

4. It is true as contended by the learned Counsel for the assessee that the conclusions reached by the Tribunal are not supported by proper discussion of the material before it. It is also true that the tribunal after cataloguing the arguments advanced at the bar, has come to certain abrupt conclusions, but all the same it cannot be denied that the findings reached by the Tribunal are findings of fact and these findings are supported by the evidence on record. The tribunal has found that the monies sent by the assessee to the Bombay firm were not loans made in the ordinary course of its money-lending business, nor in respect of any other business of the assessee. This finding covers the entire amount sought to be deducted. In view of this finding, which is

binding on this Court, our answer to the question reframed has to be in the negative and in favour of the Department. The appeal fails and is dismissed. No costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 722
(V 58 C 137)**

(From: Calcutta)*

**P. JAGANMOHAN REDDY AND
I. D. DUA, JJ.**

Basudev Hazra, Appellant v. Matiar Rahaman Mandal, Respondent.
Criminal Appeal No. 171 of 1968,
D/- 21-1-1971.

(A) Bengal Ferries Act (1 of 1885), Sec. 24 — S. 24 applies when lessee demands or receives from person using ferry or not, some payment on pretext that it is due as toll when it is legally not so due — His liability to prosecution for extortion under Penal Code does not exclude applicability of Section 24. (Para 5)

(B) Criminal P. C. (1898), S. 367 — It is not proper to ignore defence of accused because it can legitimately be taken into consideration while assessing the value of evidence and judging guilt or innocence of accused. (Para 5)

(C) Constitution of India, Article 136 — Article 136 does not confer right of appeal on party — It only confers discretionary power on Supreme Court to interfere sparingly in cases where grave miscarriage of justice has resulted from illegality or from misapprehension or mistake in reading evidence or from ignoring, excluding evidence or illegally admitting material evidence. (Para 5)

Mr. D. N. Mukherjee, Advocate, for Appellant.

The following Judgment of the Court was delivered by

DUA, J.:— The appellant, Basudev Hazra, was a leaseholder in respect of tolls of the public ferry at Sadar Ghat on the outskirts of Burdwan town for crossing the river Damodar. This lease was for a period of three years

*(Cri. Ref. No. 36 of 1967, D/- 13-9-1967 — Cal.)

BO/BO/A495/71/GNB/C

(August 14, 1963 to August 13, 1966) Ex. 2. On November 30, 1964 Matiar Rahman Mandal filed a complaint against the appellant in the court of the Sadar Sub-Divisional Officer (Judicial) Burdwan alleging that the appellant used to realise illegally 20np. per cart from the cultivators who used to drive their carts across the dry bed of the river. The matter was reported to the S. D. O. who directed an enquiry. This infuriated the appellant. On November 29, 1964 the appellant realised double the amount of toll and on protest and refusal by the complainant he was threatened with violence by the appellant.

2. The Magistrate trying the appellant for offences under Sec. 23 and 24 of the Bengal Ferries Act, 1 of 1885 convicted him of both the offences. The appellant was sentenced to a fine of Rs. 10 under Sec. 23 and to a fine of Rs. 20/- under Section 24: in default of payment of fine in the former case he was to undergo simple imprisonment for ten days and in the latter for 20 days.

3. On the appellant challenging his conviction on revision in the Court of the Sessions Judge, the Additional Sessions Judge, Burdwan made a reference to the High Court recommending the appellant's acquittal. It was observed by the Additional Sessions Judge in his reference that according to the appellant's defence the complainant's party were in fact using the landing stage and the path constructed and repaired by him and, therefore, they were liable to pay the usual toll tax. After reproducing Section 24 he added:

".....the complainant's case as it appears from the petition of complaint and also from the evidence of the three witnesses examined on the point is that they do not take advantage of any of the facilities provided by the lessee and that the lessee demanded toll from them even though they were using their own path. The defence as I have already stated, was that the pathway and the landing stage belonged to the lessee and that, therefore, he was entitled to collect toll. Forgetting the defence for the moment it seems to me that no conviction u/s 24 can be sustained on the case of the complainant as it is".

According to him the collection of money from the people using their own

pathway might amount to extortion but it would not attract Section 24. We need not refer to the recommendation with respect to the appellant's conviction under S. 23 as this was accepted by the High Court and there is no appeal against acquittal under that section.

4. The High Court accepted the recommendation with respect to the conviction under S. 23 and acquitted the appellant of that offence. In regard to the conviction under S. 24 the High Court observed that the trial Magistrate had found (i) that the appellant had been realising toll charges in excess of the scheduled rate of 20 Ps. per cart and also realising such charges from persons who did not use the ferry and (ii) that though the complainant had not availed of the ferry and had taken the cart over the sandy bed of the river 40 Ps. per cart were realised from him. These findings of fact were held not open to re-examination on revision. The High Court added that realisation of 40 Ps. fell within the mischief of S. 24 which forbids every lessee from realising more than lawful toll even in cases in which he is entitled to demand ferry charges. Repelling the argument that the present was a case of extortion and it did not fall within the purview of S. 24 the High Court, after referring to the complainant's case, observed that it was a case of illegal realisation of toll in excess, when the appellant was not entitled to realise it at all and not a case of extortion under the Indian Penal Code. The amount had been illegally demanded as a toll and that also in excess of permissible rate. The reference with respect to S. 24 was, as observed earlier, rejected.

5. The appellant has secured special leave to appeal under Art. 136 of the Constitution and his counsel Mr. D. N. Mukherjee has strenuously contended that the realisation of 40 Ps. per cart from those who do not use the ferry cannot as a matter of law fall within the mischief of Section 24 of the Bengal Ferries Act. His contention in essence is that unless someone actually uses a ferry no charges realised from him for permitting him to cross the river, even if the demand is made by way of toll, can attract the provisions of S. 24. The contention though prima facie somewhat attrac-

tive does not stand scrutiny. Section 24 reads as under:

"Penalty for taking unauthorised tolls, and for causing delay. — "Every such lessee or other person as aforesaid asking or taking more than the lawful toll, or without due cause, delaying any person, animal, vehicle or other thing, shall be punished with fine which may extend to one hundred rupees."

It is obvious that this section does not speak of taking toll in excess of the lawful limit only from those persons who use the ferry. This Act was enacted for regulating ferries but that does not mean that an illegal demand under the pretext of claim by way of toll under this Act when it is not legally claimable was not intended by the legislature to be prohibited and made punishable by the language of Section 24. Shri Mukherjee drew our attention to Section 5 of the Act in which "ferry" is defined to include a bridge of boats, pontoons or rafts, a swing-bridge, a flying bridge, a temporary bridge and a landing stage. According to him, this definition suggests that it is only when a ferry is used and excessive charges realised that Section 24 would be attracted. The submission is difficult to accept. This definition which is not exhaustive does not seem to us to control or otherwise to throw helpful light in the interpretation of S. 24. This section seems to have been designed in effect to protect the persons crossing the river against harassment and abuse of the privileged position which the lessee or other person authorised to collect the tolls of a public ferry occupies under the statute in the matter of control over the passage or pathway for crossing, fording or ferrying across the river. Demanding or receiving more than lawful dues and unduly delaying persons, animals, vehicles or things in crossing the river are both rendered penal and punishable. Whether the person from whom the amount is demanded or received is under no obligation to pay anything by way of toll while crossing the river bed or is bound by law only to pay 20 Ps. per cart as toll would thus be immaterial when payment is demanded or received on the pretext that it is due as toll when it is legally not so due. In either case S. 24 would seem to be attracted: this construction would

serve to suppress the mischief at which this section appears to be aimed. The question whether or not the appellant's case falls within the mischief of extortion as defined under the Indian Penal Code is not strictly relevant to the point arising in the controversy because if the appellant's case is covered by S. 24 of the Act then he is liable to be punished thereunder. His liability to be prosecuted under the Indian Penal Code cannot by itself in law exclude the applicability of S. 24 to his case. The Additional Sessions Judge was, in our opinion, not quite right in observing that the defence that the accused was entitled to claim the toll may be ignored, because defence of an accused person can legitimately be taken into consideration while assessing the value of the evidence and judging the guilt or innocence of the accused. The appellant's defence in this case would clearly tend to support the complainant's case that the amount received was demanded as toll which was an unlawful demand. To exclude cases like the present from the operation of S. 24 would unduly restrict its effectiveness and would indeed facilitate illegal recoveries prohibited by it. To that extent it would defeat the object and purpose which this section is intended to achieve. When the appellant's counsel took us through the evidence we found that the appellant had also delayed the prosecution witnesses without due cause in crossing the river in violation of S. 24. It is, however, unnecessary to pursue this aspect. Finally it may be pointed out that Art. 136 of the Constitution does not confer a right of appeal on a party. It only confers a discretionary power on this Court to be exercised sparingly to interfere in suitable cases where grave miscarriage of justice has resulted from illegality or from misapprehension or mistake in reading evidence or from ignoring, excluding or illegally admitting material evidence. The present case suffers from no such infirmity.

6. The appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 725
(V 58 C 138)

(From Assam: AIR 1967 Assam 58)
J. C. SHAH, C. J., K. S. HEGDE AND
A. N. GROVER, JJ.

The Commissioner of Income-tax, Assam and Nagaland etc., Appellants v. G. Hyatt, Respondent.

Civil Appeal No. 1174 of 1967, D/- 21-1-1971.

(A) Income Tax Act (1961), S. 56 — Interest on the amount of assessee's own contribution to an unrecognised provident fund cannot be considered as salary in view of S. 17 (3) (ii) but it is an "income from other sources" within S. 56. AIR 1967 Assam 58, Reversed. (Para 6)

(B) Interpretation of Statutes — There is no need to call into aid any of the rules of construction when meaning of the statute is plain and unambiguous. (Para 7)

Mr. Jagadish Swarup, Solicitor-General of India, (M/s. G. C. Sharma, R. N. Sachthey and B. D. Sharma, Advocates, with him), for Appellants; Mr. T. A. Ramachandran, Advocate, amicus curiae, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: The Commissioner of Income-tax, Assam and Nagaland has brought this appeal by certificate. The assessment with which we are concerned in this appeal is for the assessment year 1963-64, the relevant accounting year is the financial year 1962-63. The assessee was the manager of a Tea Estate under the managing agency of M/s. Gillanders Arbuthnot & Co. Ltd. The said company had a Provident Fund scheme for its employees. But that provident fund was not a recognised one. The assessee retired during the previous year relevant to assessment year 1963-64 and received out of this provident fund an amount of Rs. 27,948/- which represented the interest on the amount of his own contribution to the fund. The Income-tax Officer assessed this amount as the assessee's income from other sources. That order was confirmed in appeal by the Appellate Assistant Commissioner. But on further appeal to the tribunal by the assessee, the tribunal came to the conclusion that the receipt in question

being profits 'in lieu of salary', the same was his salary as defined in Section 17 of the Income-tax Act, 1961 (to be hereinafter referred to as the Act); the same having not been assessed as his salary, the assessment order relating to that item of receipt was not legal. At the instance of the Commissioner, the tribunal referred the following question of law to the High Court of Assam and Nagaland for its opinion:

"Whether on the facts and circumstances of the case and having regard to the provisions of section 17 (3) (ii) of the Income-tax Act, 1961 the amount of Rs. 27,948/- representing the interest on the amount of the assessee's own contributions to an unrecognised provident fund was assessable under the residuary section 56 of the said Act?"

2. The High Court answered that question in the negative and in favour of the assessee. While it came to the conclusion that the receipt in question cannot be considered as salary as defined in S. 17, in its view the same was exempt from payment of tax in view of S. 17 (3) (ii). The Commissioner is challenging the above conclusion.

3. The receipt of Rs. 27,948/- is undoubtedly an income as defined by S. 2 (24). The receipt of an interest on any investment is a gain made by the investor and therefore the same is "income". The next question is whether the said income is exempt from tax or if it is not exempt under what head the same has to be brought to tax?

4. Section 14 of the Act gives the heads of income. They are: (A) Salaries; (B) Interest on securities; (C) Income from house property; (D) Profits and gains of business or profession; (E) Capital gains and (F) Income from other sources.

5. The salaries are brought to tax under S. 15 and "the income from other sources" is brought to tax under S. 56. In this appeal we are not concerned with the other heads of income. The salary is defined in S. 17 as including any "profits in lieu of or in addition to any salary or wages" (S. 17 (1) (iv).) Sub-s. (3) of S. 17 says:

"profits in lieu of salary" includes.—

x x x

(ii) any payment . . . due to or received by an assessee from an em-

ployer or a former employer or from a provident or other fund (not being an approved superannuation fund) to the extent to which it does not consist of contribution by the assessee or interest on such contributions."

(emphasis supplied)

6. The contributions to recognised provident funds are dealt with by other provisions of the Act. Herein we are concerned with the contribution to an unrecognised provident fund. The learned Judges of the High Court opined that the receipt by the assessee with which we are concerned is exempt from the payment of tax in view of S. 17 (3) (ii). In our opinion they were clearly in error in arriving at that conclusion. Deductions from salaries are dealt with by S. 16. In view of S. 17 (1) (iv), all receipts of profits in lieu of salary have to be considered as salary. But then the question is what is meant by "profits in lieu of salary". In defining the expression "profits in lieu of salary", the legislature excluded from the scope of that expression any payments received by the assessee from a provident fund, his own contributions to the fund or any interest on such contributions. From that it follows that the receipt of Rs. 27,948/- by the assessee in the relevant accounting year cannot be considered as salary, though undoubtedly that is an income. Section 17 has nothing to do either with deductions or with exemptions. It is merely a provision defining the expression "salary". As the income in question is not salary and the same cannot be said to be either interest on the securities, income from house property, profits and gains of business or profession or capital gains, it has to be considered as "income from other sources" and brought to tax under Section 56. Section 56 (1) provides that income of every kind which is not to be excluded from the total income under the Act shall be chargeable to income-tax under the head income "from other sources" if it is not chargeable to income-tax under any of the heads specified in Section 14 items 'A' to 'E'.

7. In our opinion the meaning of Section 17 (3) (ii) is plain and unambiguous. Hence there is no need to call into aid any of the rules of construction as was sought to be done by the High Court.

8. The respondent was not represented before this Court. We are obliged to Mr. T. A. Ramachandran for acceding to our request to appear on his behalf as amicus curiae and assist us at the time of hearing of the appeal.

9. For the reasons mentioned above we allow this appeal, discharge the answer given by the High Court and answer the question referred to the High Court in the affirmative and in favour of the Department. Under the circumstances of the case we make no order as to costs.

Appeal allowed.

AIR 1971 SUPREME COURT 726 (V 58 C 139)

(From Allahabad: ILR (1965) 1 All 41)

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

The Commissioner of Income-tax, U. P. (In both the Appeals), Appellant v. M/s. Gurbux Rai Harbux Rai (In both the Appeals), Respondent.

Civil Appeals Nos. 1225 and 1226 of 1967, D/- 21-1-1971.

Excess Profits Tax Act (1940), Section 10-A — Pendency of valid proceeding under Section 15 for assessment or reassessment of escaped excess profits is a condition precedent for exercising power under Section 10-A to adjust liability to excess profits tax. ILR (1965) 1 All 41, Approved.

(Para 10)

An independent proceeding is not within the ambit of Section 10-A. The power under Section 10-A to make adjustments with respect to liability to excess profits tax can be exercised only in the course of original assessment or in the course of reassessment and not otherwise. (Para 10)

Cases Referred: Chronological Paras

(1969) I. T. Ref. No. 118 of 1962,
D/- 31-7-1969 = 75 ITR 350

(All), Gurbux Rai Harbux Rai
v. Commr. of I. T., U. P.

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(1968) Civil Appeals Nos. 741-743
of 1966, D/- 2-8-1968 (SC),
Gurbux Rai Harbux Rai v.
Commr. of Income-tax, U. P.

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Mr. S. T. Desai, Sr. Advocate,
(Mr. B. B. Ahuja, Advocate, and M/s.
R. N. Sachthey and B. D. Sharma,

BO/BO/A483/71/SSG/C

Advocates, with him), for Appellant, (In both the Appeals); Mr. M. C. Chagla, Sr. Advocate, (Mr. A. N. Goyal, Advocate, with him), for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

SHAH, C. J.: — Gurbux Rai Harbux Rai — hereinafter called 'the assessee' — is a registered firm carrying on business in piece goods and commission agents. It has its head office at Kanpur and a branch office at Farrukhabad. During the chargeable accounting periods July 4, 1943 to June 21, 1944 and June 22, 1944 to July 10, 1945 Gurbux Rai and Harbux Rai (each representing his joint family) were the two partners of the assessee with equal shares in the profit and loss. In proceedings for assessment of tax under the Excess Profits Tax Act, 1940 for the two chargeable accounting periods the assessee informed the Tax Officer that the joint family of Gurbux Rai had been dissolved and there was a reconstitution of the business of the partnership with effect from July 4, 1943. According to the assessee the constitution of the firm after partition was that in the firm at Kanpur the former two partners were interested, their share being equal, but in the business of the firm at Farrukhabad there were three partners — Harbux Rai with -8/- share, Chameli Devi with -4/- share and Gopaldas with -4/- share.

2. In assessing tax under the Indian Income-tax Act, 1922 for the assessment year 1944-45 relevant to the account year ending June 21, 1944 the Income-tax Officer held that the case set up by the assessee that there was partition amongst the members of the family of Gurbux Rai could not be accepted. In the view of the Income-tax Officer, an attempt was made "to avoid proper incidence of taxation as an afterthought to create evidence for camouflaging the Farrukhabad business as a separate unit of assessment". The Income-tax Officer directed that the income be assessed as the income of the assessee and not as the income of a separate firm. The excess profits tax assessment being consequential upon the income-tax assessment, the Excess Profits Tax Officer assessed the entire income of the two businesses at Kanpur and at Farrukhabad, in the hands of the assessee firm.

3. Against the order passed by the Income Tax Officer the assessee appealed to the Appellate Assistant Commissioner who by his order dated October 10, 1947 observed:

".....that partial partition in respect of moveable property of Gurbux Rai was effected on a date somewhere near Asadh Samvat 2000, from which date Farrukhabad was conducted by a separate firm consisting of Harbuxrai, Mst. Chameli and Gopaldas". Pursuant to this order the Income-tax Officer modified the assessment with respect to the Income-tax assessment of the assessee for the assessment years 1944-45 and 1945-46. The Excess Profits Tax Officer however started proceedings under Section 10-A by notice dated February 6, 1951 calling upon the assessee to show cause why appropriate adjustments should not be made in the assessment, and passed orders in that behalf for both the chargeable accounting periods holding that the main purpose of the partial partition of the family business of Gurbux Rai was avoidance of excess profits tax liability. By order dated February 21, 1951 passed under Section 15 of the Excess Profits Tax Act the Excess Profits Tax Officer modified the original excess profits tax assessment. In the revised assessment in pursuance of orders under Section 10-A he included the income of the branch shop at Farrukhabad in the total income of the assessee for purposes of excess profits tax assessment. The assessee appealed against the order of additional assessment contending that the Excess Profits Tax Officer was not competent to re-open the case under Section 15 as he had no definite information coming into his possession to enable him to discover that the profits of the chargeable accounting period had escaped assessment. The assessee contended that all the materials in the case were before the Excess Profits Tax Officer at the time of his original assessment and no new information came into his possession thereafter. The assessee also contended that the Excess Profits Tax Officer was not competent to pass any order under Section 10-A merely to make an adjustment in the revised assessment under Section 15. The Income-tax Appellate Tribunal held that the Excess Profits Tax Officer had received definite information regarding the state of the law in pursuance of the

appellate order of the Appellate Assistant Commissioner who had held that the family of Gurbux Rai was partially partitioned. The Tribunal also held that the Excess Profits Tax Officer was competent to pass an order under Section 10-A, of the Excess Profits Tax Act.

4. The Tribunal thereafter referred the following questions to the High Court of Allahabad under S. 21 of the Excess Profits Tax Act read with Section 66 (1) of the Income-tax Act, 1922:

"(1) Whether on the facts and in the circumstances of this case there was any definite information within the meaning of Section 15 by virtue of which the Excess Profits Tax Officer was competent to re-open the excess profits tax assessment?"

(2) Whether in the circumstances of this case, the Excess Profits Tax Officer was competent to apply the provisions of Section 10-A and make necessary adjustments in pursuance thereto in the revised assessment under Section 15?"

The High Court of Allahabad held that since the Excess Profits Tax Officer purported to re-open the assessment under Section 15 of the Excess Profits Tax Act "only because of the order of the Appellate Assistant Commissioner of Income-tax holding that the Farrukhabad business was no longer the business of the assessee and that the family of Gurbux Rai had partitioned its movable property, all of which proceeded upon material which was already initially before the Excess Profits Tax Officer and to which he had applied his mind when he made the original assessment, it was not a case where the Excess Profits Tax Officer can be said to have discovered" in consequence of definite information which had come into his possession, that profits chargeable to excess profits tax had escaped assessment. The High Court accordingly answered the first question in the negative.

5. The High Court then observed that if the Excess Profits Tax Officer was not competent to take proceedings under Section 15 of the Excess Profits Tax Act, it was not open to him to apply the provisions of Section 10-A in the proceedings upon re-opening the assessment under Section 15, for, in the view of the High

Court an order under Section 10-A may be passed only where the Excess Profits Tax Officer is seized of jurisdiction in a pending assessment proceeding. As the proceedings initiated by the Excess Profits Tax Officer under Section 15 were void, he had no power in him to make an order under Section 10-A of the Act. The High Court accordingly answered the second question also in the negative.

6. Against the order passed by the High Court, with certificate granted by the High Court these two appeals are preferred.

7. A parallel proceeding which had come before this Court in Civil Appeals Nos. 741-743 of 1966 (SC) Gurbux Rai Harbux Rai v. Commr. of Income-tax, U. P., D/- 2-8-1968, may also be referred to. It may be recalled that the Excess Profits Tax Officer at Kanpur had served a notice under Section 10-A of the Excess Profits Tax Act requiring the assessee to show cause why appropriate adjustments as respects liability to excess profits tax should not be made so as to counteract the avoidance or reduction of liability to excess profits tax by converting the business in the name of Pussulal Jangalal—the Farrukhabad firm—into a separate business. The contention of the assessee that the disruption of the family was a genuine and bona fide transaction was rejected by the Excess Profits Tax Officer. The case was then taken to the Income-tax Appellate Tribunal. The Tribunal confirmed the order of the Excess Profits Tax Officer. But at the instance of the assessee the Tribunal referred the following question to the High Court of Allahabad:

"Whether on the facts and circumstances of this case, the transaction in question was one which could be avoided under Section 10-A of the Excess Profits Tax Act?"

The High Court by order dated July 31, 1969 answered the question in the affirmative. Against the order passed by the High Court no further proceedings have been taken by the assessee challenging the conclusion of the High Court and that order has become final.

8. The High Court has held in the judgment under appeal that action taken under Section 15 of the Excess Profits Tax Act was not competent and on that account the Excess Profits Tax Officer had no jurisdiction in the

matter. But in the judgment of the High Court in Income-tax Reference No. 118 of 1962, D/- 31-7-1969 (All) no question of jurisdiction arose. The Court had only answered the question whether the transaction of partial partition was one which could be avoided under Section 10-A of the Excess Profits Tax Act. The decision of the High Court (which had become final) about the authority of the Excess Profits Tax Officer to take action under Section 10-A does not affect the maintainability of the present appeal.

9. Section 10-A of the Excess Profits Tax Act, insofar as it is relevant provides:

"(1) Where the Excess Profits Tax Officer is of opinion that the main purpose for which any transaction x x x was x x effected x x was the avoidance or reduction of liability to excess profits tax, he may, x x x make such adjustments as respects liability to excess profits tax as he considers appropriate so as to counteract the avoidance or reduction of liability to excess profits tax which would otherwise be effected by the transaction x x x".

10. Section 15, insofar as it is relevant provides:

"If in consequence of definite information which has come into his possession, the Excess Profits Tax Officer discovers that profits of any chargeable accounting period chargeable to excess profits tax have escaped assessment, or have been under-assessed, or have been the subject of excessive relief, he may at any time serve on the person liable to such tax a notice containing all or any of the requirements which may be included in a notice under Section 13, and may proceed to assess or re-assess the amount of such profits liable to excess profits tax x x x".

The High Court in the judgment under appeal held that proceeding under Section 10-A may be commenced only if there be a valid proceeding under the Excess Profits Tax Act which was pending for assessment or re-assessment of excess profits which had escaped assessment and not otherwise. In our opinion the High Court was right in so holding. Section 10-A does not contemplate an independent proceeding. Section 10-A merely con-

fers power upon the Excess Profits Tax Officer to make adjustments with respect to liability to excess profits tax: it confers power which the Excess Profits Tax Officer may exercise in the course of the original assessment or in the course of re-assessment.

11. It is necessary therefore to determine whether an order was made under Section 10-A in a pending proceeding for assessment of Excess Profits Tax. But the question whether there was a pending proceeding under Section 15 in the course of which an order under Section 10-A could be made cannot be ascertained on the materials available before us. The High Court has decided that the proceeding under Section 15 was not valid, because there was no definite information with the Excess Profits Tax Officer and on that account proceeding under Section 10-A was not valid. It has been assumed that there was a pending proceeding under Section 15 in the course of which an order under Section 10-A was made. Expression of that opinion of the High Court is challenged. We are of the view that in the interests of justice, it is necessary that a supplementary statement of the case should be called for on the question whether there was any proceeding pending under Section 15. On the question whether the proceeding under Section 15 if pending was valid, we express no opinion at this stage.

12. We direct the Tribunal to submit a supplementary statement of the case on the question whether the proceeding under Section 10-A was started in the course of assessment or re-assessment proceeding commenced under Section 15. The supplementary statement to be submitted to this Court within three months from the date on which the papers reach the Tribunal. At this stage we express no opinion on the question whether the High Court was right in holding that the proceeding under Section 15 was not competent.

Order accordingly.

AIR 1971 SUPREME COURT 730
(V 58 C 140)

(From: Patna)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

M/s. Chhugamal Rajpal, Appellant
v. S. P. Chaliha and others, Respondents.

Civil Appeal No. 1311 of 1967, D/-
21-1-1971.

Income Tax Act (1961), Section 151
(2) — Notice issued under Section 148
read with Section 151 (2) by I. T. O.
on feeling that certain transactions by
assessee with creditors were bogus
and that there was case for investigat-
ing truth of alleged transactions is
invalid as not complying with require-
ments of Section 151 (2). (Para 8)

The I. T. O. had no material
before him which could satisfy the re-
quirements of either Clause (a) or
Clause (b) of Section 147. Therefore,
he could not have issued a notice under
Section 148. The important safeguards
provided in Sections 147 and 151 are
not to be lightly treated by the Income
Tax Officer as well as by the Commis-
sioner. (Para 8)

M/s. M. C. Chagla and N. D.
Karkhanis, Sr. Advocates, (Mr. S. P.
Chowdhury and Miss Bhuvanesh
Kumari, Advocates, and M/s. J. B.
Dadachanji and Co., Advocates with
them), for Appellant; Mr. S. C. Man-
chanda, Sr. Advocate, (M/s. R. N.
Sachthey and B. D. Sharma, Advocates
with him), for Respondents.

The following Judgment of the
Court was delivered by

HEGDE, J. (on behalf of himself,
Shah, C. J. and Grover, J.): — This is
an assessee's appeal by special leave
against the judgment of the High
Court of Patna dismissing in limine its
writ petition under Articles 226 and
227 of the Constitution of India.

2. The assessee is having con-
struction contracts under the Railways
as well as the Government. It is a
partnership firm. For the assessment
year 1960-61, relevant to the account-
ing year 1959-60, after the assessee
submitted its income-tax return, it
was asked by the Income-tax Officer
during the income-tax assessment pro-
ceedings to produce before him its

*(C. W. J. C. No. 952 of 1966, D/-
17-1-1967 — Pat.)

BO/BO/A489/71/VBB/C

books of account and the other rele-
vant papers. The assessee also produc-
ed before him a statement showing
various creditors from whom it had
borrowed on Hundis during the ac-
counting year in question. In that
statement it gave the full names and
addresses of the alleged creditors.
After enquiry, the assessee's total in-
come was assessed at Rs. 69,886/-. On
June 3, 1966, the 1st respondent (In-
come-tax Officer, Ward 'A', Muzaffar-
pur) issued to the assessee a notice
under Section 148 of the Indian In-
come-tax Act, 1961. The material
portion of that notice reads as follows:

"Notice under Section 148 of the
Income-tax Act, 1961.

Income-Tax Officer, Muzaffarpur
Dated, the 3-6-1966.

To

M/s. Chugamal Rajpal, Muzaffarpur.

Whereas (I) have reason to beli-
eve that your income chargeable as
income of 1960-1961 in respect of which
you are assessable to tax for the as-
sessment year 19 19 has escaped
assessment within the meaning of Sec-
tion 147 of the Income Tax Act, 1961.

I therefore propose to re-assess
the income for the said assessment
year and I hereby require you
to deliver to me within 30 days
from the date of service of this
notice a return in the prescribed form
of your income assessable relevant to

The income of
the assessment year 1960-61 in respect
of which you are assessable for the
said assessment year.

2. The notice is being issued
after obtaining the necessary satisfac-
tion of the Commissioner of Income-
Tax, Bihar and Orissa, Patna.

Sd/- S. P. Chaliha
Income-Tax Officer,
Ward A, Muzaffarpur."

3. The assessee challenged the
validity of that notice as well as the
proceedings taken on the strength of
that notice on various grounds. As we
are accepting the contention of the as-
sessee that the impugned notice is in-
valid inasmuch as it did not comply
with the requirements of Section 151
(2) of the Act, we have not thought it
necessary to examine the other conten-
tions advanced on behalf of the as-
sessee. In this case the notice was
issued after four years but before
eight years of the date of the original
assessment.

4. Section 151 (2) of the Act reads:

"No notice shall be issued under Section 14 after the expiry of four years from the end of the relevant assessment year, unless the Commissioner is satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice."

5. Section 148 prescribes:

"(1). Before making the assessment, re-assessment or re-computation under Section 147, the Income-tax Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section.

(2) The Income-tax Officer shall, before issuing any notice under this section, record his reasons for doing so."

6. Section 147 deals with income escaping assessment. At this stage we need not refer to that section. We shall refer to that provision at a later stage. Section 139 (2) says:

"In the case of any person who, in the Income-tax Officer's opinion, is assessable under this Act, whether on his own total income or on the total
(Contd. in Col. 2.)

income of any other person during the previous year, the Income-tax Officer may, before the end of the relevant assessment year, serve a notice upon him requiring him to furnish, within thirty days from the date of service of the notice, a return of his income or the income of such other person during the previous year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed."

(proviso is not necessary for our present purpose)

7. When this appeal came up for hearing on the last occasion, as we found the affidavit filed by the Income tax Officer to be vague and indefinite, we directed the learned Counsel for the Department to produce before us the records of the Income-tax Officer to show that the Income-tax Officer had complied with the requirements of S. 148 and Section 151 (2) of the Act. When the appeal was taken up for hearing on the 18th January, 1971, only the report submitted by the Income-tax Officer to the Commissioner and the order of the Commissioner was produced. The order sheet recording the reasons of the Income-tax Officer as required by Section 148 (2) was not produced. Hereinbelow we have set out the report of the Income-tax Officer as well as the order of the Commissioner:

"Report in connection with the starting of proceeding under Sec. 147 of the Income-tax Act, 1961.

Name of District

Ward of Circle

C. I. R. No.

A Ward, Muzaffarpur
303-C.

1. Name and address of the assessee

M/s. Chugamal Rajpal,
Muzaffarpur.
R. F

2. Status

1960-61.

3. Assessment year for which notice under S. 148 is proposed to be issued.

4. Whether it is a new case or one in which re-assessment (or recomputation) has to be made.

Re-assessment.

5. If a case of reassessment (or recomputation) the income (or loss or depreciation allowance) originally assessed/determined.

Rs. 73,604/-

6. Whether the case falls under Cl. (a) or (b) of S. 147

147 (a)

7. Brief reasons for starting proceedings under S. 147 (indicate the items which are believed to have escaped assessment)

Kindly see overleaf
Sd/- S. P. Chaliha
I. T. O., 30-4-66
A-Ward, Muzaffarpur.

8. Whether the Commissioner is satisfied that it is a fit case for the issue of notice under S. 148.

Yes

Sd/- K. Narain

13-5-66

Commissioner of Income-tax,
Bihar and Orissa, Patna

9. Whether the Board is satisfied that it is a fit case for the issue of notice under S. 148.

Secretary, Board of Revenue.

During the year the assessee has shown to have taken loans from various parties of Calcutta. From D. I.'s Inv. No. A/P/Misc. (5) D. I./63-64/5623, dated 13-8-65, forwarded to this office under C. I. T. Bihar and Orissa, Patna's letter No. Inv. (Inv.) 15/65-66/1953-2017 dated Patna 24-9-65, it appears that these persons are name-lenders and the transactions are bogus. Hence proper investigation regarding these loans is necessary. The name of some of the persons from whom money is alleged to have taken on loan on Hundis are:

1. Seth Bhagwan Singh Sricharan.
 2. Lakha Singh Lal Singh
 3. Radhakissan Shyam Sunder.
- The amount of escapement involved amounts to Rs. 1,00,000/-.

Sd/- S. P. Chaliha, 30-4-66.

Income-tax Officer,
A-Ward, Mazaffarpur".

8. In his report the Income-tax Officer does not set out any reason for coming to the conclusion that this is a fit case to issue notice under Section 148. The material that he had before him for issuing notice under Section 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from the C. I. T., Bihar and Orissa. He does not mention the facts contained in those communications. All that he says is that from those communications "it appears that these persons (alleged creditors) are name lenders and the transactions are bogus". He has not even come to a prima facie conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague feeling that they may be bogus transactions. Such a conclusion does not fulfil the requirements of Section 151 (2). What that provision requires is that he must give reasons for issuing a notice under Section 148. In other words he must have some prima facie grounds before him for taking action under Section 148. Further his report mentions:

"Hence proper investigation regarding these loans is necessary". In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice under Sec. 148. Before issuing a notice under S. 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of Clauses (a) or (b) of Section 147 are satisfied, the Income Tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the Income-tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income-tax Officer had any material before him which could satisfy the requirements of either Clause (a) or Clause (b) of Section 147. Therefore he could not have issued a notice under Section 148. Further the report submitted by him under Section 151 (2) does not mention any reason for coming to the conclusion that it is a fit case for the

issue of a notice under Section 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under Section 148. To Question No. 8 in the report which reads "Whether the Commissioner is satisfied that it is a fit case for the issue of notice under Section 148", he just noted the word "yes" and affixed his signatures thereunder. We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under Section 148. The important safeguards provided in Sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance.

9. In the result this appeal is allowed, the order of the High Court is set aside and the impugned notice quashed. The Respondent No. 2 shall pay the costs of the appellant both in this Court and in the High Court.

Appeal allowed.

**AIR 1971 SUPREME COURT 733
(V 58 C 141)**

J. C. SHAH, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
A. N. RAY, JJ.

Trilochan Mishra etc., Appellants
v. State of Orissa and others, Respondents.

Writ Petns. Nos. 159 to 163 of
1969, D/- 21-1-1971.

Orissa Kendu Leaves (Control of Trade) Act (1961), Sections 3 (2) (a), 8 (1) (as amended in 1969) and Rule 5-B (6), (7), (8), (9) and (16), Rule 6 (3) and Rule 7 (1) framed under the Act are not violative of Articles 14, 15, 19 (1) of the Constitution.

There can be no legitimate grievance against the amendment of the Act and promulgation of new rules. They are all necessary to enable the Government to control the business in Kendu leaves effectively. Provisions in form G for the appointment of agents and form I for the appointment of ad-

ditional agents did not work against the interest of the Government working a monopoly business. The provision for appointment of additional agents and additional purchasers are not per se bad. The exigency of business may require such appointments. The fact that some of the agents were nominees or relations of the purchasers does not affect the scheme of State monopoly. Appointment of State Forest Corporation as additional agent can in no way detract from Government monopoly. (Paras 12, 14)

Cases Referred: Chronological Paras
(1969) AIR 1969 SC 1081 (V 56)
= (1969) 3 SCR 374, Rasbihari
Panda v. State of Orissa 5, 6
(1963) AIR 1963 SC 1047 (V 50)
= (1963) Suppl 2 SCR 691,
Akadasi Padhan v. State of
Orissa 3, 8

M/s. Gobind Das, B. P. Singh and D. N. Misra, Advocates, for Petitioners (In all petitions); Mr. M. C. Setalvad, Sr. Advocate, (M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates with him), for Respondents Nos. 1, 108 and 109 (In W. P. No. 159 of 1969); Mr. M. C. Chagla, Sr. Advocate, (M/s. Santosh Chatterjee and G. S. Chatterjee Advocates, with him), for Respondents Nos. 1, 108 and 109 (In W. P. No. 160 of 1969); M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates, for Respondents Nos. 1, 108 and 109 (In W. Ps. Nos. 161 to 163 of 1969); Mr. A. K. Sen, Sr. Advocate, (M/s. Santosh Chatterjee and G. S. Chatterjee, Advocates with him), for Respondents Nos. 2 to 6, 8 to 22, 24, 27, 28, 33 to 35, 38, 46, 49 to 51, 53, 57 to 59, 60, 63, 70, 74, 76, 82, 84, 85, 91 and 97 (In all petitions); Mr. P. K. Mukherjee, Advocate, for Respondent No. 23 (In all the petitions); Mr. M. Veerappa, Advocate, for Respondent No. 110 (In W. P. No. 159 of 1969).

The following Judgment of the Court was delivered by

MITTER, J.: — The petitioners in all these petitions under Article 32 of the Constitution pray for a declaration that Sections 3 (2) (a), 8 (1) and Rule 5-B (6), (7), (8), (9) and (16) and Rule 6 (3) and Rule 7 (1) of the Orissa Kendu Leaves (Control of Trade) Act, 1961 as amended and the rules framed thereunder are violative of the fundamental rights of the petitioners

guaranteed under Articles 14, 15 and 19 (1) of the Constitution, for a declaration that the "revised policy" as enjoined by the said Orissa Kendu Leaves (Control of Trade) Amendment Act, 1969 and rules framed is arbitrary, discriminatory and mala fide and for a writ or direction in the nature of a mandamus quashing the appointment of respondents 2 to 108 as purchasers.

2. To appreciate the grievances of the petitioners it is necessary to note in brief how the trade in Kendu leaves has been taken over by the State of Orissa by successive legislation and two decisions of this Court bearing thereupon. Kendu leaves appear to have formed a lucrative source of revenue for the State of Orissa for many years past. After the merger of the Indian States with the Province of Orissa the Government of Orissa passed an order in exercise of the powers under Section 3 (1) of the Orissa Essential Articles Control and Requisitioning (Temporary Powers) Act, 1947 by which the Kendu leaves growing areas in the State were divided into units and licences were issued to persons entitled to trade in such leaves. The District Magistrate fixed the minimum rates from time to time and the Order provided that the licensees were bound to purchase Kendu leaves from the pluckers or owners of private trees and forests at rates not below the minimum prescribed. The licensees were however not fettered in the matter of the sales of the leaves after purchase. This was followed by the Orissa Kendu Leaves Control Order, 1960 which effected some changes in the scheme previously adopted. In 1961 Orissa Kendu Leaves (Control of Trade) Act was passed with the object of creating a State monopoly in the trade of these leaves. Section 3 (1) of that Act provided that no person other than the Government, an officer of Government authorised in that behalf or an agent in respect of the unit in which the leaves are grown shall purchase or transport Kendu leaves. Sub-section (2) provided for transport of leaves from one place to another within the unit wherein such leaves have grown to any other place in that unit. By sub-section (3) any person desiring to sell Kendu leaves was at liberty to sell them to the aforesaid Government officer or agent at any depot situated within the said

unit. Under Section 4 the Government was to fix the price at which the leaves were to be purchased by them or by any officer or agent from the growers after consultation with the Advisory Committee. Section 5 enabled the Government to divide each district into such number of units as they thought fit. Under Section 7 the Government or their authorised officer or agent were bound to purchase at the price fixed under Section 4 the leaves which were offered to them for sale at the depots. Under Section 8 (1) Government was authorised to appoint agents on their behalf in respect of different units for the purpose of purchase of and trade in Kendu leaves in respect of different units and any such agent might be appointed in respect of more than one unit. Under Section 10 Kendu leaves purchased by Government or their officers or agents under the Act were to be sold or otherwise disposed of in such manner as the Government might direct.

3. The whole Act and the notifications thereunder were challenged in this Court, particularly Sections 3 and 4, on the ground that they were in conflict with Articles 19 (1) (f) and (g) and 19 (6) of the Constitution in *Akadasi Padhan v. State of Orissa*, (1963) Suppl 2 SCR 691 = (AIR 1963 SC 1047). It was held therein by this Court that the Act was a valid piece of legislation although it created a State monopoly. The validity of Section 3 was upheld as the persons specified in Cls. (b) and (c) were intended to work as agents of the Government and all their actions and dealings in pursuance of the provisions of the Act were to be actions and dealings on behalf of the Government and for the benefit of the Government. The validity of Section 4 was also upheld but Rule 7 (5) promulgated under the Act was held to be bad because it left it to the sweet will and pleasure of the officer concerned to fix any terms and conditions regarding agents on an ad hoc basis on the ground that the agency permitted under Article 19 (6) (ii) of the Constitution had to be an agency in the strict and narrow sense of the term and could only include agents who could be said to carry on the monopoly at every stage on behalf of the State for its benefit and not for their own benefit at all.

4. In effect this Court upheld the creation of State monopoly and

the employment of agents for carrying on the monopoly business by the State but R. 7 (5) was held to be invalid for the reasons indicated. According to the petitioner after the judgment of this Court the form of the agreement for agents known as the 'G' form was introduced under the rules and two sets of persons were employed to carry on the business of the State monopoly, one set known as the 'agents' and the other "purchasers". The agents were to purchase and collect Kendu leaves on behalf of the Government and the purchasers were to purchase from the Government, the rates of purchase and the price of sale being fixed by the authorities. On this basis auctions of Kendu leaves were held for the years 1966 and 1967.

5. It appears that early in 1968 letters were addressed to certain traders by the authorities intimating them that it had been decided by the Government of Orissa to renew leases of Kendu leaves held by them for the year 1968 if they accepted the terms set out therein. Under this scheme the Government offered to those licensees who in their view had worked satisfactorily in the previous year and had paid the amounts due from them regularly to continue their licences with the added provision that the agents with whom they had been working in 1967 would also work during 1968. A petition was moved before the Orissa High Court challenging this action of the Government in January 1968. Government withdrew the offers to renew the previous licences and informed the licensees that it had been decided to invite offers for advance purchase from persons who had purchased Kendu leaves from individual units during the year 1967 and had not committed default in payment of the dues. Other writ petitions were filed challenging the legality of the new method adopted by the State Government of offering to enter into agreements for advance purchase of Kendu leaves by private offers in preference to open competition. It was urged on behalf of the petitioners that by entering into agreements of advance purchase contracts for Kendu leaves by private negotiation the State Government sought to support their party interests in preference to public benefit envisaged by a proper scheme of State monopoly. In appeal from

the orders of the High Court *Rasbihari Panda v. State of Orissa*, AIR 1969 SC 1081 this Court held that the State monopoly could only be administered for the benefit of the general public and any arrangement used as a cloak for conferring private benefit upon a limited class of persons by carrying on business on their own behalf was invalid. The Court also observed:

"...in so far as the right to make tenders for the purchase of Kendu leaves was restricted to those persons who had obtained contracts in the previous year the scheme was open to the same objection. The right to make offers being open to a limited class of persons it effectively shut out all other persons carrying on trade in Kendu leaves and also new entrants into that business. It was *ex facie* discriminatory, and imposed unreasonable restrictions upon the right of persons other than existing contractors to carry on business."

The Court found that no explanation had been attempted on behalf of the State as to why an offer made by a well-known manufacturer of bidis interested in the trade to purchase the entire crop of Kendu leaves for the year 1968 for three crores of rupees was turned down. The plea put forward on behalf of the Government that its action was *bona fide* was held not to be an effective answer to a claim made by a citizen that his fundamental rights were infringed, by the action of the Government. It however appeared to this Court that during the pendency of the proceedings the entire year for which the contracts were given had expired and the persons to whom the contracts were given were not before the Court. In these circumstances counsel for the appellants agreed that

"it would be sufficient if it was directed that the tenders for purchase of Kendu leaves be invited by the Government in the next season from all persons interested in that trade."

Acting upon this suggestion the Court directed that the State Government would act in the interest of the general public and not of any class of traders so that in the next season the State might get the entire benefit of the monopoly in the trade in Kendu leaves and no disproportionate share thereof might be diverted to any private agency.

6. The petitioners' case in this series of petitions is as follows. They claim to be growers of Kendu leaves (which form the wrapper of tobacco smoked as bidi) in certain districts of the State of Orissa. They also claim to be traders and businessmen by vocation dealing primarily in such leaves. The petitioner in Petition No. 159 of 1969 claims to be a purchaser since 1965 for unit No. 60 in Bolangir Division and claims to have been working as such till the year 1968. He participated in the tender for appointment of purchasers for 1969 and had furnished solvency certificate worth Rs. 75,000/-, had deposited earnest money and complied with all the terms and conditions required under the provisions of the Act and the rules for making a valid tender. His complaint is that although his tender was the highest i.e. Rs. 213-50 per quintal, it was settled in favour of one A. K. Guha, a respondent, at the rate of Rs. 200/- only per quintal, a rate below that offered by the petitioner. His main grievance is that he was refused the appointment as purchaser as he was neither willing nor able to pay contribution at Rs. 10/- per bag which amounted approximately to Rupees 15,000/- for his area to the political fund of the Swatantra Party which happened to be at the relevant time the major partner in the Coalition Cabinet of Orissa. His case is that a suggestion was made to him for such contribution by a member of the legislative assembly of the Swatantra Party, Radha Mohan Mishra and also by Murari Prasad Mishra, Minister for Forest belonging to the same party and he was given to understand that his tender would not be considered if he was not prepared to make the payment. According to the petitioner the Government of Orissa tried to wriggle out of the findings of this Court in Rasbihari Panda's case, AIR 1969 SC 1081 (supra) by subterfuges in order to implement their policy of conferring the benefit of the trade on a chosen few for political and selfish financial ends of the party in power. It was alleged that as a preliminary to this they amended the Act and the rules framed thereunder. The main attack in the petition is directed against the addition of a provision to S. 3 (2) by which a registered grower might be permitted to transport his leaves from any place within the unit wherein such

leaves were grown to any other place outside the unit for the purpose of sale to the Government or any agent in respect of the unit authorised to purchase the same from him. Complaint was also made about the amendment of S. 8 (1) relating to the appointment of agents by the addition of the proviso:

"that the Government may for the purpose of purchase of leaves from the registered growers, appoint an additional agent in respect of one or more units."

Challenge was also made to several clauses in rule 5-B which provide for disposal of Kendu leaves. Those Clauses are (6), (7), (8), (9) and (16) which run thus:

"(6) At the time of opening of the tenders, the tenderer shall produce a certificate of solvency for at least one-fourth of the total annual purchase price according to the rate quoted by him, granted by a Revenue Officer not below the rank of a Subdivisional Officer if the tenderer has landed property at a place, wherein the Orissa Public Demands Recovery Act, 1962, is in force or a Bank guarantee for an equal amount.

(7) Government may accept or reject all or any of the tenders so received for any unit without assigning any reason therefor. The earnest money deposit shall, in case of an unsuccessful tenderer, be refunded to him and in case of a successful tenderer, it shall, subject to the provisions of sub-rule (11), be adjusted towards payment of security deposit required by sub-rule (12):

Provided that in rejecting a tender Government shall take into consideration the following among other grounds:—

- (1) Inadequacy of price offered
- (2) Speculative offers
- (3) Past conduct of parties in the trade
- (4) Transport facilities at the command of the offerer
- (5) Solvency of the offerer
- (6) Experience in the trade.

(8) If the tenders received for a unit are not considered acceptable, the Government may select as purchaser or purchasers for such unit or units any person or party of persons or parties on such terms and conditions as may be mutually agreed and such selection

need not be limited to persons who have submitted tenders for such unit or units. All the rules applicable to a successful tenderer shall apply *mutatis mutandis* to persons or parties selected as purchasers under this sub-rule.

(9) Notwithstanding anything contained in the foregoing provisions Government may sell or otherwise dispose of Kendu leaves collected by purchase or otherwise by Government or by their officers or agents in such manner as Government may deem proper.

(16) Notwithstanding anything contained in the foregoing provisions, the purchaser who is selected to purchase the Kendu leaves procured through the additional agent of any unit by the Government, shall on selection as such execute an agreement in form J."

Besides the above the petitioner also challenged the validity of sub-r. (3) of Rule 6 and the new R. 7 substituting the old rule. Rule 6 (3) enabled a registered grower who wished to transport his leaves outside the unit in which he was registered for sale to an additional agent, if any, of the said unit appointed under the proviso to S. 8 (1) on an application for a transport permit in Form D to be granted by the Divisional Forest Officer.

7. The above rule is really a complement to the proviso to S. 8 (1) in order to allow additional agents to function. Rule 7 in effect provided as follows. Under cl. (1) Government was empowered to appoint agents for a unit or units under sub-s. (1) of section 8 and to publish a notice in the official Gazette and in such other manner as was thought fit, giving terms and conditions of agency and inviting any applications for such agency, provided that no application need be invited for appointment of the additional agent referred to under the provisions of sub-s. (1) of S. 8 and such additional agent might be appointed directly by Government subject to such terms and conditions as might be decided upon, the additional agent having to execute an agreement in Form I. By cl. (2) the application for agency was to be in form E and was to be submitted to such authority by such date and in such manner as may be specified in the notice. Under cl. (3) every application was to be accompanied by a treasury challan showing a cash deposit of Rs. 500/- in the name of the Divisional Forest Officer

as advance security deposit. The applicant was also to furnish a certificate of solvency for a sum calculated at the rate of Rs. 10/- per bag for the stipulated number of bags for the respective unit, granted by a Revenue Officer not below the rank of a Subdivisional Officer if the agent had landed property at a place wherein the Orissa Public Demands Recovery Act, 1962 was in force, or a bank guarantee for an equivalent amount. Cl. (4) enabled the Government to accept or reject any application without assigning any reason therefor. Under cl. (5) Government was empowered in case it was not possible to select suitable agents for the purpose out of those who had applied for appointment as agents, to call for fresh applications, or if the time at their disposal was not sufficient, to appoint a person or party as agent who in the opinion of the Government was suitable for the work. Under cl. (6) an agent or party appointed in terms of cl. (5) had to execute an agreement in Form G within 15 days of the order of appointment failing which the appointment was liable to be cancelled. Under cl. (8) the agent was to maintain registers and accounts as might from time to time be directed by the Government which were to be submitted when called for. Under cl. (9) the agent was to furnish a list of persons employed by him within the unit and any such person so appointed if objected to was to be forthwith removed from employment by the agent. Under cl. (10) Government was at liberty to grant to the agent renewal of his agency for such period not exceeding one year at a time if it was found during the period of his agency that he had duly observed and performed the terms and conditions to the satisfaction of the Government.

8. The petitioner alleged that—

(a) As a result of the judgment in Akadasi Padhan's case, (1963) Suppl. 2 SCR 691 = (AIR 1963 SC 1047) (supra) the profit which could go to the agents was greatly reduced and they could have little interest in the scheme. The purchasers therefore set up their own men as agents and the pretended dichotomy between agents and purchasers was a mere eye-wash. The agents were not really agents of the Government. A table shown as annexure B to the petition purported to show how the agents were related to the purchasers.

(b) By virtue of the various amendments to the Act and Rules and by the conduct of the Government no outsider or no one other than the existing purchasers could and did submit tenders.

(c) The provisions relating to the solvency certificate and the provision for appointment of additional agents and additional purchasers at the discretion of the Government and the power to authorise registered growers to transport their leaves outside the unit in which they were grown were all aimed at confining the business in the hands of a chosen few completely ousting others.

(d) No principle was followed in accepting tenders. The claims of highest bidders were ignored to accommodate favourites of authorities. Appointments were in some cases made of persons whose tenders were lower than the highest ones offered. In some cases areas were settled with persons who had never submitted any tender for the area and in others settlement was made with a non-tenderer at a lower price.

9. Before us, learned counsel for the petitioners limited himself to the following objections:

1. Agents could not be allowed to be nominees of purchasers. They ought to be independent contractors.

2. The provision for appointment of additional agents under the proviso to Section 8 and Rule 7 (1) were unreasonable and arbitrary.

3. The appointment of purchasers who were not the highest tenderers was also arbitrary and mala fide. Rule 5-B (7) which allowed the Government to accept or reject all or any of the tenders without assigning any reason therefor was gravely objectionable in that it permitted the Government to make discrimination in favour of men of their choice and allowed the extraction of money for party funds. The demand for production from tenderers of a certificate of solvency for at least 1/4th of the total annual purchase price from a sub-divisional Officer if the tenderer had landed property in Orissa or a bank guarantee in the case of others was also discriminatory. It was said that the power to appoint additional agents and additional purchasers after the auction had been held was for the purpose of Government benefiting anyone it liked to the detriment of the interest of the general public and the interest of the State.

10. Our attention was drawn to the special forms which had been incorporated in the rules and the differences between them, as for instance, forms G and H which applied in the case of an agent and purchaser and forms I and J which applied to the cases of additional agents and additional purchasers.

11. It was submitted that the scheme as envisaged after the amendment of the Act in 1969 was not really in aid of establishing a State monopoly and it left loopholes for patronage by the party in power in Government of their own favourites by the extraction of money for party funds and otherwise. Counsel further submitted that agents if they were nominees or relations of purchasers, were really not bona fide agents of the Government. He drew our attention to the activities of the agent before the leaves were sold to show that a good deal of money had to be invested and quite a number of operations performed before the leaves could be put up for auction and it was submitted that if they were the nominees of the purchasers they really acted in the latter's interest and not that of the Government. Under the terms of the agreement in Form G the agents had to open depots and storage godowns at such centres within the unit as directed by the Subdivisional Officer and he could transport his leaves from the collection depot to the storage godowns. They were also prevented except with the permission of the Divisional Forest Officer from moving the Kendu leaves to places outside the unit.

12. We are not satisfied that there can be any legitimate grievance against the amendment of the Act and the promulgation of new rules set forth above. They all appear to be necessary to enable the Government to control the business in Kendu leaves effectively. Nothing was shown to us as to how any of these provisions in form G for the appointment of agents and form I for the appointment of additional agents worked against the interest of the Government working a monopoly business. The provision for appointment of additional agents and additional purchasers are not per se bad. The exigency of business may require such appointments. Further we find ourselves unable to appreciate the points sought to be

made on the basis that some of the agents were nominees or relations of the purchasers. We do not see how this can affect the scheme of State monopoly. An agent had to purchase Kendu leaves from growers at prices fixed by the Government under Section 4 (1) and he had to deliver processed Kendu leaves to such persons as were to be directed by the Forest Officers. He was to be entitled to various charges including—

(1) a fixed sum per bag of processed leaves towards costs incurred for collecting the leaves, storage, transport, packing and other charges, and

(2) remuneration at the rate fixed for each bag of processed leaves which he secured by selection or purchase.

He had also to pay collection charges to persons for collecting the leaves from Government forests and lands as may be specified in writing by the Government. It may be that on the actual rates fixed by Government the agents could not secure much profit. It is also possible that purchasers would rather deal with agents who carried out the processing and storing business in a manner which was conducive to production of good finished products than with strangers whose business methods were not known to them. But by itself such a course of dealing could not affect the interest of a Government running the monopoly business.

13. In the counter affidavits filed herein there is a denial by the Minister concerned and by Radha Mohan Mishra that any suggestion was ever made to any of the petitioners that they would have to pay Rs. 10/- for each bag if they wanted their tenders accepted. On the face of this we are not in a position to hold that the grievance of the petitioners as regards choice of persons as purchasers who were willing to contribute to party funds has been proved.

14. With regard to the appointment of additional agents, the counter affidavits show that only the State Forest Corporation had been appointed such an agent. It goes without saying that the appointment of such a corporation as an additional agent can in no way detract from Government monopoly. The counter affidavits also show that no additional purchasers had been appointed.

15. With regard to the grievance that in some cases the bids of persons making the highest tenders were not accepted, the facts are that persons who had made lower bids were asked to raise their bids to the highest offered before the same were accepted. Thus there was no loss to Government and merely because the Government preferred one tenderer to another no complaint can be entertained. Government certainly has a right to enter into a contract with a person well known to it and specially one who has faithfully performed his contracts in the past in preference to an undesirable or unsuitable or untried person. Moreover, Government is not bound to accept the highest tender but may accept a lower one in case it thinks that the person offering the lower tender is on an overall consideration to be preferred to the higher tenderer.

16. We may in this connection refer to the manner in which the contracts current at the time of the filing of the petition had been settled. The counter affidavit on behalf of the State of Orissa shows that forest and other lands, producing Kendu leaves were divided into 180 units for the years 1969, 1970 and 1971. Three units out of these were reserved for the Orissa Forest Corporation; the remaining 177 units for the public tender. Out of these 167 units were settled at the highest prices offered. 139 out of 167 were settled in favour of persons who actually made the highest tenders. 29 units were settled at the highest prices offered but in favour of other tenderers on considerations such as past experience, clean past records, etc. One unit was settled by negotiation at a price higher than the highest tender received. In the case of 5 units persons who had offered inflated and speculative prices did not turn up and the units were settled with the next best tenderers. In the case of one unit on the highest tenderer withdrawing his tender it was settled in favour of another tenderer who was to pay the next highest price. In the case of another unit the highest tenderer who had been a defaulter in the previous year had his tender rejected and the unit was settled in favour of the tenderer who had offered the next highest price. In the case of one unit on the highest tenderer failing to furnish a bank guarantee it was settled in

favour of the next highest tenderer. In the case of still another unit the claims of the sole tenderer who had filed a forged bank guarantee was not considered and the unit was settled by negotiation at the highest available price. Lastly in the case of six units no tenders had been received and these were settled by negotiation at the best available prices. The five writ petitions concerned only seven units in respect of which tenders of the petitioners had not been accepted.

17. In our view, the counter affidavit showing the manner in which the units were disposed of completely demolishes suggestions of fraudulent preference of one tenderer to another. As the petitioners have not been able to satisfy us that the amendments effected in 1969 either in the Act or in the rules are against the exercise of a monopoly in the business of Kendu leaves by the Government of Orissa and as they have further failed to make out any case of arbitrary or mala fide action on the part of the State authorities, the petitions must be dismissed with costs.

Petitions dismissed.

AIR 1971 SUPREME COURT 740
(V 58 C 142)

(From Allahabad: ILR (1967) 1 All 707)

J. C. SHAH, C. J. AND
K. S. HEGDE, J.

Hakam Singh, Appellant v. M/s. Gammon (India) Ltd., Respondent.

Civil Appeal No. 646 of 1967, D/-8-1-1971.

(A) Civil P. C. (1908), Section 20 — Parties cannot by agreement confer jurisdiction on Court not possessed by it under the Code — But agreement that one of the Courts having such jurisdiction alone shall try dispute is not contrary to public policy and does not contravene Section 28, Contract Act. (X Ref: Contract Act, Section 28). (Para 3)

(B) Civil P. C. (1908), Section 20, Expl. II — Word "Corporation" in Expl. II includes not only statutory Corporation but also company registered under Companies Act. (Para 5)

M/s. J. P. Goyal and G. S. Chatterjee, Advocates, for Appellant; Mr. V. S. Desai, Sr. Advocate, (Mr.

BO/BO/A115/71/GNB/C

B. R. Agarwala, Advocate of M/s. Gagrati and Co., with him), for Respondent.

The following Judgment of the Court was delivered by

SHAH, C. J.: — On October 5, 1960 the appellant agreed to do certain construction work for the respondent on the terms and conditions of a "written tender". Clauses 12 & 13 of the tender were:

"12. In the event of any dispute arising out of this sub-contract, the parties hereto agree that the matter shall be referred to arbitration by two Arbitrators under the Arbitration Act of 1940 and such amendments thereto as may be enacted thereafter.

13. Notwithstanding the place where the work under this contract is to be executed, it is mutually understood and agreed by and between the parties hereto that this contract shall be deemed to have been entered into by the parties concerned in the City of Bombay and the Court of law in the City of Bombay alone shall have jurisdiction to adjudicate thereon."

Disputes arose between the parties and the appellant submitted a petition to the Court of the Subordinate Judge at Varanasi for an order under Section 20 of the Indian Arbitration Act 10 of 1940 that the agreement be filed and an order of reference be made to an Arbitrator or Arbitrators appointed by the Court to settle the dispute between the parties in respect of the construction works done by him. The respondent contended that the Civil Courts in Bombay alone had because of the terms contained in Clause 13 jurisdiction to entertain the petition. The Trial Judge rejected that contention observing that the condition in Clause 13 that "the contract shall be deemed to have been entered into by the parties concerned in the City of Bombay has no meaning unless the contract is actually entered into in the city of Bombay", and that there was no evidence to establish that it was entered into in the city of Bombay. The Trial Judge concluded that the entire cause of action had arisen at Varanasi and the parties could not by agreement confer jurisdiction on the Courts at Bombay, which they did not otherwise possess.

2. The High Court of Allahabad in exercise of its revisional jurisdiction set aside the order passed by the Subordinate Judge and declared

that the Courts in Bombay had jurisdiction under the general law to entertain the petition, and by virtue of the covenant in the agreement the second branch of Clause 13 was applicable and binding between the parties and since the parties had agreed that the Courts in Bombay alone had jurisdiction to adjudicate upon the contract, the petition to file the arbitration agreement could not be entertained by the Courts at Varanasi. Against the order of the High Court directing that the petition be returned for presentation to the proper Court, the appellant has appealed to this Court with special leave.

3. Section 41 of the Arbitration Act, 1940 provides in so far as it is relevant:

"Subject to the provisions of this Act and of Rules made thereunder:

(a) the provisions of the Code of Civil Procedure, 1908, shall apply to all proceedings before the court, and to all appeals under this Act".

The Code of Civil Procedure in its entirety applies to proceedings under the Arbitration Act. The jurisdiction of the Courts under the Arbitration Act to entertain a proceeding for filing an award is accordingly governed by the provisions of the Code of Civil Procedure. By Cl. 13 of the agreement it was expressly stipulated between the parties that the contract shall be deemed to have been entered into by the parties concerned in the City of Bombay. In any event the respondents have their principal office in Bombay and they were liable in respect of a cause of action arising under the terms of the tender to be sued in the Courts at Bombay. It is not open to the parties by agreement to confer by their agreement jurisdiction on a Court which it does not possess under the Code. But where two courts or more have under the Code of Civil Procedure jurisdiction to try a suit or proceeding an agreement between the parties that the dispute between them shall be tried in one of such Courts is not contrary to public policy. Such an agreement does not contravene S. 28 of the Contract Act.

4. Counsel for the appellant contended that merely because the respondent carried on business in Bombay the Courts at Bombay were not invested with jurisdiction to entertain any suit or a petition for filing an arbitra-

tion agreement. Section 20 of the Code of Civil Procedure provides:

"Subject to the limitations aforesaid, every suit shall be instituted in a Court within the local limits of whose jurisdiction—

(a) the defendant, or each of the defendants where there are more than one, at the time of the commencement of the suit, actually and voluntarily resides, or carries on business, or personally works for gain; or

(b) x x x x

(c) the cause of action, wholly or in part, arises.

* * *

"Explanation II. — A corporation shall be deemed to carry on business at its sole or principal office in India, or, in respect of any cause of action arising at any place where it has also a subordinate office, at such place."

Plainly by the terms of S. 20 (a) read with Explanation II, the respondent Company was liable to be sued at Bombay where it had its principal place of business.

5. The argument of counsel for the appellant that the expression "corporation" in Explanation II includes only a statutory corporation and not a company registered under the Indian Companies Act is, in our judgment, without substance. The Code of Civil Procedure uses the expression "corporation" as meaning a legal person and includes a company registered under the Indian Companies Act. Order 29 of the Code of Civil Procedure deals with suits by or against a corporation and there is nothing in the Code of Civil Procedure that a corporation referred to under S. 20 means only a statutory corporation and not a company registered under the Indian Companies Act.

6. Since an application for filing an award in respect of a dispute arising out of the terms of the agreement could be filed in the Courts in the City of Bombay, both because of the terms of Cl. 13 of the agreement and because the respondents had their Head Office where they carry on business at Bombay, the agreement between the parties that the Courts in Bombay alone shall have jurisdiction to try the proceeding relating to arbitration was binding between them.

7. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 742
(V 58 C 143)

(From Punjab:)*

**J C. SHAH, C. J. AND K. S.
HEGDE, J.**

Mahabir Prasad, Appellant v. Jage Ram and others, Respondents.

Civil Appeal No. 609 of 1967, D/- 6-1-1971.

(A) Civil P. C. (1908), O. 41 R. 4; O. 22, R. 4 read with O. 22, R. 11 — Fact that person jointly interested in decree has been made a party respondent and on his death his heirs have not been brought on record does not per se divest the appellate court of its jurisdiction to pass decree in appeal under O. 41, R. 4 — Ex. F. A. 192-C of 1961, D/- 3-3-1965 (Punj), Reversed; AIR 1963 SC 1901 and AIR 1970 SC 108, Distinguished. (Para 5)

Jurisdiction of appellate court under O. 41, R. 4, C. P. C. is open when other persons who were parties to the proceeding before Subordinate Court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to appeal or are impleaded as respondents. (Para 5)

(B) Civil P. C. (1908), O. 22, R. 4 read with O. 22 R. 11 — When a party respondent in an appeal dies and one of his legal representatives is already on record in another capacity the appeal does not abate even though no application is made to bring them on record. (Para 6)

What is necessary is that such legal representative of deceased should file an application stating that he is also on record as an heir and legal representative of the deceased.

(Para 6)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 108 (V 57)=

(1970) 1 SCR 296, Ratan Lal Shah v. Firm Lalmandas Chhad-
amma Lal

(1963) AIR 1963 SC 1901 (V 50)=

(1964) 3 SCR 549, Rameshwar Prasad v. Shyam Beharilal Jagannath

Mr. S. T. Desai, Sr. Advocate, (Mr. A. D. Mathur, Advocate, with him), for Appellant; Dr. V. D. Mahajan, Advocate, for Respondent No. 3.

*(Ex. First Appeal No. 192-C of 1961, D/- 3-3-1965 — Punj at Delhi.)

AO/BO/A109/71/SSG/C

The following Judgment of the Court was delivered by

SHAH, C. J.— Jage Ram and two others—hereinafter collectively called the defendants—were lessees of certain property belonging to Mahabir Prasad, his mother Gunwanti Devi and his wife Saroj Devi (collectively referred to hereafter as 'the plaintiffs'). The plaintiffs commenced an action in the Court of the Subordinate Judge, First Class, Delhi, for a decree for Rs. 61,750 being the amount of rent due by 'the defendants'. The Subordinate Judge, Delhi decreed the suit. Execution of the decree was resisted by the defendants on the plea inter alia, that the decree was inexecutable because of the provisions of the Delhi Land Reforms Act, 1954. The Subordinate Judge upheld the contention and dismissed the application for execution. Mahabir Prasad alone appealed against that order and impleaded Gunwanti Devi and Saroj Devi as party-respondents. Saroj Devi died in November, 1962 and Mahabir Prasad applied that the name of Saroj Devi be struck off from the array of respondents. The High Court made an order granting the application "subject to all just exceptions".

3. The High Court dismissed the appeal holding that because the heirs and legal representatives of Saroj Devi were not brought on the record within the period of limitation prescribed by the Limitation Act the appeal abated in its entirety. Against that order, this appeal is preferred with certificate granted by the High Court.

4. The decree in favour of Mahabir Prasad, Gunwanti Devi and Saroj Devi was a joint decree. Order 41, Rule 4 Code of Civil Procedure provides:

"Where there are more plaintiffs or more defendants than one in a suit, and the decree appealed from proceeds on any ground common to all the plaintiffs, or to all the defendants, any one of the plaintiffs or of the defendants may appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be".

Order 41, Rule 4, Code of Civil Procedure invests the appellate Court with power to reverse or vary the decree in favour of all the plaintiffs or defendants even though they had not join-

ed in the appeal if the decree proceeds upon a ground common to all the plaintiffs or defendants. In the view of the High Court the power of the Appellate Court under Order 41, R. 4 Code of Civil Procedure may be exercised only in those cases where there is a decree which proceeds upon a ground common to more persons than one and the appeal is filed by one or more of them but not all, and other persons who are interested in the result of the appeal are not made parties to the appeal either as appellants or respondents. Where, such other persons are made parties to the appeal and one of them dies and his heirs are not brought on the record within the period of limitation prescribed by the Limitation Act, the appeal abates in its entirety. The High Court observed:

".....Appellant Mahabir Prasad has impleaded the remaining two decree-holders as respondents to the appeal. The execution application of all the decree-holders has been dismissed on a common ground that the decree which is sought to be executed has become null and void. The appeal abates so far as decree-holder Sarojni respondent is concerned because her legal representatives have not been brought on the record within time. The order of the executing Court has become final so far as this deceased respondent is concerned. It follows that that order cannot be modified or varied in favour of appellant Mahabir Prasad and the second surviving decree-holder respondent for obviously that may result in inconsistent orders with regard to the same decree. The order of the executing Court in so far as Sarojni deceased respondent is concerned has become final and if the same order is modified or interfered with so far as the other two decree-holders, namely, appellant Mahabir Prasad and respondent Gunwanti Devi are concerned, the apparent result will be two inconsistent orders with regard to the same decree which the decree-holders seeks to execute. So the appeal of appellant Mahabir Prasad also abates".

In support of their view the High Court relied upon the Judgment of this Court in Rameshwar Prasad v. Shyam Beharilal Jagannath, (1964) 3 SCR 549 = (AIR 1963 SC 1901). That was a case in which nine persons instituted a suit for a decree in ejectment and for recovery of rent against

two defendants and obtained a decree. In appeal the District Judge set aside the decree, against one of the defendants. The plaintiffs filed a second appeal in the High Court and when the appeal was pending one of the plaintiffs (appellants in the High Court) died. No application for bringing his legal representatives on the record was made within the prescribed time. The respondents objected that the entire appeal had abated because the interest of the surviving appellants and of the deceased appellant was joint and indivisible and that in the event of the success of the appeal there would be two inconsistent and contradictory decrees. The surviving appellants claimed that the appeal was maintainable on the ground that without impleading the plaintiff who had died they could have appealed against the entire decree in view of the provisions of Order 41, Rule 4 of the Code of Civil Procedure, and on that account they were competent to continue the appeal, even after the death of one of the joint decree-holders and abatement of the appeal so far as he was concerned, and the Court had power to hear the appeal and to reverse or vary the whole decree. This Court held that the provisions of Order 41, Rule 4 of the Code of Civil Procedure were not applicable, for the second appeal in the High Court was filed by all the plaintiffs jointly, and the surviving appellants could not be said to have filed the appeal as representing the deceased appellant. The Court further held that the appellate Court had no power to proceed to hear the appeal and to reverse or vary the decree in favour of all the plaintiffs or defendants under Order 41, Rule 4 of the Code of Civil Procedure, when the decree proceeded on a ground common to all the plaintiffs, or defendants, if all the plaintiffs or the defendants appealed from the decree and any of them died, and the appeal abated in so far as he was concerned under Order 22, Rule 3 of the Code of Civil Procedure. Rameshwar Prasad's case, (1964) 3 SCR 549 = (AIR 1963 SC 1901) is obviously distinguishable from the present case. In Rameshwar Prasad's case, (1964) 3 SCR 549 = (AIR 1963 SC 1901) all the plaintiffs whose suit had been dismissed had filed an appeal and thereafter one of them died and his heirs were not brought on the record. In the present case there is an order against the

decree-holders but all the decree-holders did not appeal: only one of them appealed and other two were joined as party-respondents.

5. In a later judgment of this Court in *Ratan Lal Shah v. Firm Lalmandas Chhadammalal*, (1970) 1 SCR 296 = (AIR 1970 SC 108) the plaintiffs obtained a joint decree against two persons Ratan Lal and Mohan Singh. Against the decree Ratan Lal alone appealed to the High Court of Allahabad. Mohan Singh was impleaded as a party-respondent to the appeal. Notice of appeal sent to Mohan Singh was returned unserved, and no steps were taken to serve him with notice of the appeal. The High Court dismissed the appeal holding that there was a joint decree against Ratan Lal and Mohan Singh in a suit founded on a joint cause of action and the decree against Mohan Singh had become final. The appellant could not, on that account claim to be heard in his appeal, if he was heard and his claim was upheld. The High Court observed that there would be two conflicting decisions between the same parties and in the same suit based on the same cause of action. This Court set aside the judgment of the High Court observing that even though Mohan Singh was not served with notice of appeal, the appeal filed by Ratan Lal was maintainable, in view of the provisions of Order 41 Rule 4 Code of Civil Procedure. In *Ratan Lal Shah's* case, (1970) 1 SCR 296 = (AIR 1970 SC 108) this Court allowed the appeal to be prosecuted, even though one of the joint decree-holders impleaded as a party-respondent had not been served with the notice of appeal. In the present case one of the respondents had died and his heirs have not been brought on the record. No distinction in principle may be made between *Ratan Lal Shah's* case (1970) 1 SCR 296 = (AIR 1970 SC 108) and the present case. Competence of the appellate court to pass a decree appropriate to the nature of the dispute in an appeal filed by one of several persons against whom a decree is made on a ground which is common to him and others is not lost merely because of the person who was jointly interested in the claim has been made a party-respondent and on his death his heirs have not been brought on the record. Power of the appellate court under Order 41 Rule 4 to vary or modify the

decree of a Subordinate Court arises when one of the persons out of many against whom a decree or an order had been made on a ground which was common to him and others has appealed. That power may be exercised when other persons who were parties to the proceeding before the subordinate court and against whom a decree proceeded on a ground which was common to the appellant and to those other persons are either not impleaded as parties to the appeal or are impleaded as respondents. The view taken by the High Court cannot therefore be sustained.

6. Even on the alternative ground that Mahabir Prasad being one of the heirs of Saroj Devi there can be no abatement merely because no formal application for showing Mahabir Prasad as an heir and legal representative of Saroj Devi was made. Where in a proceeding a party dies and one of the legal representatives is already on the record in another capacity, it is only necessary that he should be described by an appropriate application made in that behalf that he is also on the record, as an heir and legal representative. Even if there are other heirs and legal representatives and no application for impleading them is made within the period of limitation prescribed by the Limitation Act the proceeding will not abate. On that ground also the order passed by the High Court cannot be sustained.

7. The appeal is allowed and the proceeding remanded to the High Court to be dealt with and disposed of according to law. Defendants will pay the costs of this appeal. Costs in the High Court will be the costs in the appeal.

Appeal allowed.

AIR 1971 SUPREME COURT 744
(V 58 C 144)

(From: Madhya Pradesh)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Jiwan Nath Zutshi and others, Appellants v. The State of Madhya Pradesh, Respondent.

Civil Appeal No. 526 of 1967, D/-5-1-1971.

*(Second Appeal No. 175 of 1963, D/-17-8-1966 — Madhya Pra. — Indore Bench.)

AO/BO/A98/71/MVJ/P

Civil P. C. (1908), Section 9 — Claim made on basis of grant by erst-while ruler is not enforceable when it has not been accepted by the successor Government after merger. (X- Ref. Act of State). AIR 1964 SC 1043, Followed. (Para 6)

Cases Referred: Chronological Paras (1964) AIR 1964 SC 1043 (V 51)

= (1964) 6 SCR 461, State of Gujarat v. Vora Fiddali 6

Mr. D. P. Uniyal, Sr. Advocate, (Mr. K. P. Gupta, Advocate, with him), for Appellants; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: — This is an appeal by special leave. It is brought by the legal representatives of one Dewan Bahadur Brij Mohan Zutshi who was the Dewan of Ratlam State from 1912 to 1929. The appellants sued the State of Madhya Pradesh for a declaration of their title to the suit lands. Their suit was decreed by the trial Court but in appeal the same was dismissed and the Judgment of the first appellate Court was affirmed by the High Court.

2. The appellants' case is that the Maharaja of Ratlam announced the grant of suit lands to Zutshi in appreciation of the services rendered by him but no written order was issued. After the death of the previous Maharaja, the succeeding Maharaja after making the necessary enquiries and going through the records ordered on May, 10, 1948:

"made inquiries felt that for all practical purposes a grant had been made to the Dewan Bahadur and what was left was the mere formality of a patta which had evidently been held up until certain construction work was complete".

3. But before he made this order he had already signed the merger agreement. Curiously enough on May 11, 1948, a day after he made the order earlier referred to, he passed the following order:

"My attention has been drawn to the fact that some of the orders which I may have passed after the signing of the covenant on the 22nd April, 1948 might be embarrassing to the successor Government and that they may not feel justified in honouring them. I have therefore authorised Mr. Sharma "(his Dewan)" to review all such orders and to refer them to the

Regional Commissioner for approval. Pending such approval all such orders will be held up to enable Mr. Sharma to scrutinize them".

4. In view of this order the order made on May 10, 1948 approving the alleged grant in favour of Zutshi was held up. The Regional Commissioner did not accord his approval for the grant. Mr. Zutshi died in 1950. The suit from which this appeal arises was instituted on January 25, 1960.

5. The main evidence relied on in favour of the alleged grant is the order made by the Maharaja on May 10, 1948. The oral evidence adduced in support of the alleged grant has not been accepted either by the first appellate Court or by the High Court. Not much importance can be attached to the order made by the Maharaja on May 10, 1948 in view of his order of May 11, 1948.

6. Even if we assume that the Maharaja had made a grant on May 10, 1948, the same having not been accepted by the successor Government, the claim made is unenforceable in law — see State of Gujarat v. Vora Fiddali Badruddin Mithibarwala, (1964) 6 SCR 461 = (AIR 1964 SC 1043).

7. Admittedly Zutshi did not come into possession of the suit lands in pursuance of the alleged grant in 1924. The evidence relating to that grant has not been accepted by the first appellate Court as well as by the High Court.

8. In the result this appeal fails and the same is dismissed. But in the circumstances of the case we make no order as to costs in this appeal.

Appeal dismissed.

**AIR 1971 SUPREME COURT 745
(V 58 C 145)**

(From Punjab and Haryana)*

**J. C. SHAH C. J., K. S. HEGDE AND
A. N. GROVER, JJ.**

**Mst. Karmi, Appellant v. Amru
and others, Respondents.**

**Civil Appeal No. 656 of 1967, D/-
5-1-1971.**

*(Regular Second Appeal No. 208 of
1965, D/- 15-12-1966 — Punj. & Har.)

AO/BO/A102/71/CWM/P

(A) Constitution of India, Art. 136 — Concurrent finding as to genuineness of will cannot be questioned in special leave appeal. (Para 2)

(B) Hindu Succession Act (1956), S. 14 (2) — A widow who succeeds to properties of her deceased husband on the strength of will executed by the husband in her favour cannot claim any rights in the properties other than those conferred by the will. (Para 2)

Thus where only life estate is conferred on her under the will, she cannot claim to have become absolute owner under the Act. Her granddaughter cannot, therefore claim any title to the properties on the basis of will executed in her favour by the widow. (Para 2)

Mr. K. L. Gosain, Sr. Advocate, (Mr. Naunit Lal, Advocate, with him), for Appellant; Mr. S. P. Sinha, Sr. Advocate, (Mr. M. I. Khawaja, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.: One Jaimal was the owner of the suit properties. He died in 1938 leaving behind him his wife Nihali. His son Ditta had predeceased him. The appellant is the daughter of Ditta. The respondents are collaterals of Jaimal. The family genealogy is found at p. 125 of the paper-book. During the lifetime of Jaimal, he appears to have executed two wills. The first will was executed on December 18, 1935 and the second will on November 13, 1937. Both of them are registered wills. By the second will he revoked the first will. By that will he directed that on his death, his entire estate will devolve on his widow, Nihali during her life and thereafter the same would devolve on Bhagtu and Amru, his collaterals. On the death of Jaimal, the properties were mutated in the name of Nihali. Nihali died sometime in 1960 or 1961. On her death Bhagtu and Amru claimed the properties on the basis of the will of November 13, 1937 but the appellant claimed the properties as the sole legatee from Nihali under her will of April 25, 1958. This dispute led to the present proceedings.

2. The respondents sued the appellant for the possession of the suit properties on the strength of the will dated November 13, 1937. The appellant denied the genuineness as well as the validity of that will. The sole question for decision was whether

Nihali got the properties on the strength of the will dated November 13, 1937 or in her own right as the heir to her husband. The trial Court dismissed the suit holding that Nihali got possession of the properties not on the strength of the will but as the widow of Jaimal. The trial Judge thought that the will executed by Jaimal in 1937 had been revoked as it was not invoked after the death of Jaimal for a long period. In appeal the Additional District Judge, set aside the order of the trial Court and decreed the plaintiff's claim holding that the will executed by Jaimal was true and genuine and that it was the last will executed by him. The High Court has affirmed that decision. The concurrent finding of the 1st Appellate Court as well as the High Court that the will executed by Jaimal on November 13, 1937, is genuine is a finding of fact and the same cannot be assailed in this Court. Nihali having succeeded to the properties of Jaimal on the strength of that will cannot claim any rights in those properties over and above that given to her under that will. The life estate given to her under the will cannot become an absolute estate under the provisions of the Hindu Succession Act. Therefore the appellant cannot claim any title to the suit properties on the basis of the will executed by Nihali in her favour.

3. In the result this appeal fails and the same is dismissed. But in the circumstances of the case we make no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 746 (V 58 C 146)

(From: Patna)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Rukmanand Bairoliya, Appellant
v. The State of Bihar and others,
Respondents.

Civil Appeal No. 323 of 1967, D/-
5-1-1971.

Constitution of India, Arts. 226,
227 — Certiorari — Finding of the
Revenue authorities based on pure
assumptions and conjectures and on

*(Misc. Judicial Case No. 494 of 1963,
D/- 10-2-1966 — Pat.)

AO/BO/A104/71/GDR/P

no evidence whatsoever should be quashed. (X-Ref:— Bihar Land Reforms Act (30 of 1950), S. 4 (b)).

(Para 3)

M/s. Yogeshwar Prasad and M. V. Goswami, Advocates; for Appellant; Mr. D. Goburdhun, Advocate, for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by certificate from a judgment of the Patna High Court by which a petition under Articles 226 and 227 of the Constitution filed by the appellant was dismissed.

2. The disputed land belonged originally to one Anwar Ali Khan. His heirs gifted it to Mustaque Ali Khan. It was recorded as Ghairmazrua orchard. Mustaque Ali Khan settled this land and some other land with Mohini Devi, the mother of the appellant, by a registered patta dated June 19, 1946 on annual rental of Rs. 236/8/6 for the construction of houses thereon which could be rented out. The estate of Mustaque Ali Khan vested in the State of Bihar under the Bihar Land Reforms Act, 1950, hereinafter called the "Act". Mohini Devi created a trust in the name of her deceased husband of which the appellant was the Secretary. The disputed land continued to remain in his possession in that capacity. In 1956-57 proceedings were started for the acquisition of the disputed land for extension of the Darbhanga Medical College. An amount of Rs. 12,689/2/- was assessed as compensation for the property which had been acquired and an award was made in the joint names of the appellant and the State of Bihar. Because the appellant objected to the inclusion of the State in the award he sought a reference under S. 30 of the Land Acquisition Act. That reference was pending in the court of the District Judge, Darbhanga when on April 16, 1960 proceedings under S. 4 (b) of the Act were started in respect of the disputed land. On April 25, 1961 the Land Reforms Deputy Collector made an order that the settlement of the disputed land with Mohini Devi in 1946 by Mustaque Ali Khan was invalid and that it should be annulled. This order was confirmed by the Collector of Darbhanga on May 25, 1962. The appellant moved the Commissioner for setting aside of the aforesaid orders but without any success. He then fil-

ed a petition under Arts. 226 and 227 of the Constitution challenging those orders. The High Court referred to the following part of the order of the Commissioner:

"The circumstances of the settlement and certain features of the settlement itself may disclose the intention of the party. The land has been settled at a very low rate of Rs. 3/- per katha. But the amount of compensation has been calculated at Rs. 12,689/2/-. It is, therefore, obvious that the rate mentioned in the Patta did not disclose the real value of a plot of land situated in an important part of the city close to the Darbhanga Medical College Hospital. By acquiring such a valuable piece of land on a low rate, the intention of Smt. Mohini Devi was obviously to appropriate the profits which would have accrued to the State on vesting of the Zamindari. Had there been any intention of using this land for the construction of a house, the construction would have been taken in hand after obtaining the settlement. This was not done. The expansion of the Darbhanga Medical College Hospital was well known, and the possibility of obtaining advantage out of that expansion obviously attracted the purchaser." It was contended on behalf of the appellant before the High Court that the revenue authorities had not referred to any specific evidence in respect of their conclusion on the question of loss to the State being the object of settlement. The High Court, however, was of the view that this contention was not well founded. This is what the High Court said:

"Here the finding is based on circumstantial evidence as the order of the Commissioner, which I have extracted above, clearly shows. The revenue authorities were fully entitled to take into consideration the circumstances and features of the settlement for the purpose of determining the object with which it had been made. Besides, they also took into account the potential and the present value of the land which had been settled at a rate which, in the circumstances, was a very low rate, having regard to the situation of the land. I am, therefore, unable to accept the contention of the learned counsel that there was no material before the revenue authorities to come to the

conclusion at which they have reached."

The High Court, however, agreed that if the finding of the revenue authorities was based on no material whatsoever the position would be different.

3. Section 4 of the Act relates to the consequences of the vesting of an estate or tenure in the State. Under clause (b) of that section the Collector has been empowered to make inquiries in respect of any transfer including the settlement or lease of any land comprised in such estate or tenure or the transfer of any kind of interest in any building etc. and if he is satisfied that such transfer was made at any time after the first of January 1946, with the object of defeating any provisions of the Act or causing loss to the State or obtaining higher compensation thereunder, the Collector may, after giving reasonable notice, annul such transfer and dispossess the person claiming under it. The order of the Deputy Collector as well as the Commissioner says that both the authorities were considerably influenced by the rental of Rs. 3/- per katha at which the settlement had been made. The High Court also was of the view that this fact weighed with the authorities among other considerations in coming to the conclusion that the settlement had been made with a view to causing considerable loss to the State Government. In our opinion neither the revenue authorities nor the High Court took into consideration the absence of any proof having been adduced with regard to the actual rate of settlement prevailing at the time when the settlement of the disputed land was made. We are altogether unable to understand how the rate of Rs. 3/- per katha was considered to be very low when no material had been produced to show what the current rate of rental prevailing at the relevant time was of land similar to the disputed land. Therefore one of the principal matters which weighed with the authorities and the High Court was based on pure assumptions and conjectures and on no evidence whatsoever. On this ground alone the impugned orders should have been quashed.

4. The appeal is allowed and the impugned orders are hereby set aside. The appellant shall be entitled to his costs in this court.

Appeal allowed.

**AIR 1971 SUPREME COURT 748
(V 58 C 147)**

(From : Punjab)*

**J. C. SHAH, C. J., K. S. HEGDE AND
A. N. GROVER, JJ.**

Jaswant Singh Saluja and another, Appellants v. Chief Settlement Commissioner, New Delhi and another, Respondents.

Civil Appeal No. 606 of 1967, D/- 5-1-1971.

Displaced Persons (Claims) Supplementary Act (1954), S. 5 — **Suo motu powers of revision cannot be exercised without giving reasonable opportunity to show cause — (X-Ref: Natural justice) — L. P. A. No. 35-D of 1956, dated 27-7-1959 (Punj), Reversed. (Para 3)**

Claim regarding which valuation has become final under the Displaced Persons (Claims) Act (1950) cannot be revised in exercise of suo motu powers under S. 5 unless the grounds and materials on which the valuation is sought to be revised are informed to the claimant. (Para 3)

M/s. T. S. Arora and Ranjit Singh Rathore, Advocates, for Appellants; Mr B. D. Sharma, Advocate for Mr. S. P. Nayar, Advocate, for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.: The appellants and their deceased father S. Bhagat Singh Saluja were originally residents of Wazirabad District which is now in Pakistan. At about the time of partition of the country, they migrated to India. In pursuance of a notification under S. 5 of the Displaced Persons (Claims) Act, 1950 they filed a claim for Rs. 1,63,500/- in respect of 10 items of immovable property left by them in Pakistan, out of which 9 were in the town of Wazirabad and one was in the village Mangat Tehsil. Their claim was duly verified and accepted by the Claims Officer. Thereafter on February 15, 1955, the appellants received from respondent No. 2 a notice requiring them to appear before him on February 25, 1955 in connection with the proposed revision of their claim under the suo motu powers given under S. 5 of the Displaced Persons (Claims) Supplementary Act, 1954. In the notice the appellants were not in-

* (L. P. A. No. 35-D of 1956, D/- 27-7-1959 — Punj at Delhi.)

AO/BO/A100/71/DVT/M

formed the grounds on which the revision was sought to be made. When the 1st appellant appeared before Respondent No. 2 on February 25, 1955, he examined him and recorded his statement and thereafter on February 26, 1955 — the very next day — respondent No. 1 served an order on the appellants reducing the value of their property and fixing the same at Rupees 58,165/-.

2. The appellants challenged this order by means of a writ petition in the High Court of Punjab. The main ground taken in the writ petition was that the appellants had not been given adequate opportunity to show cause against the proposed revision of their claim. The learned single Judge who heard the writ petition dismissed the same holding that the first appellant being an advocate, the opportunity given to him must be considered as adequate. The other grounds taken on behalf of the appellants were also rejected. The Letters Patent Appeal taken by the appellants was also dismissed. Thereafter the present appeal has been brought after obtaining special leave from this Court.

3. The principal question that falls for decision in this appeal is whether the appellants had been given adequate opportunity to show cause against the proposed revision of the value of the property fixed by the Claims Officer. It may be noted that the Claims Officer's valuation had become final. If the authorities wanted to suo motu revise that order, the appellants should have been given a reasonable opportunity to show cause against the proposed revision. The appellants should have been informed the grounds on which the valuation was sought to be revised and they should have been also informed about the material in possession of the authorities justifying revision of the valuation earlier made. The notice issued to the appellants was a bald one. It merely called upon the appellants to appear before respondent No. 2 in connection with the proposed suo motu revision; the first appellant when he appeared before respondent No. 2 was not informed the grounds on which the latter proposed to revise the valuation made by the Claims Officer; nor was he called upon to produce documents or oral evidence in support of his claim. It is clear from the material on record that the appellants had not been given

reasonable opportunity to show cause against the proposed revision of the valuation. The mere fact that the first appellant is an advocate cannot cure all these defects. Even an advocate could not have divined what was passing in the mind of respondent No. 2 unless the appellants had been informed the grounds on which the revision of the valuation was sought to be made. They might have showed cause against the proposed revision and possibly placed material before respondent No. 2 to show that the impression gathered by him was not correct. Quite clearly the procedure adopted by respondent No. 2 was opposed to the principles of natural justice. To say the least it was arbitrary.

4. In view of our above conclusion it is not necessary to go into the other grounds taken by the appellants.

5. For the reasons mentioned above, we allow this appeal, set aside the orders passed by the High Court; allow the writ petition and set aside the impugned order. The case will now go back to the Additional Settlement Commissioner or his present equivalent for disposal according to law. He will now give an adequate opportunity to the appellants to put forward their case and deal with their objections in accordance with law. The respondents shall pay the costs of the appellants both in this Court as also in the High Court.

Appeal allowed.

AIR 1971 SUPREME COURT 749
(V 58 C 148)

(From: Gujarat)*

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Ratilal Chhaganlal, Appellant v.
Dhari District Municipality, Respondent.

Civil Appeal No. 624 of 1967, D/-
5-1-1971.

Civil Services — Bombay Civil Services, Conduct, Discipline and Appeal Rules, Rule 55 — Where concerned High Courts have consistently taken the view that the procedure

*(Appeal No. 47 of 1960, D/- 28-9-1966.
—Guj.)

AO/BO/A101/71/GKC/P

prescribed under Rule 55 is directory and not mandatory—Supreme Court declined to disturb the settled law.

(Para 2)

Cases Referred: Chronological Paras

(1951) 53 Bom LR 282, Broach

Municipality v. Bhadrikal

Ambalal Patel

2

Mr. B. Datta, Advocate and Mr. D. N. Mishra, Advocate for M/s. J. B. Dadachanji and Co., for Appellant; Mr. K. Jayaram Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: — The material facts in this appeal, by special leave lie within a narrow compass. The appellant was working as Officiating Secretary of the respondent Municipality in December, 1951. It is said that when the cash balance was checked on December 24, 1951, it was short by Rs. 250/-. On that ground he was dismissed from service by the President of the Municipality. On the question whether the appellant was guilty of misconduct, there was difference of opinion between the President and the Vice-President as well as between the President and the Municipality. Later on the Municipality was superseded by the Government and an administrator appointed. The administrator after looking into the revelant papers came to the conclusion that the appellant should be dismissed from service. He accordingly passed the order dismissing him on July 25, 1952. The appellant's appeal to the Director of Local Authorities was rejected on January 24, 1953. Thereafter he instituted a suit seeking a declaration that his dismissal was illegal and invalid and therefore he continues to be in service. The trial Court came to the conclusion that the appellant's dismissal was illegal and void but it dismissed the suit on the ground that it was barred by limitation. In appeal the first appellate Court differed from the trial Court on the question of limitation but it held that though the appellant's dismissal was wrongful, the same was not illegal and void. On that ground it affirmed the decree of the trial Court. In second appeal the High Court concurred with the conclusions reached by the first appellate Court.

2. All the Courts below have concurrently come to the conclusion that the appellant had not been given proper opportunity to establish his in-

nocence. They came to the conclusion that no charges had been served on the appellant nor any proper enquiry held. Hence, there was a breach of principles of natural justice; but both the first appellate Court and the High Court rejected the plaintiff's prayer on the ground that his dismissal was merely wrongful and not illegal; hence he could claim only damages and not a declaration that he continues to be in service. The respondent-Municipality is a 'B' class Municipality. According to Rule 6 of the Rules framed by that Municipality in matters of appointment, punishment, dismissal, fine, reduction in rank, suspension from work, leave, pension and contribution to Provident Fund, the relevant rules applicable to the State servants prevailing from time to time were to apply to the servants of the Municipality. In that way Rule 55 of the Bombay Civil Services Conduct, Discipline and Appeal Rules governed the case of the plaintiff. That rule provides inter alia that no order of dismissal, removal or reduction shall be passed on a member of the service unless he has been informed in writing all the grounds on which it is proposed to take action against him and he has been afforded an adequate opportunity of defending himself. It further provides the manner in which the enquiry has to be held against any such person. On the facts found by the Courts below, clearly there was a contravention of Rule 6 read with Rule 55 of the Bombay Civil Services Conduct, Discipline and Appeal Rules. But both the first appellate Court and the High Court have come to the conclusion that Rule 6 is only directory and not mandatory and hence its contravention merely makes the order of dismissal wrongful and not illegal. In coming to that conclusion they have followed the earlier decisions of the Gujarat High Court as well as the decision of the Bombay High Court in Broach Municipality v. Bhadrikal Ambalal Patel, (1951) 53 Bom LR 282. The rule that came up for consideration in Ambalal Patel's case, (1951) 53 Bom LR 282 (supra) is similar to the one with which we are concerned in this appeal. The interpretation placed by the Bombay High Court on that Rule as far back as in 1950 appears to have been consistently followed by the Bombay High Court and later on by the Gujarat High Court as could be gathered from the

judgment of the High Court. Herein we are concerned with an interpretation of a rule under a local law. The concerned High Courts have consistently taken the view that the procedure prescribed under that rule is directory and not mandatory. It will not be proper for this Court to disturb the settled law. In this view, we do not think that we should interfere with the judgment of the High Court.

3. This appeal is accordingly dismissed. But in the circumstances of the case we direct that the parties shall bear their own costs in all the Courts.

Appeal dismissed.

**AIR 1971 SUPREME COURT 751
(V 58 C 149)**

(From: Patna)*

**J. C. SHAH, K. S. HEGDE
AND A. N. GROVER, JJ.**

Sunil Kumar Roy, Appellant v.
M/s. Bhowra Kankanee Collieries Ltd.
and others, Respondents.

Civil Appeal No. 2428 of 1966, D/-
15-12-1970.

Transfer of Property Act (1832),
Section 107 — An agreement which
varies the essential terms of an exist-
ing registered lease, such as amount of
rent must be registered. (1899) ILR
22 Mad 217, Overruled; (1910) ILR 37
Cal 293 and (1912) ILR 39 Cal 284
(FB), Approved. (Para 3)

Cases Referred: Chronological Paras
(1912) ILR 39 Cal 284 = 16 Cal

WN 55 (FB), Lalit Mohan
Ghosh v. Gopal Chuck Coal
Co. Ltd.

(1910) ILR 37 Cal 293 = 10 Cal
LJ 570, Durga Prasad Singh

v. Rajendra Narain Bagchi

(1899) ILR 22 Mad 217 = 8 Mad

LJ 256, Obai Goundan v.

Ramalinga Ayyar

Mr. B. Sen, Sr. Advocate (Mr.
Sukumar Ghose, Advocate, with him),
for Appellant; Mr. M. C. Chagla, Sr.
Advocate (M/s. S. C. Banerjee and
A. K. Nag, Advocates, with him), for
Respondents Nos. 1 and 2.

The following Judgment of the
Court was delivered by

GROVER, J.: — This is an appeal
by certificate from a judgment of the

*(A. F. O. D. No. 459 of 1959, D/- 9-10-
1964 — Pat.)

AO/BO/G167/70/SNV/P

Patna High Court. The facts may be
shortly stated. By a registered inden-
ture of lease dated December 18, 1900
the Eastern Coal Co. Ltd., was granted
a lease by the Zamindar of Jharia of
certain land in mauza Gourkhanti in
pargana Jharia. The Eastern Coal Co.
erected buildings for manufacture of
coke and also constructed office and
the quarters for the staff and the
labourers. On May 17, 1946 the
Eastern Coal Co. sold the machineries
on the demised land to the appellant
and also granted a lease of the land
on which the buildings stood to him.
One of the terms of the lease was that
royalty would be paid by the appel-
lant at the rate of Re. 1/- per ton on
despatches of coke. The rate was
subject to being revised from time to
time by mutual arrangement between
the parties "as may be justified by
market condition". According to the
appellant the Eastern Coal Company
came to an arrangement in 1950 with
him by which royalty on breeze coke
was to be paid at the rate of 2 As. per
ton. In December 1951 another
arrangement was arrived at by which
royalty on hard coke was to be paid at
the reduced rate of 8 As. per ton
instead of Re. 1 per ton stipulated in
the lease dated May 17, 1946. This
arrangement was to be given effect
to from July 19, 1952. On January 5,
1955 the Eastern Coal Company in-
formed the appellant that the colliery
had been sold to the Bhowra Kankanee
Collieries Ltd. respondent No. 1, the
sale being effective from January 1,
1955. Respondent No. 1 claimed
royalty on all despatches of coke
including breeze coke at the rate of
Re. 1 per ton. The appellant took up
the position that by mutual agreement
Eastern Coal Company had agreed to
the royalty being payable on hard
coke at the rate of 8 As. per ton and
on breeze coke at 2 As. per ton. The
appellant paid to respondent No. 1 the
amount calculated according to the
above rates.

2. On January 31, 1956 respon-
dent No. 1 instituted a suit against
the appellant claiming a sum of
Rs. 23,287-4-3 on account of royalty
on all kinds of coke despatched during
the period January 1955 to November
1955 at the rate of Re. 1 per ton. The
Company further claimed damages at
6% per annum amounting to Rupees
1212-11-9. The appellant contested
the suit, his main plea being that by
virtue of the arrangement arrived at

with the Eastern Coal Company in accordance with the terms of the lease dated May 17, 1946 the royalty was payable at the rate of Re. 1 per ton for hard coke and 2 As. per ton for breeze coke. The trial Court accepted the plea of the appellant about reduction of the rates of royalty in terms of the arrangement arrived at with the Eastern Coal Company. It was further held that the document Exh. A-4 in which this agreement or arrangement was incorporated did not require registration compulsorily and was admissible in evidence. The suit was dismissed. Respondent No. 1 preferred an appeal to the High Court. Although the point with regard to the admissibility of Exh. A-4 for lack of registration was raised before the High Court it did not give any decision on it. The judgment of the High Court rested on the finding that the appellant had failed to prove that the reduction in the rate of royalty had been given effect to from July 1952.

3. Mr. B. Sen for the appellant sought to raise the question about the admissibility of Exh. A-4 for want of registration. In the first place this contention cannot be entertained so long as the finding of the High Court on the only point which was canvassed before it about the reduction of the rate of royalty is not set aside. The High Court had held after an examination of the evidence that it had not been proved that there was any change in the market condition in July or in December 1953 to call for a reduction in the rate of royalty or that there was any mutual arrangement or agreement between the lessor or the lessee for such a reduction which was to become effective from July 1952. No attempt was made by Mr. Sen to persuade us to reverse this conclusion. Even on the assumption that a mutual arrangement or agreement as evidenced by Exh. A-4 was arrived at between the appellant and the Eastern Coal Co. Ltd., we are unable to agree that any reduction in the rate of royalty could have been effected by means of Exh. A-4 which had not been registered under the provisions of the Indian Registration Act. It is well settled by now that a document which varies the essential terms of the existing registered lease, such as the amount of rent, must be registered: See *Durga Prasad Singh v. Rajendra Narain Bagchi*, (1910) ILR 37 Cal 293 which was approved by the

Full Bench in *Lalit Mohan Ghosh v. Gopal Chuck Coal Company Ltd.*, (1912) ILR 39 Cal 284 (FB). The decision of the Madras High Court in *Obai Goundan v. Ramalinga Ayyar*, (1899) ILR 22 Mad 217, taking a contrary view has not been followed by the High Courts in India and the consistent view that has been taken is that registration of an agreement is necessary which reduces the rent of an existing registered lease. See *Mulla on Indian Registration Act*, 7th Edn. pages 75-76.

4. The other contentions faintly raised before us arising out of issue No. 3 and that Exh. A-4 had been acted upon do not survive in view of the conclusions arrived at by the High Court and the view that we have taken about the admissibility of the aforesaid document. The Civil Miscellaneous Petitions which were filed in this Court shall stand dismissed as, in our opinion, no ground has been made out for admitting additional evidence or for impleading the Oriental Coal Co. Ltd., as a party respondent here.

5. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 752
(V 58 C 150)

(From: Calcutta)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Surath Chandra Chakravarty,
Appellant v. **The State of West Bengal,**
Respondent.

Civil Appeal No. 1258 of 1966,
D/- 14-12-1970.

Civil Services — Civil Services
(Classification, Control and Appeal)
Rules, Rule 55 — Vague and indefinite charges and failure to supply statement of allegations would render removal of Government servant void and inoperative. (Constitution of India, Article 311). F. A. No. 146 of 1960, D/- 16-9-1965 (Cal), Reversed.

(Para 4)

Rule 55 embodies a principle which is one of the basic contents of a reasonable or adequate opportunity

*(First Appeal No. 146 of 1960, D/- 16-9-1965 — Cal).

AO/AO/G63/70/MLD/M

for defending oneself. If a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him. The whole object of furnishing the statement of allegations is to give all the necessary particulars and details which would satisfy the requirement of giving a reasonable opportunity to put up defence. So, in spite of the Government servant repeatedly objecting to the vagueness of charges and non-furnishing of statement of allegations, the failure to supply him the facts, circumstances and particulars relevant to the charges even at the stage of second show cause notice would amount to denial of proper and reasonable opportunity of defending himself in complete disregard of Rule 55. (Para 4)

Mr. C. B. Agarwala, Sr. Advocate, (M/s. P. K. Chakravarty, Procyot Kumar Chakravarty and Miss Uma Mehta, Advocates with him), for Appellant; Mr. B. Sen, Sr. Advocate, (M/s S. P. Mitra and S. N. Mukherji, Advocates, and Mr. G. S. Chatterjee, Advocate for Mr. Sukumar Basu, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by certificate from a judgment of a Division Bench of the Calcutta High Court reversing the judgment and decree of a learned Single Judge made in exercise of original jurisdiction in a suit filed by the appellant.

2. The record of the case is voluminous and apparently that led to very lengthy judgments both by the Single Judge and the Division Bench. A host of facts have been introduced out of which it is necessary to state only those which are relevant for the purpose of the disposal of the points before us. The appellant was appointed Station Officer in the Bengal Fire Service in 1943. In March 1949 he was appointed to act as Assistant Director of Fire Services and Regional Officer, Calcutta Industrial Area until further orders. S. Bose, who was appointed Director of Fire Service on or about the same date, received some complaints against the appellant. He made certain preliminary enquiries. In

the beginning of May 1949 Bose informed the appellant that the post of Assistant Director Fire Service would be treated as abolished with effect from the date of the appointment of the appellant as Assistant Director. This led to protests by the appellant against the abolition of that post. A lot of acrimonious dialogue started between Bose and the appellant; the former made his final report to S. K. Gupta, Secretary Local Self-Government, as to the charges which were to be preferred against the appellant. On July 12, 1949 the appellant was suspended. On July 19, 1949 a communication containing the charges against the appellant was sent to him by S. K. Gupta, Secretary Local Self-Government. It is necessary to reproduce it in extenso:

"Charges.

Whereas it has been made to appear to the Government of West Bengal —

(1) that you, Sri S. C. Chakravarty, Regional Officer, Calcutta Industrial Area, West Bengal Fire Service incited the subordinate staff of the said service by circulating false rumours regarding the retrenchment policy of the Government, thereby spreading insubordination and discontent within the Force;

(2) that you, Sri S. C. Chakravarty, Regional Officer, Calcutta Industrial Area, West Bengal Fire Service, took an active part in a conspiracy to implicate the present Director of Fire Service West Bengal in a false case by planting firearms in his office and to injure him by planting a time bomb in his car when he might be going on inspection;

(3) that you, Sri S. C. Chakravarty, Regional Officer, Calcutta Industrial Area, West Bengal Fire Service, have been guilty of —

(a) wilful disobedience of Government Order directing you to stay at your headquarters at Barrackpore and of the order of the Director Fire Service to produce the petrol log book of your inspection car;

(b) grave negligence of duty; failure to attend office on many days and irregular attendance even on the days when you came to office, resulting in accumulation of work;

(c) fabricating false entries in the cash book by putting signatures on dates when you did not attend office;

(d) taking illegal issue of petrol from the accounts of different fire

stations in addition to the quota allotted to you for your use; and

(e) cooking up false complaint against some members of the staff of the West Bengal Fire Service whom you tried to rope in into the conspiracy but failed and refusing permission to them to see the Director, Fire Service, apprehending a disclosure.

And whereas these acts of indiscipline, conspiracy, negligence in the performance of your duties and other irregularities were committed by you while you were holding the responsible position of the Regional Officer, Calcutta Industrial Area, in a disciplined organisation like the West Bengal Fire Service and which, therefore, amounted to an abuse or misuse of the position so enjoyed by you.

Now, therefore, you are directed to show cause why you should not be dismissed from the service of the Government or otherwise suitably punished departmentally.

The enquiry will be conducted by the undersigned. Sri S. C. Chakravarty is directed to put in a written statement of his defence by the 8th August, 1949, and to state within the time aforesaid whether he desires to be heard in person.

Sd. illegible.

Secy. to the Govt.
of West Bengal".

Local Self-Government
Department, Calcutta.
The 19th July, 1949.

3. It is common ground that a statement of the allegations on which each charge was based was never sent to the appellant. He sent a letter dated August 5, 1949 with reference to the communication containing the charges. He emphatically denied what had been alleged against him and described the charges as false and actuated by mala fides. What is worth noticing is that the appellant in categorical terms stated that the charges and allegations were vague, indefinite and lacking in material particulars and pointed out that "unless the charges are made specific to the point and contain full details with date, time, place, and person etc. it is impossible for me to meet them properly." No further particulars or details were supplied at that stage or subsequently. S. K. Gupta submitted his report on May 1, 1950. He found charges 1, 2 and 3 (b) as having been proved against the appellant. Charge 3 (a) was drop-

ped. As regards charges 3 (c) and 3 (d) it was found that there had been gross negligence on the part of the appellant in attendance as well as in carrying out all his ordinary duties; viz., checking and signing of the cash book and disposal of current work including grant or refusal of leave applications. The appellant was not found guilty of charge 3 (e). On June 10, 1950, the Deputy Secretary to the Government, West Bengal, sent a notice to the appellant in which it was stated that in view of the findings of the Enquiry Officer he was considered to be unsuitable for retention in service and it was proposed to remove him. A summary of the findings of the Inquiry Officer was sent and the appellant was directed to show cause why he should not be removed from the service of the Government. The appellant wrote a long letter on July 1, 1950 in which he once again pointed out that according to law he was entitled to have a statement of allegations on which each charge was based before the enquiry started. But he was not given any such statement with the result that he could not defend his case properly. On June 16, 1950 the Director of Fire Services communicated an order of dismissal to the appellant who filed an appeal to the Government without any success. In August 1951 the appellant moved the High Court under Article 226 of the Constitution for quashing the order of dismissal. In April, 1952 the High Court acceded to the appellant's prayer and quashed the order of dismissal on the sole ground that the punishment which had been tentatively proposed in the show cause notice was removal and therefore an order of dismissal could not have been made. On May 15, 1952 the appellant called upon the Government to reinstate him in his post. On May 31, 1952 an order was made by the Governor, West Bengal, removing the appellant from service. A memorandum was sent by the Joint Secretary, Local Self-Government, along with a copy of the order of the Governor. It was stated therein that after a careful consideration of the report of the Enquiry Officer and the representation submitted by the appellant the Government, in consultation with the Public Service Commission, West Bengal, had decided that he should be removed from service.

4. In September 1952 the appellant filed a suit in the Calcutta

High Court challenging the order of his removal from service and asking for various reliefs including a declaration that he was still in Government service and a decree for arrears of pay and allowances from the date of suspension till institution of the suit and interim pay and allowances till the disposal of the suit together with interest etc. We need refer only to para 19 (a) of the plaint in which it was pleaded that the enquiry was vitiated because under the rules and procedure for holding such enquiry the appellant was entitled to be furnished with definite charges. But the charges and allegations were vague, indefinite and lacking in material particulars and in spite of repeated requests these were neither made specific nor material particulars like, day, time, place and persons were supplied. In the written statement filed by the respondent it was denied that the charges or allegations were vague, indefinite or lacking in material particulars as alleged. It is unnecessary to set out the other pleadings but the issues which were settled would indicate the points which the trial Court was called upon to decide. These issues were:—

1. Is there a valid contract of employment between the plaintiff and the defendant under the Government of India Act?
2. Was the suspension order dated 12th July 1949 mala fide, wrongful and ultra vires?
3. Was Mr. S. K. Gupta in a position to exercise unbiased mind in the matter of enquiry?
4. Was the order dated 16th September 1950, illegal, void and ultra vires the Constitution and it cannot operate to terminate the service of the plaintiff?
5. Was the order of removal dated 31st May, 1952 illegal, void in law and ultra vires the Constitution of India and the Civil Service Rules for grounds stated in paragraphs 29 and 30 of the plaint?
6. Was the plaintiff no longer in suspension and was unable to be reinstated in service to his usual pay and allowances from the date of his suspension in view of the order dated 24th April, 1952?
7. To what relief, if any, is the plaintiff entitled?

Some additional issues were framed out of which we may only refer to

those which were settled on June 8, 1959 and which were in these terms:—

1. Was the enquiry made by Mr. Gupta vitiated on the grounds as alleged in paragraph 19 of the plaint?
2. Is the Court debarred from trying issues Nos. 4, 5 and 6 and the additional issues settled today by reason of res judicata?

The learned Judge found that the Enquiry Officer S. K. Gupta was biased against the appellant before he held the enquiry. It was further found that no particulars and other necessary details were given in the charges and they were vague resulting in non-compliance with Rule 55 of the Civil Services (Classification, Control and Appeal) Rules and the necessary particulars were not supplied in spite of the repeated objections of the appellant to the charges being vague and indefinite. In the opinion of the learned Judge the trial was vitiated for want of definite charges. It was held that the appellant had been duly appointed as member of the Fire Service of the State and that a contract in terms of Article 299 of the Constitution was not necessary. Issues 2 and 4 were not pressed. Reading the prayer in the light of the averments in the plaint the learned Judge granted a declaration that the purported removal of the appellant was void and inoperative and he remained or was still in Government service. He was held entitled to salary and other benefits from the date of his suspension till the date of the judgment. It was particularly mentioned that the parties had worked out the figures of the salary and allowances etc., at Rs. 69,636/- for which a decree was granted together with interest at 6% per annum till the date of realisation. The respondent filed an appeal to the Division Bench of the High Court. We do not consider that we need refer to all the points dealt with by the Division Bench. In our judgment the Division Bench was wholly in error in reversing the decision of the learned Single Judge on one of the crucial points, namely, non-compliance with Fundamental Rule 55 and complete vagueness and indefiniteness of the charges on which no proper enquiry could be held. It is incomprehensible how the details as to date, time, place and person etc. would not have made the charges more definite as appears to have been the opinion of the Division Bench. We are unable to

agree that the details without which a delinquent servant cannot properly defend himself are a matter of evidence. In this connection reference may be made to Fundamental R. 55 which provides, inter alia, that without prejudice to the provisions of the Public Servants Enquiry Act 1850 no order of dismissal, removal or reduction shall be passed on a member of service unless he is informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself. The grounds on which it is proposed to take action have to be reduced to the form of a definite charge or charges which have to be communicated to the person charged together with a statement of the allegations on which each charge is based and any other circumstance which it is proposed to be taken into consideration in passing orders has also to be stated. This Rule embodies a principle which is one of the basic contents of a reasonable or adequate opportunity for defending oneself. If a person is not told clearly and definitely what the allegations are on which the charges preferred against him are founded he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him. By way of illustration one of the grievances of the appellant contained in his letter dated March 24, 1950, to the Enquiry Officer may be mentioned. This is what he said though the language employed is partly obscure and unhappy:

"Regarding the first charge I beg to submit that the allegation is vague. In the charge it has not been specifically stated as to where, when and before whom I circulated false rumours, regarding retrenchment policy of the Government and thereby spread insubordination. In fact if one goes through the statements of P. Ws. made to D. F. S. as submitted before my suspicion, it will appear that no specific case could have made with all material particular as to date, time and person. Having been able to take deposition and to conduct enquiry keeping me in dark and finally put me out of office. Sri S. Bose was able to win over the witnesses and was able to shape his case to suit his purpose."

Now in the present case each charge was so bare that it was not capable of

being intelligently understood and was not sufficiently definite to furnish materials to the appellant to defend himself. It is precisely for this reason that Fundamental Rule 55 provides, as stated before, that the charge should be accompanied by a statement of allegations. The whole object of furnishing the statement of allegations is to give all the necessary particulars and details which would satisfy the requirement of giving a reasonable opportunity to put up defence. The appellant repeatedly and at every stage brought it to the notice of the authorities concerned that he had not been supplied the statement of allegations and that the charges were extremely vague and indefinite. In spite of all this no one cared to inform him of the facts, circumstances and particulars relevant to the charges. Even if the Enquiry Officer had made a report against him the appellant could have been given a further opportunity at the stage of the second show cause notice to adduce any further evidence if he so desired after he had been given the necessary particulars and material in the form of a statement of allegations which had never been supplied to him before. This could undoubtedly be done in view of the provisions of Art. 311 (2) of the Constitution as they existed at the material time. The entire proceedings show a complete disregard of Fundamental Rule 55 in so far as it lays down in almost mandatory terms that the charges must be accompanied by a statement of allegations. We have no manner of doubt that the appellant was denied a proper and reasonable opportunity of defending himself by reason of the charges being altogether vague and indefinite and the statement of allegations containing the material facts and particulars not having been supplied to him. In this situation, for the above reason alone, the trial Judge was fully justified in decreeing the suit.

5. A faint attempt was made by the learned counsel for the respondent to assail the decision of the trial Court on issue No. 1. Both the Single Judge and the Division Bench had given concurrent findings against the respondent on that point. The respondent cannot be permitted to re-agitate the matter before us.

6. We accordingly allow this appeal, set aside the judgment and

decree of the Division Bench and restore that of the trial court. The appellant will further be granted a declaration that he is entitled to the salary and allowances for the period subsequent to the date of the decree of the learned Single Judge of the High Court to the date of his superannuation. The appellant will be entitled to his costs in this court.

Appeal allowed.

AIR 1971 SUPREME COURT 757
(V 58 C 151)

(From: Allahabad)*

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

Ram Narain and others, Appellants v. The State of U. P., Respondent.

Criminal Appeal No. 17 of 1970,
D/- 11-12-1970.

(A) Penal Code (1860), S. 302 — Appellate Court's interference with an order of the Trial Court awarding lesser penalty in a murder case is justified only when its inadequacy (as manifested by the facts and circumstances of the case) results in a failure of justice. (Para 5)

(B) Constitution of India, Art. 136 — The Supreme Court will cure High Court enhancing a sentence at the instance of a private complainant when the State does not seek enhancement and the Trial Court awarding lesser punishment has practised no deviation from recognised principles and has caused no failure of justice. (Para 7)

Mr. A. S. R. Chari, Sr. Advocate, (Mr. B. R. G. K. Achar, Advocate, with him), for Appellants; Mr. O. P. Rana, Advocate, for Respondent.

The following Judgment of the Court was delivered by

DUA, J.: In this appeal by special leave we are only concerned with the question of sentence imposed on appellants 1, 2 and 3 by the High Court. They are Ram Narain son of Manni Lal Ahir, Babulal son of Bhikhari Ahir and Nankau son of Manni Lal. Special leave was declined to the other convicts who had applied along with the present appellants.

2. Eight persons were tried in the Court of the 1st Temporary Ses-

sions Judge, Kanpur for the murder of one Bitta. The three appellants with whom we are now concerned were alleged to have been armed respectively with deadly weapons like gandasa, sword and ballam. They were charged under Section 148, I. P. C. with having formed an unlawful assembly along with the five co-accused with the common object of committing the murder of the deceased. They were further charged under Section 302 read with Section 149, I. P. C. for committing the said murder.

3. At the trial evidence was led to show that five accused persons had direct enmity with the deceased and about the remaining three it was admitted that Shivrath, accused, is the brother of the wife of Rameshwar, accused, and Jai Jai Ram and Nankau (one of the appellants here) are cousins of the accused Rameshwar and Babulal. The actual occurrence took place at 3.30 a. m. on the night between 17th and 18th April, 1966. Prosecution evidence was led to show that Rameshwar, Shivrath, Baboo alias Babua and Jailal pressed the deceased with their lathis when the three appellants along with Lallu, accused, who was armed with a lathi inflicted injuries on the deceased killing him. The trial Court came to the conclusion that all the eight accused persons had motive for killing the deceased and that they had jointly committed his murder after forming an unlawful assembly with the common object of doing so. In considering the question of sentence that Court took the view that all the accused were equally guilty of murder and it made no difference as to who actually gave the blow with the gandasa, sword or the ballam or as to who pressed the victim with lathis. The final conclusions of the trial Court may be stated in its own words:

"Considering the entire evidence on the record and the circumstances of the case, I have come to the conclusion that all the eight accused jointly committed the murder of Bitta after forming an unlawful assembly of which the common object was to commit the murder of Bitta and this offence was committed by all of them in prosecution of the said common object of the unlawful assembly formed by them. Thus all the accused are clearly guilty of the offence of rioting and murder with which they stand charged.

*(Cri. Appeals Nos. 483, 484 and 58) of 1967 and Cri. Revn. No. 475 of 1967, D/- 15-9-1969 — All.)

Coming to the question of sentence it is to be noted that all the accused are equally guilty so far as the offence of murder is concerned irrespective of the fact whether some particular accused actually gave blow of a gandasa or a sword or a ballam or pressed the victim with a lathi. As most of the accused had some cause of grievance against the deceased and because no revolting cruelty was committed on the dead body of the deceased after he had died, the lesser penalty for murder, that is life imprisonment would meet the ends of justice in this case".

4. The eight convicted persons appealed to the High Court by three separate appeals and the complainant Mahabir preferred a criminal revision for enhancement of the sentence imposed on Nankau, Ramnarain and Babulal with whom we are concerned in this appeal. The High Court dismissed the appeal preferred by the convicts and allowed the criminal revision as a result of which the sentence on the present three appellants was enhanced to one of death. After discussing the injuries caused to the deceased the High Court observed:

"From the above it is evident that each of these appellants Nankau, Ramnarain and Babulal inflicted fatal injuries on Bitta which were individually sufficient to cause his death. The murder of Bitta was cold-blooded and a premeditated one. We are accordingly of the opinion that the three appellants Nankau, Ramnarain and Babulal each inflicted fatal injuries on Bitta and deserve the extreme penalty of death."

5. We are asked by Shri Chari, learned counsel for the appellants, to set aside the sentence of death and restore that of life imprisonment imposed by the trial Court. The question of sentence, it is well settled, is always a matter of judicial discretion of the trial Court within the statutory limits. In the case of murder the discretion is limited to two alternatives for the sentence can be either one of death or of imprisonment for life. The proper exercise of discretion in this respect is generally a matter of some difficulty. This discretion has, however, like all discretions, to be exercised on a proper consideration of all the relevant facts and circumstances keeping in view the broad objective of the sentence being neither too severe nor too

lenient. If the reasons for awarding the lesser penalty by the trial Court in case of murder are such on which a judicial mind may appropriately do so then the appellate Court is not expected to enhance the sentence and impose the extreme penalty of death. Merely because the appellate Court feels that left to itself it would have preferred to impose the sentence of death is by itself and without more not a sufficient ground to justify enhancement. It is only when the sentence appears on the facts and circumstances of the case to be so manifestly inadequate as to have resulted in failure of justice that enhancement of the sentence may be justified by the appellate Court.

6. In the present case reasons given by the learned Sessions Judge for imposing the lesser penalty appear to us to be such that a judicial mind may well do so; they are neither contrary to any well-established principle nor so erroneous as to persuade us to hold that the sentence imposed is manifestly inadequate. It has to be remembered that under the existing law in cases of murder it is not necessary for the Court to give reasons for not imposing the extreme penalty of death and the discretion of the Court in awarding the lesser penalty is, therefore, wider than before the amendment of the law in this respect. It is further noteworthy that the State had not considered it proper to ask for enhancement of the sentence. The High Court was moved by private complainant who was apparently inspired by considerations of private vengeance. The High Court appears to have ignored this aspect.

7. It is true that this Court normally does not interfere with the discretion exercised by the High Court on the question of sentence even though the same has been enhanced but where the trial Court has exercised its discretion on proper consideration of the material on record and its order cannot be described to be either contrary to recognised principle or otherwise having caused failure of justice and further when the State does not consider that the ends of justice require enhancement of the sentence but the High Court interferes at the instance of a private complainant this Court would be fully justified in considering for itself the propriety of the sentence as enhanced by the High Court. In our view the High Court

was in error in enhancing the sentence of the three appellants from life imprisonment to that of death. We accordingly allow the appeal and setting aside the sentence of death, restore the sentence of life imprisonment imposed by the trial Court.

Appeal allowed.

AIR 1971 SUPREME COURT 759
(V 58 C 152)

(From: Gujarat)*

P JAGANMOHAN REDDY AND
I. D. DUA, JJ.

Patel Uka Naran, Appellant v. Kalyan Karsan and another, Respondents.

Criminal Appeal No. 104 of 1968, D/- 18-1-1971.

(A) Constitution of India Art. 134
— Normally Supreme Court does not review evidence in criminal appeals unless there is some illegality or grave irregularity or some serious lapse on the part of Courts below in marshalling or evaluating evidence and the Supreme Court feels justified in reviewing it in the larger interests of justice. (Para 4)

(B) Constitution of India, Art. 134
— Additional evidence which would be futile in face of direct evidence on record cannot be allowed in criminal appeal before Supreme Court when no cogent ground for delay is made out and no cause of justice requires it. (X Ref: Supreme Court Rules, O. 47). (Para 6)

(C) Constitution of India, Art. 134
— Concurrent conclusions of Courts below when not tainted with any infirmity are binding on Supreme Court. (Para 7)

Mr. G. D. Gupta, Advocate, for Appellant; M/s. S. K. Dholakia, and S. P. Nayar, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

DUA, J.: — The appellant, Patel Uka Naran, was the President of the Sultanpur Juth Vividh Karyakari Sahkari Mandli (hereinafter called the Mandli) on January 22, 1966, having held that office for nearly 7 or 8 years till August 31, 1966 when he was suc-

ceeded by Arjan Limba. Kalyan Karamshi (complainant) an illiterate agriculturist was a shareholder of the Mandli. He had taken a loan of Rs. 800/- from the Mandli and in January, 1966, Rs. 1,215.73 (inclusive of interest upto January 15, 1966 and expenses for notice, etc.) were due from him on account of this loan. On January 10, 1966 he was given a notice by the Mandli to pay this amount within eight days from its receipt failing which it was threatened that the amount would be recovered by proceedings for recovery of revenues. It was pointed out that the Mandli had obtained a certificate to recover the amount according to revenue proceedings. To avoid unnecessary additional expense the complainant was requested to make arrangements for paying the amount. On January 22, 1966, Bhagvanji Vithaldas was the Secretary of the Mandli. These facts are not disputed. According to the prosecution case on January 22, 1966 the complainant went to the Mandli Office and paid to the appellant Rs. 1,220/- (12 currency notes of Rs. 100/- each and two currency notes of Rs. 10/- each) who gave him a receipt for the amount scribed by a clerk and signed by the appellant with the seal of the Mandli thereon: Ex. P/13. The Secretary was not present in the office on that day and that is why a pucca receipt for this amount was not issued. The appellant told the complainant that after adjusting the account the amount received in excess would be returned to him. The complainant, feeling satisfied went home with the kutchra receipt. On October 29, 1966 after the appellant had ceased to be the President of the Mandli and Arjan Limba had taken over, a notice Ex. P/15 described as the last notice was sent by the Mandli to the complainant informing him that Rs. 415.73 had become due as interest on the principal amount of Rs. 800/- upto January 15, 1966 and requiring him to pay the principal and interest accrued upto the date of payment and also the expenses of the notice. This notice further pointed out that earlier a notice dated January 10, 1966 had been sent to the complainant on which no action was taken by him and as the debt had become barred by time, a certificate had already been received by the Mandli for recovering the amount "by attachment according to land revenue proceedings". It was emphasised that

if the amount was not paid the Mandli would be obliged to take attachment proceedings. On the complainant informing the Mandli of the payment having already been made by him and enclosing a copy of the receipt (Ex. P/13), the Secretary of the Mandli wrote back on December 5, 1966 intimating to the complainant that the amount of the receipt had not been credited in the account books on the date of the receipt or thereafter. He was informed that he might take such further action in the matter as he liked. It may be pointed out here that Bhagvanji Vithaldas, who was the Secretary on January 22, 1966 had since died and he was succeeded by Bhikhalal Shamjibhai (P. W. 4) sometime in March, 1967 as deposed by him. On December 20, 1966 the complainant received a letter from the Registrar of Co-operative Societies, Rajkot asking him to institute a complaint in respect of the payment of Rs. 1,220/- made by him to Uka Naran, the ex-President of the Mandli promising him the necessary assistance in the matter. Three days later the complaint, out of which the present appeal arises, was instituted and after trial the Judicial Magistrate, First Class, Gondal, convicted the appellant on September 22, 1967 of an offence under Section 409, I. P. C. sentencing him to simple imprisonment for one year and fine of Rs. 2,000/-, with further simple imprisonment for two months in case of default in payment of fine. Out of the fine, if realised, Rs. 1,220/- were directed to be paid to the complainant. That Court also convicted him of an offence under Section 420, I. P. C. imposing a sentence of simple imprisonment for two months.

2. On appeal the Sessions Judge, Rajkot set aside the appellant's conviction under Section 420, I. P. C. and converted his conviction under Section 409 to one under Section 406, I. P. C. and also reduced the sentence to simple imprisonment for 9 months. The fine was also reduced to Rs. 1,500/- and it was directed that out of the fine, if realised, Rs. 1,220/- be paid to the Mandli instead of the complainant. The appellant's revision to the High Court of Gujarat was summarily rejected on April 19, 1967 and leave to appeal to this Court was declined on December 19, 1967. The appellant secured special leave to appeal to this Court on May 3, 1968.

3. The appellant had denied receipt of the sum of Rs. 1,220/- and execution of the receipt, Ex. P/13. But the trial Court and the Sessions Court on appeal, concurrently found that the receipt was signed by the appellant after receiving the amount of Rs. 1,220/-. The evidence of the complainant Kalyan Karamshi (P. W. 1) and of Narain Chagga (P. W. 2) the totat of the Mandli who had scribed the receipt, in whose presence the amount of Rs. 1,220/- was paid by the complainant to the appellant and who had put the seal of the Mandli on the receipt was believed by both the Courts. The receipt was accordingly held to be genuine and not forged as suggested by the appellant. The plea of the appellant that he was not present at Sultanpur on January 22, 1966 but was at Kodinar was found by both the Courts to be untrustworthy. The learned Sessions Judge, while rejecting the plea of the receipt being forged also took notice of the fact that during the trial different positive suggestions were made by the appellant in regard to the forgery of the receipt.

4. In this Court the appellant's learned counsel was unable to make out any special ground for re-appraisal and re-examination of the evidence afresh and for review of the concurrent conclusions of the two Courts below. This Court, it may be remembered, normally does not proceed to review the evidence in appeals in criminal cases unless there is some illegality or grave irregularity or some serious lapse on the part of the Court below in marshalling or evaluating the evidence and feels justified in adopting such a course in the larger interests of justice. We find no such extraordinary circumstance in this case impelling us to re-examine the evidence in order to determine its credibility.

5. The only point which the appellant's counsel pressed and did so with a certain degree of persistence, is that after the new President of the Mandli had taken over the charge, the debts due to the Mandli were got verified and the debtors were personally called for the purpose of verification. The counsel desired this Court to summon the records of the verification proceedings to see if the complainant had been summoned and if his debt was verified in his presence. In case it was so verified, then the

story of the payment of Rs. 1,220/- to the appellant on January 22, 1966 must, according to the appellant's counsel, be held to be false. His application under Order 47 of the Supreme Court Rules made on January 4, 1971 prayed for permission to the appellant to rely on verification report a copy of which was filed with the special leave petition and on all the annexures and documents mentioned therein.

6. Now Jayantilal, a senior clerk in the Rajkot District Registrar's office, was examined by the appellant as D. W. 1. He produced a copy of the verification report Ex. 43 dated September 11, 1966, relating to the enquiry held by the new Managing Committee into the advances made by it. Neither in the trial Court nor on appeal in the Sessions Court was any point sought to be made on behalf of the appellant with any seriousness on the basis of this report. In the special leave petition in this Court in paragraph 7 it was averred that the verification report conclusively proves the petitioner's innocence. It is stated there that the new Managing Committee verified the debts due to it on September 11, 1966 and some of the debts were verified by the Committee by calling the debtors personally. Those who could not come were served with notices for the purpose of verifying the amounts due from them. The report Ex. 43, as produced at the trial was incomplete because it did not contain the list of the persons served with notices. According to the appellant's averments the complainant's name does not appear in the list of persons served with notices for the purpose of verifying the debts due from them and since the complainant had admittedly received the notice of demand for the amount due as per Ex. P/15 it is sought to be inferred that his claim had been verified by calling him personally. In that event, according to the appellant, the receipt, Ex. P/13, must be held to be a forged document. This reasoning is *prima facie* unacceptable. It may be recalled that as soon as the complainant received Ex. P/15 on October 29, 1963 he immediately informed the Mandli about the payment and also forwarded a copy of the receipt and on learning that the amount had not been credited in his account he lodged the complaint. We have not been able to appreciate how this demand notice can establish

the forged nature of the receipt. On this view we do not consider it necessary to refer in detail to the order of this Court dated September 21, 1970 in this appeal on which the appellant's counsel attempted to rely. Suffice it to say that on that date after hearing the appellant's counsel a Bench of this Court of which one of us was a member directed the office to send for the records of the Mandli mentioned in the report (Ex. P/43) including the annexures and also any further report that might be found on the record. On December 15, 1970 on a representation by the appellant's counsel it was ordered that he should make an application before the close of the Court for adducing additional evidence. This order was not complied with. The application presented on January 4, 1971 is not accompanied by any prayer to condone the delay. In any event in face of the direct evidence of P. W. 1 and P. W. 2 regarding the payment of the amount by the complainant to the appellant and execution of the receipt, in our view, it is futile for the appellant to rely on verification enquiry proceedings. Ex. P/43 does not help the appellant and there is no cogent ground made out for, nor does the cause of justice require, the production of any additional evidence as desired by the appellant. The application dated January 4, 1971 is without merit and is rejected.

7. The concurrent conclusions of the two Courts below are not tainted with any infirmity and they are binding on this Court. This appeal must, therefore, be dismissed. The appellant should surrender to his bail bond to undergo the remaining sentence of imprisonment.

Appeal dismissed.

AIR 1971 SUPREME COURT 761
(V 58 C 153)

(From: AIR 1967 Punj 345)

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Jugraj Singh and another, Appellants v. Jaswant Singh and others, Respondents.

Civil Appeal No. 198 of 1967, D/- 16-3-1970.

(A) Evidence Act (1872), Ss. 85, 114 — Registration Act (1908), Sec. 33

LN/LN/F952/70/SSG/T

— Power of attorney for execution and presentation of document for registration — Authentication — Presumption — Endorsement of Notary Public that it had been subscribed and sworn before him — There is presumption that he must have satisfied himself in discharge of his official duties that the person executing it is the proper person — Fact that he does not say so in his endorsement is not material. (Paras 6, 7)

(B) Evidence Act (1872), Sec. 85 — Registration Act (1908), Sections 32, 33 — Execution and presentation of sale deed for registration — Vendor in U. S. A. — First power of attorney not duly authenticated — Second power of attorney duly authenticated and noticing first being defective and same being ratified — Second power validates transaction and registration even though both being earlier to second power — Such ratification relates back to date of act done and agent is put in same position as if he had authority to do it at that date — Illegality in registration held cured — 1901 AC 241 and (1843) 6 M and G 236, Applied; AIR 1931 PC 52, Distinguished. (Paras 8, 9, 11)

(C) Specific Relief Act (1877), Section 42 — Suit for declaration that defendants are neither owners of land nor they have right to get the same as per certain order of S. D. O. acting as Collector — Plaintiff neither asking for cancellation of order nor for any injunction — Such a suit will be hit by Section 42. (Para 11)

(D) Civil P. C. (1908), Order 1, Rule 3 — Suit for declaration that transferees from mortgagors' son is not owner of suit land — Mortgagor's son though not a necessary party is proper party — Suit only against transferees held to be not properly framed. (Para 12)

Cases Referred: Chronological Paras

(1950) AIR 1950 All 524 (V 37)	
= 1950 All LJ 466, Wali Mohammad v. Jamal Uddin	3
(1931) AIR 1931 PC 52 (V 18)	
= 58 Ind App 58, Dottie Karan v. Lachmi Prasad Sinha	4, 10
(1901) 1901 AC 241 = 70 LJKB 662, Keighley Maxsted and Co. v. Durant	8
(1843) 6 M & G 236 = 12 LJCP 306, Wilson v. Tumman	8

M/s. Hardev Singh, H. L. Kapoor and Dhul Chand, Advocates, for Appellants; Mr. Bishan Narain, Sr. Advo-

cate (M/s. Sadhu Singh Bireswar Bhattacharya and Jagmohan Khanna, Advocates, with him), for Respondents.

The following Judgment of the Court was delivered by

HIDAYATULLAH, C. J.: This is an appeal against the judgment of a learned single Judge of the High Court of Punjab dated December 14, 1966 confirming the dismissal of a suit filed by the appellants. The facts of the case are as follows:

One Bhag Singh mortgaged certain lands to Ran Jang Singh in the year 1923. On September, 6, 1961 one Vernon Seth Chotia, son of Bhag Singh executed a power of attorney in California, U.S.A. authorising Sardar Kartar Singh Chawla, an advocate of this Court, to sell the property and to execute the sale deed and present it for registration. This power of attorney was witnessed by one Daniel E. Cooper. On the strength of this document, Sardar Kartar Singh Chawla executed the sale deed on May 30, 1963 in favour of the respondents in this appeal. He presented it for registration and the document was registered. The vendees thereupon sought to redeem the mortgage and applied under S. 9 of the Punjab Redemption of Mortgages Act, 1913. They deposited the entire amount due under the mortgage in the Collector's court and we understand that the amount is still lying there, because of the later proceedings from which this appeal arises. The Collector ordered the redemption of the mortgage. The Appellants who are the sons of the original mortgagee thereupon filed a suit under S. 12 of the Act on August 7, 1963. It is necessary to refer to their petition of plaint, not with a view to finding out what they stated there, but to see what reliefs they claimed in the suit. In para 10 of the petition of plaint, the appellants as plaintiffs stated:

"The plaintiffs pray that a decree for declaration to the effect that the defendants are neither the owners of the above mentioned land nor they have any right to get the aforesaid land redeemed as per the orders of the S. D. O. Mukatsar exercising the powers of Collector, dated the 6th August, 1963 which is illegal and against law and the plaintiffs are not bound by it and neither the defendants are entitled to take possession of the aforesaid land in accordance with that

order, be passed in favour of the plaintiffs against the defendants with costs."

2. While this suit was still pending and because of the challenge to the power of attorney on the ground that it had not been properly authenticated under the law, a fresh power of attorney was executed by Vernon Seth Chotia on March 23, 1964 in favour of Sardar Kartar Singh Chawla. The second power of attorney was subscribed and sworn to before the Notary Public in and for the County of Alameda, State of California. The Clerk of the Court as required by the laws of California appended a certificate that the Notary Public had duly given the certificate in acknowledgment of the execution of the power of attorney by Vernon Seth Chotia. The endorsement of the Notary Public reads:

"Subscribed and sworn to before me this 23rd day of March 1964.

Betty J. Botelko

Notary Public in and for the County of Alameda, State of California."

This second power of attorney was produced in the suit and the court of first instance ordered the dismissal of the suit, because it was of opinion that the transfer in favour of the redeeming mortgagors by Vernon Chotia was thereafter flawless. Appeal in the District Court and a second appeal filed in the High Court failed. This appeal has been brought by special leave.

3. Mr. Hardev Singh in arguing the appeal referred to the provisions of S. 85 of the Indian Evidence Act which provides that a Court shall presume that every document purporting to be a power of attorney and to have been executed before and authenticated by a Notary Public was duly executed and authenticated. He contended that authentication of the power of attorney had to be in a particular form, and that it was not sufficient that a witness should have signed the document, be he a Notary Public or any other. It ought to have been signed by the persons named in S. 85 and should have been authenticated properly. He admitted that there was no prescribed form of authentication, but he relied upon a ruling of the Allahabad High Court reported in *Wali Mohammad v. Jamal Uddin*, AIR 1950 All 524, where it is stated that authentication means that the person who authenticates must satisfy himself

about the identity of the person executing or making the document. He argued that the authentication should have shown on its face that the Notary Public had satisfied himself that Vernon Chotia was the real person who had signed the power of attorney before him. He contended, therefore, that the first power of attorney was invalid because it was not authenticated before any of the persons named in S. 85 and the second power of attorney was invalid, because it did not show on its face that the Notary Public had satisfied himself that it was Vernon Chotia who executed the document. He also contended that, in any event, the execution of the second power of attorney was ineffective after the expiry of four months during which registration had to be obtained and further that the act of Mr. Chawla in presenting the document for registration under the invalid first power of attorney could not be cured by the execution of a second power of attorney.

4. Mr. Hardev Singh referred us to the provisions of Sections 32 and 33 of the Indian Registration Act. Under Section 32, it is provided that a document to be registered, whether the registration is compulsory or optional, must be by the presentation at the proper registration office either by some person executing or claiming under the same or by the agent of such person, representative or assign, duly authorised by power-of-attorney executed and authenticated in the manner therein mentioned. His contention was that for a proper registration, due presentation was a condition precedent and that presentation could only be either by the executant, that is the Principal who conveyed under the deed or a duly constituted representative under a power of attorney properly executed. He referred then to Section 33 which says that if the principal at the time of execution does not reside in India the power of attorney will be recognised only if it is executed before and authenticated by a Notary Public. In other words, his contention was that power of attorney for purpose of presentation of a document for registration as also for its execution must be a properly authenticated document and in the case of a person residing abroad, it must be a document executed by the Principal before the Notary Public and attested and authenticated

by the Notary Public after due proof of the identity of the person making the document. He relied further upon the ruling in *Dottie Karan v. Lachmi Prasad Sinha*, 58 Ind App 58 = (AIR 1931 PC 52) and contended that if a power of attorney under which a document was presented and got registered, were found to be defective, then the registration would be of no consequence, because the registering officer would lack jurisdiction to register the document.

5. These are the stages by which Mr. Hardev Singh contended that registration in this case was ineffective, that the vendees derived no title and therefore they had no title to claim redemption either under the Punjab Redemption of Mortgages Act or otherwise. These contentions were also raised in the High Court and the two Courts below, but were concurrently rejected.

6. It is plain that presentation for registration could be, either by the Principal or by a duly constituted attorney. It is equally plain that a proper power of attorney duly authenticated as required by law had to be made before power could be conferred on another either to execute the document or to present it for registration. That indeed is the law.

7. The short question in this case is whether Mr. Chawla possessed such a power of attorney for executing the document and for presentation of it for registration. Now, if we were to take into account the first power of attorney which was executed in his favour on May 30, 1963, we would be forced to say that it did not comply with the requirements of the law and was ineffective to clothe Mr. Chawla with the authority to execute the sale deed or to present it for registration. That power of attorney was not authenticated as required by Section 33 of the Indian Registration Act which in the case of an Indian residing abroad, requires that the document should be authenticated by a Notary Public. The document only bore the signature of a witness without anything to show that he was a Notary Public. In any event there was no authentication by the Notary Public (if he was one) in the manner which the law would consider adequate. The second power of attorney however does show that it was executed before a proper Notary Public who com-

plied with the laws of California and authenticated the document as required by that law. We are satisfied that that power of attorney is also duly authenticated in accordance with our laws. The only complaint is that the Notary Public did not say in his endorsement that Mr. Chawla had been identified to his satisfaction. But that flows from the fact that he endorsed on the document that it had been subscribed and sworn before him. There is a presumption of regularity of official acts and we are satisfied that he must have satisfied himself in the discharge of his duties that the person who was executing it was the proper person. This makes the second power of attorney valid and effective both under Section 85 of the Indian Evidence Act and Section 33 of the Indian Registration Act.

8. The only question is whether the second power of attorney was effective to render valid the transaction of sale and the registration of the document both earlier than the power of attorney. In our judgment, it would be so. Mr. Hardev Singh does not read into this matter the fact of ratification by Vernon Seth Chotia of his earlier power of attorney. The second power of attorney states in express terms that the first power of attorney was defective and was being ratified. Vernon Seth Chotia also stated in the second power of attorney that the act of Mr. Chawla would be his act which included not only the making of the document but also the presentation of that document. Now the law is quite clear that ratification relates back to the original act provided there is a disclosed principal and this has been stated nowhere better than by Lord Macnaghten in *Keighley Maxsted and Co. v. Durant*, 1901 AC 241 at pp. 246, 247, quoting *Tindal, C. J. in Wilson v. Tumman*, (1843) 6 M & G 236 at p. 242.

"That an act done, for another, by a person though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or on a contract, to the same effect as be, and with all the consequences which follow from, the same act done by his previous autho-

city. And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract".

Relation back of an act of ratification was expressly accepted in this case. Other cases have been summarised in the manual of the Law and Practice of Power of Attorney issued by the Council of Chartered Institute of Secretaries. This follows from the maxim of law "Omnis ratihabitio retrotrahitur et mandato priori aequiparatur" that is to say, ratification is thrown back to the date of the act done, and the agent is put in the same position as if he had authority to do the act at the time the act was done by him. The learned authors quote the case of the House of Lords which we have above cited and add to it certain other cases with which we do not consider necessary to encumber this judgment.

9. It therefore follows that the second power of attorney was a valid document and it authorised Mr. Chawla to execute the document as well as to present it for registration. This being a document ratifying a former inconclusive act related back to the time when the first document was made and cured the illegality in the presentation for registration which had taken place.

10. The case of the Privy Council on which great reliance was placed, namely, 58 Ind App 58 = (AIR 1931 PC 52) (cit. supra) no doubt states that presentation by a person who is not properly authorised by a power of attorney is ineffective and the registration void, but there the Judicial Committee was not considering the case of a subsequent ratification. They were only concerned with an invalid document and nothing more. If there had been ratification, the other principle to which we have adverted here would have been taken note of and the decision would probably have been different.

11. In these circumstances, we are satisfied that there was proper execution of the document and registration. It is hardly necessary in view of our decision, to say anything more about this case. We are also satisfied that the appellants were not entitled to a declaration. We have reproduced

the paragraph in which the reliefs were asked in the plaint. It will be noticed that they neither asked for the cancellation of the order of the Collector nor for any injunction, two of the reliefs which they were entitled to ask in the case in addition to the declaration. Such a suit would be hit by Section 42 of the Specific Relief Act and we would be quite in a position to deny them the declaration without these specific reliefs. Indeed they had only to ask for the setting aside of the order.

12. Further, this is obviously an unmeritorious suit on the part of the mortgagees. They are after all mortgagees and redemption has been offered to them by a person who is the son of the original mortgagor and who has resorted to the quick remedy of the Redemption Act, for getting the mortgage redeemed. This mortgage took place as far back as 1923 and we are now in the year 1970. It is obvious that over the years this property must have appreciated considerably in value. The intention of the mortgagees is to retain the property as long as they can by raising technical objections in the way of the mortgagors seeking to redeem it. Further again the appellants as plaintiffs in the case joined the transferees from Vernon Seth Chotia but made no attempt to join Vernon Seth Chotia, the son of the original mortgagor. The suit could be only properly framed with all the parties before the Court. In our opinion, even if Vernon Seth Chotia was not a necessary party, he was at least a proper party. If he had been brought before the court, we would have known from him whether he had given the authority to execute the document and he could have adopted the act of Sardar Chawla by ratifying it again. The suit was not properly framed. For all these reasons, the appeal has no merits and it fails and will be dismissed with costs.

13. We are surprised to note that the learned Judge in the High Court did not award costs. Normally costs should follow the event and it is not the rule that costs should be left to be borne to the parties. Here a case was decided against one of the parties in a contentious matter, and costs should have been awarded.

Appeal dismissed.

AIR 1971 SUPREME COURT 766
(V 58 C 154)

(From: Punjab)*

J. M. SHELAT AND
C. A. VAIDIALINGAM, JJ.The State of Punjab, Appellant v.
Kishan Das, Respondent.Civil Appeal No. 359 of 1967, D/-
19-1-1971.

(A) Constitution of India, Art. 311 (2) — 'Reduction in rank' means reduction from a higher to a lower rank or post and not merely losing places in rank or cadre — For punishment of forfeiture of approved service resulting in loss of higher salary or reducing chances of promotion to higher post remedy lies under relevant service rules and not under Article 311 (2) — AIR 1959 Orissa 167, Overruled; AIR 1958 SC 36, Relied on; Case law discussed. (Paras 9 and 13)

(B) Civil Services — Punjab Police Service Rules (1959), Rule 16.1 — 'Reduction' and 'forfeiture of approved service for increment' are two distinct and separate punishments — Second show cause notice is essential under Rule 16.24, Clause (ix) only in case of dismissal or reduction in rank — Punishment of forfeiture of approved service imposed on a constable reducing his salary to the starting point in the time-scale is not a reduction in rank.

(Paras 4, 12)

Cases Referred: Chronological Paras

- (1970) AIR 1970 SC 77 (V 57) = (1970) 1 SCR 220, Debesh Chandra Das v. Union of India 11
(1966) AIR 1966 SC 1197 (V 53) = (1966) 3 SCR 61, Shitla S. Srivastava v. North Eastern Railway 8
(1964) AIR 1964 SC 423 (V 51) = (1964) 4 SCR 598, P. C. Wadhawa v. Union of India 10
(1962) AIR 1962 SC 8 (V 49) = (1962) 1 SCR 886, Shri Madhav Laxman Vaikunthe v. State of Mysore 7
(1962) AIR 1962 SC 1704 (V 49) = (1963) 1 SCR 437, The High Court, Calcutta v. Amal Kumar Roy 8

*(Civil Misc. No. 1144-C of 1966 in Second Appeal No. 340 of 1966, D/- 29-7-1966 — Punj.)

BO/BO/A210/71/KSB/C

- (1959) AIR 1959 Orissa 167 (V 46) = ILR (1959) Cut 89, Rupnarain Singh v. State of Orissa 2, 12, 13
(1958) AIR 1958 SC 36 (V 45) = 1958 SCR 828, Parshotam Lal Dhingra v. Union of India 6, 12, 13
(1943) AIR 1943 FC 18 (V 30) = (1943) 5 FCR 7, Afzalur Rahman v. Emperor 12

Mr. V. C. Mahajan, Advocate, for Appellant; Mr. A. K. Nag, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SHELAT, J.: — The respondent was at all material times a constable in the Punjab Police Service and was posted at Ambala. In November, 1960, he was served with a charge-sheet attributing to him arrogance towards his superior officers and indiscipline. A departmental enquiry was admittedly held in accordance with the procedure laid down therefor in the Punjab Police Rules, 1934. The said charges having been held to have been proved, an order followed forfeiting his entire service with permanent effect. This meant bringing down his salary to Rs. 45/- per month, which would be the salary payable to a constable at the starting point of his service. An appeal by him before the Deputy Inspector-General having failed, he filed a suit in the Court of Sub-Judge, Ambala.

2. The suit was on the basis that the said order amounted to reduction in rank, that therefore, Article 311 (2) of the Constitution was attracted and that no show cause notice against the action proposed against him having been served upon him before the said order was passed, the order was vitiated and was bad. The Trial Court accepted this contention and decreed the suit. An appeal by the appellant-State failed as the District Judge, relying on Rupnarain Singh v. State of Orissa, AIR 1959 Orissa 167, held that the said order amounted to reduction in rank and the respondent was therefore entitled to the procedural safeguards laid down in Article 311 (2). A second appeal by the State before the High Court was summarily rejected. Hence, this appeal founded on special leave granted by this Court.

3. The only question arising in this appeal, the facts not being in dis-

pute, is whether the order forfeiting the respondent's service, which meant reducing his salary to the starting point in the time-scale for constables, amounted to reduction in rank within the meaning of Article 311 (2). The respondent being a constable, there was no question of his being reduced from a higher post or rank to a lower post or rank. The order, none-the-less, reduced the emoluments received by him as it deprived him of the increments earned by him as a result of the approved service, he had put in, having been forfeited. It also affected his seniority, and therefore, chances of promotion. The question is, whether for that reason the order is tantamount to reduction in rank attracting Article 311 (2).

4. Rule 1.13 of the Punjab Police Service Rules (hereinafter referred to as the Rules) provides that a "Gazetted Police Officer" means a police officer appointed under Section 4 of Article V of 1861, and includes the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General, Superintendents, Assistant Superintendents and Deputy Superintendents. The expression "enrolled police officer" means police officers appointed under Section 7 of the said Act and includes inspectors, sergeants, sub-inspectors, assistant sub-inspectors, head constables and constables. The expression "upper subordinate" includes all enrolled police officers of and above the rank of assistant sub-inspector, and the expression "lower subordinate" includes all other enrolled police officers. There is thus a hierarchy in the Police Service of the State comprised of several posts, the post of a constable being the last rung in the ladder. Rule 13.1, which deals with promotion of police officers from one rank to another, provides that such promotions from one rank to another and from one grade to another in the same rank shall be made by selection tempered by seniority. Cl. 3 of that rule lays down that for purposes of regulating promotion amongst enrolled police officers, six promotion lists, A, B, C, D, E and F should be maintained. Lists A, B, C and D are meant to regulate promotion to the selection grade of constables and to the rank of head constables and assistant sub-inspectors. List E regulates promotion to the rank of sub-inspector and List F regulates promotion to

the rank of Inspector. Rule 13.5 deals with promotion of constables to selection grade and Rule 13.6 provides that a list, called List A, shall be maintained by each Superintendent of Police of Constables eligible under Rule 13.5 for promotion to the selection grade of constables. Rule 13.7 provides for a list, called List B, divided into two parts, namely, selection grade constables considered suitable as candidates for the Lower School course at the Police Training School, and constables, selection or time-scale, considered suitable for drill and other special courses at the Police Training School. Rule 13.8 lays down that promotion to the post of head constable has to be made in accordance with the principle described in sub-rules (1) and (2) of Rule 13.1. Rule 13.8-A provides that infliction of any major punishment would be a bar to admission to or retention in lists A, B or C. Rule 16.1 lays down diverse punishments which can be awarded to members of the service in accordance with the provisions contained in these Rules. These punishments are: (1) dismissal, (2) reduction, (3) stoppage of increment or forfeiture of approved service for increment, (4) entry of censure, (5) confinement to quarters for a period not exceeding 15 days, (6) extra guards, fatigue or other duty, and punishment drill for certain days. Under Rule 16.1 (3), a major punishment means any authorised punishment of reduction, withholding of increments, forfeiture of approved service, dismissal and every judicial conviction on a criminal charge. Rule 16.4 defines 'reduction' and provides that a police officer may be reduced (a) to a lower rank (except in the case of sergeants and of constables on the time-scale), (b) from the selection grade of a rank to the time-scale of the same rank, (c) if in a graded rank to a lower position in the seniority list of his grade or to a lower grade in his rank. Rule 16.5 provides that the increment of a police officer on a time-scale may be withheld as a punishment. Clause (2) of that rule provides that approved service for increment may be forfeited, either temporarily or permanently, and such forfeiture may entail either the deferment of an increment or increments or a reduction in pay. It further provides that the order must state whether the forfeiture of approved service is to be permanent, or, if not, the period for which it has

been forfeited. Thus, under Rr. 16.4 and 16.5 the two punishments of reduction and forfeiture of service are two distinct punishments. Rule 16.24 lays down the procedure to be followed in departmental enquiries. Clause (ix) of that Rule clearly provides that it is only in the case of an order of dismissal or reduction in rank that a second show cause notice against the proposed action against a police officer has to be served before an order is passed against him. Such a second show cause notice is, therefore, not required to be served in the case of other major or minor punishments. There is no dispute that in the present case the procedure laid down in these Rules and applicable to the respondent was followed.

5. The contention, however, was that though the Rules distinguish the two punishments of reduction and forfeiture of service and treat them as distinct, there were certain decisions of this Court which have held that for an order to amount to reduction in rank within the meaning of Art. 311 (2) it was not necessary that it must actually reduce a Government servant from a higher to a lower post or rank, and that even if the order affected adversely his seniority or chances of promotion within the rank or cadre to which he belongs, it would still constitute reduction in rank.

6. Parshottam Lal Dhingra v. Union of India, 1958 SCR 828 = (AIR 1958 SC 36) was one such case on which counsel leaned heavily. But the question there was whether the reversion of the appellant from Class II service, wherein he was at the relevant time officiating, to Class III service to which he permanently belonged, amounted to punishment, and therefore, attracted Art. 311 (2). The decision laid down the principle that reduction in rank would be punishment if it carried with it penal consequences and that the two tests to be applied were (1) whether the servant had the right to the post or rank, and (2) whether evil consequences, such as forfeiture of pay or allowances, loss of seniority in his substantive rank, stoppage or postponement of future chances of promotion followed as a result of reduction in rank. The appellant in that case was holding an officiating post and had therefore no right under the Railway Code to continue in it. The Court held that since under the gene-

ral law such appointment was terminable at any time on reasonable notice, the reduction could not operate as a forfeiture of any right, and therefore, the order could not be said to have visited him with any evil consequences. Consequently, it did not amount to reduction in rank by way of punishment. The decision also laid down that the words "dismissal", "removal" and "reduction in rank" used in Article 311 (2) were words of art, having technical meanings, they having been adopted from service rules prevailing earlier, such as Classification Rules of 1920 and 1930, and having therefore acquired well-known meanings. Under those rules, dismissal, removal and reduction in rank were major punishments providing special procedural protection. On examination of the history of the service rules, Section 96B (i) of the Government of India Act, 1915 and Section 240 of the 1935 Act, the Court held that "both at the date of the commencement of the 1935 Act and of our Constitution the words "dismissed", "removed" and "reduced in rank", as used in the service rules, were well understood as signifying or denoting the three major punishments which could be inflicted on Government servants". The decision concluded that "the principle is that when a servant has right to a post or to a rank either under the terms of the contract of employment, express or implied, or under the rules governing the conditions of his service, the termination of the service of such a servant or the reduction to a lower post is by itself and prima facie a punishment, for it operates as a forfeiture of his right to hold that post or that rank and to get the emoluments and other benefits attached thereto." The passage in the judgment emphasised before us was:

"A reduction in rank likewise may be by way of punishment or it may be an innocuous thing. If the Government servant has a right to a particular rank, then the very reduction from that rank will operate as a penalty, for he will then lose the emoluments and privileges of that rank. If, however, he has no right to the particular rank, his reduction from an officiating higher rank to his substantive lower rank will not ordinarily be a punishment. But the mere fact that the servant has no title to the post or the rank and the Government has, by

contract, express or implied, or under the rules, the right to reduce him to a lower post does not mean that an order of reduction of a servant to a lower post or rank cannot in any circumstances be a punishment. The real test for determining whether the reduction in such cases is or is not by way of punishment is to find out if the order for the reduction also visits the servant with any penal consequences." According to this decision, reduction in rank within the meaning of Art. 311 (2) means reduction from a higher to a lower rank or post in the hierarchy of the service to which a Government servant seeking protection of that article belongs and not reduction in the same rank, e.g., losing places in seniority in the rank to which he belongs.

7. Shri Madhav Laxman Vaidkunthe v. State of Mysore, (1962) 1 SCR 886 = (AIR 1962 SC 8) another decision relied on by counsel, was a case of a Mamlatdar, officiating as a District Deputy Collector. His reversion from the officiating post to his permanent post was held to be punishment attracting Article 311 (2). This was a clear case of reduction in rank as the reversion brought down the appellant from a higher to a lower post. It did not merely affect his seniority or the stage at which he was in the time-scale to which he belonged in the hierarchy of service.

8. The decision in point really is the High Court, Calcutta v. Amal Kumar Roy, (1963) 1 SCR 437 = (AIR 1962 SC 1704) where the respondent, a Munsif, was excluded by the High Court from consideration for the post of a Subordinate Judge for a year thereby depriving him eight places in the cadre of Subordinate Judges when he was appointed an Additional Subordinate Judge. The respondent's contention was that such an exclusion amounted to withholding of promotion or reduction in rank. The first part of the contention was rejected on the ground that he had no right to promotion and the second on the ground that deprivation of eight places in seniority in the same rank did not constitute reduction in rank. This decision was followed in Shitla S. Srivastava v. North Eastern Railway, (1966) 3 SCR 61 = (AIR 1966 SC 1197) where it was held that the removal of the appellant's name from a provisional panel of persons for consideration for higher posts did not attract

Article 311 (2) as it did not amount to reduction in rank. The Court held that the expression "rank" in Article 311 (2) had reference to a person's classification and not his particular place in the same cadre in the hierarchy of the service to which he belongs.

9. It is thus clear that reduction in rank within the meaning of Article 311 (2), as the expression itself suggests, means reduction from a higher to a lower rank or post and not merely losing places in the rank or cadre to which the Government servant belongs, and consequently, his seniority within such cadre or rank. This would be so, even if as a result of the Government's action he loses a higher salary or his chances of promotion to a higher post are reduced. For such action, the remedy would be under the rules governing the service and not under Article 311 (2) as such action does not amount to reduction in rank as understood for the purposes of Article 311 (2).

10. Counsel for the respondent, however, argued that there were other decisions which have held otherwise and assisted him. P. C. Wadhwa v. Union of India, (1964) 4 SCR 598 = (AIR 1964 SC 423) was one such decision which, he thought, assisted him. In that case, the appellant was officiating in the senior time-scale and was posted at Ferozepore as an Additional Superintendent of Police. In July, 1958, he was reverted to his substantive post. The reason for the reversion was that he was tried as a Superintendent of Police and was found to be immature. The record showed that the reversion was not due to the return of the permanent incumbent from leave or deputation or for any other administrative reason and other officers junior to him continued in the senior time-scale while he was reverted. The record also revealed that an enquiry was not resorted to only for the reason that it would take a long time. His contention in these circumstances was that his reversion amounted to reduction in rank. That was accepted because it would seem from the facts that the reversion was from senior time-scale to junior time-scale of the service. Though both the posts were cadre posts in the Police Service, the reversion was from the post of the Additional Superintendent of Police to one of Assistant Superintendent of Police, the former obviously

being a post higher than the latter. Although both the posts were in the same cadre, promotion from the junior to the senior time-scale was by seniority. It is clear, therefore, that appointment of one in the junior time-scale to a post in the senior time-scale was promotion, and therefore, appointment to a higher post. Such is not, however, the position in the instant case.

11. Debesh Chandra Das v. Union of India, AIR 1970 SC 77 was another decision relied upon by Mr. Nag. The appellant there was the Chief Secretary of Assam and a member of the Indian Civil Service. He was appointed a Secretary in the Union Government, a tenure post, the tenure period of which was to expire in July, 1969. In September, 1966, he was asked to choose between reversion to the service of his parent State or compulsory retirement. He complained against the order by a writ petition contending that the order was a stigma and amounted to reduction in rank, which, therefore, could not be passed without undergoing the procedure laid down in Article 311 (2). His appointment as the Secretary at the Centre was not by way of deputation but was by way of appointment to a tenure post. This Court held, on an examination of the rules, that cadres for the Indian Administrative Services were to be found in the States only, that there were no cadres in the Government of India, that a few of them were, however, intended to serve at the Centre and when they did so, they enjoyed better emoluments and better status. Such an appointment, the Court held, meant promotion to a higher post. In the circumstances, the order amounted to the appellant's reduction from a higher to a lesser rank. This, again was a case where the Government servant was reverted from a post higher than the post of the Chief Secretary, Assam, and not a reduction in the same time-scale post or deprivation of places in the same time-scale post thereby adversely affecting his seniority therein or chances of promotion.

12. The decision of the High Court of Orissa in AIR 1959 Orissa 167 would apparently assist the respondent, for the impugned order there was similar to the one in the instant case. That order directed that the petitioner, who was then serving as a

forester, be reduced to the lowest scale of Rs. 50/- in the scale of pay of Rs. 50-2-70 fixed for the foresters. The High Court upheld the contentions of the petitioner, viz., (1) that the order was punishment, and (2) that it amounted to reduction in rank within the meaning of Section 240 (3) of the 1935 Act and Article 311 (2). These conclusions were reached on two premises. The first was that Rule 2 of the Bihar and Orissa Subordinate Services Discipline and Appeal Rules in Clause (iii) provided, amongst others, the punishment of "reduction to a lower post or time scale or to a lower stage in the time-scale". Following the decision in Afzalur Rahman v. Emperor, AIR 1943 FC 18 where the Court had observed that in construing Section 240 of the 1935 Act, the longstanding service practice based on statutory rules in force long before the passing of the 1935 Act, and which were continued in force by that Act, should be considered, the High Court held that the expression "reduction in rank" in Section 240 (3) must also include reduction to a lower stage in the time-scale as Rule 2 (iii) had treated reduction to a lower post and "reduction to a lower stage in the time-scale" as one kind of punishment. Such a reasoning does not apply to the present case because Rule 16.1 of the Punjab Police Rules makes a clear distinction between "reduction" and stoppage of increment or forfeiture of approved service for increment, the two being distinct and separate punishments permissible under that Rule. The second premise upon which the High Court reached the said conclusions rested on the observations in Dhingra's case, 1958 SCR 828 = (AIR 1958 SC 36) wherein this Court laid down the criterion to judge whether an order is a punishment or not by observing that it would be punishment if the order entailed or provided for forfeiture of pay or allowances or loss of seniority in his substantive rank, or stoppage or postponement of his future chances of promotion. The passage relied on by the High Court laid down determinants for treating an order as one of punishment and not a test for reduction in rank. As already stated, in Dhingra's case, 1958 SCR 828 = (AIR 1958 SC 36) the impugned order was held to be one of reduction in rank because the appellant there was reduced from Class II to Class III

service, i. e., from a higher to a lower post, the time-scales of the two posts being different. The reduction of rank was held not to be a punishment because the appellant was not entitled to the better post wherein he was merely officiating and therefore did not visit him with any evil consequences. The observations relied on by the High Court thus related to the question whether the impugned order was one of punishment and not for deciding whether it amounted to a reduction in rank and were, therefore, not apposite. The basis for the second premise of the High Court, therefore, was not correct and therefore, cannot help the respondent.

13. The aforesaid analysis of the decisions leads us to the conclusion that the expression "reduction in rank" in Article 311 (2) has to be construed according to the well-established meaning it has acquired, as in the case of the other two expressions, namely, 'dismissal' and 'removal' in that article, under the various service rules and the provisions in that regard in the Constitution Acts of 1915 and 1935. The expression "reduction in rank" in the article, therefore, means reduction from a higher to a lower rank or post when imposed as a penalty. Therefore, an order forfeiting the past service which has earned a Government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his seniority within the rank to which he belongs or his future chances of promotion, does not attract the article. His remedy, therefore, is confined to the rules of service governing his post. In our view, neither Parshotam Lal Dhingra's case, 1958 SCR 828 = AIR 1958 SC 36) nor Rupnarain Singh's case, AIR 1959 Orissa 167 assists the respondent, as the first does not lay down what he contended and the second was not correctly decided.

14. The result is that the State's appeal succeeds and must be allowed. Consequently, the respondent's suit has to be dismissed. In the circumstances of the case, however, there will be no order as to costs.

Appeal allowed.

AIR 1971 SUPREME COURT 771
(V 58 C 155)

(From: Punjab)*

J. M. SHELAT, C. A. VAIDIALINGAM
AND P. JAGANMOHAN REDDY, JJ.

Om Parkash and others, Appellants v. Union of India and others, Respondents.

Civil Appeal No. 264 of 1967, D/- 2-12-1970.

(A) Interpretation of Statutes — Conferment of specific power without prejudice to generality of general power already specified — Specific power is only illustrative and does not restrict general power in any way. AIR 1945 PC 156, Rel. on; AIR 1970 SC 1978, Dist. (Para 5)

(B) Displaced Persons (Compensation and Rehabilitation) Act (1954), Sections 19, 24, 22 — Section Officer-cum-Managing Officer can cancel under Section 19, allotment based on oral verification if relevant revenue records justify such course — Chief Settlement Commissioner can also cancel such allotment under Section 24.

On the basis of an oral verification some land was allotted to a person. Subsequently the Section Officer-cum-Managing Officer, relying on Fard Taqsim and Khasra Girdawari, discovered that an area of some acres was in excess of what the allottee was entitled to. He cancelled the allotment to the extent of the excess. The appellate authority in appeal against that order referred the matter to the Chief Settlement Commissioner who acting under Section 24 cancelled the order of allotment to the extent of the excess. He also relied on Fard Taqsim and Khasra Girdawari. The appeal was thereafter dismissed.

Held, the oral verification was subject to correction, variation and cancellation if revenue records justified such a course. The Fard Taqsim was an important revenue record and the Section Officer-cum-Managing Officer as well as the Chief Settlement Commissioner were right in placing reliance on the Fard Taqsim and Khasra Girdawari. Both of them had jurisdiction to cancel the allotment under Sections 19 and 24 respectively. The appellate authority was also right

*(Civil Writ No. 1383 of 1966, D/- 28-7-1966 — Punj.)

in referring the matter to the Chief Settlement Commissioner. Civil Writ No. 1383/1966, D/- 28-7-1966 (Punj), Affirmed. (Paras 4, 7, 10, 11, 12)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 1978 (V 57)

= (1970) 1 SCJ 927, Estate Development Ltd. v. Union of India

(1966) AIR 1966 SC 1445 (V 53)

= (1966) 3 SCR 198, Ramesh v. Gendalal Motilal Patnik

(1945) AIR 1945 PC 156 (V 32)

= 72 Ind App 241, King Emperor v. Sibnath Banerjee

M/s. Bhawani Lal, S. R. Agarwal and E. C. Agrawala, Advocates, for Appellants; Mr. Ram Panjwani, Advocate, for Respondents.

The following Judgment of the Court was delivered by:

P. JAGANMOHAN REDDY, J: —

This appeal is against the order of cancellation of the allotment made in favour of the Appellant's father in 1948 under the Displaced Persons (Compensation and Rehabilitation) Act, 1954 (hereinafter called the Act) in the following circumstances:

After the partition of India in 1947 the Appellant's father Shri Ram Chander filed a claim in respect of the land which was owned and left behind by him in Pakistan. In respect of this claim land measuring 49.2 Standard acres was allotted to him in village Pasina Kalan, Tehsil Panipat, District Karnal. Soon thereafter the Appellant's father, after this allotment died in 1948 leaving the Appellants and their brother Shri Ved Prakash as the only legal heirs. After the proprietary rights were conferred upon the Appellants, Ved Prakash sold his share of the land to Appellants Nos. 2 and 3 by Registered sale deed dated 27th November, 1957. It appears that the Section Officer-cum-Managing Officer, Department of Rehabilitation, Jullundur Respondent No. 4 while verifying the claim discovered that an area of 15-17½ standard acres was in excess of what the Appellants were actually entitled to, having regard to the nature of the land left by their father in Pakistan which was not wholly canal irrigated but comprised of Banjar Jadid, Banjar Qadim and Ghair Mumkin land and accordingly he reopened the allotment and cancelled it to the extent of the excess. Against this order the appellants filed

an appeal to Respondent 3 challenging the jurisdiction of Respondent 4, the Section Officer-cum-Managing Officer to pass an order cancelling permanent rights conferred on them. Respondent 3 however referred the matter to Respondent 2—the Chief Settlement Commissioner, Punjab on 31-7-1964 who acting under Section 24 (1) of the Act cancelled the order of allotment to the extent of 15-17½ standard acres out of the area allotted to Appellant's father. Thereafter the appeal filed by the Appellants was dismissed by Respondent 3 as infructuous. A revision against the order of the Respondent 2 was preferred to the Central Government under Section 33 of the Act which was also rejected on the 27th May 1966. The Appellants thereafter filed a Writ Petition in the High Court of Punjab for the issuance of a writ of certiorari for quashing the orders passed by the Respondents 1 to 4 which was dismissed in limine by a Bench of that Court on the 28th July 1966. Subsequently another Bench of the same Court however, granted a certificate to appeal to this Court under Article 133 of the Constitution of India in as much as following the Judgment of this Court in Ramesh v. Gendalal Motilal Patnik, AIR 1966 SC 1445, it was held that the order of dismissal in limine was a final order and the value of the subject matter in dispute being Rs. 20,000/- the Appellant was declared to be entitled to the grant of a certificate to appeal as a matter of right.

2. It is contended before us by Shri Bhamari Lal learned Advocate for the Appellants that once proprietary rights have been conferred upon the Appellants in respect of the entire area of the land which is allotted to them, the Section Officer-cum-Managing Officer had no jurisdiction to cancel the allotment and if this is so the High Court ought to have quashed that order in exercise of the jurisdiction vested in it under Article 226 of the Constitution of India. It is also contended that Respondent 3 was not justified in making a reference to Respondent 2 for cancelling the proprietary rights conferred upon the Appellants because if Respondent 4 had no jurisdiction to cancel the order, he had also no jurisdiction to cancel the allotment except to cancel the order of Respondent 4. Further the reference made by Respondent 3 to Respondent 2 is equally bad because under Sec. 19

of the Act read with Rule 102 of the Displaced Persons Compensation & Rehabilitation Rules, it is for the Section Officer-cum-Managing Officer Respondent 4 to refer the matter to Respondent 2, as such the reference by Respondent 3 to Respondent 2 is bad in law.

3. Lastly it was contended that the authorities were in error in holding that there was no material for them to hold that the land which was owned by the Appellant's father in Pakistan was not canal irrigated land because the first Fard Taqsim received from the Pakistan authorities did not even show the name of the Appellant's father as owner of any land in Pakistan and when the second Fard Taqsim was received by the Rehabilitation authorities from Pakistan they did show the Appellant's father as owner of the land but Khasra Girdawari which was received with it did not show the entire land as canal irrigated. In these circumstances it was urged that no reliance could be placed upon these contradictory documents which were sent by Pakistan authorities from time to time. The learned Advocate also contended that the best evidence which could have shown the classification of the land owned by the Appellant's father was the 'Shud Kar' entries of the canal Department which would corroborate the Appellant's contention that the entire land was canal irrigated but when these documents were sent for, the Pakistan authorities said that the 'Shud Kar' had been destroyed and subsequently the Deputy Commissioner for India in Pakistan had informed that the Pakistan authorities were not co-operative in supplying the entries in 'Shud Kar'. It was also contended by the learned Advocate that the Jamabandi papers which are the most important Revenue records ought to have been looked into instead of the Fard Taqsim and the Khasra Girdawari and if so examined the Jamabandi papers would have shown that the land which the Appellant's father owned was canal land.

4. It is not denied that the Appellant's father obtained the allotment on the basis of an oral verification of his claim under 3 categories — Quasi permanent, Temporary and Reserve. This oral verification is subject to correction, variation and cancellation if subsequently relevant

revenue records which were called for from the Pakistan authorities justified such a course. The Section Officer-cum-Managing Officer could therefore under Section 19 of the Act cancel any allotment or terminate any lease or amend the terms of any lease or allotment under which any evacuee property was allotted. The Chief Settlement Commissioner had also the powers under sub-section (1) of Section 24 of the Act to call for the records at any time of the proceedings under the Act in which an officer specified therein has passed an order, for the purpose of satisfying himself as to the legality or propriety of any such order and may pass such order in relation thereto as he thinks fit. Sub-section (2) further provides as follows:

"Without prejudice to the generality of the foregoing power under sub-section (1), if the Chief Settlement Commissioner is satisfied that any order for payment of compensation to a displaced person or any lease or allotment granted to such a person has been obtained by him by means of fraud, false representation or concealment of any material fact, then, notwithstanding anything contained in this Act, the Chief Settlement Commissioner may pass an order directing that no compensation shall be paid to such a person or reducing the amount of compensation to be paid to him, or as the case may be, cancelling the lease or allotment granted to him; and if it is found that a displaced person has been paid compensation which is not payable to him, or which is in excess of the amount payable to him, such amount or excess, as the case may be, may, on a certificate issued by the Chief Settlement Commissioner, be recovered in the same manner as an arrear of land revenue".

5. It is therefore contended relying on sub-section (2) that inasmuch as no fraud or false representation or concealment of any material fact has been alleged or proved in this case, the Chief Settlement Commissioner cannot exercise the revisionary power under Section 24. This contention in our view has no validity. It is a well-established proposition of law that where a specific power is conferred without prejudice to the generality of the general powers already specified, the particular power is only illustrative and does not in any

way restrict the general power. The Federal Court had in Talpade's case indicated the contrary but the Privy Council in *King Emperor v. Sibnath Banerjee*, 72 Ind App 241 = (AIR 1945 PC 156) observed at page 258:

"Their Lordships are unable to agree with the learned Chief Justice of the Federal Court on his statement of the relative positions of sub-sections (1) and (2) of Section 2 of the Defence of India Act, and counsel for the respondents in the present appeal was unable to support that statement, or to maintain that Rule 26 was invalid. In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (1)".

6. The decision of this Court in *Estate Development Ltd. v. Union of India*, (1970) 1 SCJ 927 = (AIR 1970 SC 1978) did not consider this aspect of the matter and was only concerned with sub-sec. (2) of Section 24 and consequently it is not of much assistance to the Appellants.

7. In this view the contention of the learned Advocate that neither the Section Officer-cum-Managing Officer under Section 19 nor the Chief Settlement Commissioner under Section 24 had jurisdiction to revise their earlier orders, has no force, nor is there any justification in the contention that Respondent 3 could not refer the matter to the Chief Settlement Commissioner for him to exercise the power under Section 24 (1) of the Act.

8. On the merits of the case there is no doubt that the initial allotment was made on the assumption that the land belonging to the Appellant's father which was left in Pakistan was canal land but as it turned out from the records which the Department of Rehabilitation obtained from the Pakistan Government the lands owned by the Appellants were not entirely canal land but there were included in it Banjar Jadid, Banjar

Qadim and Ghair Mumkin land, which did not entitle the Appellant's father to allotment of 49.2 Standard Acres but to a lesser extent. In other words the allotment made to the Appellant's father initially was 15-17½ standard acres in excess of the extent to which he was entitled. The Appellant, however, as already stated contests this finding. The learned Advocate on their behalf has urged before us that Fard Taqsim and Khasra Girdawari had not correctly indicated either the extent of the land or its classification. We do not think this contention is tenable. The Chief Settlement Commissioner has in his order dated the 22nd February 1965 stated that the second Fard Taqsim and also Khasra Girdawari of 1946-47 showing the class of soil abandoned in Pakistan was verified after inspection from the original records from the Pakistan authorities and also by the officials of the Indian Government. The Chief Settlement Commissioner proceeded to observe that on the basis of second Fard Taqsim and the latest Khasra Girdawari supplied by the Pakistan Government it was found that the entire land abandoned by Shri Ram Chand was not canal irrigated in spite of the fact that the total area of land abandoned by him in Chak No. 708/GB was 51-7-8 A. K. M. The kind of soil as found out from the Fard Taqsim was as under:

Nehri	29-6-16 A.K.M.
Banjar Jadid	14-6-12 -do-
Banjar Qadim	6-7-15
Ghair Mumkin	0-2-5

9. On the basis of this information the Appellant will be entitled to only 33-10½ standard acres and consequently there is an excess allotment to the extent of 15-17½ standard acres. The Chief Settlement Commissioner also pointed out that on four occasions the authorities concerned being moved by the Appellants had sought for and obtained information and in so far as 'Shud Kars' are concerned they were informed that they were destroyed after 6 years and that no 'Shud kars' were available for the year 1947 or before and on the 4th occasion when again information was sought for with respect to these Shud Kar as stated earlier the Deputy Commissioner for India in Pakistan had replied that the Pakistan authorities were not co-operative in such matters.

10. It may be observed that nowhere was it urged that neither the Fard Taqsim nor the Khasra Girdawari were not important revenue records nor that they do not disclose the classification of the land or source of irrigation. What was urged was that the records sent by the Pakistan Government were not reliable. We do not think that the contention that Fard Taqsim and Khasra Girdawari are not important documents is justified nor can it be said that it is not possible to say what is the nature, extent or quality of the land. The learned Advocate has referred us to page 49 of Land Resettlement Manual by Tirlok Singh which is said to be a standard work. It is therein stated that for class of land the entry in the Jamabandis is to be followed strictly.

11. Even the earlier references in the book show that the entries in the Jamabandi did not give all the necessary details and therefore certain directions had to be given. It is also evidence that details regarding the extent distribution and classification of land could be obtained from Fard Taqsim which is also an important Revenue record.

12. A reference to the Punjab Land Revenue Act, 1887 would show that a Jamabandi is a Register of holding of owners and tenants prepared pursuant to Section 31 (2) of the Punjab Land Revenue Act, 1887. Under Sections 31 to 40 of the said Act record of rights and annual records are prepared. Jamabandi is part of the standing record maintained under Section 31 (2). A standing record is one framed at a settlement made before the said Act was passed or in pursuance of a notification issued under Section 32 of the Act and is considered to be a convenient way of distinguishing it from the annual record, an amended edition of the record-of-rights prepared for each estate yearly or at such intervals as the Financial Commissioner may prescribe in which all changes which have occurred since the standing record was framed are, or should be, incorporated. The form in which the Jamabandi is to be maintained is given in Land Revenue Rule 72 in which one of the particulars to be given in Column 6 is the "well or other means of irrigation" for the particular land. Khasra Girdawari is a harvest inspection book. This is given

in the Punjab Land Records manual. Column 5 requires the class of land according to last Jamabandi to be shown. A new Khasra Girdawari will be brought into use when a new quadrennial Jamabandi has been prepared. While Fard Taqsim is prepared under the Rules for the preparation and maintenance of Fard Taqsim arazi matruka made in exercise of the powers conferred by Section 46 of the said Act. The Fard Taqsim arazi matruka of the village would show that Column 7 requires the "well or other sources of irrigation" to be stated, just in the same way as in the Jamabandi Col. 6. (The relevant particulars and forms of Jamabandi, Khasra Girdawari and Fard Taqsim are at pages 199-200, 361 to 367 and 305-306 respectively of the Punjab Land Revenue Act 1887-V Edition-1963 by Aggarawala). We are however, not concerned with the various aspects of these records as it is not necessary for us to consider them in this case except to the extent necessary namely to show that a Fard Taqsim is as important a document as Jamabandi and gives in so far as this case is concerned the relevant data for determining whether the land owned and left by the Appellant's father was entirely canal land. Both the Section Officer-cum-Managing Officer as well as the Chief Settlement Commissioner therefore, were right in placing reliance on the Fard Taqsim and Khasra Girdawari to come to the conclusion that the entire land belonging to the Appellant's father was not canal irrigated, and therefore, what was allotted was 15-17½ standard acres in excess.

13. Even from the order in Revision of the Central Government, Department of Rehabilitation dated 3-3-1966 it is apparent that the Appellants had again pressed before him similar contentions to those urged before the Chief Settlement Commissioner. Shri Nair in a detailed order while dismissing the revision observed:

"as regards the plea that yet another opportunity may be given to the petitioners to produce some documentary evidence I am of the opinion that in the circumstances explained by the Chief Settlement Commissioner (R) it will hardly serve any purpose as the Shud kar of the Canal Department on which they rely are reported to have been destroyed.

However, if there is any cogent documentary proof to establish that the entire land was Nehri, the petitioners can place it before the authorities concerned in order to get their account corrected. As matters stand at present which indicate that all possible efforts were made to obtain the information from Pakistan, I find no illegality or impropriety in the impugned order. The petition is devoid of force and is hereby rejected".

14. We consider this order to be fair and reasonable. There is no doubt that it is still open to the Appellants to avail of the opportunity afforded to them to procure and produce such material from which it can be established that the entries in the Fard Taqsim and Khasra Girdawari are not correct or that the lands owned by the Appellants' father were canal lands entitling the Appellants to an allotment of 49.2 standard acres. Till then no exception can be taken to the orders passed by the concerned authorities. The appeal therefore fails and is accordingly dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 776
(V 58 C 156)**

(From: Patna)*

**J. C. SHAH C. J. AND
A. N. GROVER, J.**

Raghubanchmani Prasad Narain Singh, Appellant v. Ambica Prasad Singh (dead) by his Legal representatives and others, Respondents.

Civil Appeal No. 1119 of 1965, D/-18-12-1970.

(A) Hindu Law — Alienation — Alienation by Manager of joint Hindu family even without legal necessity is voidable and not void. (Para 5)

(B) Constitution of India, Art. 133 — Concurrent findings of fact — Interference — Civil P. C. (1908), Section 112.

The Supreme Court does not disturb a concurrent finding of fact and enter upon a re-appraisal of the evidence. (Para 3)

*(A. F. O. D. No. 246 of 1952, D/-2-2-1959 — Pat.)

AO/AO/G177/70/BNP/M

**(C) Constitution of India, Art. 133
(1) (a) and (1) (c) — Certificate of fitness for appeal.**

Where the value of the subject matter in the Court of First instance was Rs. 5,250/- and the judgment of the High Court was one of affirmance and the case also does not raise the substantial question of law, the High Court in granting certificate of fitness under Article 133 (1) (a) and (1) (c) commits a serious error. Further a certificate which does not set out the grounds in support of the order is defective. (Para 7)

Mr. S. V. Gupte, Sr. Advocate (Mr. Naunit Lal, Advocate, with him), for Appellant; Mr. D. Goburdhun, Advocate, for Respondent No. 2.

The following Judgment of the Court was delivered by

SHAH, C. J.: Raja Bahadur Harihar Prasad Narain Singh hereinafter called 'the Raja' settled in 1936 an area of 15 bighas of land in village Nanour Tauzi Nos. 11021 and 11163 out of his joint family estate upon Ambica Prasad and Harihar Prasad—hereinafter called "respondents 1 and 2". The Annual Jama of the land was Rs. 15/-. The appellant who is the son of the Raja filed in 1942 a suit for partition of the joint family estate. The suit was compromised. The appellant claims that the land settled upon respondents 1 and 2 were allotted to his share by that compromise. In 1946 the appellant dispossessed respondents 1 and 2 from the land settled upon them. Respondents 1 and 2 commenced an action in the Court of the Subordinate Judge, Patna, against the appellant and his brother for a decree for possession of the land and for mesne profits. The appellant by his written statement denied the settlement and set up the plea by respondents 1 and 2, that he and the members of his family were at all relevant times in possession of the land and that he had not dispossessed respondents 1 and 2 as alleged.

2. The Trial Court decreed the suit holding that the land in "dispute was" settled upon the respondents 1 and 2 by the Raja and that the Respondents 1 and 2 were in possession of the land since that date and that they were wrongfully dispossessed by the appellant. The High Court in appeal confirmed the findings of the Trial Court and dismissed the appeal

filed by the appellant. With certificate granted by the High Court under Article 135 of the Constitution, this appeal has been preferred.

3. The decision of the Trial Court which was confirmed by the High Court proceeded upon appreciation of evidence on questions of fact. Both the Courts have held that there was a settlement in favour of respondents 1 and 2 by the Raja, that Respondents 1 and 2 were in possession of the land since that date, and that they had been forcibly dispossessed of the land by the appellant. This Court normally does not interfere with concurrent findings on questions of fact and does not enter upon a re-appraisal of the evidence. No ground is made out before us for attempting a re-appraisal of the evidence.

4. It was urged that even on the findings recorded no decree could be passed in favour of respondents 1 and 2 because they had failed to establish that the lands were settled for legal necessity or for benefit to the estate of the joint family, and since respondents 1 and 2 had failed to make out any such case, the suit filed by respondents 1 and 2 must fail. In the written statement as originally filed, no plea was raised that the settlement amounted to an alienation not binding upon the other members. There was no issue on that question and obviously the Trial Court did not decide that question. The High Court was of the view that the settlement was beneficial to the estate as an act of prudent management by the Raja. The High Court relied upon several circumstances: the fact that respondents 1 and 2 were the gotias of the family of the appellant, that in respect of certain lands taken away from them no consideration had been paid, that all along respondents 1 and 2 helped the zamindar in a previous litigation and certain promises were made to them as reward for services rendered which till then were not rewarded and that respondents 1 and 2 used to perform the ceremony of Ghiudhari in the family. The High Court further held that the estate was a large one and was utilised for supporting those families which were loyal to the estate, and when lands were settled with such families "the Jama charges were practically nominal". In view of these circumstances the High Court

held that the settlement made by the Raja was proved to be an act done for the benefit of the estate. We see no reason to disagree with that finding of the High Court.

5. In any event an alienation by the Manager of the joint Hindu family even without legal necessity is voidable and not void. On the findings of the Trial Court and confirmed by the High Court, respondents 1 and 2 were in possession of the land, since the year 1936. The appellant forcibly deprived respondents 1 and 2 of possession of the land. In the circumstances respondents 1 and 2 were entitled to be restored to possession of the land, unless the appellant in an action for partition of the joint family established his claim to the land in dispute. No such attempt was made by the appellant.

6. The appeal must therefore fail and is dismissed with costs.

7. It is necessary to invite the attention of the High Court that the certificate pursuant to which the appeal has been filed under Article 135 of the Constitution is plainly defective. The High Court merely recorded that "the value and nature of the case fulfilled the requirements of Article 135 of the Constitution and the case was a fit one for appeal to the Supreme Court under Article 133 (1) (a) or Article 133 (1) (c) of the Constitution". This Court has often pointed out that a certificate which does not set out the grounds in support of the order granting certificate is defective. Article 135 of the Constitution only invests the Supreme Court with jurisdiction in respect of any matter to which the provisions of Article 133 or Article 134 do not apply if jurisdiction and powers in relation to that matter were exercisable by the Federal Court immediately before the commencement of the Constitution under any existing law. Under Sections 109 and 110 of the Code of Civil Procedure an appeal did lie to the Federal Court if the conditions prescribed thereunder were fulfilled. But prima facie, the conditions of Sections 109 and 110 of the Code of Civil Procedure were not fulfilled. The value of the subject matter in the Court of First Instance was Rs. 5,250/-, and the judgment of the High Court was one of affirmance. The case raised no substantial question of law. In our judgment, the High Court committed a serious error

in granting a certificate under Clauses (1) (a) and (1) (c) of Article 133 in this case.

Appeal dismissed.

**AIR 1971 SUPREME COURT 778
(V 58 C 157)**

(From: Madhya Pradesh)*

**S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.**

Ratan Lal, Appellant v. The State of Madhya Pradesh, Respondent.

Criminal Appeal No. 135 of 1968, D/- 17-12-1970.

(A) Penal Code (1860), Section 84 — Plea of unsoundness of mind — Burden of proof is on accused.

The crucial point of time at which unsoundness of mind has to be proved is the time when the crime is actually committed. The burden of proving this can be discharged by the accused from the circumstances which preceded, attended and followed the crime. AIR 1961 SC 998 and AIR 1964 SC 1563, Rel. on. (Para 2)

Held, in view of the testimony of defence witnesses the behaviour of the accused on the day of occurrence, failure of the police to lead evidence as to his condition when the accused was in custody and the medical evidence, that the accused was insane within the meaning of Section 84. Cr. App. No. 143 of 1966, D/- 1-5-1968, (M. P., Gwalior Bench), Reversed.

(Para 14)

(B) Penal Code (1860), Section 84 — Plea of unsoundness of mind — Homicidal tendency is not necessary or only sign of insanity. Cr. App. No. 143 of 1966, D/- 1-5-1968, (M. P., Gwalior Bench), Reversed. (Para 12)

(C) Penal Code (1860), Section 84 — Plea of unsoundness of mind — Tendency to set fire to one's own clothes and house is more than mere irrationality. It is prima facie proof of insanity. (Para 11)

(D) Penal Code (1860), Section 84 — Plea of unsoundness of mind — Proof of insanity — Appreciation of evidence.

* (Cri. Appeal No. 143 of 1966, D/- 1-5-1968 — Madh Pra — Gwalior Bench.)

Testimony of defence witnesses as to unsoundness of mind of accused should not be disbelieved merely because they are relation of accused. It is the relations who are likely to remain in intimate contact of the accused. Cr. App. No. 143 of 1966, D/- 1-5-1968, (M. P., Gwalior Bench), Reversed. (Para 14)

Cases Referred: Chronological Paras
(1964) AIR 1964 SC 1563 (V 51)

= (1964) 7 SCR 361, D. C.

Thakkar v. State of Gujarat 2

(1961) AIR 1961 SC 998 (V 48)

= (1961) 3 SCR 583, State of

Madhya Pradesh v. Ahmadullah 2

M/s. R. L. Kohli and J. C. Talwar, Advocate, for Appellant; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, J.: — This appeal by special leave is directed against the judgment of the High Court of Madhya Pradesh, Gwalior Bench, allowing the appeal of the State and convicting the appellant for having committed an offence punishable under Section 435, Indian Penal Code, and sentencing him to undergo imprisonment for one year. The only point involved in the present appeal is whether the appellant was a person of unsound mind within Section 84 of the Indian Penal Code at the time of the incident. The Magistrate held that he was not liable to punishment as he was insane at that time and did not know that he was doing anything wrong or anything contrary to law. The High Court, on the other hand, came to the conclusion that the case of the appellant did not fall within the exception created by S. 84, I. P. C.

2. It is now well settled that the crucial point of time at which unsoundness of mind should be established is the time when the crime is actually committed and the burden of proving this lies on the accused. (See State of Madhya Pradesh v. Ahmadullah, (1961) 3 SCR 583 = (AIR 1961 SC 998). In D. C. Thakkar v. State of Gujarat, (1964) 7 SCR 361 = (AIR 1964 SC 1563); it was laid down that "there is a rebuttable presumption that the accused was not insane, when he committed the crime, in the sense laid down by Section 84 of the Indian Penal Code: the accused may rebut it by placing before the Court all the relevant evidence oral, documentary

or circumstantial, but the burden of proof upon him is no higher than that which rests upon a party to civil proceedings." It was further observed:

"The crucial point of time for ascertaining the state of mind of the accused is the time when the offence was committed. Whether the accused was in such a state of mind as to be entitled to the benefit of Section 34 of the Indian Penal Code can only be established from the circumstances which preceded, attended and followed the crime."

3. The learned counsel contends that if regard is had to the circumstances which preceded, attended and followed the crime it would be clear that the accused is entitled to the benefit of Section 84 of the Indian Penal Code.

4. The prosecution case is that on January 22, 1965, the appellant set fire to the grass lying in the khalyan of Nemichand at the time of the setting of the sun. He was caught at the spot while setting fire. On being asked why he did it the accused said, "I burnt it and do whatever you want". The accused was arrested on January 23, 1965, and he remained in police custody till February 2, 1965, when it was found that the accused needed medical examination, and accordingly the District Magistrate ordered that he be medically examined. No explanation has been given why he was kept in police custody all that time. There is no evidence either to indicate as to his condition from the time of his arrest to the time when his case was referred for medical examination. These facts were within the knowledge of the police and we should have expected that the prosecution would lead evidence regarding his condition during this time. Further, the police made it impossible for the appellant to prove his mental condition at the time of the incident by keeping him in their custody from January 23 to February 2, 1965, not having him examined and not sending him to judicial custody earlier where he would have been examined by the jail doctor.

5. On February 20, 1965, V. S. Vaidya, Assistant Surgeon, Civil Hospital, Vidisha, reported to the Jailor, Sub-Jail, Vidisha, as follows:

"Subject: In Ref. to your letter No. 295, dated 8-2-1965.

Sir,

Ratanlal Prisoner was kept under observation as indoor patient during this time. He was keeping silent, he never used to reply any question so in my opinion he should be refd. to some specialist for further investigation and needful". On February 22, 1965, Y. D. Kamran, Civil Surgeon, Vidisha, reported as follows:

"Shri Ratanlal, undertrial, was examined by me. He does not appear to be deaf or dumb, but is mentally retarded. He should be referred to Superintendent, Mental Hospital, Gwalior, for expert opinion".

On March 29, 1965, Dr. B. Shah, Psychiatrist and Superintendent, Mental Hospital, Gwalior, reported as follows:

"This is to certify that Shri Ratanlal s/o Kishanlal who has been kept under observation in this hospital from 18-3-1965 to 29-3-1965 is a person of unsound mind, in terms of Indian Lunacy Act, 1912. He is not dangerous and/or violent by reason of lunacy and thus unfit to be at large. The report is based on the following facts observed here:—

(1) Remains depressed.

(2) Does not talk.

(3) He is a case of Maniac depressive.

(4) Psychosis and needs treatment".

On April 28, 1965, another report was given that he was still a person of unsound mind in terms of Indian Lunacy Act, 1912, but was better though still confused, and further that treatment was being continued and it may take 4 to 6 weeks more for recovery.

6. The defence also led evidence as to his condition before the incident in question. Shyamlal, D. W. 1, son-in-law of the appellant stated that "the accused was not feeling well for 2-3 years. He was in such a condition that if he is sitting will remain sitting. If he is to go then he will go and if he wishes to fall in the river then he will fall. Such was the condition of his mind that he used to set fire to his own clothes and house." He further stated that on the day of the incident the appellant did not allow anybody to enter his house and had put a lock on the house and his

children took their food outside, and the accused did not talk to anybody. He further stated that "prior to this incident the accused was being taken to Bhopal after tying him for the treatment of his mind. He was also taken to Bhavera but the accused did not improve." In cross-examination it was brought out that "prior to the setting of fire the accused was neither got admitted in the Government hospital nor any report was lodged in the police station." No cross-examination was directed to ascertain the nature of his illness or to bring out that he was otherwise sane.

7. Another witness, Than Singh, D. W. 2, (the appellant is his maternal uncle) stated that the appellant "used to do whatever he thought. He used to run away wherever he liked. He used to jump in the river also. He used to enter the house of anybody. He used to lock his house. His children used to lie hungry outside. He used to set fire in his clothes also. On the day of occurrence the condition of the accused was worst. He did not speak to anybody on that day." The witness, however, admitted that the accused had not been taken to Government hospital.

8. The Trial Court also mentioned that Moolchand, P. W. 3, Madora, P. W. 4, and Dharma, P. W. 6, admitted that the appellant remained in the khalyan throughout the period that the grass was burning till the chowkidar took him to thana and did not utter a word and did not try to run away.

9. The Trial Court relying on the evidence of Shyamlal, D. W. 1, Than Singh, D. W. 2, and the behaviour of the accused on that day came to the conclusion that the accused was insane. He also relied on the certificates issued by the doctors, mentioned above. He further found support in the absence of motive for the crime. He also relied on the fact that the appellant's khalyan adjoined the khalyan which was set on fire by him, and if the appellant had been sane he would not have taken the risk of having his own khalyan burnt, which was most likely.

10. The High Court, with respect, erred in differing from the Trial Court. The High Court observed that the appellant had not examined

in defence any expert in mental diseases to substantiate his plea of legal insanity. It is expecting rather a great deal from a poor villager that he should produce experts in mental diseases, specially in view of the certificates issued by the Medical authorities after he was arrested. The High Court further erred in holding that the medical reports were of no evidential value. It is true that the reports speak of the mental state of the accused at the time when the reports were issued but the High Court failed to note that the appellant was in police custody from January 23, 1965, and the police could have produced evidence to show that he was absolutely sane till the day when they sent him for medical examination.

11. The High Court thought that the evidence of the two defence witnesses only suggested an irrational behaviour on the part of the accused. The High Court failed to note that, according to D. W. 2, the appellant used to set fire to his own clothes and house, and this could hardly be called irrational; it is more like verging on insanity.

12. The High Court also felt it rather unsafe to rely on the testimony of the two defence witnesses because such evidence could always be procured. It was also impressed by the fact that there was no independent witness forthcoming nor was there any evidence showing that the accused was taken to Bhopal or Gwalior for treatment. The High Court observed:

"Apart from this, these witnesses merely suggest that there was irrational behaviour on the part of the accused. But it has not been proved that he entertained any homicidal tendencies. The evidence adduced is merely of conduct not confirming to the accepted pattern of human behaviour. Such evidence is inadequate to establish that there was such an impairment of cognitive faculties of the accused as to render him legally insane". With respect, it is not necessary that every insane person should have homicidal tendencies. In this case he is not charged for an offence involving homicide but arson.

13. Although the High Court discarded the medical evidence, it took account of its own observations, when it stated:

"We had an opportunity to observe the accused, who was produc-

ed before us by the learned counsel, and he appeared to be a man of normal understanding. We also find that in answering questions which were put to him by the Court under Section 342, Cr. P. C., the accused showed intelligence and care".

With great respect, these are irrelevant considerations. The appeal was heard on April 25, 1968, and the incident occurred on January 22, 1965. A person can surely improve within three years.

14. We are inclined to agree with the conclusion arrived at by the learned Magistrate. We hold that the appellant has discharged the burden. There is no reason why the evidence of Shyam Lal, D. W. 1, and Than Singh, D. W. 2, should not be believed. It is true that they are relations of the appellant, but it is the relations who are likely to remain in intimate contact. The behaviour of the appellant on the day of occurrence, failure of the police to lead evidence as to his condition when the appellant was in custody, and the medical evidence indicate that the appellant was insane within the meaning of Section 84, I. P. C.

15. We accordingly allow the appeal and acquit the appellant of the offence under Section 435, I. P. C., because at the time of the incident he was a person of unsound mind within the meaning of Section 84 of the Indian Penal Code. His bail bond shall stand cancelled.

Appeal allowed.

AIR 1971 SUPREME COURT 731
(V 58 C 158)

(From: Mysore)*

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.

Shri Tarachand, Appellant v. Superintendent of Central Excise, Bangalore, Respondent.

Criminal Appeal No. 76 of 1968,
D/- 3-12-1970.

(A) Defence of India Rules (1962),
Part XII-A (Gold Control Rules) (as
inserted in 1963), Rules 126-Q, 126-X
and 126-J (4) — Notification, D/-

*(Cri. Appeal No. 215 of 1966, D/- 8-2-
68 — Mys.)

LN/LN/F935/70/CWM/P

10-1-1963 under Rule 126-X read with Rule 126-J (4) as modified on 5-11-1963 by another notification — Construction of — Prosecution for offence punishable under Part XII-A — Who can institute.

Prosecution for an offence punishable under Part XII-A referred to in Rule 126-Q can be instituted by or with the consent of an officer not inferior in rank to the Assistant Collector of the Central Excise Department.

In view of the multifarious activities of the higher officers of the Central Excise Department it is clear that after the responsible officers of the Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case further steps in the matter of actual prosecution including the drafting and presentation of the complaint can be lawfully carried out by others.

(Paras 10, 11 and 13)

(B) Criminal P. C. (1898), Section 537 — Wide language of complaint and charge — Cannot prejudice accused when he admits salient facts alleged.

When the relevant salient facts alleged by the prosecution are admitted by the accused, there can be no question of prejudice having been caused to accused by wide language of the complaint and charge.

(Para 14)

Mr. V. M. Tarkunde, Sr. Advocate, (M/s. R. Jethmalani, N. H. Hingorani and Mrs. K. Hingorani, Advocates, with him), for Appellant; Mr. S. P. Nayar, Advocate, for Respondent.

The following Judgment of the Court was delivered by

DUA, J.: — This appeal by special leave is directed against the judgment and order of the Mysore High Court on appeal setting aside in part the order of the appellant's acquittal by a Second Class Magistrate and convicting him under Rule 126-P (2) of the Defence of India Rules as amended in 1963 — hereafter called the Rules — and sentencing him to rigorous imprisonment for six months. The order of the trial Court acquitting him of the offence under Section 135 of the Customs Act was upheld.

2. The appellant alighted from a service plane at H. A. L. Aerodrome,

Bangalore on November 16, 1963 at about 12.45 in the afternoon, E. R. Fariman, Inspector, C. I. D. had prior incriminating information about the arrival of a person whose description seemed to tally with that of the appellant. The Inspector and his staff who were on the look out waited for the appellant to take his baggage from the baggage counter. As soon as the appellant took delivery of a plastic bag and a hold-all the Inspector asked the appellant to accompany him to the Security Room. On being questioned the appellant gave his name as Tara Chand though he admitted that he had travelled under the name of J. D. Shaw. In the Security Room in the presence of Panchawatdars the plastic bag and the hold-all were opened and examined. From a pillow taken out of the hold-all were found two tape bags containing 16 pieces of gold with foreign markings. These tape bags had been put into the pillow which was then stitched. The appellant was then produced by the Inspector before his D. S. P. along with the articles seized from him. After obtaining sanction from the Collector under Section 137 (1) of the Customs Act and under Rule 126-Q of the Rules Shri Rasool, Superintendent of Central Excise (P. W. 3) filed the complaint.

3. The learned Magistrate trying the appellant found the gold pieces to be of foreign origin. He, however, did not find any evidence establishing them to be smuggled with the result that the appellant was acquitted of the offence under Section 135 of the Customs Act. The learned Magistrate did not draw any presumption against the appellant because the seizure of the gold pieces was not by the Customs authorities but by the police who thereafter handed over the gold pieces to the office of the Collector of Central Excise and Customs.

4. While considering the case against the appellant under Rule 126-P (2) of the Rules, the learned Magistrate observed that according to the relevant notification issued by the Government of India on November 5, 1963 in modification of the earlier one issued under Rule 126-J read with Rule 126-X of the Rules, it is either the Assistant Collector of Central Excise or the Collector of Central Excise who can institute prosecution. These officers are not authorised to

delegate the power to institute prosecution. According to the learned Magistrate the Collector of Excise had, therefore, no power to delegate the right to institute prosecutions with which he alone had been clothed. Exhibit P/5 was in the circumstances considered to be ineffective. On this reasoning the complaint having not been filed by the officer competently authorised the appellant was acquitted.

5. On appeal by the Superintendent of Central Excise and Customs (the complainant in the case) the High Court disagreed with the view taken by the learned Magistrate. It may be pointed out that the appeal by the complainant was confined only to the acquittal under Rule 126-P (2) of the Rules and the appellant's acquittal under Section 135 of the Customs Act was not questioned, it being conceded that there was no evidence on the record to bring the appellant's case under Section 135 of the Customs Act.

6. The High Court relying on Ex. P/5 and the two notifications issued by the Government of India came to the conclusion that the Collector was lawfully empowered to authorise the Superintendent of Central Excise to prosecute the appellant. That Court also arrived at the conclusion that the appellant, who was not a dealer or refiner, having a licence, was found in possession of gold, of which no declaration had been made under the law and, therefore, he was guilty of an offence punishable under Rule 126-P (2) of the Rules. The appeal was accordingly allowed and the appellant convicted and sentenced to rigorous imprisonment for six months.

7. In this Court Shri Tarkunde assailed the legality of the view taken by the High Court. According to him the trial Court had rightly held the prosecution not to have been instituted by a duly authorised person. Let us see if the scheme of the relevant statutory provisions supports the learned counsel.

8. Part XII-A of the Rules deals with Gold Control and it contains Rules 126-A to 126-Z. This part was inserted in the Defence of India Rules in January 1963. Rule 126-Q provides:

"(1) No prosecution for any offence punishable under this Part shall be instituted against any person except

by, or with the consent of, the Administrator or any person authorised by the Administrator in this behalf.

(2) Nothing in Rule 154 shall apply to any contravention of any provision of this Part or any order made thereunder."

The word "Administrator" was substituted for the word "Board" in September 1963. We are informed that no Administrator as defined in R. 126 (a) was appointed by the Central Government under power conferred on it by Rule 126J (1). Under Rule 126X the Central Government is empowered to perform all or any of the functions of the Administrator and also by notification to exercise all or any of the powers conferred on the Administrator by Part XII-A if considered necessary or expedient in the public interest to do so. The Administrator who is to take suitable measures: (a) to discourage the use and consumption of gold, (b) to bring about conditions tending to reduce the demand for gold and, (c) to advise the Central Government on all matters relating to gold, is enjoined by Rule 126J (3) to discharge his functions subject to the general control and directions of the Central Government. Sub-rules (4) and (5) of Rule 126J provide:

"(4) The Administrator may by general or special order authorise such person as he thinks fit to exercise all or any of the powers exercisable by him under this Part and different persons may be authorised to exercise different powers:

Provided that no officer below the rank of Collector of Customs or Central Excise or Collector of a district shall be authorised to hear appeals under sub-rule (3) of Rule 126-M.

(5) Subject to any general or special direction given or condition attached by the Administrator any person authorised by the Administrator to exercise any powers may exercise these powers in the same manner and with the same effect as if they had been conferred on that person directly by this Part and not by way of authorisation".

9. We may bear in mind the effect of sub-rule (5) on the scheme. Rule 126-H (2) (d) dealing with restrictions on possession and sale of gold by persons other than licensed holders lays down:

"(2) Save as otherwise provided in this Part,—

... ..

(d) no person other than a dealer licensed under this Part shall buy or otherwise acquire or agree to buy or otherwise acquire, gold, not being ornament, except,

(i) by succession, intestate or testamentary, or

(ii) in accordance with a permit granted by the Administrator or in accordance with such authorisation as the administrator may, by general or special order make in this behalf:

Provided that a refiner may buy or accept gold from a dealer licensed under this Part;"

Turning now to the two notifications on the construction of which the fate of this case depends, we find that on January 10, 1963 the Central Government issued a notification in exercise of the powers conferred on it by Rule 126X read with Rule 126J (4) authorising certain officers of the Central Excise Department to exercise any or all of the powers of the Gold Board in relation to certain matters specified therein. At sl. No. 10 of the Table contained in the notification officers not inferior in rank to the Assistant Collector were authorised to exercise powers and functions in relation to the matter of "according of sanctions for the prosecution of offences" with reference to Rule 126Q. We have reproduced the exact words of the entry in Col. (4) of the Table. This notification was amended in certain respects on November 5, 1963. At sl. No. 10 of the amended Table officers not inferior in rank to the Assistant Collector of Central Excise Department were authorised to exercise the powers and functions in relation to the matter of "institution of prosecution for any offence punishable under Part XII-A of the Defence of India Rules" with reference to Rule 126Q. Here again we have reproduced the exact words used.

10. According to Shri Tarkunde these notifications did not empower the Assistant Collector to authorise the Superintendent of Central Excise and Customs to institute the present proceedings. The Assistant Collector, said the counsel, was authorised only himself to institute them and he could not lawfully accord consent for

the institution of prosecution as he purported to do under Ex. P/5. We are unable to accept this submission.
(Contd. in Col. 2.)

The actual wording of the relevant entries in all the columns of serial No. 10 in the Table of the later notification may here be reproduced.

"10. Assistant Collector of the Central Excise Department

126—Q

Institution of prosecution for any offence punishable under Part XIIA of the Defence of India Rules, 1962".

This has to be read along with the opening part of the earlier notification dated January 10, 1963 which remains the principal notification and was amended only in certain particulars on November 5, 1963. According to the opening part of the principal notification the officers not inferior in rank to the officers specified in Col. 2 of its Table were authorised to exercise any or all of the powers of the Gold Board in relation to the matters specified in the corresponding entries in Cols. 3 and 4. In place of "Gold Board" we have to read the word "Administrator" and since no Administrator was ever appointed, the powers and functions entrusted to him were at the relevant time being exercised by the Central Government. We may point out that it was apparently by oversight that the word "Administrator" was not substituted for the expression "Gold Board" in the notification though in September 1963 such substitution had been effected by appropriate amendment in the relevant rules. This was not controverted at the Bar and indeed no point was sought to be made on this ground. It would thus be seen that in determining the scope and extent of the power of the officers authorised in the Table of the Notification to exercise the powers and functions of the Administrator, actually exercised by the Central Government (there being no Administrator appointed under the rules), we have to see the nature of the power and function mentioned in Col. 4 and examine it by reference to the rule mentioned in Col. 3 in the light of the expression "in relation to the matters specified" in the notification which, in our opinion, to some extent widens the scope of the powers and functions delegated by the notification.

11. Under Rule 126-Q as read in the light of the entries at Serial No. 10 of the notification prosecution for an offence punishable under Part XII-A can, in our opinion, be instituted by or with the consent of an officer

not inferior in rank to the Assistant Collector of the Central Excise Department. In Ex. P/5 dated September 4, 1964, Shri V. Parthasarathy, Collector of Central Excise accorded his sanction to the prosecution of the appellant as required under Rule 126Q of the Defence of India Rules. He did so in exercise of the powers conferred on him by the two notifications mentioned above. The offence for which the consent was given was described in this document as under:

"Whereas Shri Tarachand S/o Deviraj (Devichand) Room No. 4, Mistry Bungalow, Duncan Road, Bombay 4 was found to have acquired gold not being ornament except by succession, intestate or testamentary or in accordance with the permit granted either by the Administrator or by the Deputy Secretary in the Office of the Gold Control Administrator, Bombay, duly authorised in this behalf by the Government of India vide their Notification No. F. 1/8/63-CC dated 20-10-1963, 16 pieces of gold of 10 tolas each bearing markings as to its origin and purity contrary to the provisions of Rule 126H (d) of the Defence of India Amendment Rules.

Whereas any person having in his possession or in his control any quantity of gold or buys or otherwise acquires or accepts gold in contravention of any provisions of Part XII-A of the Defence of India Rules renders himself liable for punishment under Rule 126P (2).

And on careful study of the material placed before me and satisfying myself that the said Sri Tarachand is liable to action under Rule 126P (2) of the Defence of India Amendment Rules, 1963 for, reasons mentioned above, I, V. Parthasarathy, Collector of Central Excise, Mysore Collectorate, Bangalore, in exercise of the powers conferred on me by the Government of India in their Notification No. F25/1/63-GCR, dated 5-11-63 issued under Rule 126J read with Rule 126-X of the Defence of India Amendment Rules do hereby accord

consent for the institution of prosecution of the said Sri Tarachand as required under Rule 126Q of the Defence of India Amendment Rules, 1963."

12. This authority, in our opinion, quite clearly falls within the notification read as a whole and the High Court was right in so construing it.

13. The submission that these notifications must be construed strictly because by these instruments the authority to prosecute is delegated and so construed they should be held to confer power only to prosecute but not to accord consent to the appellant's prosecution by some other person or authority has not impressed us. The attempt by the appellant's learned counsel in this connection to equate these notifications with powers of attorney does not carry the matter any further. The plain reading of the relevant entries in the notifications leaves no doubt in our mind as to its meaning, scope and effect. It quite clearly authorises the Collector to exercise the power and function in relation to the matter of institution of prosecution for any offence punishable under Part XII-A of the Rules referred to in Rule 126-Q. Keeping in view the multifarious activities of the higher officers of the Central Excise Department it seems to us that after the responsible officers of this Department not inferior in rank to the Assistant Collector had applied their mind and come to a decision as to the desirability of starting the prosecution in a given case further steps in the matter of actual prosecution including the drafting and presentation of the complaint can be lawfully carried out by others. That this is the real object and purpose of the notifications is clearly brought out on plain reading of their language. To hold otherwise, as desired by Shri Tarkunde, would not only mean unduly straining the unambiguous statutory language but would also tend to thwart, instead of effectuating, their real purpose. We are thus in agreement, with the view taken by the High Court.

14. The counsel next submitted that the charge levelled against the appellant was different from the one for which he has been convicted. In any event the charge framed, according to the counsel, was vague and

it has caused him prejudice in his defence. Here again, we are unable to agree. In the complaint all the relevant facts were stated quite clearly and it was emphasised that the appellant had been found in possession of 16 pieces of gold with foreign markings ingeniously concealed inside long tabular pouches, in turn hidden inside a pillow case. He was stated to be guilty inter alia of offences punishable under Rule 126-P (2). The second charge framed by the Court was as follows:

"That you on or about the 16th November, 1963 at about 12.45 hours at H. A. L. Aerodrome, Bangalore, alighted from the plane No. 105 which arrived from Bombay and when you and your articles were searched, you were found in possession of 16 pieces of gold each bearing markings as to its foreign origin and purity weighing 10 tolas each, having illegally imported into India in contravention of prohibition imposed by the Ministry of Finance Notification No. 1211 F1/48, dated 25th August, 1948 and without permit issued by the Gold Control Authorities as required under Rule 126-H (d) under the Defence of India Amendment Rules, 1963 and thereby committed an offence under Rule 126P (2) r/w 126-I (10) of the Defence of India Amendment Rules, 1963 relating to Gold Control and within my cognizance".

The appellant never complained that this charge was vague or outside the complaint. Indeed in his statement in Court the appellant has admitted all the relevant facts alleged by the prosecution. The facts alleged and proved clearly bring the appellant's case within the mischief of Rules 126-H (2) (d) and 126-P (2). Rule 126-H (2) (d) has already been reproduced earlier. Under Rule 126-P (2) (ii) whoever has in his possession or under his control any quantity of gold in contravention of any provision of Part XII-A is punishable with imprisonment for a term of not less than six months and not more than two years and also with fine. All the relevant salient facts alleged by the prosecution having been admitted by the appellant there can hardly be any question of prejudice having been caused to him by the wide language of the complaint and the charge, assuming the language to be wide. This argument is accordingly repelled.

15. Lastly the counsel contended that the sentence imposed was too severe. The entire gold seized from him having been confiscated the sentence undergone should, according to the submission, be held to serve the cause of justice. We have already noticed that under Rule 126P (2) (ii) the minimum period of imprisonment prescribed is six months. According to the appellant the law has since been amended and under the Gold (Control) Act 18 of 1965 which has repealed Part XII-A of the Rules there is no minimum sentence of imprisonment prescribed. In our opinion this case must be governed by the law as it was in force prior to the enforcement of the Gold (Control) Act, 1965. Our attention has not been drawn to any provision of law nor to any principle or precedent which would attract the provisions of the Gold (Control) Act of 1965 to this case in regard to the question of sentence.

16. This appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 786
(V 58 C 159)

(From: Bombay)*

S. M. SIKRI, V. BHARGAVA
AND I. D. DUA, JJ.

C. R. Bansi, Appellant v. State of Maharashtra, Respondent.

Criminal Appeal No. 83 of 1965,
D/- 15-12-1970.

(A) Civil Services — Central Civil Services (Classification, Control and Appeal) Rules (1957), Rule 23, Expl. — Explanation is restricted to Rule 23 for giving a dismissed servant a right of appeal — Person who has ceased to be a member of Central service cannot invoke aid of explanation for being treated as a public servant requiring sanction for his prosecution. (Paras 7, 8)

(B) Prevention of Corruption Act (1947), Section 6 — Sanction for prosecution — Income-tax Officer employed in connection with affairs of union dismissed from service for criminal mis-

conduct — He ceases to be a public servant within meaning of Section 6(1) (a) and no sanction for his prosecution is necessary — Fact that his appeal against dismissal order is pending cannot make him a public servant.

(Para 8)

(C) Prevention of Corruption Act (1947), S. 5 (1) (a) — Charge under, of habitually accepting bribe — Individual instances though may be useful to prove general averment in particular cases, their mention in the charge is not at all essential — Charge is not illegal for non-mention of particular instances — AIR 1954 SC 359, Foll.

(Para 9)

(D) Constitution of India, Article 136 — Concurrent findings of fact — Supreme Court would not ordinarily go into questions of fact unless it is shown that they are vitiated in any respect.

(Para 10)

(E) Prevention of Corruption Act (1947), Section 5 — Charge for offence of criminal misconduct under Section 5 (2) read with Section 5 (1) (a) & (d) — Prosecution failing to prove particular instances of bribery alleged — Accused proved to have resources and property beyond his known means — Presumption under Section 5 (3) can be raised — Conviction of accused under Section 5 (2) upheld.

The proposition that if the prosecution fails to establish any of the offences mentioned in Section 5 (1) (a) to 5 (1) (d), the question of assets being found disproportionate to the known sources of the accused becomes irrelevant, cannot be accepted as correct.

(Para 11)

Section 5 (3) does not create a new offence. But this does not mean that if the prosecution fails to prove the specific charges the presumption under Section 5 (3) cannot be applied.

(Para 15)

Where the accused was charged with offence of criminal misconduct punishable under Section 5 (2) read with Section 5 (1) (a) and (d) and (3) of the Act and it was established that the accused had pecuniary resources and property disproportionate to his known means.

Held, that the presumption under Section 5 (3) arose in the case even though the prosecution failed to prove the particular instances of bribery alleged by it. AIR 1954 SC 359 and

* (Cri. Appeal No. 1330 of 1964, D/- 24-10-1964 — Bom.)

AIR 1960 SC 7, Foll.; 1964 (2) Cri LJ 65 (SC) and AIR 1961 SC 583, Dist.

(Para 18)

Cases Referred: Chronological Paras

- (1964) 1964-2 Cri LJ 65 = (1963) Suppl 2 SCR 652, R. S. Pandit v. State of Bihar 6, 16
 (1961) AIR 1961 SC 583 (V 48) = (1961) 2 SCR 971, Surajpal Singh v. State of Uttar Pradesh 6, 15
 (1960) AIR 1960 SC 7 (V 47) = (1960) 1 SCR 461, C. S. D. Swamy v. The State 13
 (1954) AIR 1954 SC 359 (V 41) = (1955) 1 SCR 92, Biswabhusan Naik v. State of Orissa 9, 12, 14

Mr. A. S. R. Chari, Sr. Advocate, (M/s. R. Nagaratnam, Vineet Kumar and Mrs. Shyamla Pappu, Advocates with him), for Appellant; Mr. Debabrata Mukherjee, Sr. Advocate, (M/s. H. R. Khanna and S. P. Nayar, Advocates, with him), for Respondent.

The Judgment of the Court was delivered by

SIKRI, J.: — This is an appeal by special leave against the judgment and order of the High Court of Judicature at Bombay dismissing the appeal of the appellant against the conviction recorded by the Special Judge for Greater Bombay. The appellant was convicted by the Special Judge under Section 5 (2), read with Section 5 (1) (a) and (d) and Section 5 (3), of the Prevention of Corruption Act, 1947 (2 of 1947) — hereinafter referred to as the Act — and sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 1,25,000, in default of payment of fine to suffer further rigorous imprisonment for one year. The Special Judge further directed that the amount of fine be recovered from the properties seized.

2. The following charge was framed against the appellant:

"That you, while functioning as (a) Income-tax Officer, from about 1st April, 1947 to November 1954 at Jalgaon Dhulia, Codhra and Mahansa (b) as Inspector of Income-tax from November, 1954 to January 1958 at Surat and Broach, (c) as Income-tax Officer from January 1958 to the end of November 1961 at Bhavnagar, Dhulia, Amraoti and Ratnagiri, habitually accepted or obtained and habitually agreed to accept or attempted to obtain gratification other than legal remuneration and obtained for

yourself pecuniary advantage by corrupt and illegal means or by otherwise abusing your position as a public servant, with the result that, during the said period, you came in possession of assets of the value of about Rs. 2,01,080/- which were disproportionate to your known sources of income for which you could not satisfactorily account and you thereby committed the offence of criminal misconduct punishable under sub-section (2) read with sub-ss. (1) (a), (d) and (3) of Section 5 of Act (2 of 1947), the Prevention of Corruption Act, 1947, and within the cognizance of this Court".

3. The case of the prosecution before the Special Judge was that the appellant was habitually corrupt, and wherever he was posted he used to develop personal contacts with the assessee, whose cases were pending before him and in his talk with them he tried to impress upon them that they were likely to be heavily taxed; he used to create a favourable psychological background and taking advantage of the same tried to screw out money from them; if the assessee did not accept his proposal or proved to be smarter, he used to harass him by various methods. The prosecution sought to establish the charge against him under Section 5 (1) (a) of the Act by leading evidence of five instances:-

(i) He obtained from the witness Gopaldas an amount of Rs. 3,000/- as a loan and subsequently converted it as his personal gratification for finalising income-tax cases of his firm.

(ii) He demanded an illegal gratification of Rs. 10,000/- from the witness Gopaldas to show him favour in the Wealth Tax Proceedings.

(iii) He attempted to obtain bribe from P. W. 7 — Motilal Bansgopal, whose income-tax proceedings were pending before him.

(iv) He attempted to obtain bribe from the assessee P. W. 9, Somchand Khimji, whose income-tax proceedings were pending before him.

(v) He also made a demand of bribe of Rs. 400/- to Rs. 500/- from P. W. 93 Gulabdas Kisondas Bhatia of Dharangaon.

4. Before the Special Judge the prosecution also relied on the presumption arising under Section 5 (3) of the Act as the accused was found to be in possession of assets worth about Rs. 2,01,080/- which were disproport-

tionate to his known sources of income.

5. The learned Special Judge, in a very detailed and lengthy judgment, held that it was not proved that the appellant had obtained Rs. 3,000/- from Gopaldas representing that he wanted the amount as a hand-loan for taking delivery of the car. He further held that it was not proved that the appellant demanded bribe of Rs. 10,000/- from him as a motive for doing him favour in the disposal of his wealth tax cases. Regarding P. W. 7, Motilal Bangsopal, the Special Judge held that the accused had entertained a corrupt motive in asking the assessee — P. W. 7 — to see him at his residence, and this circumstance could be considered against him in considering the charge for the offence of habitually being corrupt. Regarding Somchand, P. W. 9, the Special Judge held that the appellant had made an implied demand of bribe and had a guilty conscience. Regarding Gulabdas, he held that the allegation regarding demand of bribe from P. W. 93, Gulabdas, had not been proved. He summarised the findings thus:

"Thus out of specific instances the prosecution has established only two and it has been proved that the accused had made an implied demand of bribe from P. W. 9, Somchand and he had also asked P. W. 7, Motilal to come to his residence in connection with the delay in filing the return. The second instance though does not establish any demand of bribe as such, it does prove the proclivity of the mind of the accused and a corrupt tendency and would support the prosecution version."

He further held that "the two instances proved will not themselves be sufficient to prove habit of bribe taking and the question is whether considering all the matters before the Court it can be held that the accused is guilty of criminal misconduct and if yes, of what category." He further held that the appellant could be convicted on the strength of presumption arising under Section 5 (3).

6. The High Court repelled the contention of the appellant that no presumption arose under Section 5 (3) of the Act because no specific instances had been held to be proved and, at any rate, they did not amount to an offence. The High Court distinguished the

cases of R. S. Pandit v. State of Bihar, (1963) Suppl 2 SCR 652 = (1964-2 Cri LJ 65) and Surajpal Singh v. State of Uttar Pradesh, (1961) 2 SCR 971 = (AIR 1961 SC 583). The High Court further observed that the Trial Judge had accepted the evidence regarding two instances while it was prepared to accept the instance involving Gopaldas also. The High Court generally agreed with the finding regarding disproportionate assets and disbelieved the explanation offered by the appellant.

7. Before we deal with the merits of the case, we shall take up two preliminary points raised by the learned counsel for the appellant, Mr. Chari. He urged that as sanction had not been given for prosecuting the appellant the whole trial was bad. He said that the search of the appellant's house took place on November 4, 1961, and on June 27, 1962, he was dismissed from service by the Commissioner of Income-tax. On July 30, 1962, charge-sheet was filed in the Court of Special Judge. On September 21, 1962, the appellant submitted an appeal to the President of India and the President was pleased to convert the order of dismissal into one of removal. The learned counsel contends that pending the appeal the appellant should have been deemed to be in service and, therefore, deemed to be in service on July 30, 1962. A similar point was raised before the Special Judge and he repelled the contention in the following terms:

"For requiring a sanction to be taken before taking cognizance of an offence against a person, he must be in actual employment of the State. A mere right of appeal will not invest him with that status. Moreover, a person may have right of appeal, but he may not exercise the same and may not file the appeal. It is purely within his discretion and the act of taking cognizance which is the course of law would not be made dependent upon such arbitrary and discretionary alternatives held by a person."

The Special Judge also referred to Rule 23 of the Central Civil Services (Classification, Control and Appeal) Rules, 1957, and the explanation therein in which it is stated:

"In this rule the expression 'member of a Central Civil Service' includes a person who has ceased to be a member of the service."

This explanation was also relied on before us. Regarding the explanation the learned Special Judge came to the conclusion that the explanation was restricted to that particular rule for giving the dismissed servant a right to prefer an appeal.

8. We agree with the conclusion of the learned Special Judge. Section 6 of the Act reads as follows:

"Previous sanction necessary for prosecution. (1) No Court shall take cognizance of an offence punishable under Section 161 or Section 164 or Section 165 of the Indian Penal Code (Act 45 of 1860) or under sub-section (2) of Section 5 of this Act, alleged to have been committed by a public servant, except with the previous sanction,

(a) in the case of a person who is employed in connection with the affairs of the Union and is not removable from his office save by or with the sanction of the Central Government, of the Central Government;

(b) in the case of a person who is employed in connection with the affairs of a State and is not removable from the office save by or with the sanction of the State Government, of the State Government;

(c) in the case of any other person, of the authority competent to remove him from his office.

(2) Where for any reason whatsoever any doubt arises whether the previous sanction as required under sub-section (1) should be given by the Central or State Government or any other authority, such sanction shall be given by that Government or authority which would have been competent to remove the public servant from his office at the time when the offence was alleged to have been committed". It seems to us that the person must be employed in connection with the affairs of the Union in sub-clause (a) and with the affairs of the State in sub-clause (b). The case of the appellant would be covered in sub-clause (a) because he had been employed in connection with the affairs of the Union. But the sub-section contemplates that the person must be employed in connection with the affairs of the Union and not that he was employed with the affairs of the Union. The policy underlying Section 6, and similar sections, is that there should not be unnecessary harassment of

public servants. But if a person ceases to be a public servant the question of harassment does not arise. The fact that an appeal is pending does not make him a public servant. The appellant ceased to be a public servant when the order of dismissal was passed. There is no force in the contention of the learned counsel and the trial cannot be held to be bad for lack of sanction under Section 6 of the Act.

9. The other preliminary point which the learned counsel raised was that the charge was defective. We have already set out the charge. It is true that there are no instances given in the charge. But as the charge is of habitually accepting the bribe it is not necessary that the various instances should have been mentioned. It was expressly so held by this Court in *Biswabhusan Naik v. State of Orissa*, (1955) 1 SCR 92 = (AIR 1954 SC 359). This Court overruled a similar point in the following words:

"But no particulars need be set out in the charge in such a case because the offence under Section 5 (1) (a) does not consist of individual acts of bribe as in Section 161 of the Indian Penal Code but is of a general character. Individual instances may be useful to prove the general averment in particular cases but it is by no means necessary because of the presumption which Section 5 (3) requires the Court to draw". This Court accordingly held in that case that there was no illegality in the charge. We accordingly hold that the charge in this case was not illegal.

10. We may now deal with the merits of the case. This is an appeal by special leave, and as there are concurrent findings of fact we do not ordinarily go into questions of fact. But we allowed Mr. Chari to take us through the relevant evidence, both oral and documentary, in order to show whether the concurrent findings were vitiated in any respect. He has not been able to point out any circumstances which may lead us to differ from the concurrent findings. It is true that as far as the case of *Gopal-das* is concerned the High Court differed from the Special Judge and held that the allegations were proved. The learned counsel has taken us in detail through the material relevant to this witness and we are inclined to

agree with the conclusion arrived at by the High Court. But apart from that the concurrent findings regarding P. W. 7, Motilal, and P. W. 9, Somchand, and the presumption arising under Section 5 (3) are sufficient to sustain the conviction recorded against the appellant.

11. The learned counsel urged before us that if the prosecution fails to establish any of the offences mentioned in Ss. 5 (1) (a) to 5 (1) (d), the question of assets being found disproportionate to the known sources of the accused becomes irrelevant. A number of cases were referred to us but we are unable to agree with this proposition because we are bound by the ruling to the contrary given by this Court.

12. In (1955) 1 SCR 92 = (AIR 1954 SC 359) after referring to Section 5 (1) (a) and Section 5 (3), Bose, J., speaking for the Court, observed:

"Therefore, all that the prosecution has to do is to show that the accused, or some person on his behalf, is in possession of pecuniary resources or property disproportionate to his known sources of income and for which the accused cannot satisfactorily account. Once that is established then the Court has to presume, unless the contrary is proved, that the accused is guilty of the new offence created by Section 5, namely criminal misconduct in the discharge of his official duty".

Then the Court proceeded to deal with the facts thus:

"Now the accused was found in possession of Rs. 3,148. He accounted for Rs. 430 of that sum by showing that it was paid to him at the time as a trap. He has been acquitted of that offence, so all he had to account for was the balance Rs. 2,698. This is a large sum for a touring officer to carry with him in cash while on tour. His explanation was not considered satisfactory and that is a question of fact with which we are not concerned in this Court. Therefore, all that remains to be seen is whether this was disproportionate to his known sources of income".

Then the Court referred to the findings regarding his total emoluments drawn and the small piece of land owned by him, and observed:

"Once the facts set out above were found to exist and the explana-

tion of the accused rejected as unsatisfactory, Section 5 (3) was at once attracted and the Court was bound to presume (the word used in the section is "shall" and not "may") that the accused was guilty under Section 5 (2), especially as this part of the section goes on to say — "and his conviction therefor shall not be invalid by reason only that it is based solely on such presumption".

"These facts alone are enough to sustain the conviction and we need not consider the other matters".

The conviction, therefore, of Biswabhusar Naik, in that case, solely proceeded on the presumption as in the earlier part of the judgment it was observed that he was separately charged and separately prosecuted under Section 161 of the Indian Penal Code for three specific offences of bribe taking but was acquitted on all the counts and his conviction was only under Section 5 (2) alone.

13. Similarly in C. S. D. Swamy v. The State, (1960) 1 SCR 461 = (AIR 1960 SC 7) Swamy's conviction was sustained only on the presumption. The appellant, Swamy, in that case was put up on trial on charges under Sections 5 (1) (a) and 5 (1) (d) of the Act. Payments of particular sums by way of bribe were not proved against him. But the High Court, holding that the appellant's bare statements from the dock unsupported by any other acceptable evidence could not satisfactorily account for the large deposits standing to his credit in his bank accounts raised the presumption under Section 5 (3) of the Act and held him guilty of criminal misconduct in the discharge of his official duty under Section 5 (1) (d) of the Act. It was contended before this Court that the charge relating to specific instances of bribery having failed the contrary presumption under Section 5 (3) of the Act should have been established. This Court repelled the argument in the following words:

"The finding of the High Court and the Court below is that the prosecution had failed to adduce sufficient evidence to prove those particular facts and circumstances of criminal misconduct within the meaning of Section 5 (1) (a) of the Act, but the failure to bring the charge home to the accused under Section 5 (1) (a) does not necessarily lead to the legal effect contended for. As soon as the

requirements of sub-section (3) of S. 5 have been fulfilled, the Court will not only be justified in making, but is called upon to make, the presumption that the accused person is guilty of criminal misconduct within the meaning of Section 5 (1) (d). If there is evidence forthcoming to satisfy the requirements of the earlier part of sub-section (3) of Section 5, conviction for criminal misconduct can be had on the basis of the presumption which is a legal presumption to be drawn from the proof of facts in the earlier part of the sub-section (3) aforesaid. That is what has been found by the Courts below against the accused person. Hence, the failure of the charge under Clause (a) of sub-section (1) of Section 5 does not necessarily mean the failure of the charge under Section 5 (1) (d)".

14. It will be noticed that while Bose, J., in (1955) 1 SCR 92 = (AIR 1954 SC 359), held that once the presumption applies the accused was guilty of the new offence created by Section 5, namely, criminal misconduct in the discharge of his official duties, without specifying any of the sub-clauses, Sinha, J., as he then was, held that the offence under Section 5 (1) (d) was made out. It is not necessary to decide in this case which is the correct way of putting the matter because whichever reasoning is accepted the case of the appellant fails.

15. The case of (1961) 2 SCR 971 = (AIR 1961 SC 583) does not assist the appellant. It is true that, as laid down by this Court, Section 5 (3) does not create a new offence. But this does not mean that if the prosecution fails to prove the specific charges the presumption under Section 5 (3) cannot be applied. In Surajpal's case, (1961) 2 SCR 971 = (AIR 1961 SC 583) what happened was that the only charge against Surajpal was of criminal misconduct under Section 5 (1) (c) of the Act. But since he was acquitted of the charge it was held that he could not be convicted of criminal misconduct referred to in Clauses (a), (b) or (d) of Section 5 (1) of the Act for which he had not been charged.

16. (1963) Suppl 2 SCR 652 = (1964-2 Cri LJ 65) also does not assist the appellant. It is true that it was held in that case that Section 5 (3)

does not create a separate offence but lays down only a rule of evidence and marks a departure from the well-established principle of criminal jurisprudence that onus is always on the prosecution to bring home the guilt to the accused. But it does not follow from this that if the prosecution has failed to prove specific instances it cannot rely on the presumption.

17. The learned counsel contended that if this is the law the prosecution need not allege any specific instance at all and could come to Court only alleging that the accused had assets disproportionate to his known sources of income. This point does not arise in this case and is not likely to arise again because the Act has since been amended and the act of possessing pecuniary resources or property disproportionate to known sources of income, for which the public servant cannot satisfactorily account, has been made into a separate offence. Therefore we need not consider this example given by the learned counsel.

18. Accordingly we hold that the appellant in this case had pecuniary resources and property disproportionate to his known sources of income, and that both the High Court and the learned Special Judge rightly held that the presumption arose under Section 5 (3).

19. We may mention that the learned counsel tried to show that the assets were not too disproportionate but nothing has been shown which would entitle us to set aside the concurrent findings on this aspect of the case.

20. The learned counsel then said that a fine of Rs. 1,25,000/- has been levied and the appellant has already undergone sentence of about four months. He said that the appellant is now on bail and it would be hard on him if we send him back to jail. He further said that the investigation began somewhere in 1961, the trial began in 1963, and the expenses of the trial and the printing of the records has cost the appellant a great deal, and further that the State has kept Rs. 1,25,000/- out of the seized amount for recovery of the fine. The learned counsel for the respondent drew our attention to Section 5 (2) which provides that any public servant

who commits criminal misconduct in the discharge of his duty shall be punishable with imprisonment which shall not be less than one year but which may extend to seven years and shall also be liable to fine, provided that the Court may, for any special reasons recorded in writing, impose a sentence of imprisonment of less than one year. It seems to us that in view of the facts mentioned by the learned counsel for the appellant it will meet the ends of justice if the sentence is reduced to one already undergone, maintaining the sentence of fine.

21. In the result the appeal is allowed to the extent that sentence of three years' rigorous imprisonment is altered to imprisonment already undergone. His bail bonds shall stand cancelled.

Sentence reduced.

AIR 1971 SUPREME COURT 792 (V 58 C 160)

(From Madras: AIR 1970 Mad 25)

J. C. SHAH, G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
A. N. RAY, JJ.

The Check Post Officer, Coimbatore etc., Appellants v. M/s. K. P. Abdulla and Bros. (In both the Appeals), Respondent.

Civil Appeals Nos. 2012 and 2013 of 1969, D/- 23-11-1970.

Constitution of India, Art. 246, Schedule VII, List II, Entry 54 — Taxing entry — Madras General Sales Tax Act (1 of 1959), Section 42 (3) — Power to seize and confiscate and levy penalty in respect of goods carried in a vehicle whether sold or not — Not incidental or ancillary to power to levy sales tax and hence is unconstitutional.

A legislative entry does not merely enunciate powers: it specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein. A taxing entry therefore confers power upon the Legislature to legislate for matters ancillary or incidental including provision for preventing evasion of tax.

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But the power conferred by sub-section (3) of Section 42 of Madras General Sales Tax Act to seize and confiscate and to levy penalty in respect of all goods which are carried from one State to another in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. Section 42 (3) is, therefore, unconstitutional. AIR 1941 FC 16 and AIR 1955 SC 58 and AIR 1962 SC 123, Rel. on; AIR 1968 SC 59, Distinguished; AIR 1970 Mad 25, Affirmed. (Paras 4, 6)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 59 (V 55)

= (1968) 1 SCR 148, Commissioner of Commercial Taxes v. R. S. Jhaver

5

(1962) AIR 1962 SC 123 (V 49)

= (1962) 2 SCR 983, Balaji v. Income-tax Officer Special Investigation Circle

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(1955) AIR 1955 SC 58 (V 42)

= (1955) 1 SCR 829, Navinchandra Mafatlal v. Commr. of I. T.

4

(1941) AIR 1941 FC 16 (V 28)

= 1940 FCR 110, The United Provinces v. Mst. Atiqa Begum

4

Mr. A. K. Sen, Sr. Advocate (Mr. A. V. Rangam, Advocate, with him), for Appellants; (In both the Appeals); Mr. T. A. Ramachandran, Advocate, for Respondent (In both the Appeals).

The following Judgment of the Court was delivered by

SHAH, J.: — Motor Lorry No. K. L. R. 3919 driven along a highway from Coimbatore in the State of Madras towards the border of the State of Kerala was when searched by the Check Post Officer found to carry 85 bags of foodstuffs: 45 bags of maida, 20 bags of flour, and 20 bags of Khandasari sugar. The driver of the motor lorry was found to carry with him a bill of sale and a delivery note which covered 85 bags of flour. On the ground that without a bill of sale or delivery note maida and Khandasari sugar were attempted to be transported, and suspecting that there was an attempt at evasion of sales tax, the Check Post Officer by order dated March 2, 1965, confiscated the goods and gave an option to M/s K. P. Abdulla & Bros. the owners of the goods to pay Rs. 1,000/- as penalty in lieu of confiscation.

2. The owners of the goods then moved a petition in the High

Court of Madras challenging the validity of Section 42 (3) (a) of the Madras General Sales Tax Act, 1959, and for an order quashing the penalty, and another petition for a direction to the State of Madras and the Check Post Officer to return the goods seized and "confiscated while in transit". Ramakrishnan, J., rejected the petitions. In appeals filed by the owners, the petitions were allowed and the orders imposing penalty and confiscation of goods were set aside. The State of Madras has appealed to this Court with certificate granted by the High Court.

3. Section 42 of the Madras General Sales Tax Act, 1959, provides:

"(1) If the Government consider that with a view to prevent or check evasion of tax under this Act in any place or places in the State, it is necessary so to do, they may, by notification, direct the setting up of a check post or the erection of a barrier or both, at such place or places as may be notified.

"(2) At every check post or barrier mentioned in sub-section (1), or at any other place when so required by any officer empowered by the Government in this behalf, the driver or any other person in charge of any vehicle or boat shall stop the vehicle or boat, as the case may be, and keep it stationary as long as may reasonably be necessary, and allow the officer in charge of the check post or barrier, or the officer empowered as aforesaid, to examine the contents in the vehicle or boat and inspect all records relating to the goods carried, which are in the possession of such driver, or other person in charge, who shall, if so required, give his name and address and the name and address of the owner of the vehicle or boat as well as those of the consignor and the consignee of the goods.

(3) The officer in charge of the check post or barrier, or the officer empowered as aforesaid, shall have power to seize and confiscate any goods which are under transport by any vehicle or boat and are not covered by,

- (i) a bill of sale or delivery note,
- (ii) a Goods Vehicle Record, a Trip Sheet or a Log Book, as the case may be; and

(iii) such other documents as may be prescribed under Sections 43 and 44;

Provided that before ordering confiscation the officer shall give the person affected an opportunity of being heard and make an inquiry in the prescribed manner;

Provided further that the officer ordering the confiscation shall give the person affected option to pay in lieu of confiscation—

(a) in cases where the goods are taxable under this Act, in addition to the tax recoverable, a sum of money not exceeding one thousand rupees, or double the amount of tax recoverable, whichever is greater; and

(b) in other cases, a sum of money not exceeding one thousand rupees". By sub-section (2) the driver or any person in charge of the vehicle is required to stop the vehicle and to allow the officer in charge of the check post or barrier to examine the contents in the vehicle, and to inspect all records relating to the goods carried in the vehicle. The officer in charge of the check post or barrier is invested with power by sub-sec. (3) to seize and confiscate any goods which are carried and are not covered by the documents specified therein. The officer is required when ordering confiscation to give the person affected option to pay penalty in lieu of confiscation.

4. Entry 54 of List II of the Seventh Schedule to the Constitution authorises the State Legislature to legislate in respect of taxes on the sale or purchase of goods. A legislative entry does not merely enunciate powers: it specifies a field of legislation and the widest import and significance should be attached to it. Power to legislate on a specified topic includes power to legislate in respect of matters which may fairly and reasonably be said to be comprehended therein: see *The United Provinces v. Mst. Atiq Begum*, 1940 FCR 110 = (AIR 1941 FC 16), *Navinchandra Mafatlal v. The Commissioner of Income-tax, Bombay City*, (1955) 1 SCR 829 = (AIR 1955 SC 58) and *Balaji v. Income-tax Officer, Special Investigation Circle*, (1962) 2 SCR 983 = (AIR 1962 SC 123). A taxing entry therefore, confers power upon the Legislature to legislate for matters ancillary or incidental including provision for

preventing evasion of tax. Sub-ss. (1) and (2) of S. 42 are intended to set up machinery for preventing evasion of sales tax. But, in our judgment, the power to confiscate goods carried in a vehicle cannot be said to be fairly and reasonably comprehended in the power to legislate in respect of taxes on sale or purchase of goods. By sub-section (3) the officer in charge of the check post or barrier has the power to seize and confiscate any goods which are being carried in any vehicle if they are not covered by the documents specified in the three sub-clauses. Sub-section (3) assumes that all goods carried in a vehicle near a check post are goods which have been sold within the State of Madras and in respect of which liability to pay sales tax has arisen, and authorises the check post officer, unless the specified documents are produced at the check post or the barrier, to seize and confiscate the goods and to give an option to the person affected to pay penalty in lieu of confiscation. A provision so enacted on the assumption that goods carried in a vehicle from one State to another must be presumed to be transported after sale within the State is unwarranted. In any event power conferred by sub-section (3) to seize and confiscate and to levy penalty in respect of all goods which are carried in a vehicle whether the goods are sold or not is not incidental or ancillary to the power to levy sales tax. A person carrying his own goods even as personal luggage from one State to another or for consumption, because he is unable to produce the documents specified in clauses (i), (ii) & (iii) of sub-section (3) of Section 42, stands in danger of having his goods forfeited. Power under sub-section (3) of Section 42 cannot be said to be ancillary or incidental to the power to legislate for levy of sales tax.

5. The High Court was of the view that the question which fell to be determined was concluded by the judgment of this Court in *The Commissioner of Commercial Taxes v. R. S. Jhaver*, (1968) 1 SCR 148 = (AIR 1968 SC 59). That case arose under Section 41 (2) of the Madras General Sales Tax Act 1 of 1959, and this Court struck down the power conferred under the Madras General Sales Tax Act, 1959, upon the officer of the Government to seize such accounts,

registers, records or other documents of the dealer as he may consider necessary, if he had reason to suspect that any dealer has attempted to evade payment of any tax, fee or other amount. This Court held that tax and penalty cannot be levied before the first sale in the State, and on that account authority conferred to levy tax and penalty before the sale and to confiscate the goods for non-payment was outside the legislative competence of the State. That case may have no direct bearing in this case.

6. In the present case, however, the power to confiscate the goods and to levy penalty in lieu of confiscation, when in respect of the goods found in a vehicle the driver of the vehicle is not carrying with him the documents specified therein, is not a provision which is ancillary or incidental to the power to tax sale of goods.

7. The appeals therefore fail and are dismissed with costs. One hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 794 (V 58 C 161)

(From Patna: (1963) 2 ITJ 180)

J. M. SHELAT AND

C. A. VAIDIALINGAM, JJ.

Raja Bahadur Kamakhya Narain Singh, (In both the Appeals), Appellant v. The Commissioner of Income-tax, Bihar and Orissa (In both the Appeals), Respondent.

Civil Appeals Nos. 481 and 482 of 1966, D/- 1-9-1969.

(A) Constitution of India, Art. 136 — Appeals arising out of references under Section 66 (2), Income Tax Act (1922) — Supreme Court cannot exercise any wider power of interference than that permitted to the High Court under the Income Tax Act.

(Para 12)

(B) Income Tax Act (1922), Section 66 — Adventure in the nature of trade — Mixed question of law and fact — Tribunal misdirecting itself in law — Court can review finding of tribunal.

The question, whether an assessee carries on business or whether certain

IN/IN/E498/69/DHZ/B

transactions are in the course of business or whether they amount to adventures in the nature of trade or business, is a mixed question of fact and law. But to distinguish a question of fact and a question of law is not always easy, for, sometimes there is a common area between the two and though a mere question of fact can be turned into one of law, care should be taken against a finding of a mixed question of fact and law being given the unassailability which the Act confers on a pure finding of fact. Since the expression 'adventure in the nature of trade' implies the existence of certain elements in the transactions which in law would invest them with the character of trade or business and the question on that account becomes a mixed question of law and fact, the Court can review the Tribunal's finding if it has misdirected itself in law. AIR 1959 SC 359; AIR 1957 SC 49 and AIR 1954 SC 253, Rel. on.

(Para 12)

(C) Income Tax Act (1922), Section 33 — Subsequent Tribunal having advantage of examining assessee's transactions during a longer period and thus having a more comprehensive picture of all transactions — Can come to conclusion different from that arrived at earlier.

(Para 16)

(D) Income Tax Act (1922), Sections 4, 10 — Profits over sale of shares acquired not for dealing in them — Would be on capital account. (1963) 2 ITJ 180 (Pat), Reversed.

The profits made on the sale of shares, acquired with the intention of obtaining control over the company's management and not for dealing in them, would be on the capital and not revenue account. AIR 1955 SC 252 and AIR 1963 SC 835, Rel. on; (1963) 2 ITJ 180 (Pat), Reversed.

(Para 20)

(E) Income Tax Act (1922), Sections 4, 10 — Sale of investment realising enhanced profits — Whether and when profits are assessable to tax — Test laid down — (1963) 2 ITJ 180 (Pat), Reversed.

Where a person in selling his investment realises an enhanced price, the excess over his purchase price would be profit assessable to tax, if what is done is not a mere realisation of the investment but an act done for making profits. The distinction whether the transaction is of one kind or the other depends on the question whether the excess was an enhance-

ment of the value by realising a security or a gain in an operation of profit making. The surplus realised on the sale of shares, would be capital if the assessee is an ordinary investor realising his holding; but it would be revenue, if he deals with them as an adventure in the nature of trade. The fact that the original purchase was made with the intention to re-sell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances it may point to the trading character of the transaction. The test often applied is, has the assessee made his shares and securities the stock-in-trade of a business. (Para 13)

Held, that the Tribunal misdirected itself in applying the law to the facts found by it both in the matter of gold and shares, and the High Court would have been entitled to interfere with its findings instead of holding that it could not do on the ground that the findings were findings of fact. The questions involved being mixed questions of fact and law were not unassailable. (1963) 2 ITJ 180 (Pat), Reversed.

(Para 21)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 835 (V 50)

= (1962) 44 ITR 788, Commr.

of I. T. v. National Finance, Ltd.

20

(1959) AIR 1959 SC 359 (V 46)

= (1959) 35 ITR 594, Venkataswami Naidu v. Commr. of I. T.

12

(1957) AIR 1957 SC 49 (V 44)

= (1957) 31 ITR 28, Sree Meenakshi Mills Ltd. v. Commr. of I. T.

12

(1955) AIR 1955 SC 252 (V 42)

= (1955) 27 ITR 49, Kishan Prasad and Co. Ltd. v. Commr. of I. T.

20

(1954) AIR 1954 SC 253 (V 41)

= (1954) 25 ITR 265, Liquidator of Pursa Ltd. v. Commr. of I. T.

12

Mr. S. T. Desai, Sr. Advocate, (Mr. D. N. Mukherjee, Advocate, with him), for Appellant, (In both the Appeals); Mr. Jagdish Swarup, Solicitor General of India, (M/s. S. K. Aiyar, R. N. Sachthey and B. D. Sharma, Advocates, with him), for the Respondent, (In both the Appeals).

The following Judgment of the Court was delivered by

SHELAT, J.:— These two appeals, under special leave, arise from two

References to the High Court of Patna under Section 66 (2) of the Income-tax Act, 1922 and relate to the assessment years 1945-46 and 1946-47. In the first appeal, the question arising for determination is whether, on the facts and circumstances of the case, the surplus receipt of Rs. 13,43,469/-, realised as a result of the sale of gold is assessable as income, or profits or gains for the assessment year 1945-46 under Section 4 (3) (vii) of the Act. In the second appeal, two questions arise for determination; one relates to the surplus receipt of Rs. 33,481/- arising out of the sale of some more gold, and the second relates to the receipt of Rs. 88,522/- realised by the assessee as a result of sale of certain shares. All the three questions raise the common problem whether the said transactions in gold and shares were by way of realisation of investment or were adventures in the nature of trade or business.

2. The assessee was at all material times a landholder deriving large income from agriculture, royalties of minerals and income from forests forming part of his estate. Prior to 1937 when he was a minor, his estate was under the management of a Court of Wards. On attaining majority, the estate, which included Government securities of the value of about Rs. 40 lacs, was handed over to him on August 19, 1937. During the account year 1938-39 he sold the whole lot of these securities and realised Rs. 44,25,088/- the sale thus resulting in an excess of Rs. 4,55,305/-. This excess amount was assessed as profit by the income-tax officer for the assessment year 1939-40. But on appeal against the assessment order, the Appellate Tribunal set aside that order on a finding that the said sale was by way of a change in investment, and therefore, was not a transaction in the nature of trade or business. On March 23, 1939, the assessee opened an account in the Imperial Bank of India initially with Rs. 46 lacs, which included the said sale proceeds of Rs. 44 lacs and odd and to which on March 27, 1939 he added Rs. 2.60 lacs. The account was opened in the name of his wife and was called "Account of Rs. 48 lacs floating in the share market". In September 1939, the assessee purchased shares and debentures of the value of Rs. 34.14 lacs from out of the funds in the said account. He, however, sold

certain shares for Rs. 5,75,723/- in October 1939, and then the rest of them in 1940 and 1941 realising Rs. 29,58,677/- and Rs. 64,201/- respectively. The first sale fetched a profit of Rs. 1,17,064/-; the second a profit of Rs. 25,133/- and the third a loss of Rs. 1,642/-. — The income-tax officer brought to tax the two surpluses in the assessments for the assessment years 1940-41 and 1941-42. But the department was again unsuccessful as the Tribunal once again held, on the strength of the correspondence which had passed between the assessee, his bankers and the brokers in Calcutta, that the only possible conclusion emerging from that correspondence was that the assessee's intention was not to deal in shares and debentures, and that the said transactions were a mere change in investment carried out of a single scheme of earning a better yield from investments. The Tribunal's orders in respect of these assessments for the assessment years 1939-40 to 1941-42 were made part of the Statement of Case filed by the Tribunal before the High Court in the present References.

3. Between June 28, 1940 and November 9, 1940 the assessee purchased 68109 tolas of gold for Rupees 23,47,380/- from out of the sale proceeds of the said shares. The gold so purchased was kept in his family vaults at Padma, the seat of his estate, for nearly 4 years. Between October 9, 1944 and October 20, 1944, he disposed of the bulk of the gold i. e., 55494 tolas, for Rs. 36,80,174/- the sale resulting in a surplus of Rs. 13,43,469/-, which is the subject-matter of the first appeal. The remaining quantity of gold was sold in October 19, 1945; that that sale brought him an excess of Rs. 33,481/-, which is part of the subject-matter of the second appeal.

4. In respect of these two surplus amounts, the assessee contended that they were the result of a change in investment and could not be said to be transactions in the nature of trade or business. His case was that neither the Government securities, nor the shares and debentures purchased out of their sale proceeds, nor the gold were sold and purchased by way of dealing in them, that at no time they became his stock-in-trade for any business or adventures in the nature of trade or business therein, that the transactions were mere conversions

from one investment to another, depending upon the circumstances which prevailed during the respective periods and that the sale of gold in 1944 and 1945 was occasioned partly due to the tide in the second world war turning in favour of the allies and partly due (a) to his having to pay Rs. 7 lacs by way of income-tax, (b) expenses for the marriage of his younger brother, (c) for payment of Rs. 6 lacs debt to one Gupta and (d) for purchase of Victory Bonds worth Rs. 14 lacs and odd at the instance of the Government authorities as contribution of his estate to the war effort.

5. The Tribunal rejected the case that gold had been sold for the reasons given by the assessee or as a change in investment and held that (1) conversion of shares into gold was not due to any panic resulting from the war, (2) that there was no pressing necessity for the sale of gold as alleged by him, (3) that Victory Bonds were not by way of any war effort since the assessee sold them away within a short time after their purchase, and (4) the sale proceeds of gold were utilised in purchasing shares for which he borrowed an additional amount of Rs. 5.10 lacs in 1945-46 against gold. In this view the Tribunal confirmed the I. T. O.'s decision that the two excess amounts were liable to income-tax in the two assessment years.

6. The sale proceeds of gold sold as aforesaid were utilised by the assessee in purchasing 7025 shares of Karanpura Development Company Limited for Rs. 2,37,267/- during the period December 8, 1944 to April 20, 1945 and shares of Bokaro Ramgur Company for Rs. 39,81,663/- purchased in 1945-46. Part of the sale proceeds were also utilised in purchasing the said Victory Bonds. Between November 8, 1945 and February 21, 1946, he sold 6950 of the Karanpura shares realising a net surplus of Rs. 88,522/-, which the Income Tax Officer treated as business profit and brought to tax for the assessment year 1946-47.

7. As the Statement of Case by the Tribunal shows, the Tribunal examined the assessee's dealings since the time he took over the said estate. The Tribunal noted that the said shares were purchased from the said Rupees 48 lacs in the Bank reserved for that purpose and that they were sold and purchased at very short intervals.

From these facts it held that he must be considered to have launched a scheme in dealing in shares, which conclusion, it thought, was strengthened by the fact of the assessee having borrowed Rs. 5.10 lacs for the said purpose. The Tribunal further held that the complete picture of the said transactions over a length of time had not been before the preceding Tribunal when it passed the earlier orders for the assessment years 1939-40 to 1941-42, and therefore, its conclusions were not applicable to the transactions in question. It consequently held the assessee to be a dealer in shares. As regards the gold also the Tribunal confirmed the orders of the I.T.O. rejecting the assessee's case that the gold was purchased by him owing to the war crisis and sold by him on account of the pressing necessities alleged by him and the change in the war situation then.

8. By an order dated April 2, 1959, the High Court referred that Statement of Case back to the Tribunal under S. 66 (4) directing it to consider further all the materials before it and file a supplementary Statement of Case as the High Court found the Statement factually incorrect in certain respects. The Tribunal accordingly sent a supplementary Statement of Case on April 23, 1960.

9. After setting out the assessee's transactions of the sale of Government securities in 1938-39, the purchase of shares from their sale proceeds, their sale in 1939-40 and 1940-41, the purchase of gold and its sale, the Tribunal once again rejected the assessee's claim that those transactions were conversions of one investment to another made for a better return or that the gold was sold in October 1944 for pressing necessities alleged by the assessee. Regarding the purchase and sale of shares, the Tribunal stated that the assessee purchased shares of the value of Rs. 37 lacs and odd in 1945-46, that those were shares of two concerns only, Bokaro and Ramgur Company Limited and Karanpura Development Company Limited and that as the latter company's shares were of the value of Rs. 2,37,267/- only, the bulk of the amount of Rs. 37 lacs and odd went into the purchase of the shares of Bokaro and Ramgur Co. Ltd. The Tribunal noted that the sale of Karanpura shares resulted in a net profit of Rs. 88,522/-, that in respect of the Karanpura shares there was correspon-

dence showing that his brokers had advised him to acquire 51 per cent of the company's shareholding as he desired to obtain control over its management, that for doing so he wanted to obtain founder's shares (each of which shares carried 3 votes per share), that a compromise was proposed in a suit he had filed as the lessor of the mines leased out to the company, that M/s. Bird & Co., the managing agents of that company, were not willing to sell him shares representing the unissued capital of the company on terms proposed by the assessee and that ultimately he failed to obtain majority of shares which only could have enabled him to obtain control over the company's management. But the Tribunal found that

"the assessee was attempting to obtain control of the company not by purchasing of shares in the market, but by issue of shares by the company in order to settle the dispute between the company and the assessee. These negotiations finally failed".

It finally held that having perused the correspondence and having regard to the circumstances, the purchase of Karanpura shares was not in pursuance of a scheme to obtain control over the company by acquiring 51 per cent of the votes therein.

10. The High Court, after hearing the References, held that though the Tribunal had in the earlier assessments held that the assessee's transactions in shares, securities and gold did not amount to transactions in the nature of trade or business, and therefore, the assessee could not be treated as a dealer in these articles, there was no bar to the revenue coming to a different conclusion, though to do so it must have some new materials and facts before it. It further held that the present Tribunal could also arrive at such a conclusion having regard to (a) the frequency of transactions of purchase and sale of shares, (b) the short interval between purchase and sale of shares, (c) the fact of Rs. 48 lacs in the assessee's wife's account having been ear-marked for shares transactions, (d) his borrowing Rs. 5-10 lacs against gold for purchase of shares, and lastly, the fact that the Tribunal this time had before it a more complete picture of the assessee's transactions over a length of period which its predecessor had not when it dealt with the assessments for the assessment years 1939-40 to 1941-

42. The High Court further held that there was fresh material, namely, that when the gold was sold, its sale proceeds were again invested in shares and the fact that though Victory Bonds were purchased in January 1945 they were sold after an interval of two months only. The High Court, in this view, concluded that "the Appellate Tribunal, therefore had before it fresh materials for coming to a conclusion contrary to the one come to by its predecessors in the previous orders." It rejected the assessee's case (a) that he had converted one investment into another, i.e., from shares and securities to gold, because of the worsening of the war situation after the fall of France in 1940, (b) that when the war situation improved in 1944 and with that the price of gold began to fall he once again converted his investment from gold to shares, i.e., from an unproductive investment into one which could give him an adequate yield, and (c) that he had sold gold because of pressing necessities. The first contention was held unsustainable because even after purchasing gold the assessee had retained considerable cash; the second was rejected on the ground that the assessee had sold gold not because of the allied victory in sight but because he found the gold unprofitable by reason of the fall in its price and the third was rejected as the assessee had failed to make good the pressing necessities alleged by him. The High Court further held that the findings given by the Appellate Tribunal were all findings of fact and as they could not be said to have been arrived at without any evidence they could not be interfered with in a Reference under Section 66 (2), and answered the questions as to the two surplus amounts of Rs. 13 lacs and odd and Rs. 33 thousand and odd as liable to assessment. In regard to the excess of Rs. 88,522/- resulting from the sale of Karanpura shares, the High Court agreed with the Tribunal that that amount also was rightly brought to tax. It held that the finding of the Tribunal that the purchase of these shares was not in pursuance of a scheme to obtain control in the company and that the assessee's scheme for that purpose was to acquire shares representing the unissued capital of the company was one of fact with which also it had no jurisdiction to interfere.

11. Counsel for the appellant disputed the correctness of the High

Court's judgment and contended (1) that it was in error in declining to go into the correctness of the findings of the Tribunal by merely stating that they were findings of fact, (2) that the question whether a particular item was a trading profit or capital accretion depended on the intention on the part of the assessee at the time of the transaction in question and which had to be arrived at by an inference from established facts and was, therefore, a mixed question of fact and law, (3) that on the facts and circumstances, the Tribunal, and following it the High Court, was in error in treating the gold and the Karanpura shares as the stock-in-trade of the assessee for his alleged trading activities, (4) that the onus of proving that the activities of the assessee amounted to activities in the nature of trade or business was on the department and particularly so, as the Tribunal in the earlier assessments had come to a contrary conclusion, and (5) that the facts and circumstances as accepted by the Tribunal in its Statement of Case showed that the purchases of gold and shares were made without any intention at that time to re-sell them at profit, and that therefore, the subsequent sales thereof would not stamp those transactions with the character of trade or business in them.

12. Since these appeals arise out of References under S. 66 (2), we cannot exercise any wider power of interference than that permitted to the High Court under the Act. That was not disputed by Mr. Desai. But in support of his contention that this was a case where the High Court could and should have interfered with the Tribunal's findings, he cited a number of decisions. It is not necessary to go into all those decisions as the principles on which such interference can be made and the scope of power under S. 66 to do so are by now well established. That the question, whether an assessee carries on business or whether certain transactions are in the course of business or whether they amount to adventures in the nature of trade or business, is a mixed question of fact and law is well settled. The decision in Venkataswami Naidu and Co. v. C.I.T. (1959) 35 ITR 594 at pp. 603 to 604 = (AIR 1959 SC 359 at pp. 363, 364) is an instance in point where this Court observed that the expression 'adventure in the nature of trade' appearing in the definition of

"business" implies the existence of certain elements in the adventure which in law would invest it with the character of trade and that renders the question whether a transaction is in the nature of trade a mixed question of law and fact and the High Court in such a case would interfere if the Tribunal had misdirected itself in law. [cf. also Liquidators of Purna Limited v. C.I.T. (1954) 25 ITR 265 = (AIR 1954 SC 253)]. But to distinguish a question of fact and a question of law is not always easy, for, sometimes there is a common area between the two and though a mere question of fact can be turned into one of law care should be taken against a finding of a mixed question of fact and law being given the unassailability which the Act confers on a pure finding of fact. The case of Sree Meenakshi Mills Limited v. C.I.T. (1957) 31 ITR 28 = (AIR 1957 SC 49) holds that where an ultimate finding on an issue is an inference, to be drawn from facts found, on application of a principle of law, there is a mixed question of law and fact and such an inference in such a case is a question of law open to review by the court. On the other hand, when the final determination of the issue does not involve any application of a principle of law, an inference is a pure inference of fact drawn from the other basic facts. Such an inference can be attacked only if there is no evidence to support it, or, if it is perverse. Since the expression 'adventure in the nature of trade' implies the existence of certain elements in the transactions which in law would invest them with the character of trade or business and the question on that account, becomes a mixed question of law and fact, the Court can review the Tribunal's finding if it has misdirected itself in law.

13. It is fairly clear that where a person in selling his investment realises an enhanced price, the excess over his purchase price is not profit assessable to tax. But it would be so, if what is done is not a mere realisation of the investment but an act done for making profits. The distinction between the two types of transactions is not always easy to make. The distinction whether the transaction is of one kind or the other depends on the question whether the excess was an enhancement of the value by realising a security or a gain in an operation of profit making. If the transaction is in the ordinary line of the assessee's busi-

ness there would hardly be any difficulty in concluding that it was a trading transaction, but where it is not, the facts must be properly assessed to discover whether it was in the nature of trade. The surplus realised on the sale of shares, for instance, would be capital if the assessee is an ordinary investor realising his holding; but it would be revenue, if he deals with them as an adventure in the nature of trade. The fact that the original purchase was made with the intention to re-sell if an enhanced price could be obtained is by itself not enough but in conjunction with the conduct of the assessee and other circumstances it may point to the trading character of the transaction. For instance, an assessee may invest his capital in shares with the intention to re-sell them if in future their sale may bring in higher price. Such an investment, though motivated by a possibility of enhanced value, does not render the investment a transaction in the nature of trade. The test often applied is, has the assessee made his shares and securities the stock-in-trade of a business.

14. Though the assessee was at the material time a landholder of a large estate, that fact by itself would not mean that his transactions in shares, securities and bullion cannot be transactions in the nature of trade. They had, therefore, to be examined in the light of all the facts and circumstances to ascertain whether they had been entered into in pursuit of a trading activity. The first relevant fact is that the assessee's occupation was that of a landholder, having, on attaining majority, a considerable amount of money available for raising income therefrom. The transactions in question were obviously not in the line of any business or trade carried on by him. Since the Tribunal came to a conclusion as regards the nature of the assessee's transactions different from that arrived at earlier, it would be useful to tabulate them at one place. So tabulated, they are as follows:

(1) Sale of Government securities in 1938-39 which realised Rs. 44.25 lacs;

(2) Opening of an account with this and certain other amounts totalling Rs. 48 lacs in the Imperial Bank;

(3) Purchase out of these funds, shares and debentures of the value of Rs. 34.14 lacs in September 1939;

(4) Sale in October 1939, i.e., within a month, of some of these shares bringing him Rs. 5.75 lacs;

(5) Sale of the bulk of the shares in 1940 bringing in Rs. 29.58 lacs;

(6) Sale of the remaining shares in 1941 resulting in a small deficit;

(7) Purchase of 68109 tolas of gold in June 1940 for Rs. 28.47 lacs;

(8) Sale of the bulk of the gold, i.e., 55495 tolas in October 1944 resulting in a surplus of Rs. 13 lacs and odd;

(9) Sale of the remaining gold in October 1945 resulting in a surplus of Rs. 33,481/-;

(10) Purchase of Karanpura shares between December 1944 and April 1945 of the value of Rs. 2,37,267/-;

(11) Purchase of Victory Bonds in January 1945 of Rs. 14 lacs, and sale thereof in March 1945;

(12) Borrowing Rs. 5.10 lacs against gold in 1945-46;

(13) Purchase of Bokaro Ramgur shares in 1945-46 for Rs. 39.81 lacs; and

(14) Sale of Karanpura shares in 1945-46 bringing in a surplus of Rupees 88,000/- and odd.

As already stated, though these transactions were not in the line of any trade or business carried on by the assessee, nonetheless, if they possess the characteristics of adventures in the nature of trade, the profits resulting therefrom would be liable to tax. But in an enquiry on the question whether these transactions were in the nature of trade or business, it would not be altogether irrelevant to notice that in 1938-39, when the assessee sold the Government securities, he sold the entire lot and invested the bulk of their sale proceeds in shares and debentures, i.e., as much as Rs. 34 lacs. The same feature is present also in his purchase of gold in 1940 and its disposal in 1944 and 1945 using its sale proceeds in buying shares, which, it must be remembered, were of two companies only. The transactions thus are not diversified, nor are gradual according to the opportunities offered by fluctuating market prices, but are in bulk and almost at a time, which ordinarily are not the characteristics of the dealings of a person carrying on trade or business, in them. Thus, in 1938-39 all Government securities were sold and the bulk of their sale proceeds, i.e., Rs. 34 lacs and odd, used in the purchase of shares. The same was the case when gold was bought and

sold. Furthermore, when a person trades in shares and debentures, he does not ordinarily buy shares of two companies only, except when a particular script has the possibility of giving an unusual or a certain profit. There was nothing on record to show, nor did the Tribunal find, that that was the case with the shares of either of the two companies whose shares the assessee purchased in such large quantity. Prima facie, these transactions would appear in the nature of investments and their conversion into what the assessee believed to be better investments as the circumstances changed from time to time.

15. In support of his contention that these transactions were not in the nature of trade or business, the assessee had relied on the correspondence between him on the one hand and his bankers and brokers on the other, which had satisfied the Tribunal previously with reference to the assessment years 1939-40 to 1941-42. That correspondence lends support to the assessee's case inasmuch as he had therein clearly instructed his brokers to invest the sale proceeds of the said Government securities in such a way as to give him an annual yield of net 7 per cent. There can be no doubt that Government securities were sold accordingly and shares of certain companies were purchased from their sale proceeds in accordance with the advice of his brokers and bankers. When it was found that certain shares so purchased were not likely to yield the percentage he desired, they were sold within hardly a month from their purchase. The circumstances in which these transactions were brought about, would disclose, as was held by the previous Tribunal in the case of the earlier assessments, that the assessee's intention then was to change his investments from Government securities into shares and debentures which, he was advised, would procure him a better yield. This conclusion is consistent with his sale of the entire lot of Government securities at a time, his going in for shares with their sale proceeds and the sale in October 1939 of certain shares which were found incapable of giving the return he desired.

16. Since the present Tribunal had the advantage of examining the assessee's transactions during the whole of the period, i.e., right from

1938-39 to 1944-45 and thus have a more comprehensive picture of all the transactions, there would be no bar to its coming to a conclusion different from that arrived at in the earlier years, if the acts and conduct of the assessee taken as a whole throughout the period pointed to a different conclusion as both the Tribunal and the High Court have said. But the only new materials pointed out by the Tribunal from which a different conclusion could be arrived at were (1) the sale of gold in 1944 and 1945, (2) the purchase of the said shares from its sale proceeds, and (3) the sale of Karanpura shares.

17. The question, therefore, the Tribunal had before it was, whether when the assessee purchased the gold he did so with the intention to deal in it. The Tribunal held, and the High Court concurred with it, that the assessee's transactions showed that they were in the nature of trading transactions. Two facts, however, throw considerable doubt on the validity of that conclusion and neither the Tribunal nor the High Court seems to have weighed them with the consideration which they demand. The first fact is that in 1940 he converted his entire share-holding into gold, a fact consistent with his case that he did so because of the nervousness engendered by the breaking out of the Second World War, the initial German victories and the fall of France. The Tribunal did not countenance this case for it thought that if that was so, the assessee would have invested the other cash lying with him also in gold, and secondly because according to it the war panic started in 1942 and not in 1940. We do not think that this was an accurate approach. The fact that the assessee did not invest all his cash cannot mean, as the Tribunal thought, that his case about the purchases of gold was not correct. The war had commenced in 1939 and it is a notorious fact that in 1940 the fortunes of the allies were none too bright. The fact was that the assessee sold his entire share-holding and applied their sale proceeds and also a further amount of Rs. 13 lacs and odd obtained from his lessees, M/s. Anderson Wright and Company, into gold. The second fact, whose significance does not also seem to have been adequately apprehended, was that the assessee, who started with the plan of getting

at least net 7 per cent yield, put a very large part of his funds into gold, an altogether sterile security, and retained that gold in his family vaults for nearly 4 years. The Tribunal had before it the gold prices current during the years 1940 to 1944. These indicate that the gold price remained steady at Rs. 42 per tola all throughout 1940. There was, however, an upward trend noticeable from about the end of 1941 which went up to Rs. 65 towards the end of 1942. By the middle of 1943 the gold price had risen to Rs. 90 and even more. In October, 1944, when the assessee sold a large bulk of his gold holding, the price was at Rs. 68 per tola. If the idea of the assessee in purchasing the gold was to trade in it, he would not have waited for 4 years without disposing of a particle of it. The price was on the upward trend in 1941 and reached the climax in 1943 when he could have sold the gold and made considerable gain. The fact that he did not do so and waited until October 1944 appears to give credence to his case that by about the end of 1944 the war fortunes were turning in favour of the allies, that confidence had gradually been regained by trading circles and that that was why he thought that it was no longer necessary for him to retain the gold any further and could safely invest his money in income bearing securities. The further fact that he sold practically the whole of his stock of gold in October, 1944 instead of selling it bit by bit when the price was rising since about the end of 1942 is inconsistent with the hypothesis that the object with which the gold was purchased was to trade in it.

18. Regarding share transactions, we think that the Tribunal placed undue emphasis on the fact that when he opened the bank account in March, 1939 with the sale proceeds of Government securities, he did so, firstly, in the name of his wife and secondly, called that account as one of "Rs. 48 lacs floating in the share market". The first had no particular significance and the second properly viewed only meant that he wanted to set apart this fund for transactions in shares and securities and not mix up his other capital and the income arising from his estate. The name he gave to this account cannot for that reason only render his dealings with that ac-

count into trading transaction, if otherwise, they were not.

19. Similarly, the Tribunal was unduly impressed by the fact that he sold away the Victory Bonds within about two months from their purchase. The correspondence produced by the assessee clearly shows that he had bought those Bonds at the pressure of the then Commissioner. The Bonds were not likely to fetch him the yield he desired. His purchase of them had thus served the purpose, viz., his showing to the authorities that his estate had made a war contribution. The sale by him of those Bonds would not affect the Government or its war effort. The fact that he sold them soon after the purchase would not invest it with the stamp of trade or business in Victory Bonds.

20. As regards the Karanpura shares, the correspondence between him and the company and the advice he had from his brokers referred to in the Statement of Case show that the assessee did at one time entertain the idea of obtaining control over the company's management by procuring 51 per cent of its total shares. He could do so by purchasing shares in the open market and also by other means. He purchased 7025 shares in the market but that was clearly not enough. There was at that time litigation going on between him and the company and he seems to have hit upon the idea that he would compromise his suit if the managing agents of the company were to sell him shares representing its unissued capital at prices offered by him. The object of his offer was that he would not have to pay the market price of the shares which was 3 times more than the one offered by him. The company did not agree and his move for compromise failed. According to him, there was, therefore, no useful purpose for retaining those shares and he sold 6950 shares leaving only 75 shares with him. On these facts the Tribunal was not right in concluding that the shares which the assessee purchased from the market were not for the purpose of acquiring the major share-holding in the company and that the control over the company was to be obtained only by purchasing shares representing the unissued capital. Both the purchase of shares and the move to obtain shares representing the unissued capital were part of the same design and

if the latter failed, his purchase of 7025 shares would obviously not bring him nearer his object. Furthermore, the bulk of the sale proceeds of gold went into the purchase of Bokaro Ramgur shares which remained with him till the assessment years in question. The profits made on the sale of shares, acquired with the intention of obtaining control over the company's management and not for dealing in them, would be on the capital and not revenue account. (see *Kishan Prasad and Company Limited v. C. I. T.*, (1955) 27 ITR 49 = (AIR 1955 SC 252) and *C. I. T. v. National Finance Limited*, (1962) 44 ITR 788 = (AIR 1962 SC 835). The Statement of Case itself set out facts which were consistent with the assessee's case.

21. In our view the Tribunal misdirected itself in applying the law to the facts found by it both in the matter of gold and shares, and the High Court would have been entitled to interfere with its findings instead of holding that it could not do so as the findings were findings of fact. The questions involved being mixed questions of fact and law, the hypothesis on which the High Court acted that the findings were purely findings of fact and therefore, were unassailable was in our view not correct.

22. The appeals, therefore, will have to be allowed and the answers given by the High Court set aside. We hold that the two questions referred to the High Court should have been answered in assessee's favour and we do so accordingly. The respondent will pay to the appellant costs of these appeals but only one hearing fee.

Appeals allowed.

AIR 1971 SUPREME COURT 813 (V 58 C 162)

(From: Punjab and Haryana)*
C. A. VAIDIALINGAM AND
A. N. RAY, JJ.

Surta and others, Appellants v.
The State of Haryana, Respondent.

Criminal Appeal No. 225 of 1970,
D/- 12-2-1971.

Constitution of India, Article 134
— In a criminal appeal Supreme

*(Cri. Appl. No. 263 of 1969, D/- 21-10-1970 — Punj. & Haryana.)

BO/CO/A739/71/GDR/C

Court will interfere with sentence only when it is established that the sentence is harsh or unjust in the facts and circumstances of the case. (Para 7)

M/s. Nur-ud-din Ahmad and U. P. Singh, Advocates, for Appellants; M/s. Gautam Goswami and R. N. Sachthey Advocates, for Respondent.

The following Judgment of the Court was delivered by

RAY, J.:— This appeal is by special leave against the judgment dated 21 October, 1970 of the High Court of Punjab and Haryana convicting the nine appellants, Surta, Ram Sarup, Birkha, Jagram, Mangal, Juggal, Mannu, Lakhi and Sisram under Section 148 of the Indian Penal Code and sentencing them to six months rigorous imprisonment and also convicting them under S. 339/149 of the Indian Penal Code and sentencing them to rigorous imprisonment for one year. The other two appellants were awarded a sentence of imprisonment till the rising of the Court and a fine of Rs. 50/- under Section 148 of the Indian Penal Code and in default of payment of fine to undergo rigorous imprisonment for one month each. They were further sentenced to pay a fine of Rs. 100/- under Section 333/149 of the Indian Penal Code and in default of payment to undergo rigorous imprisonment for two months each.

2. The appeal by special leave was limited to the question of sentence only.

3. On 30 July, 1966 Mangal Singh, Assistant Sub-Inspector accompanied by four constables left Police Station, Rewari for patrol duty sometime after 8 p. m. One Piare Lal lodged a report with Mangal Singh that two of his cows were missing. Mangal Singh and his constables reached village Jatuwas in the company of Piare Lal. Piare Lal pointed out the two cows. Mangal Singh called Kurra who was Lambardar. Three other persons came along with Kurra. Mangal Singh informed those three persons that the two cows belonged to Piare Lal and were alleged to be stolen property. These persons refused to hand over the cows. When efforts of Mangal Singh failed to persuade the villagers to hand over the cows he ordered the constables to untie the cows for taking them away. At this Kurra and the three other per-

sons, Chhelu, Ram Rikh and Partap assaulted Mangal Singh. The four constables intervened. The villagers rushed to the spot and fell upon Mangal Singh and the constables. In order to defend himself Mangal Singh fired from his service revolver which injured one of the villagers. Mangal Singh received some injuries on his arm and his revolver fell from his hand. The four constables and Piare Lal ran away from the spot. After some time the Sub-Inspector of Rewari Police Station learning that a Police Officer was lying injured reached the place and found Mangal Singh. The Police Officer recorded the statements of Mangal Singh and of the constables. Mangal Singh was sent to the hospital at Rewari for medical examination. The Sub-Inspector Ripudaman Singh carried on the investigation. He arrested 22 persons and recovered the service revolver from the person of Surta.

4. The defence version was that crops of the accused were damaged by stray cattle. They made a complaint to the Deputy Commissioner. The accused had been told to detain the stray cattle so that they could be removed. The accused rounded up the cattle and informed the officers at Delhi to send a truck for taking away the cattle. Before the cattle could be taken away the Police party arrived. The accused informed the Police party that the cattle could not be taken away. This infuriated Mangal Singh who started firing. The defence further stated that they caused injuries in the exercise of private defence of person as otherwise Mangal Singh would have killed some of them.

5. The High Court found that when the four constables went forward to untie the cattle the villagers attacked Mangal Singh and other constables and it was at this stage that the pistol was used. The accused did not have the right to stop the Police party from untying the cattle. It was also found by the High Court that the accused did not have the right of private defence and force was used to restrain them from interfering with the Police party taking possession of the cows.

6. Before the High Court it was submitted on behalf of the appellants that the sentence was severe. The High Court held that the sentence was not at all excessive and in fact the Sessions Judge erred on the side of

leniency. Counsel on behalf of the appellants submitted that the accused spent about 3 months in prison before being enlarged on bail and in the facts and circumstances of the case that sentence should suffice.

7. This Court interferes with sentence only when it is established that the sentence is harsh or unjust in the facts and circumstances of the case. Sometimes consideration of age has also occasioned interference. There are instances of interference in sentences of fine in cases of violation of statutory offence. In the present case, the Sessions Court and the High Court both considered the question of sentence. There is nothing on record to suggest that the sentence passed is unjust or harsh.

8. The appeal is therefore, dismissed. The accused will surrender if on bail and serve out the sentence.

Appeal dismissed.

AIR 1971 SUPREME COURT 804 (V 58 C 163)

(From: Orissa)*

S. M. SIKRI, C. J., P. JAGANMOHAN REDDY AND I. D. DUA, JJ.

Balakrushna Swain, Appellant v. The State of Orissa, Respondent.

Criminal Appeal No. 44 of 1968, D/- 9-2-1971.

Criminal P. C. (1898), S. 161 — Unjustified and unexplained long delay on part of investigating officer in recording statement of material eye witness during investigation of murder case will render evidence of such witness unreliable. Cr. A. Nos. 222 & 223 of 1966, dated 15-2-1967 (Orissa), Reversed.

(Paras 5, 6, 8)

Mr. R. Mahalingier, Advocate, amicus curiae for Appellant; M/s. Gobind Das and B. D. Sharma, Advocates, for Respondent.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.: — The Appellant Balakrushna Swain was convicted of an offence of murder under Section 302 and awarded death sentence by the Additional Sessions

*(Cri. Appls. Nos. 222 and 223 of 1966, D/- 15-2-1967 — Orissa.)

Judge, Cuttack, subject to confirmation by the High Court. He was further convicted of an offence under Section 148 and sentenced to four months rigorous imprisonment. Two other accused namely Laxmidhar Swain and Pranakrushna Swain were convicted under Sections 148 and 323 Indian Penal Code and both sentenced in respect of Section 148 Indian Penal Code to four months rigorous imprisonment. Further though both of them were convicted under Section 323 the former was sentenced to a fine of Rs. 50/- while the latter to Rs. 200/- in default to undergo respectively one month and four months rigorous imprisonment. Eight other accused who were tried along with them were acquitted. The Appellant and the other two accused appealed to the High Court which while confirming the conviction awarded life sentence instead of death penalty on the Appellant and maintained the sentences passed on the other two convicted accused. The Appellant has come up before us in Appeal by special leave.

2. The deceased Bhramar Swain had after the death of his wife kept Sundari sister of Chakradhar Swain P. W. 5 as his Mistress. After she had lived with him for sometime it was said that there arose a faction in the village in which the Appellant supported the claim of Sundari that she should be given the status of a wife by the deceased. Sundari's brother P. W. 5 and their maternal uncle Baishnab were also supporting the deceased to make provision for and accept Sundari as his wife. In respect of this dispute there was some strained feeling between Sundari's brother Chakradhar and the deceased. Apart from this there were also some land disputes arising out of purchases by the deceased from one Fakir Swain father of P. W. 9 and P. W. 10 his homestead and house standing in front of his house. The Appellant however raised an objection that he and the deceased jointly purchased this property but the deceased claimed that he alone had purchased it. It is also said there was a disagreement with some of the villagers of Nachhipura because of which the deceased lived for a year or two at village Pokhariapada in the house of his relation Daitari Naik. The deceased came back to Nachhipura a few days before the occurrence namely on 6-1-66. P. W. 5

was helping the deceased in building a part of his house and for this purpose he brought a rafter from the house which the deceased had purchased from Fakir Swain. While this rafter was being fixed for reconstructing the house of the deceased the Appellant came there, started a quarrel and after some exchange of words the Appellant snatched away the wooden rafter and carried it away. On the same evening it is said that a meeting in a lane near the house of Anand Swain was held attended to by 11 accused originally charged before the Sessions Judge, at which there was a talk that the deceased had come to the village and that he should be killed. That night at about 9 p. m. the deceased after taking his night meal wanted to go to sleep in the house of Uttam P. W. 2. As he was apprehending danger he was accompanied by P. W. 2 and P. W. 5 and on the way the deceased and P. W. 5 both went to ease themselves. After easing and washing themselves while they were returning and proceeding towards the house of P. W. 2 the Appellant and the accused Laxmidhar Swain suddenly appeared from a hay stacked nearby with Lathis or some like weapons. Laxmidhar Swain at once gave a stroke on the head of Chakradhar P. W. 5 while the Appellant gave a stroke on the head of the deceased who fell down. Uttam P. W. 2 who was walking in front, on listening the cry of P. W. 5 came back when Pranakrushna Swain gave him a stroke on his back. After the deceased had fallen down, it is alleged that the Appellant gave a Katari blow on him, as a result of which the deceased died. All the accused then ran away. The villagers who had heard the disturbance came there and found that P. W. 5 was also having severe bleeding injuries. The dead body of the deceased was then placed on a bamboo platform erected at the spot. P. W. 1 who is deceased's sister's son and who is said to be adopted by the deceased went to the Police Station at Ersama which is situated at about 7 miles away from the Village and gave the F. I. R. at 6 a. m. on 7-1-66 in which he said:

"My maternal uncle after easing himself went to clean himself in the common pond of Gurubari Swain, Nisakar Swain and others on the southern side of the village and came

out. Balakrushna Swain, Pranakrushna Swain and Laxmidhar Swain came out at once from the side of that tank with Lathis or some like weapon as was visible. Laxmidhar Swain at once gave a stroke on the head of Chakradhar Swain. Balakrushna Swain gave a stroke on the head of my maternal uncle Bhramar. I could not clearly see, in the moonlight, the weapon they held. My maternal uncle at once fell down just after the stroke on him. When Uttam Charan Swain came there hearing the cry of Chakradhar Swain, Panu Swain gave two strokes on his back".

Thereafter the F. I. R. records P. W. 1 as stating that 20 or 25 people who were standing there said 'kill him catch him'. He further says he was able to recognise by the voice seven accused whose names he gave. Apart from these seven persons he had also named five others who were standing there holding a lathi which he says was visible to him in the moonlight. The Investigating Officer Banambar Ray P. W. 19 started the investigation, went to the spot, held an inquest and collected blood stained mud M. O. XII from the paddy field where the incident is said to have taken place. He also went to the house of the deceased and searched for blood stained earth but did not find it. P. W. 19 says while he was going to the place of incident, he met P. W. 5 who was being carried in a basket, so he gave a requisition Ex. 11 to the Medical Officer, Ersama for examination and treatment. The body of the deceased was also sent on 8-1-66 to Cuttack for post-mortem examination, as carriers could not be arranged earlier. On 7-1-66 he arrested the Appellant and two others and the remaining accused were arrested on different dates. A wooden lathi M. O. IV was recovered from the house of the Appellant on 8-1-66 and M. O. V and VI, the blood stained Lungi and Ganji (Vest) of P. W. 5 was seized on 15-1-66. He then sent the blood stained articles to the chemical examiner. These articles bore a few brown stains of blood with respect to which the serilogist reported that the result of the test on the Ganji was inconclusive while the blood on the Lungi and blood stained earth had disintegrated and therefore it could not be ascertained that what was found on these articles was human blood.

3. The case of the defence is that the accused did not commit the offence and said that due to previous enmity and party faction they have been implicated. The further case of the defence was that on the evening of the incident at about 6 p. m. on 6-1-66 during the course of a quarrel between the deceased on the one side and Chakradhar P. W. 5 and the Appellant on the other in the house of the deceased about a wooden pole brought from the house of the deceased which he had purchased and which the Appellant claimed belonged jointly to him and the deceased; a wooden rafter from the roof fell on the deceased as also on P. W. 5 Chakradhar and injured them. As a result of the injury thus caused, the deceased died. Thereafter the dead body was removed to the paddy field and placed on a bamboo platform erected for this purpose.

4. The Sessions Judge as well as the High Court rejected this defence relying on the evidence of P. W. 1 who had stated that though a wooden rafter had fallen down it did not cause any injury either to the deceased or Chakradhar P. W. 5. The eye witnesses to this incident are P. W. 1, nephew of the deceased, P. W. 2 Uttam Swain and P. W. 5 Chakradhar, the brother of Sundari. Of these P. W. 2 was declared hostile. The High Court observed that of these eye witnesses the evidence of P. W. 1 and P. W. 2 is not reliable but it believed the evidence of P. W. 5 and confirmed the conviction of the Appellant.

5. It has been contended before us that the evidence of P. W. 5 is also not reliable, in that he is inimically disposed to the deceased and was an interested witness inasmuch as he was the brother of Sundari whose side he was taking to obtain for her the status of a wife. In fact according to the submission of the learned Advocate the Appellant had not killed the deceased but the rafter had fallen while they were all quarrelling in the house of the deceased injuring the deceased and P. W. 5 as a result of which injury the deceased died. Thereafter there was a conference between P. W. 1, P. W. 5 and others all night in that house as to what should be done with the dead body and ultimately it was decided to remove the dead body to the paddy field

put it on a bamboo platform which was to be built for this purpose and implicate the accused. Accordingly P. W. 1 was sent to give a report. As we said earlier the High Court did not rely on the evidence of P. W. 1 and P. W. 2 as in its view they could not have witnessed the occurrence. It was also observed that P. W. 1 was an interested witness being the sister's son of the deceased and also that he could not have seen the actual murder and assault as on his own showing he was proceeding to P. W. 2's house when the deceased who had gone to ease himself was assaulted while he was on his way to join him. P. W. 2's evidence was not relied on although he is stated to have been assaulted by (the accused) the Appellant, Pranakrushna Swain because there was no mark of injury on his person nor was he medically examined. P. W. 19, the Investigating Officer admitted that although he had seen P. W. 2 in the Village from January 7 to January 13, 1966 he found no marks of assault on him nor did P. W. 2 consent for being sent to medical examination. As we have pointed out earlier P. W. 2 was also declared hostile and the prosecution allowed to cross-examine him. In these circumstances their evidence was rightly not relied upon to support the prosecution case as to who and in what circumstances the occurrence took place. The only other evidence is that of P. W. 5 who was not examined till the 15th January i.e. till after 10 or 11 days of the incident. There was no reason why P. W. 19 could not have examined him because on his own showing P. W. 19 had met P. W. 5 while he was going to the Village when P. W. 5 was being taken to the Hospital. No doubt P. W. 19 says that P. W. 5 was not in a condition, for him, to record his statement but apart from his saying so he does not tell us in what condition P. W. 5 was. P. W. 5 went to the Ersama Primary Health Centre where Dr. Kanungo P. W. 22 who was then the Medical Officer in-charge had examined him on receiving a requisition Ex. 11 from the Police. According to the Doctor, P. W. 5 was under his treatment from 7-1-1966 to 12-1-1966. On examination he found four wounds:

1) "One contused wound with blood clot over the injury over the surrounding tissues, extending to face. The margins were rough and regular.

The size of injury was 1 1/2" x 1/4". As the injury was bleeding I could not measure its depth, but the injury had a depth. The injury was on the left side head.

2) One contused wound with blood clot, with haematoma of mucous surface on right side upper lip. The size of the injury was 1/4" x 1/4". The colour of the injury was black.

3) One bruise with swelling 3" x 1 1/2" on the left fore-arm dorsal aspect-close to elbow joint.

4) One bruise with swelling 2" x 1" on left side back over scapula."

In cross-examination the Doctor admitted that P. W. 5 was not treated as an emergency patient and since there were only 2 beds for emergency cases he did not admit him as Indoor patient and that P. W. 5 was making his own arrangement for his stay and attending the Primary Health Centre daily for his treatment. P. W. 5 however states that he was admitted as an indoor patient for 12 days which cannot be accepted in view of the Doctor's evidence. While noting this divergence in the evidence of P. W. 19 and P. W. 5 the High Court seems to accept an explanation given by the Public Prosecutor that because P. W. 5 was being seen by the P. W. 19 everyday, P. W. 5 may have made arrangements for his stay in the Hospital premises but this is no-one's case. P. W. 19 says that P. W. 5 was coming everyday for treatment but there is no evidence as to whether P. W. 5 was staying in the Hospital premises or elsewhere, as such we find no justification in accepting the statement of P. W. 5 which in our view is a falsehood. In answer to a question by the Additional Sessions Judge P. W. 22 says he found a laceration in injury No. 1 although he did not mention the word laceration. He however admitted that in a contused wound there is always a laceration but the margins are regular. In further cross examination the Doctor said that since the margins of injury were regular he mentioned it as a contused wound instead of a lacerated wound and noted accordingly in his report Ex. 11/1. He further states that by a lathi no incised wound can be caused. Incised wounds have always some depth. In injury No. 1 also he found a depth but says that in contused wound also there can be some depth. This evidence clearly shows that P. W. 5 was not certainly,

in a condition where his statement could not have been taken. The statement by P. W. 5 that he was an indoor patient was an attempt to support P. W. 19's explanation for not recording his statement earlier. That there was no valid reason for P. W. 19 not to record his statement earlier when he met P. W. 5 on the 7th itself is clear from his admissions that after he received the injuries he did not lose his senses and in fact sat at the place where the incident took place for two ghadis. The High Court itself has commented on the lapses in investigation and the delay in examination of P. W. 5 who was a material witness; none-the-less it merely says "even so the evidence of Chakradhar P. W. 5 cannot be rejected on account of his delayed examination by the investigating officer. In our opinion the delayed examination does not affect the veracity of Chakradhar Swain". Why when a similar statement made by P. W. 1 regarding the occurrence is not relied on, the statement of P. W. 5 should be relied particularly when such a long delay in his not being examined earlier is not explained. The High Court said that the Doctor P. W. 22 had not mentioned that there was a bleeding injury on the right side fore-head in certificate Ex. 11/1 although such an injury was mentioned in the Police requisition Ex. 11 of 7-1-66. This comment we may observe is not warranted because the Doctor was not cross-examined in respect of these discrepancies. The mere fact that P. W. 19 had given a requisition to examine P. W. 5 for an injury on the right side does not necessarily establish that the injury was on the right side. A good deal of cross-examination was directed in respect of the Report Ex. 11/2 given by him but nowhere was he asked as to whether there was an injury on the left side and why he had omitted to mention it. It is no one's case that there were two wounds one on the left side and the other on the right side. What P. W. 5 says is that Laxmidhar gave him four lathi blows as a result of which he had bleeding injury on the nostril and on the left side of head and he fell down because of this assault. The Doctor however said that this injury was on the right side. While there could have been a mistake whether the injury was on the right side as spoken by the Doctor or on the left

side as spoken by the injured, there could be no mistake as to whether there could be one wound or two wounds because the witness does not speak about his having two wounds one on the left side and the other on the right side. Further P. W. 5 says that the Doctor gave him a discharge slip on the day he was discharged but later took it back after consultation with the Thana Babu and thereafter he did not give him any discharge slip. P. W. 5's blood stained clothes were also seized on the 15th about 10 days after the incident. The witness wants us to believe that for these 10 days he was wearing these blood stained clothes without removing them.

6. In view of all these incongruities we think there is justification in the comment of the learned Advocate for the accused that the delayed examination of P. W. 5 by P. W. 19 would give an opportunity to P. W. 5 to concoct a different version than what actually took place.

7. On the question of how the deceased received the fatal injury also there is material contradiction in the evidence of P. W. 5, Dr. N. K. Mohanty P. W. 16 who conducted the post-mortem, says that he found three external injuries which are:

1) Incised looking lacerated wound on scalp 3" x 3/4" x bone deep extending vertically from a point 2 1/2" above the root of the nose, on the frontal bone and right parietal bone.

2) Ecchymosis on left fore-head extending over an area of 2" x 2".

3) Ecchymosis of left upper eye lid.

On dissection a linear fracture of the skull 7" long extending in the frontal bone from a point 3" above the root of the nose which after running 2" turns to left vertically downwards on the left temporal bone. There was also a crack fracture 4" long running through the pituitary fossa extending to left along the front margin of the left petrous temporal bone. The injury to the brain in his opinion was the cause of death and that a blunt weapon must have caused the head injury. He was asked in examination-in-chief whether the blunt side of a Katari might also cause such an injury and his answer was that it could be so caused but in cross-examination he admitted that the head injury on

the deceased was not an injury caused by a sharp cutting weapon by using its sharp edge. The evidence of P. W. 5 is that the Appellant gave a lathi blow on the waist of the deceased and after he fell down on the ground the Appellant gave a blow with the Katuri on his head. He further says he could see clearly the Katuri and that the Katuri blow on the deceased was given when P. W. 5 was still standing. According to this witness there was only one blow with a lathi and that too on the waist, if so this evidence is inconsistent with the Doctor's finding that the head injury must have been caused by a blunt weapon like a lathi. P. W. 5 however had stated in the Committal Court that one blow was given with lathi on the head and the other blow was on the waist and that too with a lathi. When confronted with his statement in the Committal Court that the Appellant had given a lathi blow on the head of the deceased, he denied that he made such a statement. When he was asked that in the Committal Court he had not said the Appellant had given a Katuri blow on the head of the deceased he said it is not a fact that he did not speak of a Katuri blow on the deceased. It was also put to him that he had not stated before the Police that a Katuri blow was given by the accused to the deceased but does not remember whether he stated before the police whether only one blow was given to the deceased. While the High Court noted this contradiction it appeared to it that the evidence of the Doctor that a blunt weapon must have caused the injury to the deceased was consistent with the statement of P. W. 5 in the Committal Court which statement was held to be substantive evidence since it was brought on record after due confrontation under Section 145 of the Evidence Act. The High Court further observed:

"In fact, even at the trial before the learned Additional Sessions Judge, Chakradhar (P. W. 5) in course of cross-examination ultimately said that he saw only one lathi blow given by the accused Appellant Balakrushna to the deceased. It is not improbable that there was some confusion not unnatural nor unlikely in a situation in which the three assailants were assaulting three victims at night in the paddy field in the manner they were doing — by reason of which Chakra-

dhar (P. W. 5) at the Sessions trial mentioned Katuri also in addition to Lathi."

On the other hand the Trial Judge while referring to the contradiction in the Committal Court with the statement made by the Appellant before him observed that the outstanding fact is that the Appellant had both a lathi and a Katuri in his hand which fact was corroborated by P. W. 11 when he says he saw the Appellant running and holding in one hand a lathi and in the other a Katuri and since P. W. 16 the Doctor says the injury on the deceased could be caused by a lathi blow and also by the blunt edge of the Katuri he thought it was immaterial "whether some of the eye witnesses speak of a lathi blow being the cause of the head injury of Bhramar and others speak of a blow given with a Katuri being the cause of the injury. Thus from the above evidence of the occurrence witnesses, P. Ws. 1, 2 and 5 corroborated by the evidence of P. W. 11 in a substantial degree, the irresistible conclusion must be that the accused Balakrishna caused the mortal head injury of the deceased by giving a severe blow with either a lathi or the blunt edge of a katuri and thus, the death of Bhramar was caused instantaneously".

8. The above passage would show that the Sessions Judge was trying to reconcile the contradictions in the two statements of P. W. 5 by holding that the accused had both a Katuri and a lathi in his hands. This is so because P. W. 1 also says that the Appellant had a Katuri and a lathi when he attacked the deceased. It is in our view difficult to comprehend how he could carry a lathi in one hand and a Katuri in the other and still be free to give a Lathi or Katuri blow on the head of the deceased with such force and intensity as would cause the kind of injury which caused the death of the deceased. Be that as it may, the High Court as we have pointed out earlier relied on the statement of P. W. 5 made in the Committal Court in holding that the blow was given by a lathi. We however find that the Sessions Judge brought the deposition of P. W. 5 in the Committal Court on record under Section 288 of the Criminal Procedure Code not at the time when P. W. 5 was being examined but after the evidence for the prosecution

was closed and after the statement of all the accused were recorded. The next day i. e., 8-12-66 it would appear the defence counsel tendered the deposition of P. W. 2 in the Committal Court but the Sessions Judge not only admitted that evidence but also the evidence of P. W. 5 in the Committal Court under Section 288, Criminal Procedure Code. Whether this is the proper procedure need not now concern us but even so the High Court failed to note that in the Committal Court the witness had not said that the Appellant was carrying a Katari also, but none-the-less in the Sessions Court he insists that he had said so. Similarly he denied that he stated in the Committal Court that the blow on the head was given by a lathi. In any case if the statement in the Committal Court is to be taken the first blow which was given by the Appellant was with a stick and was on the head and the second blow was on the waist. In the Sessions Court however, he stated that the first blow with a lathi was on the waist and after the deceased fell down it was only then the fatal blow was given on the head. These contradictions ordinarily would by themselves not have much significance but where as in this case the witness for no justifiable reasons was not examined for nearly 10 days and he is found to be telling falsehoods on material aspects of the case it becomes difficult to place any reliance on such testimony particularly when he tries to conform to the evidence of P. W. 1 in the Sessions Court that the first blow was given by a lathi on the waist and the second by a Katari on the head. When this very statement of P. W. 1 has not been relied on by the High Court there is no reason for taking a part of his statement from the Sessions Court and a part from the Committal Court to piece it as a whole for a narration as to how the deceased was killed. There are also other circumstances in this case which though may not support the defence version of how the incident took place none-the-less indicate that there have been confabulations and consultations between P. W. 5 and the other witnesses immediately after the death of the deceased. The fact that the dead body was put on a bamboo platform which was constructed for that purpose in the paddy fields would indicate that the incident may

not have taken place as spoken to by the witnesses. The evidence of P. W. 1 shows that on the date of the occurrence he, Mahani, Uttam, Fakir, Nisakar had discussions for two hours in the house of Bharmar. The question naturally arises as to what they were discussing. Were they discussing as suggested by the learned Advocate for the Appellant as to what story must be told about the death of the deceased? This admission merely indicates that the version in first information was not spontaneous. P. W. 2 says that the Appellant dragged the deceased and Laxmidhar Swain caught hold of the neck of the deceased and threw him on the floor and then the Appellant assaulted him with a Katari on the head. This caused bleeding injury and death on the spot. The witness further says in cross-examination that there was a quarrel between the deceased and his brother-in-law (Sala) on the date of occurrence. This quarrel between Sala and Behnoi took place two ghadis before sunset. He also said that the deceased never used to stay in his — the witness's house but on the day of the occurrence he was going to stay in his house. On the evidence of P. W. 1 15 days before the incident, he, the deceased's mother and younger son came to live in the deceased's house at Nachhipura. When the deceased found that his house was broken down, he started to build it, on the day of the incident when there was a verbal wrangle and physical struggle between the deceased on one side and the Appellant and P. W. 5 on the other in respect of a rafter brought by the deceased from the house purchased from Fakir Swain. In fact he admits at this time a wooden rafter fell down but it did not cause any injury to the deceased and P. W. 5. The witness also speaks of enmity between P. W. 5 and the deceased because P. W. 5 was supporting Sundari. There seems to have been a Criminal Case filed by the deceased against Sundari. P. W. 5 and the Appellant sometime before the incident and according to the witness on the day of the incident P. W. 5 and the Appellant were on one side when the physical struggle as spoken to by P. W. 1 took place against the deceased. Relying on this evidence the learned Advocate for the Appellant contends that on the day of the incident there was a quarrel and a

physical struggle about the rafter brought from the house purchased by deceased from Fakir Swain, in which P. W. 5 and the Appellant were on one side and the deceased on the other. In this physical struggle it is contended that blows may have been exchanged between P. W. 5 on the one hand and the deceased on the other in which P. W. 5 caused a fatal injury to the deceased, while deceased was responsible for injuries on P. W. 5. Thereafter it is alleged that P. W. 5 with the help of P. W. 1 and others cooked up and concocted the story against the Appellant and others as they were also inimical and would have a motive for killing the deceased. Whether there is justification for this contention which is merely based on the testimony of P. W. 1 that there was quarrel and physical struggle between the deceased on one side and P. W. 5 and the Appellant on the other, there are several features in this case to which we have referred which will certainly create a doubt as to the veracity of P. W. 5's statement. If P. W. 1's testimony about the occurrence cannot be relied on or the same parity of reasoning the evicence of P. W. 5 also is not dependable. The evidence to which we have referred would show that the eye witnesses have not come out with the truth as to how the occurrence took place and where it took place. In the circumstances it would be unsafe to rely on it, in convicting the accused. We accordingly allow the Appeal, set aside the conviction and direct the accused to be released.

Appeal allowed.

AIR 1971 SUPREME COURT 311
(V 58 C 164)

(From: Andhra Pradesh)*

S. M. SIKRI, C. J.

AND P. JAGANMOHAN REDDY, J.

The State of Andhra Pradesh, Appellant v. P. V. Narayana, Respondent.

Criminal Appeal No. 184 of 1968, D/- 9-2-1971.

(A) Prevention of Corruption Act (1947), Section 5-A — The grant of permission to investigate under Section 5-A is not merely a mechanical

*(Cri. App. No. 138 of 1966, D/- 19-4-1968 — Andh Pra.)

BO/CO/A613/71/KSB/C

act — The grant of permission to Inspector of Police on his application and mere ipse dixit that Senior Officers being otherwise busy were unable to take up investigation is illegal and would nullify the object of Section 5-A. (Para 4)

(B) Criminal P. C. (1898), Sec. 537 — Illegal investigation by police prior to taking cognizance of offence does not vitiate either the trial or conviction unless miscarriage of justice has been caused thereby — High Court errs in quashing conviction on ground of illegal investigation without going into question of prejudice. (X-Ref: Prevention of Corruption Act (1947), Section 5-A) — AIR 1955 SC 196 and AIR 1971 SC 508, Followed; Cr. App. No. 138 of 1966, D/- 19-4-1968 (Andh Pra), Reversed. (Para 7)

Cases Referred: Chronological Paras (1971) AIR 1971 SC 508 (V 58)

= Cri. Appl. No. 25 of 1967, D/- 27-11-1970, Dr. M. C. Sulkunte v. State of Mysore 7

(1955) AIR 1955 SC 196 (V 42)

= (1955) 1 SCR 1150, H. N.

Rishbud and Inder Singh v.

The State of Delhi 6

Mr. P. Ram Reddy, Sr. Advocate, (Mr. G. Narayana Rao, Advocate, with him), for Appellant; Mr. K. Jayaram, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, C. J.: — This appeal is by certificate granted by the Andhra Pradesh High Court against its judgment allowing the appeal of the respondent and quashing the proceedings against him. He had been convicted by the learned Special Judge for SPE cases, Secunderabad, under Sec. 161, Indian Penal Code and Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act, 1947 and sentenced to various terms of imprisonment.

2. The facts of the case and the points raised before us are as follows:

3. The respondent was working as Head Train Examiner and was posted at Waltair in the South Eastern Railway. It was alleged that on 14th July, 1964, the respondent demanded and accepted an amount of Rs. 5/- as gratification, other than legal remuneration, from P. W. 1 who too was a railway employee, as a motive or reward for having attested on 1-7-1964

an Urban Bank Pay Order dated 20-6-1964 for Rs. 265.80np. drawn in favour of P. W. 1 and for having posted him for duty at the Waltair Goods Yards. It appears that P. W. 1 approached the Inspector of the Special Police Establishment and informed him that the respondent was harassing him for a payment of bribe of Rs. 5/-. The Inspector made confidential enquiries and learnt that the respondent was indulging in corrupt practices and that there was truth in the complaint made by P. W. 1. On 13-7-64 he presented the requisition Ex. P-14 before the 1st Class Magistrate, Visakhapatnam, requesting him to authorise the Inspector to investigate the case. After stating the facts briefly in this requisition he said, "As the Superintendent of Police, S. P. E., is engaged in administrative matters and supervising investigations at Hyderabad and the other two Deputy Superintendents of Police are also engaged in the investigation of important cases and other enquiries and as it is not possible to secure their presence in the near future at Waltair to investigate into said complaint of Sri Appanna, I request that I may be permitted under Section 5-A of the Prevention of Corruption Act (Act 2 of 1947) and Section 155 (2), Criminal Procedure Code to investigate the allegations and to lay a trap". On the same day the District Munsif-cum-First Class Magistrate, Visakhapatnam, passed the following order:

"Whereas it is alleged that respondent is demanding and accepting illegal gratification from his staff for showing official favours and that he demanded Rs. 5/- as bribe from Shri Ella Appanna for having attested his cheque.

And whereas, I am satisfied that the Superintendent of Police and the two Deputy Superintendents of Police, Special Police Establishment, Hyderabad, are otherwise engaged and unable to take up investigation of the allegations complained of;

And whereas, I Shri D. Krishnan Raju, am satisfied on a perusal of the petition of the Inspector of Police and on hearing Shri P. Sreerama Murthy, Inspector of Police, that there are reasonable and good grounds to authorise investigation of the allegations, I do hereby authorise Shri P. Sreeramamurthy, Inspector of Police, Special Police Establishment, Hydera-

bad under Sections 5-A of Act 2 of 1947 and 155 (2), Criminal P. C. to investigate the allegations and to lay a trap".

4. It would be seen from the requisition and the order of the Magistrate that it is not stated that the Inspector of Police had contacted the Superintendent of Police or the two Deputy Superintendents of Police or he was told by them that they were engaged in administrative matters and supervising investigation of important cases and they were unable to take up the investigation of either this case or other cases. In his evidence he admitted that before giving the requisition he did not send any memo or letter to his office for ascertaining whether the D. Ss. P. or S. P. were engaged in any other case. So, the net result seems to be that the Inspector made the requisition at his own initiative without getting into contact with the S. P. or the D. Ss. P. The Magistrate was apparently satisfied that the assertion of the Inspector of Police that the Superintendent of Police and the two Deputy Superintendents of Police were unable to investigate or unable to take up the investigation. It seems to us that the procedure adopted is wholly unwarranted by the provisions of the Prevention of Corruption Act. It may be that the Inspector thought that it was not necessary that the Superintendent of Police or the Deputy Superintendents of Police should themselves write to the Magistrate or apply that the Inspector of Police be authorised to investigate but it seems to us that they must be in the picture before the Inspector of Police applies for permission. In other words they must tell the Inspector of Police that they are too busy to take up the investigation of this case or they must on this ground authorise him to apply to the Magistrate to permit him to investigate the case. This procedure which has been adopted by-passes the provisions of the Act and nullifies the objective of Parliament that the senior Officers should ordinarily investigate such cases. The High Court in our view rightly held that the grant of permission to investigate the case is not merely a mechanical act and the Magistrate had erred in giving the sanction.

5. It appears that the Superintendent of Police felt that the permis-

sion, which P. W. 11 had obtained from the Magistrate was somewhat defective and, therefore, it was felt that the Magistrate be requested again to give a fresh sanction. Accordingly, he applied to the Fourth City Magistrate on 24th July, 1964, that as he himself and the Deputy Superintendents of Police were engaged in the investigations and secret inquiries and were unable to take up investigation personally, the Inspector of Police be authorised to conduct further investigations. On 25th July, 1964, the Magistrate gave the necessary authorisation. But the High Court rightly remarked that the main investigation had already been done by that time. The High Court on being satisfied rightly held that the investigation was unauthorised and as such the proceedings were vitiated. Before the High Court, the learned Counsel for the respondent argued on the facts of the case but as the sanction itself was held invalid, the High Court did not give its opinion with regard to the facts of the case.

6. The learned Counsel for the appellant Shri P. Ram Reddy contended that assuming the sanction was bad, this Court has held on a number of occasions that an illegal investigation does not vitiate the trial. In other words, that in order to set aside the conviction it must be shown that there has been miscarriage of justice as a result of bad and irregular investigation. The earliest case on the point is *H. N. Rishbud and Inder Singh v. The State of Delhi*, (1955) 1 SCR 1150 = (AIR 1955 SC 196). This Court observed:

"If, therefore, cognizance is in fact taken on a police report vitiated by the breach of a mandatory provision relating to investigation, there can be no doubt that the result of the trial which follows it cannot be set aside unless the illegality in the investigation can be shown to have brought about a miscarriage of justice..... We are, therefore, clearly, also, of the opinion that where the cognizance of the case has in fact been taken and the case has proceeded to terminate, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

7. The latest decision to which our attention is invited was an unreported case *Dr. M. C. Sulkunte v. State*

of Mysore, Criminal Appl. No. 25 of 1967 D/- 27-11-1970 = (reported in AIR 1971 SC 508). It is clear from these authorities that the High Court erred in quashing the proceedings against the respondent solely on the ground of illegal investigation.

8. The High Court did not go into the question whether the illegal investigation had resulted in prejudice to the respondent. The learned Counsel for the respondent contended that the very fact that the main investigation was conducted without a valid sanction had resulted in prejudice to the respondent. It seems to us that the High Court should, apart from other questions which it did not deal with, also go into this question of prejudice. We accordingly accept the appeal, set aside the judgment and order of the High Court and remand the case to it for disposal in accordance with law.

Case remanded.

AIR 1971 SUPREME COURT 813 (V 58 C 165)

S. M. SIKRI, C. J.,
P. JAGANMOHAN REDDY AND
I. D. DUA, JJ.

Saptawna, Petitioner v. The State of Assam, Respondent.

Writ Petition No. 554 of 1970, D/- 5-2-1971.

(A) Constitution of India, Art. 32 — In the case of an under-trial prisoner the question that he is entitled to be released as he was not produced before a Magistrate within 24 hours of his arrest does not arise. (X-Ref: Criminal P. C., Section 61) — 1971 Cri LJ (N) 8 (SC), Rel. on.

(Para 3)

(B) Constitution of India, Art. 32 — Where an accused is illegally detained, the detention becomes lawful when subsequently he is arrested and produced before a Magistrate within 24 hours. (X-Ref: Criminal P. C., Section 61).

(Para 3)

(C) Constitution of India, Art. 32 — In the case of an under-trial prisoner charged with two or more offences the fact that he was arrested only in one case does not make any difference. (X-Ref: Criminal P. C., Section 61).

(Para 3)

BO/BO/A562/71/GNB/P

(D) Constitution of India, Art. 32 — Criminal P. C. does not apply to Tribal areas in Assam and Manipur by reason of Sixth Schedule to the Constitution — Only its spirit applies — Hence when an accused is arrested on a charge of two or more offences he need not be produced in connection with each offence before a Magistrate for remand. (X-Ref: Criminal P. C., Section 61). 1971 Cri LJ (N) 8 (SC) and AIR 1967 SC 212, Rel. on.

(Para 4)

Cases Referred: Chronological Paras

(1971) 1971 Cri LJ (N) 8 = Writ

Petn. No. 238 of 1970, D/- 29-9-

1970 (SC), V. L. Rohlua v. Dy.

Commr., Aijal Dist.

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(1967) AIR 1967 SC 212 (V 54)

= (1966) 3 SCR 830, State of

Nagaland v. Rattan Singh

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Mr. Harbans Singh, Advocate, amicus curiae (The Petitioner was also present in Court), for Petitioner; Mr. Naunit Lal, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SIKRI, C. J.: — In this petition under Article 32 of the Constitution the petitioner complains against his detention. The relevant facts are these. It appears that the petitioner was arrested on January 10, 1968 but it is not quite clear by whom he was arrested. The suggestion of the State Counsel is that he was arrested originally under the Armed Forces (Assam and Manipur) Special Power Act, 1958. Be that as it may, according to the affidavit of Shri P. Sengupta, Deputy Secretary to the Government of Assam, Political (A) Department, he was arrested by the Civil Police on January 24, 1968, and was produced before the competent Magistrate on January 25, 1968, in connection with G. R. Case No. 27/68. It is further stated that the Civil Police registered other cases against the petitioner vide G. R. 235/68 of Aijal Police Station Case No. 16 (8)/68 under Section 32 (5), D. I. R., G. R. 212/66 of Aijal Police Station Case No. 54 (5)/66 under Section 121, Indian Penal Code., etc., and G. R. Case No. 27/68 vide Session Case No. 128/69 under Section 121 (A)/392, Indian Penal Code. It is further stated in the affidavit that subsequent to the production of the petitioner before the Magistrate in connection with G. R. Case No. 27/68, the petitioner was shown as arrested in the other two

cases as well. The petitioner was, however, discharged from G. R. 27/68 on October 10, 1970, but it is maintained in the affidavit that the petitioner is in custody in connection with the other two cases in which he has been charge-sheeted. It was denied that the petitioner was never produced before a Magistrate. It is further stated that the last order of remand for the petitioner was passed by the Aijal Court in G. R. Case No. 235/68 on December 16, 1970. It was admitted that there has been delay in the trial of the cases owing to various circumstances but it appears that the High Court has already ordered on December 18, 1970 that the trial of the cases should be completed within four months. It was further stated that this order of the High Court has been communicated to the Prosecuting authorities and every effort is being made to comply with the order of the Hon'ble High Court for early disposal of the cases.

2. The learned counsel for the petitioner says that the petitioner is entitled to be released on three grounds: (1) The original date of arrest being January 10, 1968 and the petitioner not having been produced before a Magistrate within 24 hours, the petitioner is entitled to be released; (2) The petitioner having been arrested in one case on January 24 1968 and he having been discharged from that case, he is entitled to be released; and (3) As the petitioner was not produced for obtaining remand he is entitled to be released.

3. A similar case came before this Court from this very District V. L. Rohlua v. Dy. Commr. Aijal Dist. Writ Petition No. 238 of 1970, D/- 29-9-1970 (SC) (reported in 1971 Cri LJ (N) 8) and the first point was answered by a Bench of five Judges thus:

"If the matter had arisen while the petitioner was in the custody of the Armed Forces a question might well have arisen that he was entitled to be released or at least made over to the police. However, that question does not arise now because he is an under-trial prisoner."

It seems to us that even if the petitioner had been under illegal detention between January 10 to January 24, 1968 — though we do not decide this point — the detention became lawful on January 24, 1968 when he was arrested by the Civil Police and

produced before the Magistrate on January 25, 1968. He is now an under-trial prisoner and the fact that he was arrested in only one case does not make any difference. The affidavit clearly states that he was also treated to have been arrested in the other cases pending against him.

4. It appears from the affidavit that the petitioner was not produced before the Magistrate in all cases, but as observed by this Court in the case of *V. L. Rohlua* (supra),

"the Criminal Procedure Code is not applicable by reason of the Sixth Schedule to the Constitution in this area. This was laid down in *State of Nagaland v. Rattan Singh*, (1963) 3 SCR 830 = (AIR 1967 SC 212). Only the spirit of the Criminal Procedure Code applies."

It is not necessary that the petitioner should be produced on each occasion before a Magistrate for remand.

5. In the result the petition fails and is dismissed.

Petition dismissed.

AIR 1971 SUPREME COURT 815 (V 58 C 166)

(From: Punjab)*

S. M. SIKRI C. J., V. BHARGAVA
AND I. D. DUA, JJ.

Municipal Corporation of Delhi (in all the appeals), Appellant v. Shiv Shanker (in all the appeals) Respondent; Y. K. Kapoor, Intervener.

Criminal Appeals Nos. 151 to 158, of 1966, D/- 1-2-1971.

Interpretation of Statutes — Prevention of Food Adulteration Act cannot be held to be impliedly repealed by Essential Commodities Act or Fruit Products Order made thereunder — (X-Ref. Prevention of Food Adulteration Act (1954), S. 1) — (X-Ref. General Clauses Act (1897), Ss. 6, 26) — (X-Ref. Fruit Products Order (1955), Cl. 15) — (X-Ref. Essential Commodities Act (1955), Ss. 1, 3) — Cr. Revisions 81-D to 83-D, 107-D and 129-D to 132-D of 1964 (Punj), Reversed. Cr. A. 996 of 1961, D/- 29-10-1962 (Punj), Overruled. (Paras 9, 10, 11)

The object and purpose of the

*(Criminal Revisions Nos. 81-D to 83-D, 107-D and 129-D to 132-D of 1964, D/- 30-12-1964 — Punj. at Delhi.)

BO/BO/A551/71/DHZ/C

Adulteration Act is to eliminate the danger to human life and health from the sale of unwholesome articles of food. The Essential Commodities Act on the other hand has for its object the control of the production, supply and distribution of, and trade and commerce in, essential commodities. In spite of this difference the two provisions may have conterminous fields of operation. The provisions of the Adulteration Act and of the Fruit Order are supplementary and cumulative in their operation and they can stand together. If the Adulteration Act or Rules impose some restrictions on the manufacturer, dealer and seller of vinegar then they have to comply with them irrespective of the fact that the Fruit Order imposes lesser number of restrictions in respect of these matters. The Parliament did not intend by enacting the Essential Commodities Act or the Fruit Order to impliedly repeal the provisions of the Adulteration Act and the Rules in respect of the vinegar. Both the statutes can function with full vigour side by side in their own parallel channels. Even if they happen to some extent to overlap, Section 26 of the General Clauses Act fully protects the guilty parties against double jeopardy or double penalty. Both the Adulteration Act and the Essential Commodities Act have been amended from time to time after their enactment. The subsequent amendments of the Adulteration Act and of the Essential Commodities Act by the Parliament and the amendment of the Adulteration rules would also tend to negative any legislative intent of implied repeal of the Adulteration Act by the Essential Commodities Act or the Fruit Order. (Paras 9, 10, 11)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 701 (V 56) | |
| = (1969) 3 SCR 65, T. S. Baliah v. T. S. Rangachari | 3 |
| (1969) Cri. A. No. 163 of 1967, D/- May, 1969 (Delhi) (FB), Municipal Corporation v. Har-narain | 12 |
| (1962) Cri. A. No. 996 of 1961, D/- 29-10-1962 (Punj), State v. Raj Kumar | 2, 3, 4, 5 |
| (1957) AIR 1957 SC 458 (V 44) = 1957 SCR 423, Om Prakash Gupta v. State of U. P. | 3 |
| (1952) AIR 1952 Punj 89 (V 39) = 1952 Cri LJ 316, State v. Gurcharan Singh | 3 |

(1883) 11 Q. B. D. 120 = 52 LJ

QB 282, Paine v. Slater

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Mr. Bishan Narain, Senior Advocate, (M/s. B. P. Maheshwari and N. K. Jain, Advocates, with him), for Appellant, (In all Appeals); Mr. C. K. Daphtary, Senior Advocate (Mr. N. N. Goswami, Advocate and M/s. K. L. Mehta and S. K. Mehta, Advocates of M/s. K. L. Mehta and Co. with him), for Respondent, (In Cr. A. No. 151 of 1966); Mr. K. L. Gossain, Senior Advocate, (Mr. N. N. Goswami, Advocate and M/s. K. L. Mehta and S. K. Mehta, Advocates of M/s. K. L. Mehta and Co. with him), for Respondent, (In Cr. As. Nos. 152 to 158 of 1966); Mr. S. K. Mehta, Advocate of M/s. K. L. Mehta and Co., for Intervener.

The following Judgment of the Court was delivered by

DUA, J.: — These eight appeals with certificate (Crl. Appeals Nos. 151 to 158 of 1966), raise a common question of law and would, therefore, be disposed of by a common judgment. Indeed, all the appeals in the Punjab High Court were also disposed of by a learned single Judge of that Court sitting on circuit at Delhi by a common judgment and another learned single Judge of the same Court similarly certified the cases to be fit for appeal to this Court by a common order.

2. The only question canvassed at the bar requiring determination by us is whether the respondent is liable to be prosecuted under the Prevention of Food Adulteration Act, 37 of 1954 (hereafter called the Adulteration Act) for selling adulterated vinegar when the vinegar is being sold under a licence granted under the Fruit Products Order, 1955 (hereafter called the Fruit Order) made by the Central Government under Section 3 of the Essential Commodities Act. The High Court has, relying on an unreported Bench decision of the Punjab High Court in *State v. Raj Kumar*, (Crl. A. 996 of 1961, D/- 29-10-1962 (Punj)), held that they cannot be prosecuted. It was argued in the High Court that the rules made under the Adulteration Act had come into force after the enforcement of the Fruit Order and vinegar being mentioned as an article of food in those Rules, prosecution under both the provisions of law was permissible. Reliance in support of this argument was also placed on Section 26 of the General Clauses

Act. This argument was not accepted and it was observed that the special provisions of the Fruit Order had overriding effect and, therefore, a manufacturer of Fruit Products could only be prosecuted under the provisions of the Fruit Order. Prayer for reference to a larger Bench for reconsideration of *Raj Kumar's* case, Crl. A. 996 of 1961, D/- 29-10-1962 (Punj) (supra) did not find favour with the learned single Judge.

3. In this Court the view taken in *Raj Kumar's* case, Crl. A. 996 of 1961, D/- 29-10-1962 (Punj) (supra) was sought to be supported by the learned counsel for the respondent. The provisions of the Fruit Order and of the Adulteration Act, it was contended, could not harmoniously co-exist on the statute book, as compliance with one would, in certain contingencies, result in violation of the other in some respects. With respect to the particular charges tried in the cases in appeal, however, no attempt was made on behalf of the respondents to show that there was any fatal conflict or inconsistency between the two provisions. The question before us accordingly lies within a very narrow compass. The appellant urged that there is no implied repeal of the Adulteration Act by the Fruit Order in so far as the sale of vinegar is concerned, whereas the case of the respondent is that there is an implied repeal and the respondents are not liable to be prosecuted under the Adulteration Act for violating its provisions. *Shri Bishan Narain* sought support for his submission from *Om Prakash Gupta v. State of U. P.*, 1957 SCR 423 = (AIR 1957 SC 458) and *T. S. Baliah v. T. S. Rengachari*, (1969) 3 SCR 65 = (AIR 1969 SC 701). In the former case Section 5 (1) (c) of the Prevention of Corruption Act was held not to repeal Section 409, I. P. C. The decision of the Punjab High Court (*Khosla and Falshaw, JJ.*) in *State v. Gurcharan Singh*, AIR 1952 Punj 89, holding to the contrary was overruled. In the latter case Section 52 of the Income-tax Act, 1922 was held not to repeal Section 177, I. P. C.

4. It is unnecessary to refer in detail to the facts of all the eight cases separately as no such reference was made by either side at the bar. *Shri Bishan Narain* for the appellant, by way of illustration made a passing reference to the facts of Crl. Appeal

No. 155 of 1966. From the record of that appeal we find that samples of (i) sugar cane juice vinegar, (ii) vine (pure) vinegar and (iii) pure jaman vinegar, were taken by a Food Inspector from the shop of the respondent on October 17, 1960 and on the same having been found highly adulterated and unfit for human consumption because of the presence of sulphuric acid which is prohibited, complaints under Sections 7/16 of the Adulteration Act were instituted by the Municipal Prosecutor in December, 1960. After the prosecution evidence was recorded, the respondent Shiv Shankar applied to the trial Magistrate in October, 1963 praying that the prosecution be dropped. In this application it was admitted that the prosecution had arisen out of a raid dated October 17, 1960 at the premises of the accused "when allegedly samples of vinegar were taken which are stated to be adulterated because of the presence of sulphuric acid". It was pleaded that the petitioning accused had secured in 1960 a licence under the Fruit Order and vinegar whether brewed or synthetic being a food product and standard specification for such vinegar being tabulated in Part XIV attached to the Second Schedule of the Fruit Order, prosecution without the previous sanction of the licensing Officer as required by Clause 15 of the said Order was unauthorised. Prosecution under the Adulteration Act was on this ground pleaded to be incompetent. In the application reliance in support of this plea was placed on the unreported Bench decision of the Punjab High Court in Raj Kumar's case, Cri. A. No. 996 of 1961, D/- 29-10-1962 (Punj) (supra) in which according to the accused it had been held that a licensee under the Fruit Order could not be prosecuted for any contravention of that Order or of the Adulteration Act without the previous sanction of the Licensing Authority appointed under the Fruit Order. The trial Magistrate basing himself on an unreported single Bench decision of the Punjab High Court and on S. 26 of the General Clauses Act rejected this application. On revision, the Additional Sessions Judge relying on the decision in Raj Kumar's case, Cri. A. No. 996 of 1961, D/- 29-10-1962 (Punj) (supra) made a reference to the High Court recommending that the proceedings be quashed. J. S. Bedi J., relying

on Raj Kumar's case, Cri. A. No. 996 of 1961, D/- 29-10-1962 (Punj) (supra) quashed the proceedings. S. K. Kapur J., who certified the case to be fit for appeal after quoting a passage from Raj Kumar's case, Cri. A. No. 996 of 1961, D/- 29-10-1962 (Punj) (supra) considered the question raised to be important enough for appeal to this Court.

5. The general principles governing implied repeal appear to us to have long since been settled. The difficulty is normally experienced in their application to a given case. From the passage quoted by Kapur J., from the unreported Bench decision in Raj Kumar's case, Cri. A. No. 996 of 1961 D/- 29-10-1962 (Punj.) (supra) upholding the implied repeal of the Adulteration Act by the Fruit Order it seems to us that the Division Bench did not correctly and fully grasp them. We accordingly consider it proper to broadly restate the general rule. It was laid in *Paine v. Stater*, (1883) 11 QBD 120, that when two Acts are inconsistent or repugnant the later will be read as having impliedly repealed the earlier. As the legislature must be presumed in deference to the rule of law to intend to enact consistent and harmonious body of laws, a subsequent legislation may not be too readily presumed to effectuate a repeal of existing statutory laws in the absence of express or at least clear and unambiguous indication to that effect. This is essential in the interest of certainty and consistency in the laws which the citizens are enjoined and expected to obey. The legislature, which may generally be presumed to know the existing law, is not expected to intend to create confusion by its omission to express its intent to repeal in clear terms. The Courts, therefore, as a rule, lean against implying a repeal unless the two provisions are so plainly repugnant to each other that they cannot stand together and it is not possible on any reasonable hypothesis to give effect to both at the same time. The repeal must, if not express, flow from necessary implication as the only intendment. The provisions must be wholly incompatible with each other so that the two provisions operating together would lead to absurd consequences, which intention could not reasonably be imputed to the legislature. It is only when a consistent body of law cannot be maintained

without abrogation of the previous law that the plea of implied repeal should be sustained. To determine if a later statutory provision repeals by implication an earlier one it is accordingly necessary to closely scrutinise and consider the true meaning and effect both of the earlier and the later statute. Until this is done it cannot be satisfactorily ascertained if any fatal inconsistency exists between them. The meaning, scope and effect of the two statutes, as discovered on scrutiny, determines the legislative intent as to whether the earlier law shall cease or shall only be supplemented. If the objects of the two statutory provisions are different and the language of each statute is restricted to its own objects or subject, then they are generally intended to run in parallel lines without meeting and there would be no real conflict though apparently it may appear to be so on the surface. Statutes in *pari materia* although in apparent conflict, should also so far as reasonably possible, be construed to be in harmony with each other: and it is only when there is an irreconcilable conflict between the new provision and the prior statute relating to the same subject-matter, that the former, being the later expression of the legislature, may be held to prevail, the prior law yielding to the extent of the conflict. The same rule of irreconcilable repugnancy controls implied repeal of a general by a special statute. The subsequent provision treating a phase of the same general subject-matter in a more minute way may be intended to imply repeal pro tanto of the repugnant general provision with which it cannot reasonably co-exist. When there is no inconsistency between the general and the special statute the latter may well be construed as supplementary.

5A. In the light of these broad guidelines we may now examine the two statutes as they stood in 1960 because the cases with which we are concerned relate to that year. The history and the scheme of the two statutory provisions would be helpful in discovering the legislative intent on the question of implied repeal. Turning first to the Adulteration Act, it was enacted by the Parliament to make provision for the prevention of adulteration of food and it came into force on June 1, 1955. Previously corresponding laws on adulteration of food-

stuffs were in force in different States, having been enacted by their respective legislatures. All those laws were repealed by Section 25 of the Adulteration Act. It may be pointed out that under the Government of India Act, 1935 "adulteration of food-stuffs and other goods" was a provincial subject whereas under the Constitution it is included in the Concurrent List. Section 2 (i) of this Act which defines the word "adulterated" consists of several sub-clauses. One of these sub-clauses is (1) according to which

"an article of food shall be deemed to be adulterated if the quality or purity of the article falls below the prescribed standard or its constituents are present in quantities which are in excess of the prescribed limits of variability".

Clause (v) of Section 2 defines "food" to mean "any article used as food or drink for human consumption other than drugs and water and includes: (a) any article which ordinarily enters into or is used in the composition or preparation of human food, and (b) any flavouring matter or condiments. According to Clause (ix) an article of food shall be deemed to be "misbranded" if it falls within any one of the sub-clauses (a) to (k). It is not necessary to reproduce all these sub-clauses. "Package" has been defined in Clause (x) to mean "a box, bottle, casket, tin, barrel, case, receptacle, sack, bag, wrapper or other thing in which an article of food is placed or packed". We have referred to the definitions of "misbranded" and "package" because one of the cases before us (Crl. A. 154 of 1966) is a case of alleged misbranding, the remaining seven cases being of alleged adulteration. Section 5 prohibits import of, *inter alia*, adulterated and misbranded food and all articles of food in contravention of any provision of the Act or of any rules made thereunder. Section 7 prohibits manufacture for sale or store and also sale and distribution of, *inter alia*, adulterated and misbranded food and of articles of food, in contravention of the Adulteration Act and the Rules made thereunder. Section 8 provides for appointment of Public Analysts and Section 9 for the appointment of Food Inspectors. The powers of Food Inspectors are contained in Section 10. He possesses very wide powers for

the purpose of effectively achieving the statutory object of preventing the manufacture, sale and distribution etc., of adulterated articles of food. The procedure for taking samples of food by the Food Inspector for analysis is prescribed in Section 11 and the report of the Public Analyst is made admissible by Section 13. The proviso to sub-section (5) of Section 15 makes the certificate signed by the Director of Central Food Laboratory final and conclusive proof of the facts stated therein. The Central Food Laboratory is established by the Central Government under Section 4 for the purpose of carrying on functions entrusted to it by the Adulteration Act or by the Rules made thereunder. Section 16 provides for penalties for offences under the Adulteration Act and cl. (a) of sub-section (1) makes it an offence for any person, whether by himself or by any person on his behalf to import into India or manufacture for sale or to store, sell or distribute any article of food in contravention of any of the provisions of the Act or of any rules made thereunder. In the prosecution for an offence pertaining to the sale of an adulterated or misbranded article of food Section 19 makes impermissible the defence that the vendor was ignorant of the nature, substance or quality of the food sold by him or that the purchaser having purchased an article for analysis was not prejudiced by the sale. Section 20 prohibits cognizance and trial of offences under the Act except when prosecution is instituted by or with the written consent of the State Government or a local authority or a person authorised in this behalf by such Government or authority. Under the proviso to this section a purchaser referred to in Section 12, is, however, empowered to institute a prosecution if he produces in Court a copy of the report of the Public Analyst along with the complaint. Section 21 overrides Section 32, Cr. P. C. in the matter of sentence to be passed under this Act by the Presidency Magistrates or Magistrates of I Class, trying offences under the Act. Section 23 confers on the Central Government wide powers to make rules under the Act after consulting the Central Committee for Food Standards appointed by the Central Government under Section 3. Section 24 empowers the State Government, (after consultation with the

Central Committee for Food Standards and with previous publication) to make rules for giving effect to the provisions of the Act in matters not covered by Section 23. Various States have actually framed rules under this section.

6. We may now briefly refer to the Prevention of Food Adulteration Rules, 1955 (hereafter called the Adulteration Rules). These rules were made by the Central Government under Section 4 (2) and Section 23 (1) of the Adulteration Act and were published in the Official Gazette as per notification dated September 12, 1955. The rules other than those contained in Part III — Appendix B — Item A.12 Margarine, Part VI and Part VII came into force on the date of their publication in the Official Gazette; the rules contained in Part III, Appendix B, Item A.12 Margarine came into force on June 1, 1956 and the rules contained in Part VI and Part VII came into force on December 1, 1956: vide Rule 1 (3). Under Section 23 (2) (prior to its amendment in 1964) all rules made under sub-section (1) had to be laid as soon as possible before both Houses of Parliament. By Act 49 of 1964 sub-section (2) was amended so as to provide for every rule made under sub-section (1) to be laid before each House of Parliament while in Session for a total period of 30 days in order to afford an opportunity to the two Houses to study and to modify or annul it for future if both Houses so agree. We have referred to this amendment as some of the rules were amended thereafter. The effect of the subsequent amendment of some of the rules will be noticed later. The Adulteration Rules clearly bring out the anxiety of their authors to see that wholesome food is sold to the citizens. The duties and powers of Food Inspectors as contained, inter alia, in Rules 9 and 13, broadly illustrate this anxiety. These rules also indicate that the framers of the Rules were not unaware of the different provisions of the Fruit Order. By way of illustration reference may be made to Rule 50 which prescribes conditions of licence to manufacture, sell, stock, distribute or exhibit certain articles of food. In Clause (1) of sub-rule (1) of this rule the fruit products covered under the Fruit Order and some other articles have been excluded from the operation of this rule. This clause was

amended twice, once in November, 1956 and again in April, 1960. Had the Adulteration Act been intended to be impliedly repealed by the Fruit Order (which would also mean implied repeal of the rules) it would have been unnecessary to expressly exclude such fruit-products from the operation of this rule. Rule 5 and Appendix B of these Rules came into force on December 1, 1956 after the promulgation of the Fruit Order. According to R. 5 the standard of quality of the various articles of food specified in Appendix B are as specified therein. In Appendix B item at Sl. No. A. 16 deals with "fruit products". But the articles of fruit products dealt with in A. 16. O. 1 to A. 16.12 clearly show that vinegar is not included in the expression "fruit products". Vinegar is dealt with in A. 20 and synthetic vinegar in A. 20. O. 1. Both these items were added in April, 1960.

7. We may now turn to the Essential Commodities Act, 10 of 1955 and the Fruit Order. The Essential Commodities Act was enacted in 1955 with the object of providing, in the interests of the general public, for the control of the production, supply and distribution of, and trade and commerce in, certain commodities. It came into force on April 1, 1955 repealing the Essential Commodities Ordinance No. 1 of 1955 which had been promulgated with the same object and enforced on January 26, 1955, the date of the expiry of the Essential Supplies (Temporary Powers) Act 26 of 1946. The last named Act had replaced the Essential Supplies (Temporary Powers) Ordinance No. XVIII of 1946 which had come into force on October 1, 1946. That Ordinance was promulgated with the object of continuing, during a limited period, powers to control the production, supply and distribution of, and trade and commerce in, foodstuffs and certain other commodities. To empower the Indian Legislature to enact law on this subject-matter the British Parliament had passed India (Central Government and Legislation) Act, 1946 (9 and 10 Geo VI, C. 39). The Indian Legislature not being in session the Ordinance was promulgated to meet the emergency and this was replaced by Act 26 of 1946. Reference has been made by us to this past history for the purpose of indicating the different objects and purposes intended to be achieved by

the two legislative measures. Section 2 of the Essential Commodities Act which is the definition section defines in Cl. (a) "essential commodity" to mean any of the classes of commodities stated in sub-cl. (i) to (xi). Sub-clause (v) refers to "food-stuffs, including edible oilseeds and oils" and cl. (xi) confers power on the Central Government to declare by a notified order any other class of commodity to be an essential commodity for the purposes of the Act, being a commodity with respect to which Parliament has power to make laws by virtue of Entry 33 in List III in the 7th Schedule to the Constitution. Section 3 of the Act confers on the Central Government power to control production, supply, distribution etc., of essential commodities by providing, by an order, for regulating or prohibiting the production, supply and distribution of those commodities and trade and commerce therein. Every order made under this section has to be laid before both Houses of Parliament as soon as may be after it is made. By virtue of Section 6 Orders made under Section 3 have effect notwithstanding anything inconsistent therewith contained in any enactment other than the Essential Commodities Act. Section 7 provides for penalties for contravention of orders made under S. 3. Under S. 11 courts are prohibited from taking cognizance of offences punishable under this Act except on a report in writing of the facts constituting such an offence made by a person who is a public servant as defined in S. 21, I.P.C. Section 12 of this Act vests in the Presidency Magistrates and Magistrates of I Class power to pass sentences of fines exceeding Rs. 1,000/- on convicted persons notwithstanding the restriction in this respect imposed on their powers by S. 32, Cr. P. C. As already noticed earlier, an Ordinance called the Essential Commodities Ordinance, 1 of 1955 had been promulgated on the expiry of the Essential Commodities (Temporary Powers) Act and the present Act was passed to replace that Ordinance.

8. It may appropriately be pointed out at this stage that it was not the respondent's case that the Essential Commodities Act had the effect of impliedly repealing the Adulteration Act for the purposes of these cases. The only argument urged was that the Fruit Order had that effect and its

overriding effect by virtue of S. 3 of the Act was strongly emphasised. We may now turn to the Fruit Order (S. R. O. 1052 dated 3rd May, 1955 published in the Gazette of India dated 14th May, 1955) which was made by the Central Government in exercise of the powers conferred on it by S. 3 of the Essential Commodities Act. Clause (2) of this Order, which is the definition clause, defines the expression "fruit product" in sub-cl. (d) and "vinegar, whether brewed or synthetic" is included in this expression as per item (ii) of this sub-clause. "Licensing Officer" as defined in sub-cl. (g) means the Agricultural Marketing Adviser to the Government of India and it includes any other officer empowered in this behalf by him with the approval of the Central Government. "Manufacturer" as defined in sub-cl. (h) means a licensee engaged in the business of manufacturing fruit products for sale and includes a person purchasing such fruit products in bulk and repacking them for sale either by himself or through someone else. Clause 4 prohibits all persons from carrying on business of manufacture except and in accordance with the terms of an effective licence granted to him under this Order in Form "B". Clause 5 prescribes procedure for applications for the grant of a licence under cl. 4. Clause 7 enjoins the manufacturers to manufacture fruit products in conformity with the sanitary requirements and the appropriate standard of quality and composition specified in the Second Schedule to the Order and cl. 8 lays down the requirements to be complied with by the manufacturers in regard to the packing, marketing and labelling of containers of fruit products. Clause 10 prohibits sale, exposure for sale, despatch or delivery to any agent or broker for the purpose of sale, any fruit products which do not conform to the standard of quality and composition specified in the Second Schedule or which are not packed, marked and labelled in the manner laid down in the Order; the proviso to this clause contains directions for fruit products imported into India. Clause 12 contains a mandate for every manufacturer to comply with the directions and orders issued to him and failure to do so is to be deemed to be a contravention of the provisions of the Order. According to cl. 15 no prosecution for contravention

of any of the provisions of this Order is to be instituted without the previous sanction of the licensing Officer.

9. The object and purpose of the Adulteration Act is to eliminate the danger to human life and health from the sale of unwholesome articles of food. It is covered by Entry 18, List III of the 7th Schedule to the Constitution. The Essential Commodities Act on the other hand has for its object the control of the production, supply and distribution of, and trade and commerce in, essential commodities and is covered by Entry 33 of List III. In spite of this difference in their main objects, control of production and distribution of essential commodities may, to an extent from a broader point of view include control of the quality of the essential articles of food and, thus considered, it may reasonably be urged that to some extent it covers the same field as is covered by the provisions of the Adulteration Act. The two provisions may, therefore, have within these narrow limits conterminous fields of operation. On this premise we have to see if the two provisions can stand together having cumulative effect and in case they cannot, which provision has the overriding or controlling effect. It is needless to point out that they can stand together if the powers are intended to be exercised for different purposes without fatal inconsistency or repugnancy.

10. At the bar Shri Daftary in his usual persuasive manner argued that there is an irreconcilable conflict between the two statutory provisions and the Fruit Order, being not only of a date later than the Adulteration Act but also having, by virtue of S. 3 (6) of the Essential Commodities Act, overriding effect over all other laws, must prevail over the Adulteration Act and Rules. He pointed out that under the Fruit Order the prosecution can be instituted only with the previous sanction of the Licensing Officer whereas under the Adulteration Act even a purchaser may, without any such sanction, institute a prosecution merely by producing along with his complaint a certificate from the Public Analyst. He also drew our attention to S. 20-A of the Adulteration Act according to which, unlike the Fruit Order, the Court trying an offence under that Act is empowered

to implead the manufacturer, distributor or dealer of any article of food, if it is satisfied that he is also concerned with that offence, and to proceed against him as though the prosecution had been instituted against him under Section 20. We do not think this section in any way reflects the legislative intention of implied repeal of the Adulteration Act by the Fruit Order. The two statutory provisions can operate within their respective spheres without giving rise to any absurdity or such grave inconvenience as would impel the Court to sustain the plea of implied repeal. Incidentally it may also be pointed out that this section was added by Act 49 of 1964 which came into force on March 1, 1965 long after 1960 when the present cases were started. Shri Daftary developed his argument by adding that if the respondents have manufactured for sale and have sold vinegar in accordance with the terms of the licence granted to them under the Fruit Order then imposition of further restrictions under the Adulteration Act and Rules with a threat of severe penal consequences for violation of those provisions would be in direct conflict with the mandate or directions under the Fruit Order. The counsel contended that at least the freedom to manufacture and sell vinegar as permitted by the Fruit Order is curtailed or further circumscribed by the Adulteration Act and Rules and this must necessarily cut across the provisions of the Fruit Order. He illustrated his point by submitting that under the Fruit Order use of colouring matter is more liberal than under the Adulteration Act and Rules. In view of these conflicting provisions the Adulteration Act and Rules, according to Shri Daftary must be held to have been impliedly repealed by the Fruit Order. We are unable to agree with this submission. The two statutory provisions, for the purpose of effectuating their respective objects, have imposed different restrictions on the respondents when they manufacture and sell vinegar whether brewed or synthetic. We are, however, informed at the bar that in the present case the disputed vinegar is synthetic. In the interest of public health the respondents have to comply with the provisions of Adulteration Act and Rules and in the interests of equitable distribution of essential commodities including the articles of food

covered by Essential Commodities Act and the Fruit Order they have to comply with the provisions of the Fruit Order. The provisions of the Adulteration Act and of the Fruit Order to which our attention was drawn seem to be supplementary and cumulative in their operation and no provision of the Fruit Order is shown to be destructive of or fatal to any provision of the Adulteration Act or the Rules made thereunder so as to compel the court to hold that they cannot stand together. If the Adulteration Act or Rules impose some restrictions on the manufacturer, dealer and seller of vinegar then they have to comply with them irrespective of the fact that the Fruit Order imposes lesser number of restrictions in respect of these matters. The former do not render compliance with the latter impossible, nor does compliance with the former necessarily and automatically involve violation of the latter. Indeed, our attention was not drawn to any provision of the Adulteration Act and Rules, compliance with which would result in breach of any mandate, whether affirmative or negative, of the Fruit Order. We are, therefore, unable to find any cogent or convincing reason for holding that the Parliament intended by enacting the Essential Commodities Act or the Fruit Order to impliedly repeal the provisions of the Adulteration Act and the Rules in respect of the vinegar in dispute. Both the statutes can function with full vigour side by side in their own parallel channels. Even if they happen to some extent to overlap, Section 26 of the General Clauses Act fully protects the guilty parties against double jeopardy or double penalty. This section lays down that where an act or omission constitutes an offence under two or more enactments then the offender shall be liable to be prosecuted and punished under either or any of those enactments but shall not be liable to be punished twice for the same offence. If, therefore, the provisions of the Adulteration Act and those of Fruit Order happen to constitute offences covering the same acts or omissions then it would be open to the prosecuting authorities to punish the offender under either of them subject to the only condition that a guilty person should not be punished twice over.

11. There is also another aspect which has to be kept in view. Both the Adulteration Act and the

Essential Commodities Act have been amended from time to time after their enactment. Being governed by Entries in List III of the 7th Schedule even the States have power to amend these enactments and indeed they have been so amended in some States. The subsequent amendments of the Adulteration Act and of the Essential Commodities Act by the Parliament and the amendment of the Adulteration Rules would also tend to negative any legislative intendment of implied repeal of the Adulteration Act by the Essential Commodities Act or the Fruit Order. It may be recalled that Clause (1) of sub-rule (1) of Rule 50 of the Adulteration Rules was amended in 1956 and again in 1960 and the amended clause is indicative of the rule-making authority being conscious of both the statutory provisions being operative in their respective fields at the same time, thereby negating implied repeal. A.20 dealing with "vinegar" was also added in Appendix B of the Adulteration Rules in 1956 and A.20.01 dealing with "synthetic vinegar" was added in April, 1960. A passing reference may also be made to some of the relevant amendments in some rules made subsequent to the enforcement of the amended Section 23 (2). In Rule 55 in items at Sl. Nos. 19 and 20, dealing with pickles and chutnies made from fruit or vegetables and with tomato and other sauces, respectively, the preservatives mentioned in Clause 2 were amended. Similarly in Rule 57 (2) the table containing articles like fruit and vegetable juices including tomato-juice was amended. Both the above amendments were made in December, 1965. It may here be pointed out that pickles, chutnies, tomato products, kutchups, sauces and also other unspecified items relating to fruits or vegetables are included in the definition of "fruit product" under the Fruit Products Order. These amendments, though made after 1960, do seem to further negative the intendment of implied repeal as argued on behalf of the respondent. In view of the foregoing discussion it seems to us that the two statutory provisions can harmoniously operate without causing confusion or resulting in absurd consequences and the scheme of the Adulteration Act and Rules can without difficulty fit into the scheme of the Fruit Order under the Essential Commodities Act. The challenge on

the ground of implied repeal must, therefore, be rejected.

12. Incidentally we may note that the view taken by the learned single Judge in this case was later overruled by a Full Bench of the Delhi High Court in *Municipal Corporation v. Harnarain* (Crl. A. No. 163 of 1967 decided in May, 1969).

13. Shri Daftary, as a last resort, tried to press into service Article 14 in his challenge to the prosecution of the respondent. According to him the prosecuting authorities have an unguided licence to prosecute his clients under one or the other statute and since the penalty under the Adulteration Act is more severe than that under the Fruit Order the principle of equality before the law is violated. As this point was not taken in any of the Courts below we did not permit him to raise it in this Court. It would, however, be open to the respondent, if so advised, to raise this point in accordance with law in the Court below, because the cases have not yet been finally disposed of. The competence of the prosecution having been challenged at an intermediate stage, the cases will have to go back to the trial Court. As these cases have been pending since 1962 the trial Court should dispose them of with due dispatch and without any further avoidable delay. The appeals are accordingly allowed and the cases remitted to the trial Court for further proceedings according to law in the light of the observations made above.

Appeals allowed.

**AIR 1971 SUPREME COURT 823
(V 58 C 167)**

(From Patna: AIR 1967 Pat 81)

G. K. MITTER AND A. N. RAY, JJ.

The Government of India, Ministry of Home Affairs and others, Appellants v. Tarak Nath Ghosh, Respondent.

Civil Appeal No. 2338 of 1968, D/-12-2-1971.

Civil Services—All India Services (Discipline and Appeal) Rules (1955), Rule 7 (1) — Government is entitled to place an officer under suspension even before definite charges are communicated to him, when preliminary investigation has been made into his

BO/CO/A740/71/DHZ/C

conduct following allegations of corrupt or malpractice levelled against him. AIR 1967 SC 1274, Relied on; AIR 1967 Pat 81, Reversed.

(Paras 8, 12)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1274 (V 54)	
= (1967) 2 SCR 566, Govinda Menon v. Union of India	11
(1964) AIR 1964 SC 787 (V 51)	
= (1964) 5 SCR 431, R. P. Kapur v. Union of India	10
(1964) AIR 1964 SC 1854 (V 51)	
= (1964) 5 SCR 190, Champaklal v. Union of India	10
(1959) AIR 1959 SC 1342 (V 46)	
= (1960) 1 SCR 476, Management of Hotel Imperial New Delhi v. Hotel Workers' Union	10

Mr. Jagadish Swarup, Solicitor-General of India, (Mr. B. K. P. Sinha, Advocate with him), for Appellants; Mr. B. C. Ghosh, Senior Advocate (M/s. P. K. Chatterjee and Rathin Das, Advocates with him), for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.: — The question in this appeal is, whether the order of suspension passed on the respondent on July 31, 1964 was properly struck down by the Patna High Court.

2. The facts are as follows. The respondent is a member of the Indian Police Service appointed on 25th January, 1957 and at the material time he was holding the substantive rank of Deputy Superintendent of Police in Bihar. In June 1962 he was posted at Ranchi. He was transferred to Patna and appointed as Special Officer, Political, General and Transport Department on July 23, 1964. The order of which the validity is in question ran as follows:—

"Whereas serious allegations of corruption and malpractices have been made against Shri T. N. Ghosh, I. P., Deputy Inspector General of Police, Southern Range, Ranchi;

And whereas the said Shri T. N. Ghosh is also reported to have contravened certain provisions of the All India Services (Conduct) Rules, 1954;

And whereas the enquiries made by the Government of Bihar into these allegations have revealed that there is a prima facie case made out against him;

And whereas disciplinary proceedings in respect of these matters are

contemplated against the said Shri T. N. Ghosh;

And whereas the Government of India, after carefully considering the available material, and having regard to the nature of the charges and circumstances of the case, are satisfied that it is necessary and desirable to place the said Shri T. N. Ghosh under suspension;

Now, therefore, the Government of India hereby place the said Shri T. N. Ghosh, under suspension with immediate effect, until further orders, and direct that the said Shri T. N. Ghosh shall, during the period of suspension be paid such subsistence allowance as is admissible under the rules.

By order and in the name of the President of India.

Sd/ K. Sivaraj
Deputy Secretary to the Government of India."

The respondent addressed a memorial to the Secretary to the Government of India, Ministry of Home Affairs on 24th August 1964 complaining against the above order on the ground that it was not sanctioned by the Rules i. e., All India Service (Conduct) Rules, 1954. In particular his grievance was that as there were only allegations against him which had not crystallised into charges an order of suspension could not be made before departmental proceedings were actually started and while they were merely contemplated. He also asked for communication of the nature of the departmental proceedings which had been started against him within 14 days with a request that the order of suspension be withdrawn in default thereof. It appears that there was no response to this. The respondent filed his writ petition on September 14, 1964 praying for the quashing of the order particularly on the above grounds raised in his memorandum.

3. A counter-affidavit to the petition was filed on behalf of the Chief Secretary to the Government of Bihar who was the third respondent in the petition. The averments in the said affidavit were that a report had been made to the Central Government against the petitioner on July 6, 1964 and having regard to the activities of the petitioner it had become necessary to remove him from the field of activities and as such he had been transferred to Patna after being

relieved of his post on July 13, 1964. It was said further that even before the receipt of the suspension order the petitioner had been actually questioned by S. P. Verma, the then Inspector-General of Police, Bihar as early as February 8, 1964 apprising the petitioner that his activities had attracted the attention of Government. It was admitted that departmental enquiry and investigation into the conduct of the petitioner were still going on and as such charges had not been framed against him. Finally, it was said that the order was not by way of punishment and had been passed pending departmental enquiry into his conduct.

4. Another counter-affidavit was filed on behalf of the Government of India and the Deputy Secretary to the Government of India, respondents 1 and 2 in the petition wherein substantially the same averments were made as in the counter-affidavit on behalf of respondent No. 3.

5. A large number of points were canvassed before the High Court which examined the provisions of different sets of rules and relying particularly on the difference in wording of Rule 12 of the Central Civil Services Rules which empowered the appointing authority to place an officer under suspension, inter alia, where a disciplinary proceeding against him was contemplated or was pending and Rule 7 of the All India Services Rules (quoted in extenso hereinafter) it came to the conclusion that the order of suspension was not proper. Further, according to one of the Judges of that Court:

"To allow a member of that (the All India) service to be placed under suspension without the formal proceeding being started may cause humiliation to an officer of such high rank without any justification whatsoever". According to the other learned Judge who took substantially the same view the order of suspension only indicated that disciplinary proceedings against the petitioner were in contemplation and this was not provided for in Rule 7.

6. In our view it would not be proper to interpret the provisions of the All India Services (Discipline and Appeal) Rules, 1955 by reference to the provisions of other rules even if they were made by or under the authority of the President of India. The

All India Services (Discipline and Appeal) Rules, 1955 as they stood at the relevant time were a self-contained Code and we have to examine the provisions thereof to find out whether the order passed on the petitioner was justified. These rules were promulgated in exercise of the powers conferred by sub-section (1) of Section 3 of the All India Services Act, 1951 by the Central Government after consultation with the Governments of the States concerned. They were applicable to members of the Indian Administrative Service and those of the Indian Police Service. Clause 3 of the Rules provided for penalties which might for good and sufficient reasons be imposed on a member of the service. Suspension is not a penalty covered by this clause. Clause 4 indicated the authorities who would institute proceedings and impose penalty against members of the Services. Clause 5 which generally dealt with the procedure for imposing penalties provided by the first three sub-clauses as follows:—

"(1) Without prejudice to the provisions of the Public Servants Inquiry Act, 1850, no order shall be passed imposing any of the penalties specified in Rule 3 on a member of the Service unless he has been informed in writing of the grounds on which it is proposed to take action and has been afforded an adequate opportunity of defending himself.

(2) The grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges, which shall be communicated to the member of the Service charged together with a statement of the allegations on which each charge is based and of any other circumstances which it is proposed to take into consideration in passing orders in the case.

(3) The member of the Service shall be required within such time as may be considered by the Government reasonably adequate in the circumstances of the case, to put in a written statement of his defence and to state whether he desires to be heard in person.

(4) to (10) xx xx xx". It was only after the written statement was received from the member that the Government might, if it considered necessary, appoint a Board of Enquiry or an Enquiry Officer to

enquire into the charges framed against him. Other sub-clauses of this rule laid down generally the procedure which was to be adopted in the enquiry. Rule 7 provided as follows:

"Suspension during disciplinary proceedings. —

(1) If having regard to the nature of the charges and the circumstances in any case the Government which initiates any disciplinary proceedings is satisfied that it is necessary or desirable to place under suspension the member of the Service against whom such proceedings are started that Government may—

(a) if the member of the Service is serving under it pass an order placing him under suspension, or

(b) if the member of the Service is serving under another Government, request that Government to place him under suspension, pending the conclusion of the inquiry and the passing of the final order in the case:

Provided that in cases where there is a difference of opinion between two State Governments, the matter shall be referred to the Central Government whose decision thereon shall be final.

(2) A member of the Service who is detained in official custody whether on a criminal charge or otherwise, for a period longer than forty-eight hours, shall be deemed to have been suspended by the Government concerned under this rule.

(3) A member of the Service in respect of or against whom an investigation, inquiry or trial relating to a criminal charge is pending may, at the discretion of the Government under which he is serving, be placed under suspension until the termination of all proceedings relating to that charge, if the charge is connected with his position as a Government servant or is likely to embarrass him in the discharge of his duties or involves moral turpitude".

Under Rule 8 a member of a Service who was placed under suspension was to be entitled to receive payment from the Government suspending him subsistence allowance as specified therein.

7. The crucial question in this case is, whether suspension of a member of the Service can only be ordered after definite charges have been communicated to him in terms of sub-clause (2) of rule 5 or whether the

Government is entitled to place an officer under suspension even before that stage has been reached after a preliminary investigation has been made into the conduct of the officer concerned following allegations of corrupt or malpractice levelled against him. To determine this it is necessary to find out the object of placing a Government officer under "suspension" in terms of the said rule.

8. 'Suspension' according to the Oxford Dictionary means

"the action of suspending or condition of being suspended; the action of debarring or state of being debarred, esp. for a time, from a function or privilege; temporary deprivation of one's office or position."

A master can, subject to the contract of service, ask his servant not to render any service without assigning any reason but this would not be by way of punishment and the master would have to pay the servant his full wages or remuneration in such an eventuality. As Halsbury puts it:

"Whether or not the master has power to suspend a servant during the duration of the contract of service depends upon the construction of the particular contract. In the absence of any express or implied term to the contrary, the master cannot punish a servant for alleged misconduct by suspending him from employment and stopping his wages for the period of the suspension".

(See Halsbury's Laws of England, Third Edition, Vol. 25, Article 989, page 518).

Rule 7 of the Service Rules expressly provides for suspension of a member of the Service for the purpose of disciplinary proceedings. When serious allegations of misconduct are imputed against a member of a Service normally it would not be desirable to allow him to continue in the post where he was functioning. If the disciplinary authority takes note of such allegations and is of opinion after some preliminary enquiries that the circumstances of the case justify further investigation to be made before definite charges can be framed, it would not be improper to remove the officer concerned from the sphere of his activity inasmuch as it may be necessary to find out facts from people working under him or look into papers which are in his custody and it would

be embarrassing and inopportune both for the officer concerned as well as to those whose duty it was to make the enquiry to do so while the officer was present at the spot. Such a situation can be avoided either by transferring the officer to some other place or by temporarily putting him out of action by making an order of suspension. Government may rightly take the view that an officer against whom serious imputations are made should not be allowed to function anywhere before the matter has been finally set at rest after proper scrutiny and holding of departmental proceedings. Rule 7 is aimed at taking the latter course of conduct. Ordinarily when serious imputations are made against the conduct of an officer the disciplinary authority cannot immediately draw up the charges; it may be that the imputations are false or concocted or gross exaggerations of trivial irregularities. A considerable time may elapse between the receipt of imputations against an officer and a definite conclusion by a superior authority that the circumstances are such that definite charges can be levelled against the officer. Whether it is necessary or desirable to place the officer under suspension even before definite charges have been framed would depend upon the circumstances of the case and the view which is taken by the Government concerned.

9. There would be nothing improper per se if the rules were to provide for suspension even before definite charges of misconduct had been communicated to the officer concerned. The question is whether the language of rule 7 is so correlated to that of R. 5 as to lead us to hold that the word "charges" in sub-cl. (1) of rule 7 must mean a definite charge as mentioned in sub-cl. (2) of R. 5. It may be that even in a case where definite charges have been raised against an officer he may satisfactorily explain the circumstances and the grounds alleged against him in his written statement. It is also possible that after the enquiry is conducted it is found that the charges are all baseless. In principle we can see no difference between the position of an officer against whom definite charges have been framed to which he is required to put in his written statement and a situation where on receipt of allegations of grave misconduct

against him the Government is of opinion that it would not be proper to allow the officer concerned to function in the ordinary way.

10. The matter is however not res integra and there is a series of decisions of this Court which throw considerable light on the power of a master including a Government to suspend a servant or an officer under rules of service or even de hors such rules. The law of master and servant including Government servants with regard to suspension of an employee was discussed at some length in *Management of Hotel Imperial v. Hotel Workers' Union*, (1960) 1 SCR 476 at p. 482 = (AIR 1959 SC 1342 at p. 1345). However rules of service of Government officers did not fall for consideration there. *Champaklal Chimanlal Shah v. The Union of India*, (1964) 5 SCR 190 = (AIR 1964 SC 1854) was a case where a temporary Government servant's services were terminated. The case shows, as is well known, that even before a formal departmental enquiry is launched a preliminary enquiry is usually held to find out whether a prima facie case is made out against a Government servant. This preliminary enquiry is directed to the collection of facts in regard to the work and conduct of a Government servant in which he may or may not be associated so that the authority concerned may decide whether or not to subject the servant concerned to the enquiry under Art. 311 for inflicting one of the three major punishments mentioned therein and such a preliminary enquiry may even be held ex parte. In *R. P. Kapur v. Union of India*, (1964) 5 SCR 431 at p. 445 = (AIR 1964 SC 787 at p. 792) the general principles governing a master and servant were discussed in some detail and it was said:

"If there is no express term in the contract relating to suspension and payment during such suspension or if there is no statutory provision in any law or rule, the employee is entitled to his full remuneration for the period of his interim suspension; on the other hand if there is a term in this respect in the contract or there is a provision in the statute or the rules framed thereunder providing for the scale of payment during suspension, the payment would be in accordance therewith On general principles therefore the authority entitled to appoint

a public servant would be entitled to suspend him pending a departmental enquiry into his conduct or pending a criminal proceeding, which may eventually result in a departmental enquiry against him."

11. There is however a direct authority of this Court in *S. Govinda Menon v. The Union of India*, (1967) 2 SCR 566 = (AIR 1967 SC 1274). The appellant before this Court was a member of the Indian Administrative Service. He was the First Member of the Board of Revenue, Kerala State and was holding the post of Commissioner of Hindu Religious and Charitable Endowments. On the basis of certain complaints containing allegations of misconduct against the appellant in the discharge of his duties as such Commissioner the Kerala Government instituted certain preliminary enquiries and thereafter started disciplinary proceedings against him and also placed him under suspension under rule 7 of the All India Services (Discipline and Appeal) Rules. One of the grounds urged by the appellant was that the order of suspension which was dated March 8, 1963 was not in compliance with rule 7 inasmuch as definite charges were framed against him only on 6th June, 1963. On the basis of rule 5 (2) it was argued that the word "charges" which occurred in this rule and in R. 7 should be given the same meaning and no order of suspension could be passed under Rule 7 before the charges in terms of Rule 5 (2) were framed against him. This was turned down by this Court observing (at p. 582 of SCR) = (at p. 1283 of AIR):

"Rule 5 (2) prescribes that the grounds on which it is proposed to take action shall be reduced to the form of a definite charge or charges. The framing of the charge under Rule 5 (2) is necessary to enable the member of the Service to meet the case against him. The language of rule 7 (1) is however different and that rule provides that the Government may place a member of the Service under suspension "having regard to the nature of the charge/charges and the circumstances in any case" if the Government is satisfied that it is necessary to place him under suspension. In view of the difference of language in rule 5 (2) and rule 7 we are of the opinion that the word "charges" in rule 7 (1) should be given a wider meaning as denoting the accusation or

imputation against the member of the Service."

12. It is worthy of note that in the order of suspension it was stated as follows:—

"The Government have received several petitions containing serious allegations of official misconduct against Shri S. Govinda Menon..... Preliminary enquiries caused to be conducted into the allegations have shown prima facie that the officer is guilty of corruption. The Kerala High Court has also occasion to comment on the conduct of the officer in their judgment in G. P. 2306 of 1962 delivered on 12th February, 1963.....

The judgment in the above case and the preliminary report of the X-Branch police have disclosed the following grave charges of serious irregularity and official misconduct on the part of the accused officer.....

The detailed inquiry into the charges by the X-Branch is in progress. The evidence in the case has to be collected from a large number of officers who are subordinate to the accused officer in his capacity as First Member of the Board of Revenue. In the interest of the proper conduct of the enquiry it is necessary that the officer should not be allowed to continue in that post. Having regard to the nature of the charges against the officer and the circumstances the proper course would be to place him under suspension. Shri S. Govinda Menon I. A. S. is therefore placed under suspension under Rule 7 of the All India Services (Discipline and Appeal) Rules, 1955 till the disciplinary proceedings initiated against him are completed".

It was urged before us that the order of suspension there was different from the one before us. While there is no doubt that the order against the appellant in the above case was far more detailed both with regard to the nature of the charges and to the necessity of placing him under suspension, in substance there is little difference for the purpose of Rule 7 of the Service Rules. The order in this case dated 31st July, 1964 shows that serious allegations of corruption and malpractices had been made against the respondent and he was also reported to have contravened the provisions of the All India Service Conduct Rules and enquiries made by the Government of Bihar into the allegations had

revealed that there was a prima facie case made out against him. Merely because the order mentioned that disciplinary proceedings were contemplated against the respondent, as compared to Rule 7 which contains phrases like "the initiation of disciplinary proceedings" and the "starting of such proceedings" we cannot hold that the situation in the present case had not reached a stage which called for an order of suspension. In substance disciplinary proceedings can be said to be started against an officer when complaints about his integrity or honesty are entertained and followed by a preliminary enquiry into them culminating in the satisfaction of the Government that a prima facie case has been made out against him for the framing of charges. When the order of suspension itself shows that Government was of the view that such a prima facie case for departmental proceedings had been made out the fact that the order also mentions that such proceedings were contemplated makes no difference. Again the fact that in other rules of service an order of suspension may be made when "disciplinary proceedings were contemplated" should not lead us to take the view that a member of an All India Service should be dealt with differently. The reputation of an officer is equally valuable no matter whether he belongs to the All India Service or to one of a humbler cadre. It is the exigency of the conditions of service which requires or calls for an order of suspension and there can be no difference in regard to this matter as between a member of an All India Service and a member of a State Service or a Railway Service.

13. In the result the appeal is allowed but in the circumstances of the case we direct the parties to pay and bear their own costs.

Appeal allowed.

AIR 1971 SUPREME COURT 829
(V 58 C 168)

(From Madras: (1963) 2 Mad LJ 105)

K. S. HEGDE AND
A. N. GROVER, JJ.

P. K. Nedungadi, Appellant v. The Malayalee Bank Ltd. (In Liquidation) and others, Respondents.

Civil Appeal No. 1791 of 1967, I/- 9-2-1971.

BO/CO/A615/71/DVT/C

Companies Act (1913), S. 235 — A Director enabling another Director to perpetrate fraud resulting in loss to the Company is liable to repay and restore the loss — (1963) 2 Mad LJ 109, Affirmed. (Para 6)

Misfeasance and breach of trust include breach of duty to the Company resulting directly in misapplication or loss of Company's assets. Allegations or proof of fraud are not essential. It is immaterial that the offender is also criminally liable. Breach of such duty makes him liable to repay or restore the Company's loss.

(Paras 5 and 6)

Mr. D. P. Singh, Advocate of M/s. Ramamurthi and Co., M/s. V. J. Francis and Suresh Prasad Singh, Advocates, for Appellant; M/s. Arun Bahadur Saharya, Vishnu Bahadur Saharya and Miss Y. Khushalani, Advocates, for Respondent No. 1, Mr. K. Jayaram, Advocate, for Respondent No. 2.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal by certificate from a judgment of the Madras High Court.

2. In October, 1950 the Malayalee Bank Ltd., hereinafter called the "Bank" was ordered to be wound up. On that date there were only two Directors i. e., respondent No. 3 and the appellant P. K. Nedungadi. The second respondent P. S. Mannadiar hereinafter called "M" was appointed as the Managing Director on March 4, 1945. He continued to work as such till December 25, 1948. Afterwards he was a Director till the date of his resignation on June 14, 1950. The third respondent T. Eronanunni was Director from November 15, 1943 onwards. The fourth respondent V. K. Thirumalpad was a Director from 1940 till March 13, 1949. The appellant P. K. Nedungadi was a Director from October 8, 1948 till the date of the winding up order. The fifth respondent V. Venugopalan Thampan was a Director from June 22, 1946 till October 8, 1948.

3. In September, 1953 the Official Liquidator filed a petition under Sections 183 (3) and 235 of the Indian Companies Act together with Rule 9 of the Companies Rules and Sec. 45, A, B and F of Act IX of 1950 and Rule 6 of the Banking Companies Rules for an order determining and

fixing the liability of the respondents jointly and severally in respect of the acts of misfeasance, misapplication of monies, breach of trust etc., and to declare their liability to contribute Rs. 2,11,998.04 or such other sum as might be determined. In September, 1954 the High Court directed the Official Referee to record the evidence. Two charges were framed out of which so far as the appellant is concerned, the material portion of the following charge may be reproduced:

"In contravention of the resolution of the Board of Directors dated 27-10-1946, No. 1 (P. S. Mannadiar) amongst you took away and Nos. 2 to 5 (T. Eromanunni, V. K. Thirumalpad and V. Venugopal Thampan) permitted No. 1 to take away a sum of Rs. 14,623-4-2 from the Bank under the guise of an overdraft.

That No. 1 amongst you obtained and Nos. 2 to 5 amongst you sanctioned to No. 1 loan, aggregating to Rs. 34,863-6-0 (wherein the aforesaid sum of Rs. 14,623-4-2 was merged) on the supposed security of the Mannadiar Saw and Oil Mills Ltd., Palghat.

That at the time the transaction was put through you knew or could with reasonable diligence have known that the security was wholly illusory and that was only a device to circumvent the provisions of Section 20 of the Indian Banking Companies Act.

That by this and other connected wrongful devices you caused loss to the aforesaid bank of a sum of Rs. 49,608-4-3".

A learned Single Judge took the view that all the Directors left everything in the hands of respondent No. 2 and that was the reason why the transactions which had been brought about had taken place. According to the learned Judge any criminal prosecution in the circumstances disclosed would have failed and therefore he dismissed the application of the Official Liquidator. On appeal by him a Division Bench of the High Court held that the appellant and respondent No. 2 had been guilty of acts of misfeasance etc. and directed that they should jointly and severally pay to the Official Liquidator a sum of Rs. 46,616 together with interest on a sum of Rs. 34,541.31 from 1953 to the date of realisation. It is unnecessary to refer to the liability of the other respondents which was determined. Respondent No. 2 has not filed any appeal

and we are concerned with the appeal of Nedungadi.

4. Now what the High Court found from the evidence was as follows: Respondent No. 2 was carrying on business under the name of Mannadiar Saw & Oil Mills. He had three loan accounts with the Bank. The first was a current account and the second an overdraft account and the third an account in the name of the Mills. Large sums of money were drawn by him without security from the various accounts exceeding limits sanctioned to him by the Board of Directors. The affairs of the Mills became very unsatisfactory and its business fell on evil days. M formed a public limited company and sold the Mills and its property at an inflated price to the said company. This company was incorporated by the name of Mannadiar Saw & Oil Mills Ltd. on January 31, 1948, hereinafter referred to as the "Mills." The appellant was one of the Directors of that Company. This company was ultimately wound up in 1950. The Bank had certain deposits to the extent of Rs. 50,000/- with the Palghat Branch of the Indo-Mercantile Bank. In the beginning of 1948 the Indo-Mercantile Bank got into difficulties and it closed its business from February 10, 1948. M had an overdraft account with Indo-Mercantile Bank at its Palghat Branch. The agent of that Branch was the appellant. M purporting to act on behalf of the Bank drew a cheque on the Indo-Mercantile Bank Ltd. on February 8, 1948 for a sum of Rs. 13,000/- and with the help of the appellant that amount was adjusted against his overdraft account. In the accounts of the Indo-Mercantile Bank this sum was debited against Rs. 50,000 standing to the credit of the Bank. M however did not debit himself with the sum of Rs. 13,000/- in any of his accounts with the Bank. The amount was shown only in the suspense account. On October 8, 1948 the appellant, who was formerly the agent of Palghat Branch of Indo-Mercantile Bank, was appointed a Director of the Bank. On taking charge he discovered that M had not brought to account the sum of Rs. 13,000/- which he had taken away from the Bank in the manner stated before. M thought of a scheme by which his obligations to the Indo-Mercantile Bank were to be consolidated with certain other sums and

for the total indebtedness a mortgage was to be got executed by the Mills thereby discharging completely his indebtedness to the Bank. A fourth mortgage of the property of that company was consequently executed for a sum of Rs. 34,541-5-0. This amount which was the consideration for the mortgage was in satisfaction of the claim which the Indo-Mercantile Bank had against M and certain other amounts. Now these other amounts were made up in this way. The Indo-Mercantile Bank had a claim against one Ravi Verma who was a Director of the Mills. He was perfectly solvent and that amount could have been realized from him but instead of doing that M was given a credit to the extent of Rs. 12,083/- with a direction to him to realize Ravi Verma's dues to the Bank himself. M was also indebted to Rukmini, the sister-in-law of the appellant. For wiping out this liability a fixed deposit account for Rs. 6,000/- was opened in the Bank in the name of Rukmini. Cash money was not deposited and the consideration for the deposit was an undertaking by M to pay to the Bank and that liability was included in the total liability covered by the mortgage executed by the Mills. Subsequently the fixed deposit amount of Rs. 6,000/- was withdrawn by Rukmini. Thus, the High Court found that the three items of consideration for the mortgage which had been created on a defunct company like the Mills were, (1) the wiping out of the liability of M to the Bank to the extent of Rs. 14,623-4-2 which consisted of a sum of Rs. 13,000/- and interest; (2) wiping out of liability of Ravi Verma a solvent debtor of the Indo-Mercantile Bank to the extent of Rs. 12,083/9/7 and (3) the creation of the fixed deposit for the benefit of the fourth respondent for a sum of Rs. 6,000/-. The appellant obviously got the benefit for bringing about this transaction because of his relationship with Rukmini.

5. The High Court found that the assets of the Mills were worth not even Rs. 10,000/- and to obtain a fourth mortgage of the property of that company could not be an error of judgment on the part of the Directors but it was designed and calculated arrangement made with a view to benefit, at the expense of the Bank, M, the appellant and Ravi Verma. It was not possible to believe that the

Directors were not aware of the financial condition of the Mills. The security which was thus taken was merely illusory and when the transaction was approved at the meeting of the Directors held on July 22, 1949 the Directors present were M, the appellant and respondent No. 2 before the High Court. The Division Bench quite rightly did not agree with the learned Single Judge that all these transactions which were tell tale were the result of an error of judgment. On the contrary there was a clever plan and design behind the creation of the mortgage. As regards the appellant this is what was observed:

"The fourth respondent P. K. Nedungadi, was undoubtedly the guiding spirit for the fraud perpetrated by the first respondent. He obtained a benefit on opening a fixed deposit in favour of his sister-in-law, and realising the same while he was in active management, as the Managing Director of the Bank. But scruples were not amongst his virtues is plain from the fact that he who engineered the mortgage transaction described the same within the few months thereof in his report to the Directors. He should be made liable to the entire extent. But for his help, the first respondent could not have avoided his liability or been permitted to realise the unpaid purchase money from the Mannadiar Saw and Oil Mills Ltd., which he had no hopes of realising. He should be made liable to the entire amount decreed against the first respondent".

Under Section 235 of the Indian Companies Act, 1913 which was in force at the material time the Court has been given the power to assess damages against the delinquent Directors, etc. If the money or the property of the Company has been misapplied or there has been misfeasance or breach of trust in relation to the company by a Director, an officer or other persons mentioned in the section the Court, after examining the matter, can compel him to repay or restore the property with interest at such rate as the court may think fit or to contribute such sums to the assets of the Company by way of compensation in respect of the misapplication, retainer, misfeasance or breach of trust, as the Court thinks fit. It has been expressly declared that the section shall apply notwithstanding that the offence is

one for which the offender may be criminally responsible. In Halsbury's Laws of England, 3rd Edition, Volume 6, it has been stated at page 623 that misfeasance and breach of trust include a breach by a Promoter, Director etc. of a duty to the Company the direct consequence of which has been a misapplication or loss of its assets for which he could be made responsible in an action. Allegations or proof of fraud are not essential and it is immaterial that the offence is one for which the offender may be criminally liable.

6. In the present case the High Court has found and that finding has not been shown to be wrong or erroneous in any manner that it was the appellant who enabled M to perpetrate the fraud which apparently resulted in loss to the Company. The appellant himself also derived a certain benefit from the fraudulent acts of M. He would thus be clearly liable to repay or restore to the Bank the amount in respect of which there was misapplication, misfeasance and breach of trust resulting in loss to the Company. The appellant cannot escape liability for the entire amount for which an order has been made against him by the High Court.

7. In the result this appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 832 (1) (V 58 C 169)

Note to AIR 1971 Supreme Court 306
(V 58 C 73)

1. Narendrajit Singh (In C. A. No. 1192 of 1967); 2. Ranjit Singh and others, (In C. A. No. 1193 of 1967), Appellants v. The State of U. P. and others (in both the Appeals), Respondents.

Civil Appeals Nos. 1192 and 1193 of 1967, D/- 21-11-1969.

Note: We are advised by the Supreme Court in the letter of the Assistant Registrar of the Court (No. F 38/1/71/S-1), dated 22-2-1971, that the Judgment of the Supreme Court reported in AIR 1971 Supreme Court 306 (Feb.) has been set aside on review by the Supreme Court. Editor.

AIR 1971 SUPREME COURT 832 (2) (V 58 C 170) (From: Kerala)

S. M. SIKRI, C. J.,
P. JAGANMOHAN REDDY AND
I. D. DUA, JJ.

The State of Kerala and another, Appellants v. R. E. D'Souza, Respondent.

Criminal Appeals Nos. 205-206 of 1968, D/- 12-2-1971.

(A) Factories Act (1948), S. 2 (1) — The test for determining who is a 'worker' within definition under Factories Act is the same as laid down in AIR 1957 SC 264 which arose under Industrial Disputes Act. (X-Ref: Industrial Disputes Act (1947), S. 2 (s)) — AIR 1957 SC 264 and AIR 1958 SC 388 and AIR 1961 SC 644, Followed.

(Para 6)

(B) Constitution of India, Art. 134

(1) (c) — When the question of the principle has been settled down by Supreme Court the application of that principle to the facts of a particular case does not make the question a fit one for appeal to Supreme Court.

(Para 6)

Cases Referred: Chronological Paras

(1961) AIR 1961 SC 644 (V 48)

= (1961) 3 SCR 161, Birdhi-chand Sharma v. First Civil Judge, Nagpur 6

(1960) 1960 Ker LJ 1524 = (1961)

1 Lab LJ 549 (SC), State of Kerala v. V. M. Patel 5

(1958) AIR 1958 SC 388 (V 45)

= 1958 SCR 1340, Chintaman Rao v. State of Madhya Pradesh 5, 6

(1957) AIR 1957 SC 264 (V 44)

= 1957 SCR 152, Dharangadhara Chemical Works Ltd. v. State of Saurashtra 5, 6

The following Judgment of the Court was delivered by

SIKRI, C. J.: — These appeals are on certificates granted by the High Court of Kerala. The only question in these appeals is whether the workmen doing work in the premises of the respondent are workers within the meaning of Section 2 (1) of the Factories Act, 1948. Section 2 (1) of the Factories Act, 1948 reads as follows:

" 'Worker' means a person employed, directly or through any agency, whether for wages or not, in

any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process;"

2. The respondent was convicted under Section 92 of the Factories Act for using a building as a factory without obtaining the previous permission in writing of the Chief Inspector of Factories, for failing to apply for registration and grant of licence for the factory and for failing to maintain a muster roll of the workers employed in the factory in one case, and for failing to give attendance cards to every person employed in the factory in the other case. The respondent was sentenced to pay a fine of Rs. 20/- in each case. He was also directed under Section 102 of the Factories Act to rectify the defects within a specified period.

3. The respondent filed a Revision Petition in the High Court. The High Court held that the work that was being carried out in the premises of the respondent amounted to manufacturing process. This question has not been debated before us. The High Court further held that the workmen working in the premises of the respondent were not 'workers' within the meaning of S. 2 (1) of the Factories Act. It is this part of the decision that has been challenged in appeal by the State of Kerala.

4. The nature of the work done was described in a letter produced by the prosecution. This letter is not printed on the record but the High Court summarises the document as follows:

"This document shows that as and when catches of prawns are made, a consignment of prawns is brought to the premises in a lorry at any time of the day or the night, that the women and girls of the locality, who form a "casual, heterogeneous, miscellaneous and irregular group", come at their convenience and do the peeling, washing etc., at piece-rates; and that there are no specified hours of work, nor is there any control by the Petitioner over the irregularity and attendance or of the nature, manner or quantum of their work. The same workers after finishing the work in the premises of the petitioner, go to other similar premises in the locality where

other lorry loads of prawns are taken. In other words, if more prawns are caught at a particular time, they are brought and distributed among several premises like the Petitioner's and the local women and girls collect at the several premises and do the work at piece-rates. The same workers do not go to the same premises on different occasions, and the owners of the several premises do not have any control over the manner or quantum of work these women and girls do. The rates of remuneration naturally depend upon the quantity of prawns available, the number of women and girls that come to do the work, the hour of the day or the night when the catches arrive, etc. Sometimes, for days no work is done in the premises."

5. The High Court after referring to the decisions of this Court in Dharangadhara Chemical Works Ltd. v. State of Saurashtra, AIR 1957 SC 264, a decision under the Industrial Disputes Act, Chintaman Rao v. State of Madhya Pradesh, 1958 SCR 1340 = (AIR 1958 SC 388), and State of Kerala v. V. M. Patel, (1960) KLJ 1524 (SC), decisions under the Factories Act, held:

"It will be apparent that the women and girls who assemble and do the work when a catch of prawns is brought to the premises of the petitioner are not 'workers' coming within the definition of the Factories Act. The Petitioner does not insist as to who should do the job or how it should be done; he only wants the work to be done for the agreed remuneration without spoiling the prawns i. e. within a short time. (A quantity of prawns is taken for peeling, cleaning, washing etc., by a particular individual for a fixed remuneration, and that individual, with the assistance of others whom she employs, finishes the job as quickly as possible)."

6. The learned Counsel for the appellant contended that it was erroneous on the part of the High Court to have applied the decision of this Court in AIR 1957 SC 264, a case under the Industrial Disputes Act, to the definition of 'worker' in the Factories Act. He fairly pointed out that another Division Bench applied the same test in a dispute arising under the Factories Act. (see Birdhi-chand Sharma v. First Civil Judge Nagpur, (1961) 3 SCR 161 = (AIR 1961

SC 644). But, nevertheless, he urged that we should refer the case to a larger Bench. We see nothing wrong in the decision of this Court in 1958 SCR 1340 = (AIR 1958 SC 388). On the contrary, we are of the opinion that the case has been rightly decided. The scheme of the Factories Act clearly shows that the test adopted by this Court is the correct one. It would be impossible to apply many provisions of the Factories Act to the 'workers' of the type we are concerned with here if we were to hold that they were 'workers' within the definition of the Factories Act. We are really surprised that the High Court certified this case to be a fit case for appeal to this Court. After this Court had laid down a test to be applied for determining who were 'workers' within the meaning of the Factories Act, the High Court should have treated the question of principle as no longer open. The High Court had certified the case to be fit for appeal as it felt that the question involved is of general importance in the State. If the question of principle has been settled by this Court, the application of the principle to the facts of a particular case does not make the question a fit one for the Supreme Court within Article 134 (1) (c) of the Constitution. In the result the appeals fail and are dismissed.

Appeals dismissed.

AIR 1971 SUPREME COURT 834
(V 58 C 171)

(From Punjab : AIR 1967 Punj. 244)

S. M. SIKRI, C. J., P. JAGAN-MOHAN REDDY AND I. D. DUA, JJ.

Mahant Abhey Dass, Appellant v. S. Gurdial Singh and others, Respondents.

Criminal Appeal No. 98 of 1968, D/- 11-2-1971.

Criminal P. C. (1898), S. 253 (2)—When on allegations made against accused prima facie case is made out against them they should not be discharged under S. 253 (2). AIR 1967 Punj. 244, Reversed.

A filed a complaint against B, C and D under Ss. 447/379 and 428/34 Penal Code. He alleged that A was the owner as Dholidar and occupancy tenant of certain land, that there was

previous civil litigation between the parties, that the accused having lost in the litigation with a view to wreak vengeance on him and to create evidence in their favour, in furtherance of the common intention in his absence illegally trespassed on the land and destroyed an orchard on it and illegally and dishonestly removed some trees on it:

Held that if the allegations were true the accused had committed the offences charged against them. Thus a prima facie case had been made out against the accused and they should not have been discharged under S. 253 (2). AIR 1967 Punj. 244, Reversed.

(Paras 10, 13)

Mr. Mohan Behari Lal, Advocate for Appellant; M/s. S. C. Malik and Harbans Singh, Advocates, for Respondent No. 1; M/s. Bakshi Gurcharan Singh and Harbans Singh, Advocates; for Respondent No. 2; Mr. Harbans Singh, Advocate, for Respondent No. 3.

The following Judgment of the Court was delivered by

SIKRI, C. J.:—This appeal by special leave is directed against the judgment of the Circuit Bench of the Punjab High Court at Delhi (Narula J.) reversing the order dated December 6, 1965 of the learned Magistrate and the judgment dated March 1, 1966 of the Additional Sessions Judge, and directing that all the respondents be discharged under sub-section (2) of Section 253 of the Code of Criminal Procedure in respect of the offences alleged by the appellant before us. In order to appreciate the points it is necessary to state the facts. The Appellant is the Muktar-e-Am (General Attorney) of Mahant Santokh Dass. He filed a complaint under Sections 447/379 and 428/34, I. P. C. The allegations in brief were that Mahant Santokh Dass was the owner as Dholidar and occupancy tenant of the entire land comprising in Khasra No. 129, Civil Station, Delhi, measuring 27 Bighas and 14 Biswas. There is a Gurdwara known as Gurdwara Majnu-ka-tilla which was built in another portion of Khasra No. 129 covering an area of 4 Bighas and 7 Biswas and was managed by the accused Sardar Gurdial Singh, Manager, Gurdwara Prabandhak Committee, Sardar Gulab Singh, President Gurdwara Prabandhak Committee and Sardar Santokh Singh, Secretary, Gurdwara Prabandhak Committee.

There were certain Sewadars which the appellant cited as accused without naming them. The appellant recited the previous litigation between the parties and alleged that the committee having lost every where in Court ultimately took to the law of jungle and to wreak their vengeance and to create evidence in their favour accused Nos. 1, 3 and 4 along with accused No. 2, in furtherance of the common intention, in the absence of the owner and the appellant on the morning of March 29, 1964 by illegally trespassing on the said orchard employed coolies and some servants of the Gurdwara and totally destroyed it and closed watering well and levelled the whole thing to the ground and they illegally and dishonestly removed the trees from the orchard and took them into possession.

2. It was further alleged that the accused have no interest or title in the land which they trespassed illegally and destroyed the whole Orchard. The complainant gave a lengthy statement before the Court of the S. D. M., Delhi. He alleged that the land was in possession of his ancestors and continued to be in his possession. He relied on copies of the Khasra Girdawari relating to the land in dispute and Fard Zamabandi. He gave a statement in support of the complaint. He produced some witnesses including P. W. 5 Pheru Mal Jain, Patwari, who deposed that the land measuring 27 Bighas and 8 Biswas was under the possession of Mahant Santokh Dass and the land measuring 4 Bighas and 7 Biswas was under the possession of Gurdwara Prabandhak Committee. We need not refer to the rest of the evidence.

3. The A. D. M. after having gone through the enquiry report and the evidence on record came to the conclusion that there was a prima facie case under Sections 427/447/379/34, I. P. C. against the accused Gur Dayal Singh, Santokh Singh and Tara Chand only. He sent the case to the Court of Shri C. N. Narula, Magistrate 1st Class, for disposal according to law.

4. On December 6, 1965 an application was put in under Section 253 (2), Criminal Procedure Code, for discharging the accused persons. The main ground taken was that the decree passed in favour of Mahant Santokh Dass by Shri R. L. Lamba, Sub-Judge, had been set aside in appeal by Shri

P. N. Thukral, Additional District Judge, who had remanded the case to the trial Court. This judgment of Shri Lamba was one of the documents relied upon by the complainant to show his title. It was further stated in this application that the dispute was prima facie of civil nature and the complaint had been filed to harass the accused. The Court on December 6, 1965 wrote a short order which reads as follows:—

"Heard the parties. This Court is not to sit in judgment over the findings of learned Civil Judge or Addl. S. Judge but is only concerned with possession and criminal trespass over such possession of land in dispute. The matter of title is to be decided upon by competent Civil Courts. I see no reasons to discharge the accused at this stage or to stay the proceedings also verbally requested by counsel for the accused. Application is rejected. Case to proceed with prosecution evidence today".

5. The accused filed a revision petition before the Additional Sessions Judge, Delhi but that was dismissed on the ground that there was no ground for the discharge of the accused. As far as the title was concerned the learned Addl. Sessions Judge observed:

"The Criminal Court has, as a matter of fact, to record its own findings on the points disputed before it and the discretion of the learned Magistrate in not staying the proceedings in the complaint to await the decision in the civil suit cannot be interfered with".

6. The accused then filed a revision before the High Court. The learned Judge allowed the petition on the ground that the real dispute was regarding the title to the land on one part of which the Gurdwara was situated and on the other part the alleged criminal trespass was committed by the accused. Although the Judge said that the question of title was not directly relevant, he seems to have decided the case on the question of title for he referred to the previous history of the litigation between the parties and observed:

"The suit filed by Mahant Santokh Dass for a declaration to the effect that he was in possession of the land in dispute, of which possession was being claimed by the Gurdwara Prabandhak Committee, has been dismissed. In the face of the decree of

the civil Court in the civil suit of Mahant Santokh Dass, it is clear that the complainant had no right to eject the petitioners or to exclude them from the land in question".

7. Then the learned Judge observed:

"According to the complainant's own case, made out in the complaint, he was not in actual possession of the property at the time of the commission of the alleged offence".

8. We have looked into the complaint and there is no evidence in support of this observation of the learned Judge.

9. The learned Judge further observed:

"I have also scanned through the evidence so far recorded at the trial of this case. Even if the allegations made therein are deemed to be true, they do not appear to disclose the commission of any of the offences with which the petitioners are sought to be charged. The charges against the petitioner were therefore, clearly groundless and the learned Magistrate, in my opinion, unjustifiably declined to exercise his jurisdiction under Section 253 (2) of the Code of Criminal Procedure in refusing to discharge the accused".

10. We are unable to appreciate this conclusion of the learned Judge. If the allegations are true there is no doubt that the accused have committed the offence charged against them. Of course, it is another matter if the allegations are ultimately proved not to be true.

11. We have deliberately not referred to the previous litigation between the parties for any observation which we may make may affect either the civil suit or the fate of this case. It seems to us that the High Court while saying that it was not concerned with the title had somehow felt that the title rested with the accused-respondents.

12. The learned Counsel for the respondent No. 1 S. C. Malik tried to persuade us to go into the question of title and he said that the question of possession was dependent on title. He referred to Ex. P11, an extract from Khasra Girdawari, and wanted us to infer from it that Khasra Girdawari had been prepared on the basis of title and not on the basis of actual possession. On behalf of respondent No. 2 Bakshi Gurcharan Singh argued that

the revenue records were false and the litigation showed that the title was with the accused. Mr. Harbans Singh appearing for Respondent No. 3 added that the complaint was not filed immediately.

13. We need not discuss these points in detail because it might possibly prejudice respondents' case but it seems to us that the High Court erred in discharging the accused under Section 253 (2), Criminal Procedure Code. As held by the learned Sessions Judge a prima facie case has been made out and the accused must stand trial.

14. In the result the judgment and order of the High Court is set aside and we direct that the trial should proceed as expeditiously as possible.

Appeal allowed.

AIR 1971 SUPREME COURT 836 (V 58 C 172)

(From: Delhi)*

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

Delhi Transport Undertaking, Appellant v. Balbir Saran Goel, Respondent.

Civil Appeal No. 2266 of 1968, D/- 23-2-1970.

Civil Services — D. R. T. A. (Conditions of Appointment and Service Regulations) (1952), Regs. 9 (b), 15 — Termination of service in terms of Reg. 9 (b) — Procedure in Reg. 15 not required to be followed — Motive for termination immaterial.

If the employer chooses to terminate the services in accordance with Reg. 9 (b) after giving one month's notice or pay in lieu thereof it cannot amount to termination of service for misconduct within the meaning of Clause (a). It is only when some punishment is inflicted of the nature specified in Regulation 15 for misconduct that the procedure laid down therein for an inquiry etc., becomes applicable.

(Para 7)

It may be that the motive for termination of his services was the breach of Standing Order 17 i. e., of

*(Letters Patent Appeal No. 68-D of 1965, D/- 4-8-1967 — Delhi.)

JN/JN/B145/70/DHZ/G

filing a writ petition in the High Court against his demotion without exhausting departmental remedies but the question of motive is immaterial.

(Para 9)

Where the order is unequivocally made in terms of Regulation 9 (b) no question that punishment had been inflicted for misconduct the order being a mere camouflage can arise. Even if the employers thought that the employee was a cantankerous person and it was not desirable to retain him in service it was open to them to terminate his services in terms of Regulation 9 (b) and it was not necessary to dismiss him by way of punishment for misconduct.

(Para 10)

Cases Referred: Chronological Paras

(1968) AIR 1968 SC 1089 (V 55)

= (1968) 3 SCR 234, State of

Punjab v. Shri Sukhraj Bahadur 9

(1964) AIR 1964 SC 1680 (V 51)

= (1964) 3 SCR 55, S. R. Tewari

v. District Board, Agra 7

Mr. Niren De, Attorney-General for India, (M/s. D. D. Choudhury and G. K. Sharma, Advocates, with him), for Appellant; Mr. H. R. Gokhale, Sr. Advocate, (Mr. S. K. Gambhir, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal by special leave in which the sole question for determination is whether the services of the respondent who was an employee of the appellant could be terminated under Regulation 9 (b) without complying with the procedure prescribed by Regulation 15 of the D. R. T. A. (Conditions of Appointment and Service Regulations), 1952, as amended, which were framed under Section 53, sub-sections (1) and (2) (c) of the Delhi Road Transport Authority Act, 1950.

2. The respondent was originally appointed as a booking agent under the Gwalior Northern Transport Company. He was promoted to the rank of Travelling Ticket Examiner in 1947. In 1948 the Government of India, Ministry of Transport, took over the aforesaid company. On March 7, 1950 the Delhi Road Transport Authority Act was passed. The services of the respondent were transferred to the said Authority. In March, 1952 the respondent was demoted from the rank of Travelling Ticket Examiner to that of a Conductor. He filed a writ

petition in the Circuit Bench of the Punjab High Court at Delhi in April, 1953. The writ petition was dismissed and thereafter his services were terminated on November 11, 1953. The order of termination which was passed by the Manager of the Delhi Road Transport Authority was in the following terms:

"Your services will not be required by this organisation with effect from November 12, 1953. You will be paid one month's salary in lieu of notice".

3. There were certain proceedings before the Conciliation Officer and in answer to a query made by that officer the General Manager wrote a letter on August 14, 1953 in which it was stated, *inter alia*, that the respondent had approached the High Court when he had been demoted at the previous stage without exhausting the normal official channel of redress and without putting in his representation before the Appellate Authority as provided in the Service Rules. His services were therefore terminated under Regulation 9 (b) after paying one month's salary in lieu of notice. It may be mentioned that the Service Rule of which the breach was alleged to have been committed by the respondent was Standing Order No. 17 which enjoined that no employee should have recourse to a Court of law without first resorting to the normal official channels of redress.

4. The suit out of which the present appeal has arisen was filed by the respondent containing all the above facts in which it was alleged that the order dated November 11, 1953 was one of dismissal and had been passed as a measure of punishment, the procedure prescribed by Regulation 15 not having been followed. In para 29 of the plaint the sole allegation relating to *mala fides* was made in these terms:

".....It was *mala fide* on the part of the General Manager, D. R. T. A. to terminate the services of the plaintiff without assigning any reason".

A declaration was sought that the order of dismissal was illegal, *mala fide* etc., and that the plaintiff continued to remain in the employment of the appellant without any interruption of rights. A claim for certain amount was also made on account of salary etc. The only two issues framed on the merits were:

(1) "Whether the order dated 11th November, 1953 terminating the services of the plaintiff is illegal and ultra vires as alleged?"

(2) Whether the plaintiff is entitled to the recovery of any amount by way of consequential relief? If so, at what rate and for what period?"

The trial court held that the order terminating the services of the respondent was not covered by Regulation 9 (b) but was an order of dismissal from service under Regulation 15 (2) Clause (7) and therefore the order of termination was nothing short of dismissal. It was held that the dismissal of the respondent was illegal and that he was entitled to the pay and allowance in the sum of Rs. 4,500.

5. An appeal was taken to the District Court which confirmed the decree of trial court. A learned Single Judge of the High Court who disposed of the second appeal preferred by the present appellant affirmed the decree of the courts below but on different grounds. It was held by him that Regulation 9 (b) did not confer any power on the Authority to terminate the employment of its employees. A Division Bench which heard the appeal under the Letters Patent affirmed the decisions of the courts below but on different grounds. It was held that the real reason for dispensing with the services of the respondent was one given by the General Manager in his letter to the Conciliation Officer. It was the alleged breach of the Service Rules. A breach of the Standing Order amounted to misconduct as provided by Regulation 15 (1). One of the penalties prescribed by Regulation 15 (2) was dismissal. That though the order of termination of services of the respondent did not, on its face, contain the reason for the non-requirement of his services the real reason was the misconduct of the respondent in that he had committed a breach of the Standing Order. The procedure laid down in Regulation 15 (2) (c) of enquiry etc., not having been followed the impugned order was void and illegal. In fact that order had been made by way of punishment.

6. Regulation 9, to the extent it is material, is as follows:

"9. Termination of Service. — (a) Except as otherwise specified in the appointment orders, the services of an employee of the Authority may be

terminated without any notice or pay in lieu of notice—

(i) during the period of probation and without assigning any reasons therefor.

(ii) for misconduct.

(iii) on the completion of specific period of appointment,

(iv) in the case of employees engaged on contract for a specific period, on the expiration of such period in accordance with the terms of appointment.

(b) Where the termination is made due to reduction of establishment or in circumstances other than those mentioned at (a) above, one month's notice or pay in lieu thereof will be given to all categories of employees.

(c)

Regulation 15 says that a breach of the Standing Order issued from time to time by the Delhi Road Transport Authority will amount to misconduct. The penalties which can be imposed for misconduct are enumerated out of which dismissal is one. It is provided that no order of dismissal, removal or other punishment except censure shall be passed unless the procedure laid down in clause (c) is followed. That clause outlines the steps which must be taken in the matter of affording an opportunity to the delinquent employee and of an inquiry which is to be conducted in the matter.

7. Now Regulation 9 clearly provides for termination of services in two modes; the first is where the services may be terminated without any notice or pay in lieu of notice. This can be done among other reasons for misconduct. The second mode is of terminating the services owing to reduction of establishment or in circumstances other than those mentioned in clause (a) which relate to termination without notice. When termination is made under clause (b) one month's notice or pay in lieu thereof is to be given to the employee. Thus it is clear that if the employer chooses to terminate the services in accordance with clause (b) after giving one month's notice or pay in lieu thereof it cannot amount to termination of service for misconduct within the meaning of clause (a). It is only when some punishment is inflicted of the nature specified in Regulation 15 for misconduct that the procedure laid down therein for an inquiry etc., becomes applicable. The contention which ap-

appears to have prevailed with the High Court and which has been pressed before us is that although the order was made in perfectly harmless and innocuous terms and purported to be within Regulation 9 (b) it was a mere camouflage for inflicting punishment for breach of Standing Order 17 inasmuch as the respondent had approached the High Court under Art. 226 of the Constitution without exhausting the departmental remedies. The High Court relied on the observation in *S. R. Tewari v. District Board Agra*, (1964) 3 SCR 55 = (AIR 1964 SC 1680) that the form of the order under which the employment of a servant was determined was not conclusive of the true nature of the order. The form might be merely to camouflage an order of dismissal for misconduct and it was always open to the court before which the order was challenged to go behind the form and ascertain the true character of the order. In that case it was held that the employment was terminated by giving a notice in accordance with the rules and it was not a case of dismissal.

8. The learned Attorney-General for the appellant has sought to distinguish cases which fall under Art. 311 and those which are governed by statutory provisions or rules containing provisions analogous to Art. 311. According to his submission the concept of punishment is not relevant when the employer chooses to terminate the employment of an employee in accordance with the conditions of service. All that has to be seen is whether the order made by him is in conformity with the statutory powers. He has further submitted that where the master chooses to follow the mode of terminating the services prescribed by Regulation 9 (b) no stigma attaches to such termination and no question of the employee having been punished can arise nor can it be examined in such a case whether the order made was a mere camouflage or cloak for dismissing an employee by way of punishment for misconduct. It has further been emphasised that what has to be seen is the situation obtaining on the date the order was made and no notice should or ought to be taken of any subsequent facts emerging out of correspondence or pleadings in a Court of law in reply to the allegations in the plaint of mala fide and the like.

9. It does not appear necessary to refer to numerous decisions which have been given by this Court in cases arising under Article 311 of the Constitution on the points debated before us by counsel for both sides. In *State of Punjab v. Shri Sukhraj Bahadur*, (1968) 3 SCR 234 at p. 244 = (AIR 1968 SC 1089 at p. 1094) most of these cases have been discussed. By a conspectus of these cases, it was stated, the following propositions clearly emerge:

"1. The services of a temporary servant or a probationer can be terminated under the rules of his employment and such termination without anything more would not attract the operation of Article 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination of service have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an inquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service, does not attract the operation of Article 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Article 311, i. e., an Enquiry Officer is appointed, a charge-sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article".

In that case the departmental enquiry did not proceed beyond the stage of submission of charge-sheet followed by the respondent's explanation thereto. The enquiry was not proceeded with, there were no sittings of any enquiry Officer, no evidence was recorded and no conclusions arrived at on the enquiry. It was, therefore, held that the services had been terminated simpliciter under the rules of employment and Article 311 was not attracted. In the present case even if it is assumed that the law is the same as

would be applicable to a case governed by Article 311 it is difficult to say on the principles laid down in the above case that the services of the respondent were not merely terminated in accordance with Regulation 9 (b) which governed the conditions of his employment. It may be that the motive for termination of his services was the breach of Standing Order 17, i. e., of filing a writ petition in the High Court against the demotion without exhausting departmental remedies but the question of motive is immaterial. No charge-sheet was preferred under Regulation 15 nor was enquiry held in accordance therewith before the order under Regulation 9 (b) was made. It may be that if the respondent had successfully pleaded and proved mala fides on the part of the authority terminating his services the impugned order could be legitimately challenged but no foundation was laid in that behalf in the plaint nor was the question of mala fides investigated by the Courts below.

10. As regards the punishment having been inflicted for misconduct the order being a mere camouflage we are unable to endorse the view that any such question could arise in the present case. Regulation 9 (b) clearly empowered the authorities to terminate the services after giving one month's notice or pay in lieu of notice. The order was unequivocally made in terms of that Regulation. Even if the employers of the respondent thought that he was a cantankerous person and it was not desirable to retain him in service it was open to them to terminate his services in terms of Regulation 9 (b) and it was not necessary to dismiss him by way of punishment for misconduct.

11. The appeal is consequently allowed and the decree granted by the Courts below is set aside. In view of this Court's order dated November 1, 1968, the appellant will pay the costs of the respondent.

Appeal allowed.

AIR 1971 SUPREME COURT 840
(V 58 C 173)

(From: Bombay)*

S. M. SIKRI, G. K. MITTER AND
P. JAGANMOHAN REDDY, JJ.

Shankar Kerba Jadhav and others,
Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 79 of 1969,
D/- 8-9-1969.

(A) Criminal P. C. (1898), Section 423 (1) (a) — Powers of Appellate Court in disposing appeal — Appeal against acquittal — Order of acquittal preceded by order of sentence by Trial Court — Sentence within competence of trial Court alone can be passed by High Court — Cr. App. No. 818 of 1967, D/- 21-11-1968 (Bom), Partly Reversed; AIR 1955 Mad 608, Overruled.

Where the appeal is from an order of acquittal the matter is at large. There is no sentence which is binding on a person who was once an accused. He comes before the Court with the presumption of innocence. If the Court finds that the acquittal was not justified and that he was guilty of the offence with which he was charged, it is for the appeal Court to order punishment to fit the crime. If the appeal is from an order of acquittal with no prior order of sentence, the punishment must be commensurate with the gravity of the offence. But if the order of acquittal is preceded by an order of conviction the Court hearing the appeal from acquittal should not impose a sentence greater than what the Court of first instance could have imposed inasmuch as if the trial Court had given him the maximum sentence which it was competent to give and no appeal was preferred by the accused, the State could not have approached the High Court under any provision of the Code for enhancement of the sentence. The interposition of the order of an intermediate Court of appeal and acquittal of the accused by it should not put the accused in a predicament worse than that before the trial Court. Cr. App. No. 818 of 1967 D/- 21-11-1968 (Bom), Partly Reversed; AIR 1955 Mad 608, Overruled. Case law Ref. AIR

*(Cri. App. No. 818 of 1967, D/- 21-11-1968 — Bom.)

1966 SC 945, Explained.

(Paras 12, 16, 17)

(B) Criminal P. C. (1898), S. 423

(1) (a) — Appeal against acquittal — Acquittal preceded by order of sentence of Court of first instance — Show cause notice imposing penalty, within competence of trial Court, not necessary.

Where in an appeal from an order of acquittal preceded by an order of sentence the accused is given notice of appeal and actually takes part in the hearing before the High Court, it would be superfluous to give him notice to show cause why a sentence within the competence of the trial Magistrate should not be passed. The accused knows or ought to know that the High Court was bound to form its own conclusions on the material before it and award a sentence which the merits of the case demanded within the limit of the trial Court's jurisdiction. The absence of a show cause notice does not violate any known principle of natural justice.

(Para 18)

Cases Referred: Chronological Paras

- (1966) AIR 1966 SC 945 (V 53)
= (1966) 2 SCR 822, Jagat Bahadur Singh v. State of Madhya Pradesh 15
- (1959) AIR 1959 Andh Pra 530 (V 46) = 1959 Cri LJ 1141, Lakshminarayana v. Apparao 14
- (1955) AIR 1955 Mad 608 (V 42) = 1955 Cri LJ 1365, Public Prosecutor v. Annamalai 14
- (1947) AIR 1947 Mad 368 (V 34) = (1947) 1 Mad LJ 238, In re Tirumal Raju 14 15
- (1940) AIR 1940 Rangoon 118 (V 27) = (1940) 41 Cri LJ 621, Maung E Maung v. The King 14 15
- (1935) AIR 1935 Nag 139 (V 22) = (1935) 36 Cri LJ 867, Emperor v. Abbas Ali 14
- (1924) AIR 1924 Allahabad 130 (V 11) = (1923) ILR 45 All 594, Emperor v. Md. Yakub Ali 14 15
- (1912) ILR 39 Cal 157 = 12 Cri LJ 529 (FB), Mehi Singh v. Mangal Khandu 15
- (1911) 11 Ind Cas 788 = 12 Cr LJ 444 (Nag), Sita Ram v. Emperor 13
- (1907) ILR 30 Mad 48 = 5 Cri LJ 88, Parameswara Pillay v. Emperor 13
- (1906) ILR 29 Mad 190 = 3 Cri LJ 281, Muthiah Chetty v. Emperor 13

(1902) 2 Weir 487, In re Ramaswami

Chetty 13

(1894) ILR 21 Cal 622, Mahmudi

Sheik v. Aji Sheik 13

M/s R. V. Pillai and Subodh Markandeya, Advocates, for Appellants; Mr. H. R. Khanna, Advocate, and Mr. B. D. Sharma, Advocate, for Mr. S. P. Nayar, Advocate, for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.: — The six appellants in this appeal were charge-sheeted for having committed offences punishable under Sections 147, 447 and 325 read with Section 149 of the Indian Penal Code in the Court of the Judicial Magistrate, First Class, Deglur, District Nanded. Considering the evidence on record the Magistrate held that the accused were members of an unlawful assembly on September 27, 1965 at the village school Chotwadi with the common object of causing injuries to the complainant. He also found that the accused had committed house trespass into the compound of the school and actually caused grievous hurt to the complainant, a school teacher, in pursuance of the common object of their unlawful assembly. He convicted the accused for offences under Sections 147, 447 and 325 read with Section 149, I. P. C. and sentenced each of them to suffer rigorous imprisonment for 15 days and to pay a fine of Rs. 50 and in default of payment of fine to suffer further rigorous imprisonment for 15 days on the first count under Section 447 read with Section 149, I. P. C. and sentenced each of them to suffer rigorous imprisonment for six months and to a fine of Rs. 200 or in default of payment of fine to suffer further rigorous imprisonment for one month on the second count under Section 325 read with Section 149, I. P. C. He did not pass any fresh sentence on the third count under Section 147, I. P. C. He directed that the substantive sentences of imprisonment passed against accused on both counts should run concurrently. He also directed that in case the amount of fine was recovered, Rs. 200 should be paid to the complainant Murlidhar as compensation for the injury sustained by him under Section 545 (1) (b) of the Code of Criminal Procedure. The accused went up in appeal which was heard by the Additional Sessions Judge at

Nanded. The Sessions Judge allowed the appeal and set aside the orders of conviction and directed the accused to be set at liberty. The order for payment of fine also was set aside. The State went up in appeal against the order of acquittal to the High Court. The appeal was allowed by the High Court and the order of acquittal was set aside. The High Court convicted all the six accused under Sections 147 and 447 and 325 read with Section 149, I. P. C. and taking the view that the assault on the village teacher was wanton and unprovoked proceeded to deal with the culprits more firmly than the trying Magistrate. It passed sentence on the second accused holding him to be responsible for the blow which caused the fracture of the left ulna of the complainant, to one year's rigorous imprisonment and a fine of Rs. 300 and two months' further rigorous imprisonment in default under Section 325 read with Section 149 of the Penal Code. It also held that the remaining accused had played a comparatively minor part and injuries inflicted by them were simple. The sentence passed on each of them was six months' rigorous imprisonment and a fine of Rs. 100 and one month's further imprisonment in default under Section 325 read with Section 149, I. P. C. A further sentence of three months' imprisonment was passed on all the accused for the offence under Section 447 read with Section 149. No separate sentence was passed under Section 147. This Court granted special leave to appeal to the accused "limited to the question of legality of sentence passed by the High Court".

2. Counsel on behalf of the appellants put forward his argument in a twofold manner. His first contention was that it was not open to the High Court exercising appellate jurisdiction under Section 423 (1) (a) of the Code of Criminal Procedure to enhance the sentence passed by the trial Magistrate. The second branch of his argument was that even if the High Court was competent to do so, the appellants should have been asked to show cause why the sentence imposed on them by the Magistrate should not be enhanced and in the absence of such an opportunity, no enhancement of sentence was competent. As the trial was by a Magistrate of the First Class the maximum sentence

which could have been imposed on the accused was under Section 32 of the Code limited to a term of imprisonment not exceeding two years and a fine not exceeding Rs. 2,000. Under the Indian Penal Code the limit of punishment for an offence under Section 447 is imprisonment for a term which may extend to three months or with fine which may extend to Rs. 500 or with both, but an offence under Section 325 can be punished with imprisonment of either description for a term which may extend to seven years besides a fine.

3. Under Section 417 (1) of the Criminal Procedure Code an appeal against acquittal lies only to a High Court. Under Section 418 an appeal lies on a matter of fact as well as on a matter of law except in cases where the trial is by a jury. Sections 419 and 420 deal with the procedure for lodging an appeal and Section 421 gives the appellate Court the power to dismiss the appeal summarily on receiving the petition of appeal if it considers that there is no sufficient ground for interfering with the impugned order. Under Section 422 it is obligatory on the appellate Court if it does not dismiss the appeal summarily to cause notice to be given to the appellant or to his pleader of the time and place at which the appeal will be heard and a like notice to be given to the accused.

4. The powers of the appellate Court in disposing of the appeal are contained in Section 423 of the Code. The Court after giving the notice of appeal under S. 422 has to send for the record of the case and after perusing such record and hearing the appellant or his Pleader if he appears and the Public Prosecutor if he appears and in case of appeal under Section 417 the accused if he appears, it may dismiss the appeal in case it is satisfied that there is no sufficient ground for interfering. Where the appeal is from an order of acquittal it may under Section 423 (1) (a) reverse such order and direct that further enquiry be made or that the accused be re-tried or committed for trial as the case may be and find him guilty and pass a sentence on him according to law. No limits are here set to the sentence which may be passed by the appellate Court except that it must be "according to law". This power may be contrasted with the power under Cl. (b) of

Section 423 (1) dealing with appeals from a conviction. For such appeals the Legislature specified the powers of the appellate Court with a good deal of precision. Under sub-clause (b) a Court can—

"(1) reverse the finding and sentence and acquit or discharge the accused or order him to be tried by a Court of competent jurisdiction subordinate to such appellate Court or committed for trial, or

(2) alter the finding, maintaining the sentence, or with or without altering the finding reduce the sentence, or

(3) with or without such reduction and with or without altering the finding, alter the nature of the sentence but subject to the provisions of Section 106, sub-section (3), not so as to enhance the sentence".

It would appear from the above that wide though the powers of the appellate Court be in dealing with an appeal from a conviction, it has no jurisdiction to enhance the sentence even if it alters the finding, or without altering the finding takes the view that greater punishment than what was meted is called for.

5. Sub-clause (1) (b) however is not the last word for Clause (1-A) introduced in the section in the year 1965 expressly provides that a High Court exercising jurisdiction under Clause (1) (b) may enhance the sentence notwithstanding anything inconsistent therewith contained in the said clause provided the accused has had an opportunity of showing cause against such enhancement.

6. Section 423, Clause (1) (b) is based on the principle that where it is the convicted person who complains against the punishment given to him, he should not be put in peril of a greater punishment if the State takes no exception to the order impugned by the convicted person. The insertion of Clause (1-A) makes it clear that although the powers of Courts subordinate to the High Court are limited under Clause (1) (b) the High Court may in a proper case enhance the sentence after giving an opportunity to the accused to show cause against the proposal.

7. Apart from the powers under Chapter XXXI of the Code (containing Sections 404 to 431) which

principally deals with appeals the High Court has powers inter alia of revision under Chapter XXXII of the Code. Under Section 435 not only the High Court but even Courts subordinate to it may call for and examine the record of any proceeding before any inferior criminal Court for the purpose of satisfying itself as "to the correctness, legality or propriety of any finding, sentence or order recorded or passed and as to the regularity of any proceeding of such inferior Court". Section 439 deals exclusively with the High Court's powers of revision. Under this section the High Court is empowered in the case of any proceeding the record of which has been called for by itself or which has been reported for orders or which otherwise comes to its knowledge, to exercise the powers conferred on a Court of appeal by Sections 423, 426, 427 and 428 or on a Court by Section 338 (power to direct tender of pardon) and may enhance the sentence but sub-section (2) of the section lays down that such an order is not to be made to the prejudice of the accused unless he has an opportunity of being heard either personally or by a pleader in his own defence. Further when an accused is called upon to show cause why his sentence should not be enhanced he has a right to challenge his conviction under sub-section (6).

8. Referring to the above provisions of the Code counsel for the appellants argued that in all cases where it was considered necessary the Legislature was careful to provide that the accused should never be subjected to a greater punishment by a superior Court unless he was asked to show cause against the proposed enhancement. As there was no such provision in Section 423 (1) (a) the Legislature must be taken to have contemplated that in any case of an appeal against acquittal the accused should not be subjected to a punishment greater than what had been meted out to him by the punishing Court. It was also argued that the words in Sec. 423 (1) (a) empowered the appellate Court (the High Court in this case) to pass sentence on the accused according to law which is in contrast to the words used in Section 31 (1) of the Code under which a High Court may pass "any sentence authorised by law". It was argued that Section 423 (1) (a) thus cuts down the power which the

High Court might otherwise have had under Section 31 (1).

9. In our view the difference in the wording of Section 31 (1) and Section 423 (1) (a) is a matter of no moment. The expression "authorised by law" means sanctioned by law while "according to law" means in conformity with law. The question remains as to what would be a sentence according to law when a High Court sets aside an order of acquittal when the same is preceded by a sentence of an inferior Court. Is the High Court empowered to award any sentence which the law allows under the relevant section of the Indian Penal Code, or is its jurisdiction limited to such a sentence as was within the competence of the Court punishing the offenders or again, is it to restore the sentence originally passed?

10. Let us look at the question apart from the authorities. An appeal is a creature of a statute and the powers and jurisdiction of the appellate Court must be circumscribed by the words of the statute. At the same time a Court of appeal is a "Court of error" and its normal function is to correct the decision appealed from and its jurisdiction should be co-extensive with that of the trial Court. It cannot and ought not to do something which the trial Court was not competent to do. There does not seem to be any fetter to its power to do what the trial Court could do. In this case the trial Magistrate was competent to pass a sentence of imprisonment up to two years and the High Court's jurisdiction hearing an appeal would therefore be limited to a sentence up to that period and no more.

11. A special provision for asking the accused to show cause when the appeal is from an order of conviction or when the High Court exercises its revisional jurisdiction, is not in derogation of the above rule. As already indicated, when the accused prefers an appeal and the State is satisfied with the punishment meted out it is only logical to hold that the appellant should not stand in peril of something to his further detriment unless he is put on notice that the power of enhancement may be exercised. The same applies to the High Court's power of revision under Section 439. The Legislature felt that when the High Court is exercising powers in this regard, it should be

given all the powers of a Court of appeal including the power to enhance the sentence. Sub-section (2) of Section 439 is only meant to give an opportunity to the accused so that he be not condemned unheard and sub-section (6) is only an amplification of that principle and gives him a right to challenge his conviction if he is put in peril of enhancement of sentence.

12. Where however the appeal is from an order of acquittal the matter is at large. There is no sentence which is binding on a person who was once an accused. He comes before the Court with the presumption of innocence. If the Court finds that the acquittal was not justified and that he was guilty of the offence with which he was charged, it is for the appeal Court to order punishment to fit the crime. If the appeal is from an order of acquittal with no prior order of sentence, the punishment must be commensurate with the gravity of the offence. But if the order of acquittal is preceded by an order of conviction the Court hearing the appeal from acquittal should not impose a sentence greater than what the Court of first instance could have imposed inasmuch as if the trial Court had given him the maximum sentence which it was competent to give and no appeal was preferred by the accused, the State could not have approached the High Court under any provision of the Code for enhancement of the sentence. The interposition of the order of an intermediate Court of appeal and acquittal of the accused by it should not put the accused in a predicament worse than that before the trial Court.

13. We may now proceed to examine the earlier authorities. In *re Ramaswami Chetty*, (1902) 2 Weir 487, the action of the appellate Magistrate enhancing a fine of Rs. 50 to Rs. 65 was held to be illegal by the Madras High Court. In *Muthiah v. Emperor*, (1906) ILR 29 Mad 190 = 3 Cri LJ 281 it was said that an appellate Court has not an unlimited power but was only empowered to do which the lower Court could and should have done. In *Sita Ram v. Emperor*, (1911) 11 Ind Cas 788 = 12 Cri LJ 444 (Nag) which went up to the Nagpur Judicial Commissioner's Court by way of revision, the appellants had been convicted under S. 324, I. P. C. and sentenced to rigorous imprisonment for a term

of four months each by a Magistrate of the Second Class. On appeal the District Magistrate maintained the convictions but altered the sentences on each of the accused to one of fine only; and in default rigorous imprisonment was ordered for four months. Before the Judicial Commissioner it was contended that the sentence of fine imposed on the applicants was illegal so far as it exceeded the maximum fine which could have been inflicted by the Magistrate by whom they were tried. The Court held that when the District Magistrate decided that the case was one punishable with fine only he should have inflicted a fine which was within the jurisdiction of the trying Magistrate. The learned Judge relied on the decisions in *Mahmudi Sheik v. Aji Sheik*, (1894) ILR 21 Cal 622; (1906) ILR 29 Mad 190 = 3 Cri LJ 281 (supra), *Parameswara Pillay v. Emperor*, (1907) ILR 30 Mad 48 = 5 Cri LJ 88 and observed that alike in civil and in criminal cases the power of the appellate Court was measured by the power of the Court from whose judgment or order the appeal before it had been made.

14. The decisions in *Maung E. Maung v. The King*, AIR 1940 Rangoon 118; *Emperor v. Md. Yakub Ali*, (1923) ILR 45 All 594 = (AIR 1924 All 130), *Lakshminarayana v. Apparao*, AIR 1959 AP 530 and *Emperor v. Abbas Ali*, AIR 1935 Nag 139 are on the same lines. A different note was however struck in *Public Prosecutor v. Annamalai*, AIR 1955 Mad 608. This was a case of an appeal preferred by the State against the acquittal of two accused by a Magistrate. The High Court finding the accused guilty took the view that "passing sentence according to law" meant passing any sentence that could be given for the offence. According to the learned single Judge the powers of an appellate Court in hearing an appeal against acquittal were not in anyway restricted or limited to the powers of the trial Court. He said:

"Though there is no such limitation or restriction, still there is one circumstance which altogether cannot be ignored and which must indeed be considered before imposing the sentence and that is, what is it that the accused would have got if he was convicted by the Magistrate. He would not have got more than six months,

the maximum the Second Class Magistrate who tried him can give.

The fact that he has been acquitted should not place him in a more disadvantageous position than if he were convicted. The sentence should not therefore be more severe than what he should have got in a case of conviction".

Accordingly the accused were sentenced to six months' rigorous imprisonment. In an earlier decision of the same High Court in *re Tirumal Raju*, AIR 1947 Mad 368 another learned single Judge though disposed to accept the contention that the appellate Magistrate had no jurisdiction to enhance the fine beyond the powers of trial Magistrate, maintained the order sought to be revised by exercising power under Section 439 (3) of the Code. Running through the web of the above decisions the principle almost universally accepted is that in exercise of its appellate powers the High Court should not award a sentence which is beyond the jurisdiction of the trial Court and in our opinion this is the principle which should be adopted.

15. Our attention was however drawn to certain observations in *Jagat Bahadur Singh v. State of Madhya Pradesh*, (1966) 2 SCR 822 = (AIR 1966 SC 945), where a good many of the above authorities were taken note of by this Court. Referring *inter alia* to the cases of *Mehi Singh v. Mangal Khandu*, (1912) ILR 39 Cal 157 (FB), *Emperor v. Muhammad Yakub Ali*, (1923) ILR 45 All 594 = (AIR 1924 All 130) (supra), *Maung E. Maung v. The King*, AIR 1940 Rangoon 118 (supra) and *In re, Tirumal Raju*, AIR 1947 Mad 368 (supra) it was said that these cases laid down the correct law. The Court also added:

".....both on principle and authority it is clear that the power of the appellate Court to pass a sentence must be measured by the power of the Court from whose judgment an appeal has been brought before it".

16. The question is, can this observation be pressed into service by the appellants on the ground that as the Sessions Judge hearing the appeal from the order of the Magistrate could not have enhanced the sentence, it was not open to the High Court to do so when hearing an appeal from the order of acquittal by the Sessions Judge. In other words, could the

High Court have done what the Sessions Judge was not empowered to do? In our opinion, the answer must be in the affirmative. When the order of the Magistrate was set aside by the Sessions Judge the matter became one at large and the High Court hearing an appeal therefrom was empowered under Section 423 (1) (a) to pass a sentence according to law. It could therefore pass any sentence which the Magistrate trying the case was empowered to pass and the High Court in this case did not exceed that limit. A strange result would follow if we were to accept the contention. If the accused had been acquitted by the Magistrate and the State had filed an appeal against the order of acquittal, the High Court would no doubt have power to impose any sentence, which the Magistrate would have been entitled to impose. But if the accused is acquitted on appeal by the Sessions Judge, the power of the High Court would be limited. Surely the Code does not contemplate this difference in the appeals under Section 417, Criminal P. C.

17. Further the Sessions Judge would have been entitled to recommend enhancement of sentence to the High Court if he had maintained the conviction. And the High Court could suo motu have issued notice for enhancement. If we were to accept the contention, finality is attached to the sentence given by the Magistrate. We do not think this is the scheme of the Code. On the other hand the scheme of the Code seems to be to confer final authority on the High Court. The first contention therefore fails and we hold that in disposing of an appeal from an order of acquittal the High Court is competent to pass a sentence which the trial Court was empowered to pass.

18. The second branch of the argument is without any merit. Where the accused is given notice of appeal and actually takes part in the hearing before the High Court, it would be superfluous to give him notice to show cause why a sentence within the competence of the trial Magistrate should not be passed. The accused knows or ought to know that the High Court was bound to form its own conclusions on the material before it and award a sentence which the merits of the case demanded within the limit of the trial Court's jurisdiction. The

absence of a show cause notice does not violate any known principle of natural justice.

19. On the facts of the case, we are of the view that the sentence imposed by the High Court should be reduced to that originally imposed by the trial Magistrate. The appeal is allowed in part to this extent.

Appeal partly allowed.

AIR 1971 SUPREME COURT 846
(V 58 C 174)

(From Bombay: ILR (1963) Bom 313)
S. M. SIKRI, R. S. BACHAWAT AND
K. S. HEGDE, JJ.

The State of Gujarat, Appellant
v. Dr. Faghunath Balkrishna Chandrachud, Respondent.

Civil Appeal No. 579 of 1965, D/-
19-11-1968.

(A) Constitution of India, Art. 363
— Huzur order of Maharaja of Baroda granting pension and premature retirement compensation to civil servant of State after accession but before merger — By virtue of Clause 2 of Article VIII of Merger Agreement, Successor Government is bound by the order — Forfeiture of compensation paid — Compensation cannot be recovered under Section 143, Baroda Land Revenue Code — Words 'pension' in Clause (a) of Article VIII must have wide interpretation so as to include lump sum payable as compensation upon retirement.

Held, Executive Council Rules made by the Maharaja of Baroda on September 16, 1948 (before the State's merger, on March 21, 1949 but after the accession to Dominion of India on August 15, 1947) vested in the Executive Council the entire executive authority in regard to the administration of the Baroda State in all matters without any reservation. The prerogative and inherent powers of the Maharaja were not delegated to the Executive Council. The Maharaja was still the sovereign-ruler. The Huzur order giving compensation to the respondent on account of his premature retirement, was passed by the Maharaja on February 8, 1948 in the exercise of his prerogative and inherent powers. The order was executed and the monies were paid under it to the respondent. The Executive

DN/EN/G170/68/RGD/M

Council had no authority to revoke the Huzur order and to forfeit the monies. The order of the Executive Council dated April 22, 1949 forfeiting the monies so paid was ultra vires its powers and was illegal and not binding upon the respondent.

(Paras 5, 6)

The direction in the order for the recovery of monies under Section 148 of the Baroda Land Revenue Code was illegal. That section did not allow recovery of moneys payable under an order of the Executive Council. The recovery from the respondent under the invalid order of the Executive Council could not be justified as an act of State. The result of the illegal recovery was that to the extent of amount sanctioned as compensation the liability of the Baroda Government under the Huzur Order remained outstanding.

(Para 6)

In cases where the Government of India has acquired the territory of a sovereign Indian State either by conquest, treaty, cession or otherwise the privileges and rights obtained from the predecessor State cannot be enforced by action against the Government of India, unless it has chosen to recognise the right, privilege, debt or liability by legislation, agreement, or otherwise. The rule extends to the acts of the predecessor State after its accession to the Dominion of India on August 15, 1947 and before its complete merger in the Dominion. Case law Ref.

(Para 7)

The onus of proving that the successor governments recognized the rights and liabilities under the Huzur order dated February 8, 1948 is upon the respondent. The recognition may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights of the new sovereign. AIR 1924 P. C. 216 and AIR 1964 S. C. 1043, Ref.

(Para 8)

The Huzur Order dated February 8, 1948 was not law. A grant made by the Ruler of Indian State is not law. The Huzur order dated February 8, 1948 did not lay down a rule of conduct for the official members of the Executive Council generally. It fixed the retirement benefits of the respondent. The order was an executive act and had none of the characteristics of law. Case law Ref.

(Para 9)

Clause 2 of Art. VIII of the Merger Agreement dated March 21, 1949, which applied to the respondent who was a member of the public services of the Baroda State and who retired before the merger guaranteed continuance of the pension and leave salary sanctioned to him by the Maharaja. Ordinarily the word "pension" means a periodical allowance of money granted by the Government in consideration or recognition of meritorious services.

(Para 10)

But the word "pension" (pensionem, payment) in its widest etymological sense can be construed as including all payments of every kind and description to a retiring government servant.

(Para 10)

Considering that the object of Article VIII was to guarantee payment of retirement benefits to retired public servants of the merged State, the word "pensions" should not be given a narrow interpretation. The word "pensions" in clause 2 of Article VIII included the lump sum payable to the respondent as compensation under the Huzur order dated February 8, 1948 as modified by the Huzur order dated July 22, 1948. In substance, the Huzur order directed that the respondent would get his full salary as his pension from the date of his premature retirement up to the completion of his superannuation age and allowed him to draw immediately the entire allowance for the period in one lump sum. The allowance so payable to the respondent, in recognition of his past services was "pension" within the meaning of cl. 2 of Article VIII of the Merger Agreement.

(Para 11)

Article VIII of the Merger Agreement thus furnished strong evidence of recognition by the Government of India of the liability to pay retirement compensation under the Huzur Order dated February 8, 1948. In the circumstances it must be held that the successor governments recognized and took over the liability under the Huzur Order dated February 8, 1948. If so the liability now devolved on the State of Gujarat.

(Para 12)

(B) Baroda Land Revenue Code, Section 148 — Section does not allow recovery of monies paid under orders of Executive Council of State — Order passed by Maharaja in exercise of his prerogative and inherent powers — Monies paid under the order cannot be recovered under S. 148.

(Para 6)

(C) Pensions Act (1871), S. 1 — Word 'pension' implies periodical payments to pensioner — In wider sense, in which it is used in cl. 2 of Art. VIII of the Baroda State Merger Agreement dated March 21, 1949, it means lump sum paid as retirement benefit to civil servant upon his retirement.

(Para 11)

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 40 (V 54)=

(1966) Supp SCR 81, Firm Bansidhar Premasukhdeo v. State of Rajasthan

(1966) AIR 1966 SC 442 (V 53)=

(1966) 1 SCR 357, Pema Chibbar v. Union of India

(1966) AIR 1966 SC 704 (V 53)=

(1966) 2 SCR 56, State of Madhya Pradesh v. Lal Bhargavendra Singh

(1966) AIR 1966 SC 820 (V 53)=

(1966) 2 SCR 53, State of Madhya Pradesh v. Col. Ram Pal

(1964) AIR 1964 SC 1043 (V 51)=

(1964) 6 SCR 461, State of Gujarat v. Fiddali

(1964) AIR 1964 SC 1793 (V 51)=

(1964) 7 SCR 112, R. N. Pratap Singh Deo v. State of Orissa

(1964) AIR 1964 SC 1866 (V 51)=

(1964) 7 SCR 124, M/s. Dalmia Dadri Cement Co. Ltd. v. The Commissioner of Income-Tax

(1964) AIR 1964 SC 1903 (V 51)=

(1964) 7 SCR 892, Union of India v. Gwalior Rayon Silk Manufacturing (Weaving) Co.

(1963) AIR 1963 SC 953 (V 50)=

(1963) Supp 2 SCR 515, Maharaja Shri Umaid Mills Ltd. v. Union of India

(1961) AIR 1961 SC 1361 (V 48)=

(1962) 1 SCR 205, Jagannath Agarwala v. State of Orissa

(1958) AIR 1958 SC 816 (V 45)=

1959 SCR 729, M/s. Dalmia Dadri Cement Co. v. Commissioner of Income-Tax

(1931) AIR 1931 PC 160 (V 18)

= (1931) 58 Ind App 215, Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.

(1924) AIR 1924 PC 216 (V 11)

= (1924) 51 Ind App 357, Vajesingji Joravarsingji v. Secretary of State for India

(1880) ILR 4 Bom 432, Secy. of State v. Khemchand Jeychand

Mr. N. S. Bindra, Sr. Advocate, (M/s. M. S. K. Sastri and S. P. Nayar,

Advocates, with him), for Appellant; Mr. S. T. Desai, Sr. Advocate (Dr. Y. S. Chitale and D. N. Misra, Advocates, and M/s. J. B. Dadachanji and Co., Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

BACHAWAT, J.: — In January, 1948 in view of the imminent constitutional changes in the Baroda State, it was considered likely that the services of the Diwan Sri Sudhalkar, the appellant and Sri Gaekwad, three official members of the Executive Council of the State would be prematurely terminated. The respondent was then drawing a salary of Rs. 2000 per month and was to retire on February 14, 1952 on reaching the superannuation age of 56 years. On January 28, 1948, His Highness the Maharaja of Baroda enhanced the respondents salary to Rs. 2500/- per month. By separate orders the salaries of other official members also were enhanced. By a Huzur order dated February 8, 1948 the Maharaja fixed the pension and other retirement benefits of the respondent and Sri Gaekwad.

2. The order was in these terms:—

"His Highness the Maharaja Sahab has been pleased to order that in the event of premature retirement of the Government Members, Messrs. D. V. Gaekwad and Chandrachud, they will get forthwith as compensation an amount equivalent to the total amount they would have received had they continued in service upto the date of retirement and a full pension of Rs. 500/- per month from the date of the premature retirement.

2. Mr. D. V. Gaekwad's salary is raised to Rs. 2000/- from the date of his confirmation as Naib Dewan".

On the same date the Maharaja by a separate order fixed the pension and retirement benefits of Sri Sudhalkar. On May 18, 1948, the Maharaja directed the compulsory retirement of the respondent with effect from June 1, 1948. Soon thereafter the respondent drew from the State Treasury Rs. 95196/4/- on account of compensation allowance. On June 1, 1948 he retired from service. On the same date Dr. Jivraj Mehta became the Diwan and President of the Executive Council in place of Sri Sudhalkar. On the representation of Dr. Jivraj Mehta

the Maharaja passed another Huzur order on July 22, 1948 modifying his previous orders and directing that the respondent and the other officials would draw pension only as and when they would reach the age of retirement and that the respondent would in addition draw the salary to which he might be eligible under the account Rules. In October, 1948 there was correspondence touching the Huzur Orders between the Maharaja and Dr. Jivraj Mehta. On April 22, 1949 the Executive Council of the State of Baroda headed by Dr. Jivraj Mehta purported to review and set aside the Huzur Orders with respect to payment of compensation to the retiring officials and directed that (1) the respondent would get 4 months' privilege leave salary and as from April 1, 1949 the pension of Rs. 500/- per month sanctioned by the Maharaja, (2) the amount received by the respondent as compensation be forfeited to the State and returned by him to the Treasury; (3) Rs. 77,416/- consequently due from him after taking into account his salary and pension up to March 31, 1949 be recovered from him under Section 148 of the Baroda Land Revenue Code. Pursuant to this order the respondent's properties were attached on April 26, 1949. The respondent was compelled to refund to the State Treasury Rs. 55,000/- on April 27, 1949 and Rs. 10,000/- on April 29, 1949. On March 14, 1952 the Collector of Baroda sent a notice to the respondent demanding payment of the balance of Rs. 12,416/-. The respondent continued to draw pension at the rate of Rs. 500/- per month from April 1, 1949. On April 17, 1952, he gave notice of his intention to file the present suit under Section 80 of the Code of Civil Procedure. On June 23, 1952 he instituted the suit against the State of Bombay asking for a declaration that the Huzur order dated February 8, 1948 as modified by the Huzur order dated July 22, 1948 was valid and binding on the defendant, a declaration that the order of the Executive Council dated April 22, 1949 was invalid, an injunction restraining the defendant from recovering Rupees 12416/- and a decree for Rs. 65,000/-, and interest thereon totalling Rupees 77,300/-, future interest and costs. On August 31, 1955, the Trial Court decreed the suit. On appeal, the High Court held that the respondent was

entitled to recover Rs. 65000/- only without interest and was liable to refund Rs. 17,250/- drawn on account of pension from April 1, 1949 upto February 14, 1952. Consequently, the High Court reduced the money decree to Rs. 47,750/- gave proportionate costs and confirmed the rest of the decree. The present appeal has been filed by the State of Gujarat after obtaining a certificate from the High Court.

3. It is necessary at this stage to refer to the constitutional and political changes culminating in the merger of Baroda State in the Province of Bombay. The Maharaja of Baroda enjoyed internal sovereignty in the State under the suzerainty of the British Crown. In 1940 the Maharaja enacted the Government of Baroda Act, 1940 (Act No. VI of 1940). Section 3 provided that Baroda would continue to be governed by the Maharaja and that all rights, authority and jurisdiction appertaining to its Government was exercisable by him except as provided in the Act or "as may be otherwise directed by his Highness". Section 4 preserved all the Maharaja's powers, legislative, executive and judicial, in relation to the State and its Government and his right and prerogative to make laws, and issue proclamations, orders and ordinances by virtue of his inherent authority. Section 5 vested the executive authority of the State in an Executive Council consisting of the Dewan and other members chosen by the Maharaja and holding office during his pleasure subject to the other provisions of the Act and the directions given by the Maharaja. Section 18 (d) provided that no Bill affecting any order passed by the Maharaja in exercise of his prerogative could be moved in the Dhara Sabha without the previous sanction of the Maharaja. Section 32 (f) provided that pensions and gratuities sanctioned by the Maharaja would be expenditure charged on the revenues of the State. On August 15, 1947 the Indian Independence Act 1947 was passed and the paramountcy of the British Crown lapsed. On the same date the State of Baroda acceded to the Dominion of India. Under the Instrument of Accession the Maharaja of Baroda ceded to the Dominion Legislature the power to legislate for the State of Baroda with respect to defence, external affairs and communications. The advent of indepen-

dence in India gave momentum to the popular movement for transfer of power from the Maharaja to the people and for formation of a responsible government in the State. On January 9, 1948 the Maharaja issued a proclamation directing the formation of a body elected on the basis of adult franchise to frame a Constitution for the State subject to certain reservations and announcing his intention to appoint popular representatives to the Executive Council. By another proclamation dated August 25, 1948 the Maharaja announced that (1) the Constitution framing assembly would have full and unrestricted authority to frame a Constitution for the State in respect of all matters and subjects; (2) the entire executive authority of the State would immediately vest in the Executive Council, the Government of Baroda Act would stand amended accordingly and the words "or as may be otherwise directed by His Highness" occurring in Section 3 and the whole of Section 4 of the Act would be deemed to be omitted. On September 16, 1948 the Maharaja promulgated the Baroda State Executive Rules. Rule 6 provided that "the Executive Council shall have the entire executive authority in regard to the administration of the State in all matters without any reservation". On March 21, 1949 the Maharaja executed the Baroda Merger Agreement whereby he ceded to the Dominion Government full authority, jurisdiction and powers for and in relation to the governance of the State and agreed to transfer the administration of the State to the Dominion Government on May 1, 1949. On May 1, 1949 the administration of the State was made over to the Dominion Government. As from that date all sovereign powers of the Maharaja of Baroda ceased and the Dominion Government acquired full and exclusive extra provincial jurisdiction for and in relation to the governance of the State of Baroda. By a notification No. 101-P, dated May 1, 1949 the Central Government in exercise of its powers under Section 3 (2) of the Extra-provincial Jurisdiction Act, 1947 delegated to the Provincial Government of Bombay its aforesaid extra provincial jurisdiction including the powers conferred by Section 4 of that Act to make orders for the exercise of the jurisdiction. By notification

No. 4530/46F of the same date the Government of Bombay in exercise of the powers conferred by Section 4 of the Extra-Provincial Jurisdiction Act, 1947 repealed the provisions of the Government of Baroda Act excepting Sections 1, 2 and 36 to 45 with immediate effect. On the same date the Government of Bombay promulgated the Administration of the Baroda State Order. Paragraph 3 of the order vested the executive authority of the State in a special commissioner subject to the supervision and control of the Bombay Government. Paragraph 4 (i) (b) provided for the continuance of (a) of any law, or (b) of any notification, order, scheme, rule, form or bye-law issued, made or prescribed under any law as were in force immediately before May 1, 1949 in the Baroda State. On July 23, 1949 the Government of Bombay promulgated the Bombay State (Application of Laws) Order, 1949. Paragraph 3 of the Order provided for the extension and continuance of certain laws to the Baroda States. Paragraph 5 repealed Sections 1, 2 and 36 to 45 of the Government of Baroda Act and certain other enactments. Paragraph 5 (iii) (a) provided that the repeal would not affect any right, title, obligation or liability already acquired, accrued or incurred, or any remedy or proceeding in respect thereof. On July 27, 1949 the Governor-General in exercise of his powers under Sec. 290A of the Government of India Act, 1935 promulgated the States' Merger (Governor's Provinces) Order, 1949. Paragraph 3 of the Order provided that Baroda would be merged in the province of Bombay and administered in all respects as if it formed part of that Province. Paragraph 4 provided for the continuance of laws then in force in the merged State. Paragraph 7 (1) provided that all liabilities in respect of such loans, guarantees and other financial obligations of the Dominion Government as arose out of the governance of a merged State, would as from August 1, 1949 be liabilities of the absorbing Province, unless the loan, guarantee or other financial obligation was relatable to central purposes. Paragraph 9 provided that any proceedings which if the order had not been passed might lawfully have been brought in the merged State against the Dominion might in the case of any liability arising before

August 1, 1949 be brought (a) against the Dominion if the proceedings could have been brought against the Dominion had the liability arisen after that date and (b) otherwise against the absorbing Province.

4. The questions arising for determination in this appeal are as follows:—

(1) Was the order of the Executive Council dated April 22, 1949 ultra vires its powers and invalid and not binding on the respondent; (2) Was the Government of Baroda liable to pay the sum of Rs. 65,000/- to the respondent; and (3) if so, has the liability devolved upon the State of Gujarat.

5. The Executive Council Rules made by the Maharaja of Baroda on September 16, 1948 vested, in the Executive Council the entire executive authority in regard to the administration of the Baroda State in all matters without any reservation. The Executive Council had very wide powers, but, in our opinion, they had no authority to override and rescind the Huzur orders passed by the Maharaja himself. The prerogative and inherent powers of the Maharaja were not delegated to the Executive Council. The Maharaja was still the sovereign-ruler. The members of the Executive Council were responsible to him and held office during his pleasure. No appeal lay from his order to the Executive Council. On the contrary under R. 46 of the Privy Council Rules promulgated on December 18, 1947 an appeal lay to the Maharaja from an order passed by the Executive Council. In view of Section 18 (d) of the Baroda Constitution Act, 1940 even a legislative bill affecting an order passed by the Maharaja in the exercise of his prerogative rights could not be moved in the Dhara Sabha without his previous sanction. Under Section 32 (f) pensions and gratuities sanctioned by the Maharaja were charged on the revenues of the State. The Huzur order was passed by the Maharaja on February 8, 1948 in the exercise of his prerogative and inherent powers. The order was executed and the monies were paid under it to the respondent. The Executive Council had no authority to revoke the Huzur order and to forfeit the monies. We hold that the order of the Executive Council dated April 22, 1949 was ultra vires its powers and was illegal and not binding upon the respondent.

6. It is now conceded that the direction in the order dated April 22, 1949 for the recovery of the monies under Section 148 of the Baroda Land Revenue Code was illegal. That section did not allow recovery of moneys payable under an order of the Executive Council. The attachment levied on the respondent's properties was unlawful. The recovery of Rs. 65,000/- from the respondent under the invalid order of the Executive Council cannot be justified as an act of State. The Courts below rightly found that the respondent was compelled to pay Rs. 65,000/- under coercion. The result of the illegal recovery was that to the extent of Rs. 65,000/- the liability of the Baroda Government under the Huzur Order dated February 8, 1948 remained outstanding.

7. The main question arising in the appeal is whether the liability of the Baroda Government under the Huzur order dated February 8, 1948 devolved upon the successor Governments after the merger of the Baroda State on May 1, 1949. The view which currently prevails in this Court is that in cases where the Government of India has acquired the territory of a sovereign Indian State either by conquest, treaty, cession or otherwise the privileges and rights obtained from the predecessor State cannot be enforced by action against the Government of India, see *M/s. Dalmia Dadri Cement Co. v. Commr. of Income-tax*, 1959 SCR 729 = (AIR 1958 SC 816) (cession of Jind), *Pema Chibar v. Union of India*, (1966) 1 SCR 357 = (AIR 1966 SC 442) (conquest of Duman), nor can it be sued in the municipal Courts for the debts and contractual liabilities of the predecessor, see *Jagannath Agarwala v. State of Orissa*, (1962) 1 SCR 205 = (AIR 1961 SC 1361). (Cession of Mayurbhanj), *Firm Bansidhar Premshukhdeo v. State of Rajasthan*, AIR 1967 SC 40 (Bharatpur), unless it has chosen, to recognise the right, privilege, debt or liability by legislation, agreement, or otherwise. The rule extends to the acts of the predecessor State after its accession to the Dominion of India on August 15, 1947 and before its complete merger in the Dominion. In *State of Gujarat v. Fiddali*, (1964) 6 SCR 461 = (AIR 1964 SC 1043) the Ruler of Sant State issued a resolution or Tharao granting certain forest rights on March 12, 1948 after the ac-

cession of the State to the Dominion. On June 10, 1948 he transferred the administration of the State to the Dominion under a merger agreement dated March 19, 1948. The Court held that the Tharao was not binding upon the successor Government. It was said that the Rulers of the Indian States parted with their sovereignty in successive stages, firstly on accession, and finally on merger. As a result of accession, the Dominion of India acquired power to legislate for the territories of the acceding State in respect of defence, external affairs, and communications. Under Section 5 of the Indian Independence Act the Dominion was as from August 15, 1947 a Union comprising the acceding State. But the acceding State continued to retain its separate existence and individual sovereignty until its complete merger in the Dominion.

8. The question then is whether the successor Governments recognized the rights and liabilities under the Huzur order dated February 8, 1948. The onus of proving the recognition is upon the respondent see *Vajesingji Joravarsingji v. Secy. of State for India*, 51 Ind App 357 at p. 361 = (AIR 1924 PC 216 at p. 218). The recognition "may be either express or may be implied from circumstances and evidence appearing from the mode of dealing with those rights of the new sovereign", see (1964) 6 SCR 461 = (AIR 1964 SC 1043) (supra) at p. 510 (of SCR) = (at p. 1062 of AIR).

9. On behalf of the respondent it was argued that the Huzur Order dated February 8, 1948, was a law and as such was recognised and continued in force by the Government of India. We are unable to accept this contention. A grant made by the Ruler of an Indian State is not a law, see *State of Gujarat v. Fiddali*, (supra) (461 of SCR) = (1043 of AIR) (grant of forest rights), *R. N. Pratap Singh Deo v. State of Orissa*, (1964) 7 SCR 112 = (AIR 1964 SC 1793) (grant of khorposh allowance), *Union of India v. Gwalior Rayon Silk Manufacturing (Weaving) Co.*, (1964) 7 SCR 892 = (AIR 1964 SC 1903) (grant of exemption from taxation), *State of Madhya Pradesh v. Lal Bhargavendra Singh*, (1966) 2 SCR 56 = (AIR 1966 SC 704) (grant of maintenance allowance), nor is an agreement executed by the Ruler a law,

see *Maharaja Shri Umaid Mills Ltd. v. Union of India*, (1963) Supp 2 SCR 515 = (AIR 1963 SC 953). Accordingly, it was held in *State of Madhya Pradesh v. Ram Pal*, (1966) 2 SCR 53 = (AIR 1966 SC 820) that an order granting retirement pension in relaxation of the State Pension and Gratuity Rules was not a law. The Huzur order dated February 8, 1948 did not lay down a rule of conduct for the official members of the Executive Council generally. It fixed the retirement benefits of the respondent and of Gaekwad and enhanced Gaekwad's salary. A separate order fixed the retirement benefits of Sudhalkar, the other official member. The order concerning the respondent was an executive act and had none of the characteristics of law. Unlike other laws it was not published in the *Adnya Patrika* or the official gazette of Baroda State. We hold that the order was not a law.

10. The next question is whether the Baroda merger agreement dated March 21, 1949 recognised the rights and liabilities under the Huzur Order dated February 8, 1948. Now the Articles of the merger agreement may furnish valuable evidence of the affirmation of rights conferred by the predecessor State, see 1959 SCR 729 = (AIR 1958 SC 816) (supra) at p. 748 (of SCR) = (at p. 826 of AIR). In the *State of M. P. v. Shyam Lal* a recognition of those rights was inferred from article in merger agreements providing for the continuance of the laws of the merging State and for the taking over its assets and liabilities by the new State. In the present case Article VIII of the merger agreement dated March 21, 1951 provided:—

(1) The Government of India hereby guarantees either the continuance in service of the permanent members of the Public Services of Baroda on conditions which will not be less advantageous than those on which they were serving before the date on which the administration of Baroda is made over to the Government of India or the payment of reasonable compensation.

(2) The Government of India further guarantees the continuance of pensions and leave salaries sanctioned by His Highness the Maharaja to the members of its public services of the State who have retired or proceeded on leave preparatory to retirement, before the date on which the administration

of Baroda is made over to the Government of India.

Clause (2) of Article VIII applies to the respondent. He was a member of the public services of the Baroda State and he retired before the date of the merger. It guarantees the continuance of the pension and leave salary sanctioned to him by the Maharaja. Now what does the word "pension" in Cl. (2) of Art. VIII mean? Ordinarily the word "pension" means a periodical allowance of money granted by the Government in consideration or recognition of meritorious services. The word "pension" in the Pensions Act, 1871, Section 60 (1) (g) of the Code of Civil Procedure, 1908 and Section 6 (g) of the Transfer of Property Act, 1882 implies periodical payments of money by Government to the pensioner, see *Nawab Bahadur of Murshidabad v. Karnani Industrial Bank Ltd.*, (1931) 58 Ind App 215 at pp. 219-20 = (AIR 1931 PC 160 at p. 161). Pension, gratuity and provident fund are three distinct types of retirement benefits. But the word "pension" (pensionem payment) in its widest etymological sense can be construed as including all payments of every kind and description to a retiring Government servant, see *Secy. of State v. Khemchand Jeychand*, (1880) ILR 4 Bom 432 at p. 436. The term "pension" is frequently, particularly in recent years, used in the broad sense of retirement allowance or adjusted compensation for services rendered, see *Corpus Juris Secundum*, Vol. 67 Page 331, Vol. 70, page 425. It has received the wider connotation in the definition sections of many modern statutes. To give a few illustration, the word "pension" includes "any payment of a lump sum in respect of a person's employment", see *Fatal Accidents Act*, 1959 (7 and 8 Elis, 2 c, 65), Section 2 (2), "a superannuation allowance", see *Midwives Act*, 1936 (26 Geo. 5 and 1 Edw. 8 c. 40), Section 2 (6) a "gratuity" and a return of contributions to a pension fund with or without interest thereon or any other addition thereto, see *Transport Act*, 1947, (10 and 11 Geo. 6 c. 49), Section 125 (1), *Gas Act*, 1948 (11 and 12 Geo. 6 c. 67), Section 74 (1).

11. Now Clause (1) of Article VIII of the merger agreement guarantees payment of reasonable compensation to officials whose services are dispensed with by the new Gov-

ernment. Clause 2 guarantees the continuance of pensions and leave salaries sanctioned by the Maharaja to officers who had retired before the date of the merger. Considering that the object of Article VIII is to guarantee payment of retirement benefits to retired public servants of the merged State, we are not inclined to give the word "pensions" a narrow interpretation. In our opinion, the word "pensions" in Clause 2 of Article VIII includes the lump sum payable to the respondent as compensation under the Huzur order dated February 8, 1948 as modified by the Huzur order dated July 22, 1948. In substance, the Huzur order directed that the respondent would get his full salary as his pension from the date of his premature retirement up to the completion of his superannuation age and allowed him to draw immediately the entire allowance for the period in one lump sum. The allowance so payable to the respondent, a retiring Government servant, in recognition of his past services is "pension" within the meaning of Clause 2 of Article VIII of the merger agreement.

12. Article VIII of the merger agreement thus furnishes strong evidence of recognition by the Government of India of the liability to pay retirement compensation under the Huzur order dated February 8, 1948. We have also noticed that the successor Governments continued the old laws of the Baroda State until they were repealed or altered. The successor Governments resisted the respondent's claim on the ground that the order of forfeiture passed by the Executive Council on April 22, 1949 was lawful. There was no question of their disclaiming liability under the Huzur order of February 8, 1948 in case it was found that the order of the Executive Council dated April 22, 1949 was invalid. In the circumstances, we hold that the successor Governments recognized and took over the liability under the Huzur order dated February 8, 1948. If so, it is not disputed that the liability has now devolved on the State of Gujarat. It follows that the Courts below rightly decreed the suit.

13. This conclusion is sufficient to dispose of the appeal and we express no opinion whether the liability was also recognized by paragraph 4 (1) (b) of the Administration of Baroda

State Order, paragraph 5 (iii) (a) of the Baroda State (Application of Laws) Order, 1949 or paragraph 7 (1) of the States' Merger (Governors Provinces) Order, 1949.

14. In the result, the appeal is dismissed. There will be no order as to costs in this Court.

Appeal dismissed.

AIR 1971 SUPREME COURT 854
(V 58 C 175)

(From Mysore: (1966) 2 Mys LJ 180)

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Income-tax, Mysore, Bangalore (In both the Appeals), Appellant v. Segu Buchiah Setty (In both the Appeals), Respondent.

Civil Appeals Nos. 235 and 236 of 1967, D/- 23-4-1970.

Income-tax Act (1922), Section 27 — Scope — Multiple defaults — Assessee must show cause for each default — (1966) 2 Mys LJ 180, Reversed.

The clear import of Section 23 (4) is that on committing any one of the defaults mentioned therein the Income-tax Officer is bound to make the assessment to the best of his judgment. Although the word "or" which is disjunctive is used in Section 27 it has to be read in a reasonable and harmonious way and in conjunction with Section 23 (4). In case of multiple defaults, for each one of which an ex parte best judgment assessment has to be made under Section 23 (4), the assessee cannot ask for cancellation of the assessment by merely showing cause for one of such defaults. (1966) 59 ITR 42 (Bom), Approved; (1966) 2 Mys LJ 180, Reversed.

(Para 4)

Cases Referred: Chronological Paras
(1966) 59 ITR 42 = ILR (1966)

Bom 43, Chiranjilal Tibrewala
v. The Commr. of Income-tax,
Bombay City II

4

Mr. Jagadish Swarup, Solicitor-General of India (M/s. G. C. Sharma and B. D. Sharma, Advocates, with him), for Appellant (In both Appeals); Mr. R. Gopalakrishnan, Advocate, for Respondent (In both the Appeals).

LN/LN/B951/70/DHZ/D

The following Judgment of the Court was delivered by

GROVER, J.: — These appeals by certificate arise out of a common judgment of the Mysore High Court in references made with regard to the assessments relating to the assessment years 1953-54 and 1954-55.

2. For the assessment year 1953-54 the assessee was served with a notice under Section 22 (2) of the Income-tax Act, 1922, hereinafter called the "Act", on March 5, 1954. A similar notice was served in respect of the assessment year 1954-55 on June 5, 1954. The assessee failed to file any return in compliance with the notices. Thereupon he was served with notices under Section 22 (4) for both the assessment years and was required to produce accounts on specified dates. None appeared on any one of those dates but applications were submitted praying for adjournment on certain grounds. The Income-tax Officer was not satisfied with the reasons given for seeking adjournments and he proceeded to make the assessment under Section 23 (4) of the Act. The assessee moved the Income-tax Officer under Section 27 to reopen the assessments on the grounds given in the applications filed in that behalf. The Income-tax Officer appeared to be satisfied that there was sufficient cause for non-compliance with the notices issued under Section 22 (4) of the Act but he was of the view that the assessee had been a habitual defaulter inasmuch as he had not submitted the return under Section 22 (2) even for several preceding years for which the assessments had to be completed under Section 23 (4) of the Act. He declined to reopen the assessment under Section 27. Appeals to the Appellate Assistant Commissioner were filed. According to the Appellate Assistant Commissioner sufficient cause for non-compliance with one of the statutory notices, i. e., the notice under Section 22 (4) could not constitute sufficient cause for non-compliance with any other statutory notice [in this case the notice under Section 22 (2)]. The appellate tribunal dismissed the appeals filed by the assessee upholding the view of the departmental authorities.

3. On the tribunal having declined to refer the questions of law which were sought to be referred the High Court directed the Tribunal to

state a case and refer the following questions of law:

"Whether the Income-tax Officer having recorded a finding that there was sufficient cause for non-compliance with the notice issued under Section 22 (4), was not bound to cancel the assessment made under Section 23 (4) and to proceed to make a fresh assessment even though there was no sufficient cause for non-compliance with the notice under Section 22 (2)?" The High Court answered the question in favour of the assessee. Section 27 of the Act is in the following terms:

S. 27. "Cancellation of assessment when cause is shown. — Where an assessee within one month from the service of a notice of demand issued as hereinafter provided, satisfies the Income-tax Officer that he was prevented by sufficient cause from making the return required by Section 22, or that he did not receive the notice issued under sub-section (4) of Section 22, or sub-section (2) of Sec. 23, or that he had not a reasonable opportunity to comply, or was prevented by sufficient cause from complying with the terms of the last mentioned notices, the Income-tax Officer shall cancel the assessment and proceed to make a fresh assessment in accordance with the provisions of Section 23".

Section 22 provides for return of income. Sub-section (1) relates to a general notice to be given each year by the Income-tax Officer by publication in the Press or in the prescribed manner. Sub-section (2) relates to an individual notice. According to sub-section (4) the Income-tax Officer may serve on any person who has made a return under sub-section (1) or upon whom a notice has been served under sub-section (2) a notice requiring him on a date to be specified to produce or cause to be produced such account or documents as the Income-tax Officer may require or to furnish in writing and verified in the prescribed manner in such form and on such points or matters as may be required for the purpose of the section including, with the previous approval of the Commissioner, a statement of assets and liabilities not included in the accounts. Under Section 23 if the Income-tax Officer is satisfied without requiring the presence of the assessee

or the production by him of any evidence that a return made under Section 22 is correct and complete he has to assess the total income of the assessee on the basis of the return filed by him [sub-section (1)]. If he is not so satisfied he must serve a notice requiring the person who has made the return to attend at his office or to produce or cause to be produced any evidence on which such person may rely in support of his return [sub-section (2)]. Under sub-section (3) the Income-tax Officer after hearing such evidence as may be produced by the person making the return in response to the notice issued under sub-section (2) or such other evidence as the Income-tax Officer may require to be produced on specified points has to assess the total income of the assessee. It is provided by sub-section (4):

"If any person fails to make the return required by any notice given under sub-section (2) of Section 22 and has not made a return or a revised return under sub-section (3) of the same section or fails to comply with all the terms of a notice issued under sub-section (4) of the same section or, having made a return, fails to comply with all the terms of a notice issued under sub-section (2) of this section, the Income-tax Officer shall make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment....."

4. The High Court considered that the provisions of Section 27 were not cumulative but disjunctive and so the assessee could claim cancellation of the assessment on one of the grounds on which such cancellation could be sought under the section. According to the High Court it followed that even if there was no sufficient cause for non-compliance with a notice issued under Section 22 (2) so long as there was sufficient reason for non-compliance with the notice issued under Section 22 (4) the assessee could ask for the cancellation of the assessment. In our judgment the view of the High Court cannot be sustained. The clear import of Section 23 (4) is that on committing any one of the defaults mentioned therein the Income Tax Officer is bound to make the assessment to the best of his judgment. In other words if a person fails to make the return required by a notice under Section 22 (2) and he has

further not made a return or a revised return under sub-section (3) of the same section the Income-tax Officer must make an assessment under Section 23 (4). Similarly, if that person fails to comply with all the terms of the notice issued under Section 22 (4) or if he fails to comply with all the terms of the notice issued under Section 23 (2) the Income-tax Officer must proceed to make an assessment to the best of his judgment. Section 27 empowers the Income-tax Officer to cancel the assessment when sufficient cause is shown but such cause has to be shown for each default. For the sake of illustration, if an assessee makes a default under Section 22 (2) by not filing a return pursuant to a notice received under that section and he also does not comply with the notice under Section 22 (4) he must show sufficient cause for non-compliance with both the provisions and he cannot get the assessment cancelled merely by showing good cause for one of the two defaults. Although the word "or" which is disjunctive is used in Section 27 it has to be read in a reasonable and harmonious way and in conjunction with Section 23 (4). It is inconceivable that the legislature could have even intended that in case of multiple defaults for each one of which an ex parte best judgment assessment has to be made the assessee can ask for cancellation of the assessment by merely showing cause for one of such defaults. In our opinion the Bombay High Court in *Chiranjilal Tibrewala v. Commr. of Income-tax, Bombay City II*, (1966) 59 ITR 42 (Bom) was right in holding that in the circumstances similar to the present case the assessee cannot ask for cancellation under S. 27 of an assessment made under Section 23 (4). In this view of the matter the judgment of the High Court has to be set aside, and the question has to be answered against the assessee and in favour of the appellant.

5. The appeals are accordingly allowed with costs. One hearing fee.

Appeals allowed.

AIR 1971 SUPREME COURT 856
(V 58 C 176)

(From Madhya Pradesh: 1970 MPLJ 721)

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

D. P. Mishra, Appellant v. Kamalnaranayan Sharma and others, Respondents.

Civil Appeal No. 1738 of 1969, D/- 18-12-1970.

(A) Representation of the People Act (1951), Section 99 (1) — Corrupt practice petition — Non-party must be given opportunity to show cause why he should not be named.

A person cannot be named guilty of corrupt practice unless he has been given notice to show cause why he should not be named and has opportunity of cross-examining witness already examined against him, and further for calling his defence evidence for being heard. (Para 6)

(B) Constitution of India, Art. 136 — Supreme Court in appeal will not normally re-appraise evidence for acquittal of corrupt practice.

The reluctance is born of the quasi criminal nature of proceedings Supreme Court therefore does not normally proceed to reappraise the evidence, unless the High Court has misconceived the evidence or the conclusion is basically faulty or perverse, or where the procedure adopted entails miscarriage of justice or there are similar reasons. (Paras 7, 19)

(C) Press and Registration of Books Act (1867), Section 7 — Force of presumption under Section 7 in a charge under Section 123 (4) of the Representation of the People Act would differ with circumstances.

(Para 11)

(D) Press and Registration of Books Act (1867), Section 19-D (b) — The annual report published by the Press Registrar containing the name of a person as editor of a newspaper being only for the information of the Government and not made under any statutory provision cannot displace the effect of the return published under Section 19-D (b) containing not the name of such person but some other person. (Para 14)

AO/AO/G176/70/DHZ/C

Cases Referred: Chronological Paras

(1970) C. A. No. 1094 of 1969,
D/- 10-9-1970 = 1970 UJ (SC)
905, Meghraj Patodia v. R. K.
Birla

(1968) C. A. No. 1717 of 1968,
D/- 23-12-1968 (SC), Amar
Nath v. Lachman Singh

(1968) C. A. No. 1149 of 1968,
D/- 17-12-1968 (SC), Dr. M.
Chenna Reddy v. V. Ram
Chandra Rao

(1965) AIR 1965 SC 183 (V 52)
= (1964) 6 SCR 750, Jagdev
Singh v. Pratap Singh

Mr. E. C. Agrawala, Advocate, for
Appellant; M/s. M. C. Setalvad and
S. V. Gupte, Sr. Advocates, (M/s. K. A.
Chitale, U. N. Bachawat, Mrs. A. K.
Verma, Mr. Sreenivasa Rao, Advoca-
tes and Mr. J. B. Dadachanji, Acvo-
cate of M/s. J. B. Dadachanji and Co.,
with them), for Mr. S. C. Shukla; Mr.
M. C. Chagla, Sr. Advocate, (Mr. F. S.
Dabir, Advocate, Mr. Rameshwar
Nath, Advocate, of M/s. Rajinder
Narain and Co., and Miss Swaranjit
Sodhi, Advocate with him), for Res-
pondents Nos. 3 and 4.

The following Judgment of the
Court was delivered by

SHAH, C. J.: — In compliance
with our Order D/- 13-3-1970* the High
Court issued a notice to Shukla. Shukla
submitted his reply contending, inter
alia, that he did not publish or cause
to be published the offending state-
ments in the newspaper Mahakoshal
as alleged by Sharma. In paragraph 1
(ii) he submitted that:

"He learnt about their publication
only after and during the pendency of
the election petition for declaration of
the election of Shri D. P. Mishra as
void. The person in sole charge of
the newspaper was Shri Vishnudatta
Mishra 'Tarangi' whose name has been
printed as the Editor. The declara-
tion under Rule 8, Form VI prescribed
under the Press and Registration of
Books Act (No. XXV of 1867) for the
year 1963 shows that the said Shri
Vishnudatta Mishra 'Tarangi' and not
the opposite party (Shukla) was the
editor at the material time. x x x x
At the time of his appointment the
said Shri Vishnudatta Mishra 'Tarangi'
had insisted that there would be no
interference by the opposite party
(Shukla) in the conduct of the news-
paper".

*Reported in AIR 1970 SC 1477.

2. Several witnesses were exa-
mined before the High Court in sup-
port of the case that Shukla was
instrumental in publishing and distri-
buting the offending statements
Annexures I, II and III in the daily
newspaper Mahakoshal of which
Shukla was the editor, printer and
publisher. Some witnesses who had
been previously examined were re-
called for examination. Shukla and
Tarangi were also examined at the
hearing.

3. At the hearing of the appeal
and in the proceedings for naming
Shukla, Sharma the petitioner who
instituted the election petition took no
interest. But two persons who were
permitted to intervene in the proceed-
ing took upon themselves the defence
of the appeal and also to prosecute
the proceeding after it stood remanded
to the High Court.

4. The interveners submitted
that Shukla had published the offend-
ing matter contained in Annexures I,
II and III. They said that — (1) D. P.
Mishra prepared the offending matter,
read it over to Shukla and handed it
over to him for publication and the
same was published in the Mahakoshal
and was widely distributed; (2) the
copies of the newspaper containing the
offending matter were personally dis-
tributed by Shukla; and (3) Shukla
was the printer, publisher and editor
of the newspaper and was the owner
of the Printing Press in which the
copies of the newspaper were printed,
that he was attending to the publica-
tion of the newspaper and copies of
the newspaper were supplied to him
and that Tarangi had nothing what-
ever to do with the publication of the
newspaper "Mahakoshal" at the rele-
vant time.

5. The High Court on a review
of the evidence was of the opinion that
the case under the first and the second
heads in support of the plea of the
intervenors was not proved. The
High Court also held that even though
the name of Shukla was printed in
the newspaper 'Mahakoshal' as the
Chief Editor and that fact was printed
in the report of the Press Registrar
published for the information of the
Government showing that Shukla
was, between the years 1962 and
1965, the publisher, printer and editor
of Mahakoshal, Shukla had in June
1962 appointed Tarangi as editor of
Mahakoshal, that Tarangi was in exclu-

sive charge of the publication; that Shukla was not at the relevant time when the offending matter was published attending to the publication of Mahakoshal; that Shukla had no knowledge of the publication of the offending matter till it was brought to his notice in the course of the election petition; that Shukla was not proved to be the agent of Mishra and that even if it be held that he was the agent of Mishra, it was not proved that Mishra had given his consent to the publication of the offending matter in the Mahakoshal.

6. Section 123 (4) of the Representation of the People Act, 1951 provides:

"The publication by a candidate or his agent or by any other person, of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal, or retirement from contest, of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate's election"; is a corrupt practice. Section 99 (1) requires the Tribunal in making an order under Section 98 to record the names of all persons, if any, who are proved at the trial to have been guilty of any corrupt practice and the nature of that practice. But a person not a party to the petition cannot be named in the order, unless he has been given notice to appear before the Tribunal and to show cause why he should not be so named, and if he appears in pursuance of the notice, he has been given an opportunity of cross-examining any witness who has already been examined by the Tribunal and has given evidence against him, of calling evidence in his defence and of being heard.

7. A proceeding for naming a person who is found responsible for publication of offending matter is in the nature of a quasi-criminal proceeding. In an appeal against the order of the High Court holding on appreciation of evidence that a person charged before the High Court is not proved to be guilty of a corrupt practice, this Court does not normally proceed to reappraise the evidence, unless the High Court has misconceived the evidence or the conclusion is perverse or so basically faulty that interference by this Court is attracted or the pro-

cedure adopted by the Court has resulted in miscarriage of justice or for similar reasons. See *Amar Nath v. Lachman Singh*, C. A. No. 1717 of 1968, D/- 23-12-1968 (SC); *Jagdev Singh v. Pratap Singh* AIR 1965 SC 183; *Dr. M. Chenna Reddy v. V. Ramchandra Rao*, C. A. No. 1149 of 1968 D/- 17-12-1968 (SC); and *Meghraj Pato-dia v. R. K. Birla*, C. A. No. 1094 of 1969 D/- 10-9-1970 (SC).

8. Mr. Chagla on behalf of the interveners contended that the conclusion of the High Court was perverse because the High Court had ignored important circumstances and evidence bearing on the question in dispute, and had reached a conclusion wholly inconsistent with normal probabilities. In dealing with this contention we may first eliminate matters in respect of which there is no serious controversy. Annexures I, II & III which constitute the offending matter were published in the newspaper Mahakoshal during the course of the election campaign of D. P. Mishra. The newspaper Mahakoshal was published from Raipur, and Shukla was registered as the printer, publisher and editor in the record of the Press Registrar. The issues dated April 12, April 26 and May 4, 1963, were printed in the Mahakoshal Printing Press and were published and distributed. The matter published in those issues was in relation to the personal character and conduct of Sharma and in relation to his candidature. It was also a statement reasonably calculated to prejudice the prospects of Sharma's election.

9. Shukla admitted that the offending matter was published but claimed that it was printed in the Mahakoshal without his knowledge. He claimed that he had left the entire management of the newspaper with Tarangi and that he did not come to learn about the publication till the election petition was filed.

10. The High Court accepted the plea set up by Shukla that he did not know about the publication of the offending matter at or about the time when it was published. In support of the contention that Shukla was liable to be named, Mr. Chagla relied upon Section 7 of the Press and Registration of Books Act, 1867, upon certain proceedings in contempt taken before the High Court of Madhya Pradesh in which Shukla had admitted

his responsibility in regard to the publication made sometime in June, 1963 and also upon the service of a notice upon Shukla by Sharma who filed the election petition requiring Shukla to disclose certain facts regarding the publication, upon the evidence that Shukla was closely associated with Mishra in carrying on the election campaign, and that the daily Mahakoshal carried on propaganda exclusively on behalf of Mishra and not of any other candidate. Counsel submitted that Shukla's denial could not be accepted as there was clear evidence that copies of the daily Mahakoshal were supplied at his residence at all relevant times and it is unlikely that he did not read them.

11. Section 7 of the Press and Registration of Books Act, 1867, insofar as it is relevant, provides:

"In any legal proceeding whatever, x x the production of x x, in the case of the editor, a copy of the newspaper containing his name printed on it as that of the editor shall be held (unless the contrary be proved) to be sufficient evidence as against the person whose name shall be x x printed on such newspaper, x x that the said person was x x x the editor of every portion of that issue of the newspaper of which a copy is produced".

Section 7 raises a presumption that a person whose name is printed in a copy of the newspaper is the editor of every portion of that issue. The presumption may be rebutted by evidence. In the copies of Mahakoshal dated April 12, April 26, and May 4, 1963, it was printed that Shukla was the Chief Editor. Shukla was also described as the printer and publisher of the newspaper. The presumption under Section 7 of the Press and Registration of Books Act, undoubtedly arises, but in a charge under Section 123 (4) of the Representation of the People Act the presumption under Section 7 of the Press and Registration of Books Act, 1867, would come with greater or less force, according to the circumstances to the aid of a person claiming that the editor was responsible for the publication and that the publication was to the knowledge of editor.

12. Tarangi in his evidence has stated that he was working between June, 1962 to January, 1964 as editor of Mahakoshal and that he was in sole

charge of the newspaper including its management, and that he was solely responsible for editing, printing and publishing the newspaper, and that he had made a special condition when accepting his appointment as editor that he would be in sole charge of managing and editing the newspaper. He said that Shukla never visited the office of Mahakoshal during the period of his management; that he—Tarangi—wrote Annexures I, II and III and got them printed and published, that he had written them by himself on information which he received, and not at the instance of any other person, that he had not obtained the consent of Shukla before writing or publishing the offending matter, and that when he heard the matter contained in those articles he thought that it had news value and he printed and published it. He also stated that Shukla was not informed of the offending matter.

13. Tarangi had printed on March 1, 1963, a statement in the daily issue of Mahakoshal that he was the editor. That is clear from Annexure A. It was urged by Mr. Chagla that Shukla, to conceal his activities in the course of the election which it was expected would take place in the near future made a mere appearance of printing the name of Tarangi as editor, while in fact he remained the editor and in charge of management of the Mahakoshal. But it is clear from the issues of the Mahakoshal daily dated July 11, July 16, July 30, July 31, September 24, October 12 and October, 18, 1962, that on the title page Tarangi was shown as the editor of the newspaper. The story that Tarangi was placed in charge of the newspaper Mahakoshal between June 1962 and January 1964 is amply supported by copies of the Mahakoshal produced in the Court. It is not in dispute that in the publication of the newspaper Mahakoshal which contained the offending Annexures I, II and III it was published that Tarangi was the editor.

14. Shukla stated in his evidence that he had left Tarangi in sole management of the newspaper, that during the months of April and May 1963 he visited his house at Raipur only once, and that he had no occasion to read the previous issues of the Mahakoshal. Shukla said that he was moving about from place to place

during that period. The High Court has accepted that testimony and we see no reason to disagree with the same. Annexure A on which reliance is placed was made pursuant to Section 19-D (b) of the Press and Registration of Books Act, 1867. There was no attempt to prove that the return submitted before the Press Registrar differed from the return published under Section 19-D (b). Section 19-K (c) makes it an offence for the publisher of any newspaper to publish in pursuance of Clause (b) of Section 19-D any particulars relating to the newspaper which he has reason to believe to be false. Mr. Chagla contended that Shukla should have taken steps to produce before the High Court the original return or at any rate a copy of the return filed before the Press Registrar. We do not think that in the circumstances of the case any such obligation lay upon Shukla. If it was the case of the interveners that the statement in Annexure A was not consistent with the return made to the Press Registrar they could have summoned the Press Registrar or a member of his Office with the original return. But that was not done. It is true that in the annual report published by the Press Registrar for the use of the Central Government for the years 1963, 1964 & 1965 Shukla alone is shown as the editor of Mahakoshal and the name of Tarangi is not at all mentioned. But the annual report of the Press Registrar which contains hundreds of entries is secondary evidence of the contents of the return. There is no reason why, when the interveners have made no attempt to have the original return produced, we should accept the annual report as probative of the fact that Tarangi's name was not mentioned in the return submitted to the Press Registrar. The annual report is only for the information of the Government and a mere summary in the annual report, to which the Legislature has not attached any importance and which is not made under any statutory provision, cannot be regarded as displacing the effect of a statutory provision made under Section 19-D (b) of the Press and Registration of Books Act 1867.

15. Granting that there was close association between Mishra and Shukla and even granting that Mahakoshal was exclusively carrying on propaganda on behalf of Mishra, un-

less there is evidence to prove that Shukla had either authorised the publication of the offending matter, or had undertaken to be responsible for all the publications made in the Mahakoshal, no inference that the offending publications were made to the knowledge and with the consent of Shukla may be raised.

16. Strong reliance was placed by Mr. Chagla upon two circumstances: (i) that in certain proceedings taken in the High Court for committing the editor of Mahakoshal for contempt of court for publishing in June 1962 certain scurrilous matter concerning a Civil Judge. Shukla admitted his responsibility for the publication and tendered apology; and (ii) that Shukla did not send any reply to the notice served by Sharma, and published no repudiation.

17. The circumstances in which the proceeding for commitment for contempt of court was started may first be set out. On June 16, 1963, a news-item defamatory of one R. P. Awasthy, Civil Judge, was published in Mahakoshal. The District & Sessions Judge, Bilaspur, submitted the papers relating to the publication, to the High Court of Madhya Pradesh with a report that one Dr. Saraf Baloda a correspondent of the newspaper was responsible for the publication, and recommended that proceedings be started for committing for contempt Saraf and the editor, printer and publisher of the newspaper. A notice was issued to the editor, printer and publisher of Mahakoshal. Shukla appeared before the High Court and admitted that he was the Chief Editor of the paper, but he stated that the day to day work was done by the Sub-Editors, that he used to lay down the principle and policy of the paper and also gave general directions, that the news item received from correspondents from various places was scrutinised by the Sub-editors and the sub-editors on June 16, 1963 did not understand the implications of the offending news-item, and published it, and that when it came to his (Shukla's) notice he immediately published a contradiction and expressed his regret. He said that being the Chief Editor he accepted his responsibility. He submitted that since amends had been made soon after the facts came to his notice, his apology to the "concerned officer and assuring him that no item

will be published from the correspondent" be accepted. In view of this apology no action was taken against him by the High Court. The statement filed by Shukla is not inconsistent with the case set up by him in this proceeding. Responsibility for publication was accepted by him but he had clearly stated that the publications of news-items from the correspondents were attended to by the Sub-editors, and that he generally laid down the policy of the newspaper and gave general directions. He admitted his responsibility because he was the Chief Editor, and not because he personally had with knowledge published the article which constituted contempt of Court.

18. On October 24, 1963, Sharma addressed a letter to Shukla as printer, publisher and editor of Mahakoshal inviting his attention to the three Annexures I, II and III dated April 12, April 26 and May 4, 1963 and calling upon Shukla to "disclose the full identity of the writer within three days of his receiving the letter". He intimated that in case Shukla failed to comply with the request, he would assume that Shukla was the author of the publications, and would take suitable legal action. No reply was sent to this letter. Nor did Shukla publish any repudiation that it was without his knowledge that the matter was published. Shukla has in his evidence stated that after receiving the letter he consulted his lawyer, and he was "advised that reply was not necessary" and it "was not proper to send a reply". He stated that he remembered that his counsel advised him that since he was "involved in the petition" he should not act on the letter. These matters were elicited in cross-examination by counsel for the interveners. Mr. Chagla submitted that the testimony of Shukla in this behalf may not be accepted, because the lawyer had not been examined as a witness and even his name was not disclosed. But the matter was not probed further by the cross-examiner nor was any question asked which would suggest that any doubt was sought to be thrown on the testimony of Shukla that he acted on the advice given by his lawyer. It is true that no repudiation of Annexures I, II and III was published in the Mahakoshal, even after the letter was received from Sharma. But it must be re-

membered that in June, 1963 an election petition was filed for setting aside the election of Mishra and in paragraph 5 it was asserted that Annexures I, II and III were published in the newspaper Mahakoshal of which Shukla was the printer, publisher and editor. It was further asserted that Shukla was the agent of Mishra. If the story of Shukla that till October, 1962 he was not aware of the offending publications and he came to know of the publications for the first time be accepted, failure to repudiate the publications after the election petition was filed will not, in our judgment, lead to an inference against Shukla that he was responsible for the publications.

19. We have carefully considered the evidence and the circumstances, and we do not think that a case is made out justifying us in taking a view different from the view of the High Court. The proceeding before us is quasi-criminal in character, and this Court will not normally disagree with the view of the High Court, where the High Court has reached, on appreciation of evidence, the conclusion that the corrupt practice charged against a person is not proved. This Court has jurisdiction in appropriate cases to disagree with the conclusion reached by the High Court, but the power to interfere is sparingly exercised. It is not exercised merely because this Court may take on the evidence a different view. An appellate Court is reluctant to disregard the conclusion on matters of appreciation of evidence by the Court which had occasion to watch the demeanour of the witnesses examined before it, and to substitute its own view thereon. Where the proceeding tried by the Court of First Instance is of a quasi-criminal nature, the reluctance of the appellate Court is greater. The question is not one of power or authority of the appellate Court, but of the respect and consideration due to the Court of First Instance, and of the limit inherent in the exercise of the appellate functions.

20. The order passed by the High Court is confirmed. Having regard to the circumstances of the case, there will be no order as to costs of the proceeding against Shukla. The appeal filed by Mishra will be dismissed. Since the original applicant Sharma did not appear in this Court,

there will be no order as to costs in the appeal.

Order of High Court confirmed.

**AIR 1971 SUPREME COURT 862
(V 58 C 177)**

(From: Govt. of India, Ministry of Finance, New Delhi)*

J. C. SHAH AND K. S. HEGDE, JJ.

M/s. Travancore Rayons Ltd., Appellant v. The Union of India and others, Respondents. M/s. Special Steel Limited, Nirilon Synthetics Fibres and Chemicals Limited, Interveners.

Civil Appeal No. 2252 of 1966, D/- 28-10-1969.

(A) Central Excises and Salt Act (1944), Section 36 — Revisional jurisdiction of Central Government — Personal hearing — When should be given.

Though the rules do not require that a personal hearing should be given to a revision petitioner under Section 36 if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens.

(Para 7)

(B) Central Excises and Salt Act (1944), Section 36 — Revision by Central Government — Exercise of judicial power by administrative or executive authority — Order should be speaking order — Order merely stating that Government sees no reason to interfere with order of appellate authority is laconic and should be set aside — AIR 1966 SC 671, Held, overruled by AIR 1967 SC 1606 — (Constitution of India, Articles 136, 32 and 226).

The Central Government is by Section 36 invested with the judicial power of the State. Orders involving important disputes are brought before the Government. The orders made by the Central Government being subject to appeal to the Supreme Court under Article 136 of the Constitution, it

* (Central Excise Revision Application Order No. 543 of 1966, D/- 16-7-1966 — Govt. of India, Ministry of Finance, New Delhi.)

would be impossible for that Court, exercising jurisdiction under Article 136, to decide the dispute without a speaking order of the authority, setting out the nature of the dispute, the arguments in support thereof raised by the aggrieved party and reasonably disclosing that the matter received due consideration by the authority competent to decide the dispute.

(Para 7)

Where the order of the Central Government rejecting a revision under Section 36 merely stated that the Government having carefully considered the points made by the applicant, saw no reason to interfere with the order, the order being laconic is vitiated and should be set aside. AIR 1966 SC 671, Held, overruled by AIR 1967 SC 1606, AIR 1969 NSC 115 and AIR 1969 SC 1297 and C. A. No. 657 of 1967, D/- 17-8-1967 (SC), Rel. on.

(Paras 7 and 12)

When judicial power is exercised by an authority normally performing executive or administrative functions, the Supreme Court insists upon disclosure of reasons in support of the order on two grounds; one, that the party aggrieved in a proceeding before the High Court or the Supreme Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

(Para 11)

Cases Referred: Chronological Paras

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| (1969) AIR 1969 SC 1297 (V 56) | |
| = C. A. No. 723 of 1966, D/- 21-4-1969, The State of Gujarat v. Patel Raghav Natha | 10 |
| (1969) C. A. No. 681 of 1966, D/- 29-4-1969 = AIR 1969 NSC 115, State of Madhya Pradesh v. Seth Narsinghdas Jankidas Mehta | 10 |
| (1967) C. A. No. 657 of 1967, D/- 17-8-1967 = 1967 Jab LJ 817 (SC), Prag Das Umar Vaishya v. Union of India | 10 |
| (1967) AIR 1967 SC 1606 (V 54) = (1967) 3 SCR 302, Bhagat Raja v. The Union of India | 9 |
| (1966) AIR 1966 SC 671 (V 53) = (1966) 1 SCR 466, Madhya Pradesh Industries Limited v. Union of India | 8, 9 |

Mr. S. Mohan Kumaramangalam, Sr. Advocate, (Mr. Soli J. Sorabji, Mrs. A. K. Varma, Advocates, and M/s. Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Company, with him), for Appellant; Dr. V. A. Seyid Muhammad, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents; Mr. B. R. Agarwala, Advocate of M/s. Gagrath and Company, for Intervener No. 1; Mr. Soli J. Sorabji, Advocate, and M/s. Ravinder Narain and J. B. Dadachanji, Advocates of M/s. J. B. Dadachanji and Company, for Intervener No. 2.

The following Judgment of the Court was delivered by

SHAH, J.: — The appellant Company is engaged in the production of cellulose film. The Central Excise Inspector reported that the appellant Company was producing in its factory nitro-cellulose lacquer [falling under tariff Item No. 22 (iii) (i), No. 14 (iii) (i) of the First Schedule to the Central Excises and Salt Act, 1944, read with the Finance Act, 1955], without obtaining a central excise licence as required by the rules and was also removing nitro-cellulose lacquer for "internal use" without payment of duty. The appellant Company denied that the chemical compound utilised by it to render plain film moisture-proof was "nitro-cellulose lacquer" within the meaning of the Central Excises and Salt Act, 1944.

2. The Deputy Superintendent of Central Excise, determined that the appellant Company was liable to pay, for the period between March 1, 1955 and September 19, 1962, Rs. 4,88,797.34 as excise duty on the consumption of nitro-cellulose lacquer produced by the Company. The Deputy Superintendent issued a demand notice, but the appellant Company failed to pay the duty.

3. The Assistant Collector of Customs required the appellant Company to show cause why penalty should not be imposed on it for failing to obtain a licence for production of nitro-cellulose lacquer. The appellant Company contended that what was produced by it was not nitro-cellulose lacquer. The Assistant Collector rejected the contention and confirmed the order of assessment and imposed a penalty of Rs. 25/-.

4. In appeal to the Collector, the appellant Company raised a large

number of contentions—including the following:

(1) that nitro-cellulose lacquer which is clear as well as pigmented falls within the purview of Item 14 of the First Schedule to the Central Excises and Salt Act, 1944, and that clear and white, or murky and pigmented lacquer is not subject to duty;

(2) that a certificate of test issued by the Silk Mills Research Association, Bombay, showed that the nitro-cellulose lacquer content of a sample of surface-coating compound produced by the appellant company was only 4.7 per cent. and it could not be considered nitro-cellulose lacquer within the meaning of the Act; and

(3) that the failure to levy duty on the product from 1955 to 1962 was proof of the fact that the Excise Department was itself of the view that the product was not excisable.

5. The Collector of Customs consulted the Chemical Examiner and was of the view that the opinion expressed by the Silk Mills Research Association, Bombay, was not correct. In considering the question about the reason for not levying duty for nearly seven years, the Collector thought it necessary to give a fresh hearing to the appellant Company. Additional arguments were advanced at the second hearing. After considering the arguments advanced by the appellant Company the Collector wrote a detailed judgment setting out the "points" on which he held against the claim of the appellant Company, and expressed the view that the appellant Company was not right in contending that only that chemical which is "clear and pigmented" falls within the purview of Item 14 of the First Schedule.

6. Against the order dismissing the appeal, the appellant Company moved a petition invoking the revisional jurisdiction of the Central Government under Section 36 of the Central Excises and Salt Act, 1944. The petition was entertained, but no personal hearing was given to the appellant Company. By order dated July 16, 1966, communicated by the Joint Secretary to the Government of India, Ministry of Finance, the petition was rejected. The order read:

"The Government of India have carefully considered the points made by the applicant(s), but see no justification for interfering with the order

in appeal. The revision application is accordingly rejected".

Against the order passed by the Central Government this appeal is preferred with special leave.

7. The question raised before the Collector of Customs was of a complicated nature and for its proper appreciation required familiarity with the chemical composition and physical properties of nitro-cellulose lacquers and of the substance produced by the appellant Company. The Collector in deciding the appeal wrote an order running into 18 typed pages. There were before the Collector conflicting opinions of the Chemical Examiner and the Silk Mills Research Association, Bombay. The Collector gave two personal hearings to the appellant Company. No personal hearing was given by the Government of India to the appellant Company even though the matter raised complex questions. It is true that the rules do not require that personal hearing shall be given, but, if in appropriate cases where complex and difficult questions requiring familiarity with technical problems are raised, personal hearing is given, it would conduce to better administration and more satisfactory disposal of the grievances of citizens. The order does not disclose the name or designation of the authority of the Government of India who considered "the points made by the applicants", and it is impossible to say whether the officer was familiar with the subject-matter so that he could decide the dispute without elucidation and merely on a perusal of the papers. The form in which the order was communicated is apparently a printed form. There is a bare assertion by the Joint Secretary to the Government of India in his communication that the Government of India had "carefully considered the points made by the applicants", there is no evidence as to who considered the "points" and what was considered. The Central Government is by Section 36 invested with the judicial power of the State. Orders involving important disputes are brought before the Government. The orders made by the Central Government are subject to appeal to this Court under Article 136 of the Constitution. It would be impossible for this Court, exercising jurisdiction under Article 136, to decide the dispute without a speaking order of the

authority, setting out the nature of the dispute, the arguments in support thereof raised by the aggrieved party and reasonably disclosing that the matter received due consideration by the authority competent to decide the dispute. Exercise of the right to appeal to this Court would be futile, if the authority chooses not to disclose the reasons in support of the decision reached by it. A party who approaches the Government in exercise of a statutory right, for adjudication of a dispute is entitled to know at least the official designation of the person who has considered the matter, what was considered by him, and the reasons for recording a decision against him. To enable the High Court or this Court to exercise its constitutional powers, not only the decision, but an adequate disclosure of materials justifying an inference that there has been a judicial consideration of the dispute by an authority competent in that behalf in the light of the claim made by the aggrieved party, is necessary. If the Officer acting on behalf of the Government chooses to give no reasons, the right of appeal will be devoid of any substance.

8. Dr. Seyid Muhammad appearing for the Union of India contended that where the Central Government dismisses the petition, it is not obliged to give any reasons, for, it must be assumed that the Government had accepted every reason given by the Collector, and by dismissing the petition the officer acting on behalf of the Government must be deemed to have incorporated the reasons given by the Collector in the judgment. Counsel relies in support of this contention on the decision of this Court in *Madhya Pradesh Industries Limited v. Union of India*, (1966) 1 SCR 466 = (AIR 1966 SC 671). In that case, Bachawat, J. on behalf of himself and Mudholkar, J., refused to accept the contention that the order passed by the Government of India rejecting a revision application under the Mineral Concession Rules was liable to be quashed, because it did not give any reasons. Bachawat, J., observed at page 477 (of SCR) = (at page 677 of AIR):

"There is a vital difference between the order of reversal by the appellate authority in that case for no reason whatsoever and the order of affirmance by the revising authority in

the present case. Having stated that there was no valid ground for interference, the revising authority was not bound to give fuller reasons. It is impossible to say that the impugned order was arbitrary, or that there was no proper trial of the revision application."

On the other hand, Subba Rao, J., observed at page 472 (of SCR) = (at p. 674 of AIR):

"The least a tribunal can do is to disclose its mind. The compulsion of disclosure guarantees consideration. The condition to give reasons introduces clarity and excludes or at any rate minimizes arbitrariness; it gives satisfaction to the party against whom the order is made; and it also enables an appellate or supervisory Court to keep the tribunals within bounds. A reasoned order is a desirable condition of judicial disposal.

The conception of exercise of revisional jurisdiction and the manner of disposal provided in Rule 55 of the Rules are indicative of the scope and nature of the Government's jurisdiction. If tribunals can make orders without giving reasons, the said power in the hands of unscrupulous or dishonest officers may turn out to be a weapon for abuse of power. But if reasons for an order are given, it will be an effective restraint on such abuse, as the order, if it discloses extraneous or irrelevant considerations, will be subject to judicial scrutiny and correction. A speaking order will at its best be a reasonable and at its worst be at least a plausible one. The public should not be deprived of this only safeguard.

* * * The habit of mind of an executive officer so formed cannot be expected to change from function to function or from act to act. So it is essential that some restrictions shall be imposed on tribunals in the matter of passing orders affecting the rights of parties; and the least they should do is to give reasons for their orders.

* * * Ordinarily, the appellate or revisional tribunal shall give its own reasons succinctly; but in a case of affirmation where the original tribunal gives adequate reasons, the appellate tribunal may dismiss the appeal or the revision, as the case may be, agreeing with those reasons. What is essential is that reasons shall be given by an appellate or revisional tribunal expressly

or by reference to those given by the original tribunal. The nature and the elaboration of the reasons necessarily depend upon the facts of each case".

9. In a later judgment *Bhagat Raja v. The Union of India*, (1967) 3 SCR 302 = (AIR 1967 SC 1606) the Constitution Bench of this Court in effect overruled the judgment of the majority in *Madhya Pradesh Industries Limited's case*, (1966) 1 SCR 466 = (AIR 1966 SC 671). The Court held that the decisions of tribunals in India are subject to the supervisory powers of the High Court under Article 227 of the Constitution and of appellate powers of this Court under Article 136. The High Court and this Court would be placed under a great disadvantage if no reasons are given and the revision is dismissed by the use of the single word 'rejected' or 'dismissed'. The Court in that case held that the order of the Central Government in appeal, did not set out any reasons of its own and on that account set aside that order. In our view, the majority judgment of this Court in *Madhya Pradesh Industries Ltd.'s case*, (1966) 1 SCR 466 = (AIR 1966 SC 671) has been overruled by this Court in *Bhagat Raja's case*, (1967) 3 SCR 302 = (AIR 1967 SC 1606).

10. In later decisions of this Court it was held that where the Central Government exercising power in revision gives no reasons, the order will be regarded as void: see *State of Madhya Pradesh v. Seth Narsinghdas Jankidas Mehta*, C. A. No. 681 of 1966, D/- 29-4-1969 = (AIR 1969 NSC 115); *The State of Gujarat v. Patel Raghav Nath*, C. A. No. 723 of 1966, D/- 21-4-1969 = (AIR 1969 SC 1297); and *Prag Das Umar Vaishya v. Union of India*, C. A. No. 657 of 1967, D/- 17-8-1967 (SC).

11. In this case the communication from the Central Government gave no reasons in support of the order; the appellant Company is merely intimated thereby that the Government of India did not see any reasons to interfere "with the order in appeal". The communication does not disclose the "points" which were considered, and the reasons for rejecting them. This is a totally unsatisfactory method of disposal of a case in exercise of the judicial power vested in the Central Government. Necessity to give sufficient reasons which disclose proper appreciation of the problem to be

solved, and the mental process by which the conclusion is reached in cases where a non-judicial authority exercises judicial functions, is obvious. When judicial power is exercised by an authority normally performing executive or administrative functions, this Court would require to be satisfied that the decision has been reached after due consideration of the merits of the dispute, uninfluenced by extraneous considerations of policy or expediency. The Court insists upon disclosure of reasons in support of the order on two grounds: one, that the party aggrieved in a proceeding before the High Court or this Court has the opportunity to demonstrate that the reasons which persuaded the authority to reject his case were erroneous; the other, that the obligation to record reasons operates as a deterrent against possible arbitrary action by the executive authority invested with the judicial power.

12. The appeal is allowed and the order passed by the Central Government is set aside. The case is remanded to the Central Government with the direction that it be disposed of according to law. In this case, we are of the view, having regard to the complicated and technical questions involved, that the Central Government may be well-advised to give an oral hearing to the appellant Company. The Union of India will pay the costs of this appeal to the appellant Company.

Appeal allowed.

AIR 1971 SUPREME COURT 866
(V 58 C 178)

(From: Gujarat)*

S. M. SIKRI AND K. S. HEGDE, JJ.

The State of Gujarat and another, Appellants v. Acharya Shri Devendra-prasadji Pande, and others, etc., Respondents.

Criminal Appeals Nos. 2 to 12 of 1968, D/- 12-10-1970.

(A) Criminal P. C. (1898), Section 342 — Statement of accused, under — Court cannot split the statement into various parts and accept a portion and reject the rest — Court should either accept it as a whole or not rely on it at all — In his state-

*(Cri. Appeal No. 828 of 1965, D/- 20-2-1967 — Guj.)

KN/KN/E813/70/LGC/B

ment accused pleading not guilty — Statement taken as a whole cannot show that he was guilty of any offence. (Para 5)

(B) Bombay Public Trusts Act (29 of 1950), Sections 35 (1), 66 — Penal Code (1860), Section 40 — Mens rea — Requirement of mens rea is not a necessary ingredient of Section 35 (1) — Offence under Section 35 (1) is an absolute one — Section 35 (1) creates a quasi-criminal offence.

The mens rea means some blameworthy mental condition, whether constituted by knowledge or intention or otherwise. The plain words of the Statute are read subject to a presumption, which may be rebutted, that the general rule of law that no crime can be committed unless there is mens rea has not been ousted by the particular enactment. But this rule has several exceptions. The principal classes of exceptions may be reduced to three. One is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisances. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. 1963 AC 160 and (1895) 1 QB 918, Followed. (Paras 11, 12)

Unless a statute either clearly or by necessary implication rules out mens rea as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. But the language of a provision either plainly or by necessary implication can rule out the application of that presumption. The Court may decline to draw that presumption taking into consideration the purpose intended to be served by that provisions. AIR 1951 SC 204; AIR 1965 SC 722 and (1969) 2 WLR 470, Followed.

(Para 13)

The offence under Section 35 (1), Bombay Public Trusts Act (1950) is an absolute one and the Court cannot read into it the requirements of mens rea. Section 35 (1) creates a quasi-criminal offence. It is a regulatory provision. It is enacted with a view to safeguard the interest of the public regarding trust money. The offence under Section 35 (1) read with

Section 66 is punishable only with fine and the conviction does not carry with it any stigma. (Para 14)

Cases Referred: Chronological Paras

- (1969) 2 WLR 470 = (1969) 1 All ER 347, Sweet v. Parsley 13
 (1965) AIR 1965 SC 722 (V 52) = (1965) 1 SCR 123, State of Maharashtra v. Mayer Hans George 13
 1963 AC 160 = (1963) 1 All ER 223, Lim Chin Aik v. The Queen 10
 (1951) AIR 1951 SC 204 (V 38) = 1951 SCR 322, Ravula Hariprasada Rao v. The State 13
 (1895) 1 QB 918 = 64 LJMC 218, Sherras v. Rutzen 11

Mrs. Urmila Kapoor and Mr. S. P. Nayar, Advocates, for Appellants; Mr. V. K. Sanghi, Advocate and M/s. J. B. Dadachanji and Co., Advocates, for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.: — These appeals arise from two complaints filed by the Charity Commissioner, State of Gujarat under Section 35 (1) read with Section 66 of the Bombay Public Trusts Act, 1950 (which will hereinafter be referred to as the Act). In those complaints 10 accused were proceeded against. It was said that they were the trustees of two trusts known as "Shree Swaminarayan Mandir" and "Narayan Mandir". The 1st accused in both those complaints was the Acharya, the 10th was said to be the Mahant and the other accused the associated trustees at the relevant time. It was said that all these trustees were appointed under two different schemes framed by the High Court of Bombay. The trial Court convicted the accused but in appeal the High Court of Gujarat acquitted all of them. It held that there is no proof to show that accused 2 to 10 were the trustees of the institutions at the time the alleged offence took place. It allowed the appeal of the 1st accused on the ground that the prosecution has failed to prove the required mens rea on his part. The State of Gujarat and the Charity Commissioner have brought these appeals after obtaining special leave from this Court.

2. In the first complaint the allegation is that the 1st accused withdrew from the trust funds in Samvat

year 2014 a sum of Rs. 30277/53 for meeting his income-tax liability and that he reimbursed that amount only in Samvat year 2018. The allegation against the other accused is that they allowed the 1st accused to utilize that amount in contravention of the law. In the second complaint the allegation is that the 1st accused withdrew a sum of Rs. 40653/56 P. in the Samvat year 2015 again for meeting income-tax liability and that he reimbursed that amount also in the Samvat year 2018 and that the other accused connived at the contravention of the law by the 1st accused.

3. Accused 2 to 10 pleaded that they were not the trustees of the institutions concerned during the Samvat years 2014 and 2015 and nor were they aware of the withdrawals and as such they are not guilty of any offence. The 1st accused admitted the withdrawals mentioned in the complaints but his case was that the withdrawals were made from his Hathu Khata, a Khata built up by him and his ancestors and he has put back that amount.

4. So far as accused 2 to 10 are concerned there is absolutely no evidence against them. The only witness examined on behalf of the complainant namely the Legal Adviser of the Charity Commissioner did not give any evidence against them. No material was placed before the Court to show that they were the trustees of the trusts in question during the Samvat years 2014 and 2015. This is not a case where a trustee has failed to deposit the amounts in his hands but is a case of unauthorised withdrawals. There is no evidence to show that accused 2 to 10 knew about those withdrawals even if we assume that they were the trustees during the Samvat years 2014 and 2015. Hence the case against them must necessarily fail.

5. Now coming to accused No. 1 his case is that he withdrew the amount from his Hathu Khata which Khata according to him is his private Khata. There is no contra evidence. The complainant's witness admitted during his cross-examination that accused No. 1 kept a huge sum with the trust and that no interest was given to him in respect of that amount. It is not possible to come to the conclusion on the basis of the evidence of P. W. 1 that accused No. 1 had with-

drawn any amount belonging to the trust. In order to prove the case put forward in the complaints, reliance was sought to be placed on a letter said to have been sent by the accused to the Charity Commissioner. The original letter was not produced; only an alleged copy of the same was put on record. No witness has proved the letter said to have been written by accused No. 1, nor is there any evidence to show that the copy produced is a true copy of the letter said to have been sent by accused No. 1. We are asked to infer the guilt of the accused No. 1 on the basis of the statement made by him under Section 342, Cr. P. C. We cannot split that statement into various parts and accept a portion and reject the rest. We have to either accept that statement as a whole or not rely on it at all. In his statement the accused pleaded that he was not guilty and if his statement is taken as a whole, it does not show that he was guilty of any offence.

6. Our above conclusion is sufficient to dispose of these appeals but as the High Court has elaborately gone into the question whether the requirement of mens rea is a necessary ingredient of Section 35 (1), we shall proceed to examine that question.

7. The High Court primarily addressed itself to the question whether the Court should read into Section 35 of the Act, the requirements of mens rea. Section 35 (1) reads:

"Where the trust property consists of money and cannot be applied immediately or at any early date to the purposes of the public trust the trustee shall be bound (notwithstanding any direction contained in the instrument of the trust) to deposit the money in any Scheduled bank as defined in the Reserve Bank of India Act, 1934, in the Postal Savings Bank or in a Co-operative bank approved by the State Government for the purpose or to invest it in public securities:

Provided that such money may be invested in the first mortgage of immovable property situate in (any part of India) if the property is not leasehold for a term of years and the value of the property exceeds by one-half the mortgage money:

Provided further that the Charity Commissioner may by general or

special order permit the trustee of any public trust or classes of such trusts to invest the money in any other manner."

8. Assuming that the requirement of mens rea is a necessary ingredient of the offence under Section 35 (1) and further that the facts pleaded in the complaint are correct then there can be hardly any difficulty in coming to the conclusion that the accused had the required intention. He is said to have withdrawn monies from the trust fund and utilised the same for his private purpose.

9. It may be noted that the requirement of Section 35 (1) that a trustee should invest in proper securities the trust monies not required for immediate use merely emphasises an obvious duty of the trustee. Section 35 (1) imposes certain penalty on the trustee if he fails to do his duty. The purpose of Section 35 (1) is to safeguard the trust funds and also to guard against its misappropriation and misapplication. The Trust Act as well as Section 35 (1) imposes a duty on the trustee. The language of the provision shows that the liability imposed on the trustee is absolute. The provision is regulatory provision enacted in public interest. For the contravention of Section 35 (1) only a fine can be imposed and the punishment does not carry with it any stigma.

10. The question whether a crime can be said to have been committed without the necessary mens rea has led to considerable controversy. The broad principles accepted by Courts in this country as well as in England are: Where an offence is created by a statute, however comprehensive and unqualified the language of the statute, it is usually understood as silently requiring that the element of mens rea should be imported into the definition of the crime, unless a contrary intention is expressed or implied. In other words, the plain words of the statute are read subject to a presumption, which may be rebutted, that the general rule of law that no crime can be committed unless there is mens rea has not been ousted by the particular enactment. The mens rea means some blameworthy mental condition whether constituted by knowledge or intention or otherwise. But this rule has several exceptions, as observed by Lord Evershed in *Lim Chin Aik v. The Queen*, 1963 AC 160:

"Where the subject matter of the statute is the regulation for the public welfare of a particular activity — statutes regulating the sale of food and drink are to be found among the earliest examples it can be and frequently has been inferred that the legislature intended that such activities should be carried out under conditions of strict liability. The presumption is that the statute or statutory instrument can be effectively enforced only if those in charge of the relevant activities are made responsible for seeing that they are complied with. When such a presumption is to be inferred, it displaces the ordinary presumption of *mens rea*".

11. As long back as 1895 Wright J. observed in *Sherras v. De Rutzen*, (1895) 1 QB 918:

"There is a presumption that *mens rea*, an evil intention, or knowledge of the wrongfulness of the act, is an essential ingredient in every offence; but that presumption is liable to be displaced either by the words of the statute creating the offence or by the subject-matter with which it deals, and both must be considered".

12. It is further observed therein that the principal classes of exceptions may perhaps be reduced to three. One is a class of acts which are not criminal in any real sense, but are acts which in the public interest are prohibited under a penalty. Another class comprehends some, and perhaps all, public nuisances. Lastly, there may be cases in which, although the proceeding is criminal in form, it is really only a summary mode of enforcing a civil right. But, except in such cases as these, there must in general be guilty knowledge on the part of the defendant, or of some one whom he has put in his place to act for him, generally, or in the particular matter, in order to constitute an offence. The present case, in our opinion, falls within the first category mentioned above — Section 35 (1) deals with a quasi-criminal act.

13. This Court in *Ravula Hariprasada Rao v. The State*, 1951 SCR 322 = (AIR 1951 SC 204) ruled that unless a statute either clearly or by necessary implication rules out *mens rea* as a constituent part of the crime, a person should not be found guilty of an offence against the criminal law unless he has got a guilty mind. The same view was reiterated by this

Court in *State of Maharashtra v. Mayer Hans George*, (1965) 1 SCR 123 = (AIR 1965 SC 722). But in both those cases this Court recognized that the language of a provision either plainly or by necessary implication can rule out the application of that presumption. Further the Court may decline to draw that presumption taking into consideration the purpose intended to be served by that provision. In fact in *Ravula Hariprasada Rao's* case, 1951 SCR 322 = (AIR 1951 SC 204) (*supra*) this Court held that the liability imposed under Section 27 (A) of the Motor Spirit Rationing Order, 1941 is an absolute liability. The law on this point was elaborately discussed by the House of Lords in *Sweet v. Parsley*, (1969) 2 WLR 470. Therein it was laid down that it is a general principle of construction of any enactment which creates a criminal offence that, even where the words used to describe the prohibited conduct would not in any other context connote the necessity for any particular mental element they are nevertheless to be read as subject to the implication that a necessary element in the offence is the absence of a belief, held honestly and on reasonable grounds, in the existence of facts which, if true, would make the act innocent. In the course of his speech Lord Reid observed after referring to the well known observations of Wright J. to which we have already made reference.

"It does not in the least follow that when one is dealing with a truly criminal act it is sufficient merely to have regard to the subject matter of the enactment. One must put oneself in the position of a legislator. It has long been the practice to recognise absolute offences in this class of quasi-criminal acts, and one can safely assume that, when Parliament is passing new legislation dealing with this class of offences, its silence as to *mens rea* means that the old practice is to apply. But when one comes to acts of a truly criminal character, it appears to me that there are at least two other factors which any reasonable legislator would have in mind. In the first place a stigma still attaches to any person convicted of a truly criminal offence, and the more serious or more disgraceful the offence the greater the stigma. So he would have to consider whether, in a case of this gravity, the

public interest really requires that an innocent person should be prevented from proving his innocence in order that fewer guilty men may escape".

14. Section 35 (1) of the Act creates a quasi-criminal offence. It is a regulatory provision. It is enacted with a view to safeguard the interest of the public regarding trust money. The offence in question is punishable only with fine. The conviction under that does not carry any stigma. The language of the provision appears to make its contravention an absolute liability. Under these circumstances, we think the offence mentioned in that section is an absolute one. Consequently we cannot read into it the requirement of mens rea.

15. For the reasons mentioned above these appeals fail and they are dismissed.

Appeals dismissed.

**AIR 1971 SUPREME COURT 870
(V 58 C 179)**

M. HIDAYATULLAH, C. J.,
S. M. SIKRI, G. K. MITTER,
A. N. RAY AND

P. JAGANMOHAN REDDY, JJ.

Coffee Board, Bangalore, Petitioner v. Joint Commercial Tax Officer, Madras and another, Respondents; Hill Tiller and Co., Intervener.

Writ Petitions Nos. 216 and 217 of 1969, D/- 29-10-1969.

(A) Constitution of India, Art. 32 — Right to move Supreme Court for enforcing fundamental right — Conditions for.

Where the action is taken under an ultra vires statute, or where, although the statute is intra vires, the action is without jurisdiction or the principles of natural justice are violated, a right to move Supreme Court under Article 32 for enforcement of fundamental right exists. Errors of law or fact committed in the exercise of jurisdiction founded on a valid law do not entitle a person to have them corrected by way of petitions under Article 32. The proper way to correct them is to proceed under the provisions for appeal etc., or by way of proceedings under Article 226 before the High Court. AIR 1962 SC 1621, Rel. on. (Para 9)

DN/EN/F633/69/KSB/D

(B) Constitution of India, Art. 31 (1) — Demand of tax from corporation not leviable under a valid law — Breach of fundamental right guaranteed under Article 31 (1) is involved — Corporation being a person within Article 31 (1) can maintain a petition under Article 32 — AIR 1962 SC 1621 and AIR 1963 SC 1811 and AIR 1967 SC 585 and AIR 1963 SC 928, Rel. on; AIR 1964 SC 1140, Observation in, not approved.

(Paras 13 to 15)

(C) Constitution of India, Article 32 — Right to move Supreme Court for enforcement of fundamental right — Demand of tax not backed by valid law — Is a threat to property — Gives right to move Supreme Court by petition under Article 32 — Petitioner will be limited only to establishing fundamental right — Existence of other remedies no bar. (Para 16)

(D) Constitution of India, Article 286 (1) (b) — Read with Central Sales Tax Act (1956), Section 5 (1) — Restrictions as to imposition of tax on sale or purchase of goods — Sale in the course of export — Essentials — Tests to determine — First sale of coffee by Coffee Board to its registered exporter within Madras State — Second sale by registered exporter to foreign buyer having no connection with first sale by Coffee Board — Sale by Coffee Board held not in course of export within Article 286 (1) (b) read with Section 5 (1), Central Sales Tax Act and was liable to sales tax under the Madras Act.

Per Majority (Sikri J. dissenting):-

The phrase sale in the course of export comprises in itself three essentials; (i) there must be a sale, (ii) goods must actually be exported and (iii) the sale must be a part and parcel of the export. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export, for the export begins from the intermediary and ends with the importer. (Para 30)

There must be a single sale which itself causes the export or is in the

progress or process of export. The only sale which can be said to cause the export is the sale which itself results in the movement of the goods from the exporter to the importer.

(Para 31)

The course of export may be established by agreement or by force of law. In either case there is a seller and a buyer who by reason of the sale also become exporter and importer respectively. Any other buyer who is not himself the importer buys for export even if export ultimately results. It is to bring out these results that Parliament has recognised in Section 5 (1) Central Sales Tax Act only two cases of sale in the course of import; (a) where the sale is effected by a transfer of documents of title to goods after the goods have crossed the customs frontiers that is to say the goods are already on the way to the importer and (b) when the sale itself causes the export to take place that is to say the exporter and importer negotiate and complete a sale which without more would result in the export of the goods. No other sale can qualify for the exemption under Section 5 (1) read with Article 286 (1) (b). (Para 32)

Held on facts that the sale of coffee by the Coffee Board to its registered exporters under the terms and conditions prescribed by the rules framed by the Coffee Board was not a 'sale in the course of export' within the meaning of Article 286 (1) (b) of the Constitution read with Section 5 (1) Central Sales Tax Act and as such was liable to sales tax under the Madras Act. The Coffee Board's sale was not in anyway related to the second sale by exporter to foreign buyer which was in the course of export. AIR 1956 Mad 449, Approved; AIR 1964 SC 1752, Dist.

(Paras 33, 34, 51 52)

(E) Sales Tax — Central Sales Tax Act (1956), Section 5 (1) — 'Occasions', does not necessarily mean to cause or to be the immediate cause — Word bearing two meanings — Context in which it is used must determine appropriate meaning — So construed word 'occasions' must be given wider meaning viz., to bring about especially in an incidental or subsidiary manner. (Per Sikri J.) (Para 38)

Cases Referred: Chronological Paras
(1969) 23 STC 258 (Cal), Serajuddin
& Co. v. Commercial Tax Officer 50

- (1967) AIR 1967 Cal 338 (V 54)
= 18 STC 379, S. K. Roy v.
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Officer 7, 13
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9, 11, 15, 16
- (1962) AIR 1962 SC 1733 (V 49)
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- (1961) AIR 1961 SC 65 (V 48)
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= (1961) 1 SCR 924, B. K.
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- (1955) AIR 1955 SC 3 (V 42) =
1955 SCR 769, Laxmanappa
Hanumantappa v. Union of India 10
- (1953) AIR 1953 SC 333 (V 40)
= 1954 SCR 53, State of
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Vilas Cashew Nut Factory 21, 39, 41

(1952) AIR 1952 SC 366 (V 39)
= (1952) 3 SCR 1112, State of
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bay Co. Ltd. 19, 38, 39

(1951) AIR 1951 SC 97 (V 38)
= 1951 SCR 127, Ramjilal v.
I. T. O. Mohindragarh 10

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for Petitioner; Mr. S. V. Gupte, Sr.
Advocate (Mr. A. V. Rangam Advocate
with him), for Respondents; Mr. C. K.
Daphtary, Sr. Advocate, (Mr. B. Datta,
Advocate, Messrs. J. B. Dadachanji
and Ravinder Narain, Advocates, of
Messrs. J. B. Dadachanji and Co., and
Mr. T. Srinivasamoorthy, Advocate
with him), for Intervener.

The following Judgments of the
Court were delivered by

HIDAYATULLAH, C. J. (on behalf
of himself, Mitter, Ray and Jaganmohan
Reddy, JJ.): — These are petitions
under Article 32 of the Constitution
by the Coffee Board, Bangalore direct-
ed against the Joint Commercial Tax
Officer, Madras and the State of Tamil
Nadu questioning the demand of Sales
Tax on certain transactions of sales
which the Board claims are sales in
the course of export of Coffee out of
India and thus not liable to Sales Tax.
A preliminary objection was taken at
the hearing that the petitions do not
lie since no question of a fundamental
right is involved. We shall deal with
the preliminary objection later as the
main petition and the preliminary ob-
jection are inter-linked. But before
we mention the points in controversy
it is necessary to state the facts more
fully.

2. The petitioner is a statutori-
ly constituted body and functions
under the Coffee Act, 1942 (VII of
1942). This Act was passed to pro-
vide for the development under the
Control of the Union of the Coffee
Industry. Its main function is to con-
stitute a Coffee Board. Previously
there was an Ordinance intituled the
Indian Coffee Market Expansion Ordi-
nance, 1940 (13 of 1940). A Board call-
ed the Indian Coffee Market Expan-
sion Board was constituted under the
Ordinance. The same Board now
continues under the name 'Coffee
Board'. On this Board, all interests

are represented and some members of
Parliament and Officers of Government
have also places. Sections 4 to 10 of
the Act are concerned with the setting
up of the Board. As nothing turns
upon the constitution of the Board, it
is not necessary to give the gist of
those sections here. The Act imposes
duties of Customs and Excise — the
former on all coffee produced in India
and exported from India and the
latter on coffee released by the Board
for sale in India from its surplus pool.
The Act compels the registration of all
owners of coffee Estates and licensing
of curers and dealers. The Act next
imposes a control on the sale, export
and re-import of coffee into India. In
respect of sale, it fixes prices for sale of
coffee either wholesale or retail by regis-
tered owners and licensed curers for the
purpose of sale in the Indian Market.
The Board fixes internal sale quota
for each Estate owner and the owner
has to observe this quota and also the
price fixed. The registered owner
may not sell coffee unless it has been
cured by a licensed establishment or it
is sold uncured under a special licence.
The Act next prohibits the export of
coffee from India otherwise than by
the Board or under the authorization
granted by the Board. To this restric-
tion, there are a few minor exceptions
such as coffee in specified quantities
may be exported by taking on board
ships or aircrafts intended for con-
sumption of the crew and the
passengers or carried by a passen-
ger for his own use or exported for
special purposes specified by the
Central Government. The Government
is authorised to specify the total
quantity of coffee to be exported
during any year. Coffee once
exported cannot be re-imported
into India except under a permit. The
registered owners are required to fur-
nish periodical returns and to furnish
such information as may be prescrib-
ed. Every registered owner after deal-
ing with the coffee for sale in Indian
markets up to the internal quota fixed
for him must hand over to the Board
all surplus coffee to be included in the
Board's Surplus Pool. Similarly, cur-
ing establishments are required to sur-
render to the Board all surplus coffee.
Small producers may, however, be
exempted from the operation of this
condition. After the coffee is deliver-
ed to the Board, the control of the
Board begins. The Board classifies

the coffee and assesses its value based on its quantity, kind and quality. Once the coffee is delivered to the Board, the registered owner or the licensed curer has no rights over the coffee except to receive its price in accordance with Section 34 of the Act.

3. We are not concerned in this petition with any internal sales. The Board has elected to make monthly returns and in these petitions taxes on sales made in March and April, 1969 are challenged. Provisional assessments have been made and demand for taxes held due after allowing credit for taxes already paid, has been made by the respondents under the Madras General Sales Tax Act, 1959. Of these certain sales are claimed to be exempted from Sales Tax under the Madras Act by reason of those being in the course of export of coffee out of India. The Taxing authorities held that those sales took place within Tamil Nadu State and were thus liable to sales tax under the Tamil Nadu Act. The point of difference arises thus:

4. The Coffee Board follows a procedure for selling coffee which is to be exported out of India. Coffee for export is specially screened and selected. It is then exposed in auctions specially held for the purpose. These auctions are known as 'Export Auctions.' To be able to bid on these occasions, exporters have to get themselves registered. The Board maintains a list of registered exporters and gives to each of them a permit which authorises him to take part in the export auction. A specimen of the permit granted with the conditions attaching to it is exhibited as Annexure 'I'. The conditions which are imposed by the permit require a security deposit and a standing deposit from the registered exporter. The security may be in cash or by a guarantee from a bank or Life Insurance Corporation of India. It is provided that the permit is liable to be withdrawn and cancelled by the Chief Coffee Marketing Officer if it is found that the permit holder has sold or attempted to sell coffee, bought by him at the export auctions, within the internal market without the written permission of the Chief Coffee Marketing Officer. Similar cancellation is liable to take place if some of the other conditions of the permit are not followed.

5. The Coffee Board has also prepared a set of rules which incor-

porate the terms and conditions of sale of coffee in the course of export. These rules have been exhibited as Annexure II and they deal with the conduct of auctions and the procedure to be followed therein. They also provide for additional conditions. Rule 4 provides that only dealers who have registered themselves as exporters of coffee with the Coffee Board and who hold permits from the Chief Coffee Marketing Officer in that behalf will be permitted to participate in the auctions. Agents may, however, participate on behalf of exporters but only for one principal at a time. Before the auction, the registered dealer or the agents must show the permit issued to him or have it in his custody for production, if so desired. Before the auction is held, a catalogue of lots of coffee to be put up for auction is issued with the reserve price fixed by the Chief Coffee Marketing Officer in his discretion. Samples of Coffee are available for prospective buyers. An auction in the usual way takes place but no one is allowed to retract a bid once made. The highest bid is ordinarily accepted but if there are reasons to believe that the highest or any particular bid is not bona fide or genuine or is the outcome of concerted action for the purpose of controlling or manipulating prices or for other improper purposes or that the bidder is not likely to fulfil his contract or is otherwise undesirable, the bid may be rejected. After the bidding comes to an end and the bids have been accepted, the payment of price takes place in a particular way. We are not concerned with other provisions dealing with failure to fulfil the obligation as to payment of price, etc., objections to quality and so on. We are concerned with condition No. 26 which is headed 'Export Guarantee'. This condition is vital in the consideration of the questions involved in this case and may be quoted:

"26. It is an essential condition of this Auction that the coffee sold thereat shall be exported to the destination stipulated in the Catalogue of lots, or to any other foreign country outside India as may be approved by the Chief Coffee Marketing Officer, within three months from the date of Notice of Tender issued by the Agent and that it shall not under any circumstances be diverted to another destina-

tion, sold, or be disposed of, or otherwise released in India.

The aforesaid period may, on application by the Buyer, be extended by the Chief Coffee Marketing Officer in his discretion if he is satisfied that there is good ground to do so, subject nevertheless to the condition that as consideration for such extension, the Buyer shall pay the following additional amounts to the Board

* * *

The buyer is free to export the coffee either by himself or through any Forwarding Agent but the coffee must not be sold to the Forwarding Agents. In other words, the buyer himself arranges for the export of the coffee he has purchased at the auction and condition 29 imposes an obligation on the buyer to produce immediately after shipping evidence of the export of the coffee to the Chief Marketing Officer. If such evidence is not produced within a period of 60 days, after the time allowed to make the export, the registered exporter is deemed to have committed a default and the provisions of conditions 30 and 31 then apply to him. These conditions are as follows:

"30. If the Buyer fails or neglects to export the coffee as aforesaid within the prescribed time or within the period of extension, if any, granted to him, he shall be liable to pay a penalty calculated at Rs. 50/- per 50 kilos which shall be deductible from out of the amount payable to him as per Clause 31."

"31. On default by the Buyer to export the coffee aforesaid within the prescribed time or such extension thereof as may be granted, it shall be lawful for the Chief Coffee Marketing Officer, without reference to the buyer to seize the unexported coffee and for that purpose to make entry into any building, godown or warehouse where the said coffee may be stored, and take possession of the same and deal with it as if it were part and parcel of Board's coffee held by them in their Pool Stock.

* * *

6. Conditions 33 and 34 provide for inspection of coffee stocks and accounts and the buyer is required to send weekly returns. Other conditions need not be noticed here because they have no bearing upon the rival cases. The case of the petitioners is that the purchases at the export auc-

tions are really sales by the Coffee Board in the course of export of coffee out of the territory of India since the sales themselves occasion the export of coffee and coffee so sold is not intended for use in India or for sale in the Indian markets. The case of the Sales Tax Authorities is that these sales are not inextricably bound up with the export of coffee and that the sales must be treated as sales taking place within the State of Tamil Nadu which are liable to sales tax under the Madras General Sales Tax Act. The dispute is confined to this aspect of the matter on merits. The preliminary objection to which we referred earlier is only this that the petitions do not show a breach of a fundamental right. The petitioners only claim the benefit of the exemptions incorporated in the Constitution or the statute dealing with the levy and collection of sales tax, and their grievance can be investigated and righted by taking recourse to the appellate, revisional and other remedies under the relevant statute. We shall begin by considering the preliminary objection.

7. The preliminary objection consists of two parts. The first part questions the standing of the petitioner to move this Court for the enforcement of its so-called fundamental rights. It is argued that the petitioner being a Corporation, has no right to move this Court for the enforcement of fundamental right to hold, acquire and dispose of property since this right is available only to individuals who are citizens and a Corporation is not a citizen. Reliance is placed upon State Trading Corporation of India Ltd. v. Commercial Tax Officer, Visakhapatnam, (1964) 4 SCR 99 = (AIR 1963 SC 1811). The second part is that there is ample provision for remedies under the Sales Tax Act to question the assessment and a petition under Art. 32 ignoring those provisions should not be entertained. The case of the State Trading Corporation (1964) 4 SCR 99 = (AIR 1963 SC 1811) considered the application of Art. 19 (1) (f) in relation to Corporations. It was held that Corporations could not be regarded as citizens for the purpose of Article 19 since that article is concerned with citizens and corporations have not been declared citizens by the Constitution. The question was not considered in relation to Art. 31 (1). Some other petitions by corporations

complaining of breach of Article 31 (1) were entertained by this Court and the petitioner before us relies on those cases as precedents. The true position may therefore be stated.

8. Property as a fundamental right is mentioned in the Constitution in Articles 19 (1) (f), 31, 31 (A) and 31 (B). In Article 19 (1) (f) it is provided:

"19. Protection of certain rights regarding freedom of speech, etc.

(1) All citizens shall have the right—

* * * * *

(f) to acquire, hold and dispose of property; and

* * * * *

9. To this sub-clause there is a proviso in Clause (5) which states that nothing in Clause (f) shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, reasonable restrictions on the exercise of the right conferred, either in the interests of the general public or for the protection of the interests of any Scheduled Tribe. The main clause of the Article recognises the institution of private property with all the concomitants of that institution, namely, the acquisition, holding and disposal of property. The proviso recognises, in the public interest, restrictions on the right in existing law or hereafter to be imposed by law. The institution of property thus recognised leaves freedom to acquire any kind of property except the one in relation to which there is a restrictive law. Thus it is that certain kinds of properties such as Narcotic drugs, explosives, property in excess of ceiling placed by law, etc., cannot be acquired or held. This restriction curtails the general right and the curtailment must justify itself as a law in the public interest. Next we have Articles 31, 31 (A) and 31 (B). They occur in a section of Part III entitled "Rights to Property". The first of these three Articles deals with compulsory acquisition of property. The second and third deal with saving of laws providing for acquisition of Estates, etc., and validation of certain Acts and Regulations declared void by Courts. Two fundamental concepts in Article 31 are (a) that no person shall be deprived of his property save by authority of law, and (b) no property shall be compulsorily

acquired or requisitioned save for a public purpose and save by authority of law which itself fixes the amount of compensation or specifies the principles on which compensation is to be determined and given and the manner thereof. Other provisions either restrict or amplify the operation of these two fundamental concepts. In *Smt. Ujjam Bai's case*, (1963) 1 SCR 778 = (AIR 1962 SC 1621), the question was whether assessment of Sales Tax under a valid Act was open to challenge under Article 32 on the ground of misconstruction of the Act or a notification under it. It was held that the answer was in the negative. That case has given some trouble in view of the different opinions expressed in it. It is therefore necessary to state simply the propositions which are settled by this Court. The ruling recognises the existence of a right to move this Court under Article 32, where the action is taken under an ultra vires statute, or where, although the statute is intra vires the action is without jurisdiction or the principles of natural justice are violated. Errors of law or fact committed in the exercise of jurisdiction founded on a valid law do not entitle a person to have them corrected by way of petitions under Article 32. It is also pointed out that the proper way to correct them is to proceed under the provisions for appeal, etc., or by way of proceedings under Article 226 before the High Court.

10. In *Ramjilal v. I. T. O. Mohindragarh*, 1951 SCR 127 = (AIR 1951 SC 97) and in *Laxmanappa Hanumantappa v. Union of India*, 1955 SCR 769 = (AIR 1955 SC 3), taxation laws were unsuccessfully challenged with the aid of Article 31 (1) read with Article 265 in petitions purporting to be under Article 32. In the former case it was observed as follows:

"In our opinion, the protection against the imposition and collection of taxes save by authority of the law directly comes from Article 265 and is not secured by Clause (1) of Article 31. Article 265 not being in Chapter III of the Constitution, its protection is not a fundamental right which can be enforced by an application to this Court under Article 32. It is not our purpose to say that the right secured by Article 265 may not be enforced. It may certainly be enforced by adopting proper proceedings.

All that we wish to state is that this application in so far as it purports to be founded on Article 32 read with Art. 31 (1) to this Court is misconceived and must fail".

11. These propositions were not accepted by the majority in Ujjam Bai's case, (1963) 1 SCR 778 = (AIR 1962 SC 1621). It was observed at p. 941 (of SCR) = (at p. 1668 of AIR) as follows:

"If by these observations it is meant to convey that the protection under Article 265 cannot be sought by a petition under Article 32, I entirely agree. But if it is meant to convey that a taxing law which is opposed to fundamental rights must be tested only under Article 265, I find it difficult to agree. Articles 31 (1) and 265 speak of the same condition. A comparison of these two Articles shows this:

Article 31 (1)—"No person shall be deprived of his property save by authority of law."

Article 265—No tax shall be levied or collected except by authority of law.

"The Chapter on Fundamental Rights hardly stands in need of support from Article 265. If the law is void under that Chapter, and property is seized to recover a tax which is void, I do not see why Article 32 cannot be invoked.....It is not possible to circumscribe Article 32 by making the remedy depend only upon Art. 265."

12. The position was summed up thus:

"From this, it is clear that laws which do not offend Part III and are not otherwise ultra vires are protected from any challenge whether under Article 265 or under the Chapter on Fundamental Rights. Where the laws are ultra vires but do not per se offend fundamental rights (to distinguish the two kinds of defects), they are capable of a challenge under Article 32. Where they are intra vires otherwise but void being opposed to fundamental rights, they can be challenged under Article 265 and also Art. 32."

13. Das, J. (Sarkar J. concurring) put the same thing differently. He observed that "if a quasi-judicial authority acts without jurisdiction or wrongly assumes jurisdiction by committing an error as to a collateral fact and the resultant action threatens or violates a fundamental right, the ques-

tion of enforcement of that right arises and a petition under Article 32 will lie." He added that "where a statute is intra vires but the action taken is without jurisdiction, then a petition under Article 32 would be competent." Similar observations are to be found in the opinion of Kapur J. Therefore, the majority view considered that a breach of fundamental right guaranteed by Article 31 (1) is involved in a demand for tax which is not leviable under a valid law. The application of these principles finds ample recognition in the following cases of the Supreme Court:

(1) State Trading Corporation of India v. The Commercial Tax Officer, (1964) 4 SCR 99 = (AIR 1963 SC 1811).

(2) State Trading Corporation of India v. The State of Mysore, 14 STC 416 = (AIR 1967 SC 585).

(3) Firm A. T. B. Mehtab Majid and Co. v. State of Madras, 14 STC 355 = (AIR 1963 SC 928).

14. It will be noticed that they are all cases of Corporations and have been considered under Article 32. The ruling in the State Trading Corporation case, 14 STC 416 = (AIR 1967 SC 585) referred to earlier did not render these petitions incompetent because Article 31 (1) is not limited in its operation to citizens. It mentions "persons" who may be Corporations and group of persons.

15. In Indo-China Steam Navigation Co. v. Jasjit Singh, (1964) 6 SCR 594 = (AIR 1964 SC 1140), there are some observations that in petitions under Article 32, no claim of a fundamental right can be made under Article 31 (1) if the statute under which action is taken is valid for then Article 19 (1) (f) does not apply. These observations run counter to Ujjam Bai's case, (1963) 1 SCR 778 = (AIR 1962 SC 1621), which is binding on us. The first part of the preliminary objection fails.

16. The second part need not detain us. We have already held that demand of a tax, not backed by a valid law, is a threat to property and thus gives rise to a right to move this Court under Article 32. The petitioner in such circumstances is not compelled to wait or go through the lengthy procedure of appeals, references, etc. He may move the Supreme Court for the enforcement of the fundamental rights so threatened.

This, however, is not an absolute right. This Court will limit the petitioner to establishing a breach of fundamental right. It will not allow a petitioner to use the provisions of Article 32 to do duty as an appeal. A clear enough case as laid down in Ujjam Bai's case, (1963) 1 SCR 773 = (AIR 1962 SC 1621) analysed by us here, must be made out. A threat to property unbacked by a valid law or a want of jurisdiction or a breach of the principles of natural justice must be clearly made out, to entitle one to the assistance of this Court. If that is successfully done then the provisions for other remedies do not stand in the way. We accordingly allowed the petitioner to raise the point of jurisdiction before us.

17. We are concerned in these petitions with the exemption granted by Article 286 (1) (b) of the Constitution which reads:

"286. Restrictions as to imposition of tax on the sale or purchase of goods.

(1) No law of a State shall impose, or authorise the imposition of, a tax on the sale or purchase of goods where such sale or purchase takes place—

(a) * * *

(b) in the course of the import of the goods into, or export of the goods out of, the territory of India".

18. Before the 6th Amendment, the Constitution did not contain any definition of the phrase 'in the course of export'. By that Amendment Parliament has been given the power to indicate the principles on which that phrase is to be construed. In Section 5 (1) of the Central Sales Tax Act, 1956, Parliament has given a legislative meaning of the phrase 'in the course of export' of goods out of the territory of India. It runs thus:

"5 (1) A sale or purchase of goods shall be deemed to take place in the course of the export of the goods out of the territory of India only if the sale or purchase either occasions such export or is effected by a transfer of documents of title to the goods after the goods have crossed the customs frontiers of India".

The word 'only' in the sub-section shows that there are only two transactions which can come within the exception. In the case of sales to registered exporters, the second part

does not apply and the matter must, therefore, be judged under the first part. Before the enactment of the Central Sales Tax Act, two rulings of this Court had construed the expression and as the legislative definition gives effect to what was laid down in those two cases a reference to them appears necessary.

19. In the State of Travancore-Cochin v. The Bombay Co. Ltd., (1952) 3 SCR 1112 = (AIR 1952 SC 366), four meanings were considered and sales in the course of export were equated to sales which occasioned the export. This Court said:

"A sale by export thus involves a series of integrated activities commencing from the agreement of sale with a foreign buyer and ending with the delivery of the goods to a common carrier for transport out of the country by land or sea. Such a sale cannot be dissociated from the export without which it cannot be effectuated, and the sale and resultant export form parts of a single transaction. Of these two integrated activities, which together constitute an export sale, whichever first occurs can well be regarded as taking place in the course of the other".

20. Again,

"We are not much impressed with the contention that no sale or purchase can be said to take place 'in the course of' export or import unless the property in the goods is transferred to the buyer during their actual movement, as for instance, where the shipping documents are endorsed and delivered within the State by the seller to a local agent of the foreign buyer after the goods have been actually shipped, or where such documents are cleared on payment, or on acceptance, by the Indian buyer before the arrival of the goods within the State. This view, which lays undue stress on the etymology of the word 'course' and formulates a mechanical test for the application of Clause (b), places, in our opinion, too narrow a construction upon that clause, in so far as it seeks to limit its operation only to sales and purchases effected during the transit of the goods, and would, if accepted, rob the exemption of much of its usefulness".

21. In the State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory, 1954 SCR 53 = (AIR

1953 SC 333), it was again emphasised that sales and purchases which themselves occasion the export of the goods came within the exemption of Art. 286 (1) (b). Purchases in the State by the exporter for purposes of export were not within the exemption but sales in the State by the exporter by transfer of shipping documents while the goods were beyond the customs barrier were held exempted. It was pointed out that the word 'course' denoted movement from one point to another and the expression 'in the course of' implied not only a period of time during which the movement was in progress but postulated also a connected relation. An act preparatory to export could not be regarded as done in the course of the export of the goods. It was like a purchase for production or manufacture. Therefore, a sale in the course of export out of the territory of India should be understood as meaning a sale taking place not only during the activities directed to the end of exportation of the goods out of the country but also as part of or connected with such activities. Das J., (as he then was) wished to add one more meaning which apparently was not accepted. It was that the expression indicated the last purchase by the exporter with a view to export. The meaning given in these two cases is well established. Indeed in the State of Mysore v. Mysore Spinning and Manufacturing Co. Ltd., AIR 1958 SC 1002, this Court said that the point could not be said to be at large.

22. Parliament having accepted the construction placed by this Court on the expression, we are now required to find out what is meant by the phrase sale which occasions the export. In *Burmah-Shell Oil Storage and Distributing Co. v. C. T. O.*, (1961) 1 SCR 902 = (AIR 1961 SC 315) it was pointed out that word 'export' did not mean a mere 'taking out of the country' but that the goods must be sent to a destination at which they could be said to be imported. The same meaning must obviously be given to the phrase 'in the course of export' or in the phrase 'occasions the export.'

23. We have thus to see whether the sale is one which is connected with the export of the goods from this country to an importer in another country. The course of export can only begin if there is movement from an exporter to an importer

as the result of the sale, and then only the sale can be said to occasion the export. In *East India Tobacco Co. v. State of Andhra Pradesh*, (1962) 13 STC 529 = (AIR 1962 SC 1733), purchases made for executing specific orders received from foreign customers were held not to fall within the exemption. It is not enough that the sale is followed by an export or is made for the purpose or with a view to export, the sale must be integrally connected with the export. On the other hand in *B. K. Wadar v. Daulatram Rameshwari*, (1961) 1 SCR 924 = (AIR 1961 SC 311), it was held that if property in the goods passed to the buyer after crossing of the customs frontier for export out of India the sale was in the course of export. This is because the course of export had already begun and therefore the sale followed the commencement of the export operation.

24. Transactions of the type of the one in Wadar's case, (1961) 1 SCR 924 = (AIR 1961 SC 311), do not cause difficulty. There the course of export is quite clear and it is easy to see that the sale is integrally connected with export. Difficulty is likely to be felt when the sale is not so apparently connected. In *K. G. Khosla and Co. v. Dy. Commissioner of Commercial Taxes*, (1966) 17 STC 473 = (AIR 1966 SC 1216), the phrase 'in the course of import' was considered. It was held that in Section 3 of the Central Sales Tax Act the phrases 'occasions the movement of goods from one State to another' and 'occasions the import' mean the same thing. The movement, it was pointed out, must be the result of an agreement or an incident of the contract of sale, although it was not necessary that the sale should precede the import.

25. A more direct authority is in *Ben Gorm Nilgiri Plantations Co., Coonoor v. Sales Tax Officer*, (1964) 7 SCR 706 = (AIR 1964 SC 1752). In that case sales of the tea-chests at auctions held at Fort Cochin were claimed to be exempt from the levy of sales-tax by virtue of Article 286 (1) (b).

26. The Tea Act, like the Coffee Act, was passed to control tea industry. Under it also an export allotment for each year is declared and each tea Estate receives an export quota allotment. The tea Estate owner can obtain an export licence. The

export quota licence is transferable. A manufacturer obtains from the Tea Board allotment of export quota. The manufacturer then puts the tea in chests which are sold in public auctions. Bids are made by agents or intermediaries of foreign buyers. Agents and intermediaries then obtain licences from the Central Government for export. The question was whether the sale to the agent or the intermediary was a sale in the course of export out of India.

27. This Court found nothing in the transaction from which a bond could be said to spring between the sale and the intended export linking them as part of the same transactions. The sellers had no concern with the export, the sale imposed or involved no obligation to export and there was possibility that the goods might be diverted for internal consumption.

28. The Court considered the sales as sales for export and not in the course of export. In laying this down the Court observed:

".....to occasion export there must exist such a bond between the contract of sale and the actual exportation, that each link is inextricably connected with the one immediately preceding it. Without such a bond, a transaction of sale cannot be called a sale in the course of export of goods out of the territory of India."

* * * * *

"In general where the sale is effected by the seller, and he is not connected with the export which actually takes place, it is a sale for export. Where the export is the result of sale, the export being inextricably linked up with the sale so that the bond cannot be dissociated without a breach of the obligation arising by statute, contract or mutual understanding between the parties arising from the nature of the transaction, the sale is in the course of export."

29. The case however did not attempt to lay down any tests, observing that each case will depend on its own facts. We agree that the facts must always play their due part. We think it is possible to state some tests which can be applied in all cases.

30. The phrase 'sale in the course of export' comprises in itself three essentials: (i) that there must

be a sale (ii) that goods must actually be exported and (iii) the sale must be a part and parcel of the export. Therefore either the sale must take place when the goods are already in the process of being exported which is established by their having already crossed the Customs frontiers, or the sale must occasion the export. The word 'occasion' is used as a verb and means 'to cause' or 'to be the immediate cause of'. Read in this way the sale which is to be regarded as exempt is a sale which causes the export to take place or is the immediate cause of the export. The export results from the sale and is bound up with it. The word 'cause' in the expression 'in the course of' means 'progress or process of' or 'shortly during'. The phrase expanded with this meaning reads 'in the progress or process of export' or 'during export'. Therefore the export from India to a foreign destination must be established and the sale must be a link in the same export for which the sale is held. To establish export a person exporting and a person importing are necessary elements and the course of export is between them. Introduction of a third party dealing independently with the seller on the one hand and with the importer on the other breaks the link between the two for then there are two sales one to the intermediary and the other to the importer. The first sale is not in the course of export for the export begins from the intermediary and ends with the importer.

31. Therefore the tests are that there must be a single sale which itself causes the export or is in the progress or process of export. There is no room for two or more sales in the course of export. The only sale which can be said to cause the export is the sale which itself results in the movement of the goods from the exporter to the importer.

32. The course of export may be established by agreement or by force of law. To be the former the agreement between the seller and the buyer must envisage an export out of India who then become exporter and importer respectively. By force of law a person selling the goods may be compelled to sell them only in an export sale but that too is not essentially different from the first. In either case there is a seller and a buyer who

by reason of the sale also become exporter and importer respectively. Any other buyer who is not himself the importer buys for export even if export ultimately results. It is to bring out these results that Parliament has recognised only two cases of sale in the course of import: (a) where the sale is effected by a transfer of documents of title to goods after the goods have crossed the Customs frontiers that is to say the goods are already on the way to the importer and (b) when the sale itself causes the export to take place that is to say the exporter and importer negotiate and complete a sale which without more would result in the export of the goods. No other sale can qualify for the exemption under Section 5 (1) read with Article 286 (1) (b).

33. The question is whether the sale to the registered exporters can be said to be exempted. In the Indian Coffee Board v. State of Madras, (1956) 7 STC 135 = (AIR 1956 Mad 449) Rajgopalan and Rajgopala Ayyangar JJ. held that the sale to the registered exporter was a sale for export and only the contract of sale entered into by the registered exporter with the buyer abroad that could be brought within the scope of the exemption. The test applied by the High Court is the test we have indicated and which has found approval in the two earlier cases of this Court which have received legislative recognition. The question to ask is: does the sale to the registered exporter occasion the export which ultimately takes place? The answer is that on the rulings it must be an integral part of the precise export before it can be said to have occasioned that particular export. Here there are two independent sales involved in the export programme. The first is a sale between the Coffee Board as seller to the export promoter. Then there is the sale by the export promoter to a foreign buyer. Of the latter sale, the Coffee Board does not have any inkling when the first sale takes place. The Coffee Board's sale is not in any way related to the second sale. Therefore, the first sale has no connection with the second sale which is in the course of export, that is to say, movement of goods between an exporter and an importer.

34. Mr. Setalvad tried to argue that the first sale by the Coffee Board

included in it a compulsion to export and he relied upon the observations of Shah J., in Ben Gorm Nilgiri Plantations case, (1964) 7 SCR 706 = (AIR 1964 SC 1752). These observations were not intended to give exemption to sales for export but to sales in the course of export. One of the indicia of a sale in the course of export is the compulsion to export because the sale which is protected must be itself inextricably bound up with the export. If this were not so a chain of sales each making a mere condition for terminal export, will be exempted and the distinction between a sale for export and a sale in the course of export will completely disappear. In the Ben Gorm Nilgiri Plantations case, (1964) 7 SCR 706 = (AIR 1964 SC 1752), even the purchases by agents of foreign importers were described as sales for export. No doubt it was said that the sale to the agents did not contain a compulsion to export to the principal but that was said so that the causal connection between the sale and the export could be established. The compulsion to export here is of a different character. It only compels persons who buy on their own to export in their own turn by entering into another agreement for sale. The first sale is, therefore, an independent sale. It is a sale for export. Even with the compulsion the sale may not result for Clauses 26, 30 and 31 visualize such happenings. It follows, therefore, that unless the sale is inextricably bound up with a particular export it cannot be said to be in its course. If no particular export is in sight the sale by the Coffee Board cannot go beyond the description of sale for export.

35. For these reasons we are of opinion that the decision of the Madras High Court in the case cited above is correct. For the same reasons we are of opinion that this case does not fall within the ruling in Ben Gorm Nilgiri Plantations' case. The petitioner cannot claim exemption from the tax and the department was right in demanding the tax. The petitions fail and will be dismissed with costs.

SIKRI, J.: 36. I have had the advantage of reading the draft of the Judgment prepared by the learned Chief Justice. I agree with him that the preliminary objection raised by the respondents is devoid of force, but I regret that I cannot concur with the

conclusion that the sales in question were not made in the course of export. With utmost respect, in my opinion he has given an unduly limited meaning to the expression 'if the sale or purchase occasions such export'. My reasons in coming to this conclusion are, in brief, as follows.

37. In Shorter Oxford Dictionary (Illustrated) the word "occasion" when used as a verb means:

"To give occasion to (a person); to induce, . . . To be the occasion or cause of (something); to cause, bring about, especially in an incidental or subsidiary manner."

38. It is said that in the context the word "occasion" means "to cause or to be the immediate cause." When a word bears two meanings the context must determine which is the appropriate meaning to be adopted. What then is the context with which we are dealing? The context is the export trade and its undoubted economic importance to this country. Further, each country is more and more organising the export trade and directing its flow in particular directions. The course of export is not the same what it was before the intervention of Governments or their agencies. Moreover the idea underlying art. 286 (1) (a) was to restrict the powers of the State to levy taxes on sales or purchases in the course of export so that the export trade may not be hampered. As observed by Patanjali Sastri, C. J., in State of Travancore-Cochin v. The Bombay Co. Ltd. (1952) 3 SCR 1112 at p. 1119 = (AIR 1952 SC 366 at p. 368) "lest similar reasoning should lead to the imposition of such cumulative burden on the export-import trade of this country which is of great importance to the nation's economy, the Constituent Assembly may well have thought it necessary to exempt in terms sales by export and purchases by import from sales tax by inserting article 286 (1) (b) in the Constitution." In my view, keeping in view the aforementioned considerations the wider meaning of the word "occasion" is the more appropriate to apply in the construction of Section 5 (1).

39. It is said that Parliament had accepted the narrower meaning of the word "occasion" because this was the meaning ascribed to it by this Court in (1952) 3 SCR 1112 = (AIR 1952 SC 366) and 1954 SCR 53 = (AIR

1953 SC 333) I, with respect, am unable to appreciate this argument. In the former case this Court was concerned with export sales of certain commodities to foreign buyers on C.I.F. or F.O.B. terms. After setting out the four views presented before it, Patanjali Shastri, C. J., speaking on behalf of the Court, observed:

"We are clearly of opinion that the sales here in question, which occasioned the export in each case, fall within the scope of the exemption and that is enough to dispose of those appeals."

Later he said:

"We accordingly hold that whatever else may or may not fall within Article 286 (1) (b), sales and purchases which themselves occasion the export or the import of the goods, as the case may be, out of or into the territory of India come within the exemption and that is enough to dispose of those appeals", (emphasis supplied).

40. It seems to me that it is wrong to interpret that decision to mean that the Court held that in no other case can sales "occasion" an export. In fact the learned Chief Justice says to the contrary by saying "whatever else may or may not fall".

41. In State of Travancore-Cochin v. Shanmugha Vilas Cashew Nut Factory, 1954 SCR 53 = (AIR 1953 SC 333), this Court, inter alia, held that the last purchase of goods made by the exporter for the purpose of exporting them to implement orders already received from a foreign buyer or expected to be received subsequently in the course of business was not within the protection of Clause (1) (b).

42. In the course of discussion, apart from referring to a passage from the earlier judgment in which the word "occasion" is used, the word 'occasion' is not mentioned again. No mention is made in this judgment of facts similar to which are present in the present case. What happens when there is legal certainty that the goods are headed for a foreign destination and will not be diverted to the domestic market was not considered as the question did not arise.

43. In AIR 1958 SC 1002 facts are somewhat closer to the present case, but it does not appear that there was legal compulsion to export and that the Mills, who sold the cloth for

sale, could compel the purchasers to export. The general observations therein must be read in the light of facts.

44. With respect, I think it is erroneous to assume that Parliament by using the word "occasion" must be deemed to have used it in the same sense as Patanjali Shastri, C. J., did. It is an ordinary dictionary word and not a technical word. He was using it to describe the transactions in those cases, and the narrower meaning was apposite. Even there he guarded himself by saying "whatever else may or may not fall within Article 286 (1) (b)". It should also be noted that Patanjali Shastri, C. J., had also qualified the word "occasion" by adding the words "by themselves". These words do not exist in the Act.

45. Similar expression occurring in Sections 3 and 5 (2) of the Act has been interpreted by this Court on a number of occasions and I cannot appreciate why the same expression bears a different meaning in Section 5 (1). The earlier cases are referred to in *K. G. Khosla v. Deputy Commissioner of Commercial Taxes*, (1966) 17 STC 473 = (AIR 1966 SC 1216). *Shah, J.*, in *Tata Iron and Steel Co. v. S. R. Sarkar*, 11 STC 655 = (AIR 1961 SC 65), had interpreted Section 3 of the Act as follows:

"In our view, therefore, within Clause (b) of Section 3 are included sales in which property in the goods passes during the movement of the goods from one State to another by transfer of documents of title thereto: Clause (a) of Section 3 covers sales, other than those included in Clause (b), in which the movement of goods from one State to another is the result of a covenant or incident of the contract of sale, and property in the goods passes in either State".

In other words it was held that a sale occasions the movement of goods when the movement "is the result of a covenant or incident of contract of sale". Applying this test this Court observed in (1966) 17 STC 473 at pp. 488-489 = (AIR 1966 SC 1216 at p. 1220).

"The next question that arises is whether the movement of axle-box bodies from Belgium into Madras was the result of a covenant in the contract of sale or an incident in the contract. It seems to us that it is quite clear

from the contract that it was incidental to the contract that the axle-box bodies would be manufactured in Belgium, inspected there and imported into India for the consignee. Movement of goods from Belgium to India was in pursuance of the conditions of the contract between the assessee and the Director-General of Supplies. There was no possibility of these goods being diverted by the assessee for any other purpose. Consequently we hold that the sales took place in the course of import of goods within Section 5 (2) of the Act, and are, therefore, exempt from taxation".

46. It will be noticed that the sale which was sought to be taxed but was exempted was the sale to Southern Railway and the contract under which the movement resulted was with the Director-General of Supplies.

47. The heart of the matter lies in answering one question. Can two sales occasion an export? I find no difficulty in answering this question in the affirmative. Two sales can take place in the course of export if they are effected by a transfer of documents of title to the goods after the goods have crossed the customs frontier of India, and they both will be protected under Section 5 (1) of the Act. Therefore, it cannot be assumed that it is the intention of Section 5 (1) that only one sale can enjoy the protection of Section 5 (1). Accordingly, apart from any assumption, can two sales occasion the export. As I have said 'occasion' does not necessarily mean to cause or to immediately cause; it also means to "bring about especially in an incidental or subsidiary manner". If the sale by the appellant brings about the export in an incidental or subsidiary manner it can be said to occasion the export. It was in view of these considerations that *Shah J.*, speaking for the Court, had observed in *Ben Gorm Nilgiri Plantations Co. v. Sales Tax Officer*, (1964) 15 STC 753 at p. 759 = (AIR 1964 SC 1752 at p. 1755).

"A sale in the course of export predicates a connection between the sale and export, the two activities being so integrated that the connection between the two cannot be voluntarily interrupted, without a breach of the contract or the compulsion arising from the nature of the transaction. In this sense to constitute a sale in the course of export it may be said that there

must be an intention on the part of both the buyer and the seller to export, there must be an obligation to export, and there must be an actual export. The obligation may arise by reason of statute, contract between the parties, or from mutual understanding or agreement between them, or even from the nature of the transaction which links the sale to export. A transaction of sale, which is a preliminary to export of the commodity sold may be regarded as a sale for export, but is not necessarily to be regarded as one in the course of export, unless the sale occasions export".

48. In this passage Shah, J., clearly visualised that a transaction of sale which is preliminary to export may be regarded as in the course of export if the sale occasions the export. The test postulated may be that there must be an integral relation or bond between the sale and export. Why Shah, J., held that the sales were not in the course of export was, to use his words;

"that the tea chests are sold together with export rights imputes knowledge to the seller that the goods are purchased with the intention of exporting. But there is nothing in the transaction from which springs a bond between the sale and the intended export linking them up as part of the same transaction. There is no statutory obligation upon the purchaser to export the chests of tea purchased by him with the export rights. The export quota merely enables the purchaser to obtain export licence, which he may or may not obtain. There is nothing in law or in the contract between the parties, or even in the nature of the transaction which prohibits diversion of the goods for internal consumption. The sellers have no concern with the actual export of the goods, once the goods are sold. They have no control over the goods. There is therefore no direct connection between the sale and export of the goods which would make them parts of an integrated transaction of sale in the course of export."

49. The case, with respect, points out clearly what was lacking in the transaction. It is one way of laying down tests. If these incidents had not been missing the Court would have surely held the sale to be in course of export.

50. It seems to me that this judgment is in effect overruling earlier decisions of this Court without saying so. The Calcutta High Court (Ray and Basu JJ.) reviewed the Supreme Court cases exhaustively in *S. K. Roy v. Addl. Member, Board of Revenue*, 18 STC 379 = (AIR 1967 Cal 338) and came to the conclusion that the mere fact that there is no contract between the seller and the foreign buyer does not conclusively establish that a transaction cannot be one 'in the course of export'. It may still be held to be such a transaction provided it is established that the contract between the seller and the third party 'occasions' the export. Basu J., followed this decision in *Serajuddin and Co. v. Commercial Tax Officer*, (1969) 23 STC 258 (Cal).

51. On the facts of this case, the Coffee Board, the Sellers, have concern with the actual export of goods. They have made various provisions to see that the purchasers must export. Condition 26, quoted by the learned Chief Justice, clearly provides that the coffee shall be exported to stipulated or approved destinations and it shall not under any circumstances be diverted to another destination, sold or be disposed of or otherwise released in India. If the purchaser commits a default, apart from penalty, it is provided that unexported coffee may be seized. Thus the Coffee Board retains control over the goods. These conditions create a bond between the sale and eventual export. The possibility that in a particular case a purchaser might commit a breach of contract or law and not export does not change the nature of the transaction.

52. I would accordingly allow the petition and declare that the sales held by the Coffee Board at the export auctions were in the course of export and exempt under Article 286 (1) (b) of the Constitution, read with Sec. 5 of the Central Sales Tax Act, 1956, and quash the impugned assessments in so far as they assess such sales.

ORDER

53. In accordance with the majority judgment, the petitions fail and are dismissed with costs.

Petitions dismissed.

AIR 1971 SUPREME COURT 884
(V 58 C 180)

(From: AIR 1965 Mad 537)

J. C. SHAH AND A. N. GROVER, JJ.

S. Rajagopalaswami Naidu, Appellant v. The Bank of Karaikudi, Ltd., Respondent.

Civil Appeal No. 1672 of 1966, D/- 22-9-1970.

(A) T. P. Act (1882), Section 67-A — Same mortgagor — Husband and wife could not be treated as one entity for mortgages — Husband and wife owning separate properties and mortgaging their properties separately and jointly — Suit to enforce joint mortgage does not bar a suit to enforce mortgage executed by one spouse alone — Section 67-A not attracted as 'mortgagor' is not the same.

To attract the applicability of Section 67-A, it is essential that the mortgagor must be the same and he should have executed two or more mortgages in respect of each of which he has a right to obtain the same kind of decree under Section 67.

(Para 4)

There is no statutory provision or rule or principle by which the wife and the husband could be treated as one entity for the purpose of the mortgages.

(Para 4)

Where husband and wife own separate and distinct property and each mortgages his property separately and also jointly, the suit to enforce the joint mortgage does not bar a suit to enforce the mortgage by one spouse. Section 67-A is not attracted as the mortgagor is not the same in these cases: (1889) 13 Bom 45, Foll.; AIR 1965 Mad 537 (Pt A), Affirmed.

(Para 4)

(B) Usurious Loans Act (1918), Section 3 — Mortgage — Interest payable fixed at 10½ p. c. p. a. — Penalty clause providing that if mortgagor failed to pay interest regularly, he would be liable to pay interest at 12 p. c. p. a. — Default — Rate of 12 p. c. interest on the facts and circumstances of the case held unfair and penal — Interest directed to be calculated at original contractual rate. AIR 1965 Mad 537 (Pt B), Reversed.

(Para 5)

Cases Referred: Chronological Paras

(1889) ILR 13 Bom 45, Moro

Raghunath v. Balaji

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KN/KN/E441/70/VBB/T

M/s. P. Balagopal, A. V. Rangam and Miss Lily Thomas, Advocates, for Appellant; Mr. M. Natesan, Sr. Advocate, (M/s. R. Ramamurthi Iyer and R. Gopalakrishnan Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal by certificate from a decree of the Madras High Court.

2. The appellant mortgaged his property bearing No. 162-A, West Masi Street, Madurai town for a sum of Rs. 45,000/- with the respondent Bank on October 14, 1950. He agreed to repay Rs. 5,000/- within a specified date and the balance was payable within two years from the date of the deed together with interest at 10½%. It was further agreed that if the mortgagor failed to pay the interest periodically and regularly he would be liable to pay interest at the rate of 12% per annum from the date of such default and further if he failed to pay the entire amount stipulated within two years he would have to pay the whole amount together with interest at 3½% per annum. The sum of Rs. 5,000 was paid within the time specified but the balance remained unpaid. In January 1952, the appellant and his wife borrowed Rs. 25,000/- and jointly executed a pronote. The wife deposited her title deeds relating to premises No. 162 West Masi Street. On June 25, 1952 the appellant and his wife created a mortgage of their respective properties Nos. 162-A and 162 West Masi Street to secure repayment of a sum of Rs. 8850/-. All the three mortgages were in favour of the respondent Bank.

3. In 1953 the Bank instituted a suit on the foot of the last two mortgages and obtained a decree against the appellant and his wife. This decree appears to have been satisfied. In April, 1958 the suit out of which the present appeal has arisen was filed by the Bank on the foot of the mortgage dated October 14, 1950. The main defence of the appellant, who was the sole mortgagor, was that the suit was not maintainable in view of the provisions of Section 67-A of the Transfer of Property Act and that the stipulation of interest was penal and in contravention of the provisions of the Usurious Loans Act, 1918. A number of other issues were framed but it is altogether unnecessary to

mention them. The trial Court granted a preliminary decree for the recovery of principal amount of Rs. 40,000/- which remained unpaid with interest at 12% per annum from August 1, 1952 till the date of the decree and thereafter at 6% per annum till realisation. An appeal was taken to the High Court where two points were agitated. The first was based on the provisions of Sec. 67-A of the Transfer of Property Act and the second related to the rate of interest. The High Court did not accede to any of the contentions and dismissed the appeal.

4. Section 67-A of the Transfer of Property Act provides that a mortgagee who holds two or more mortgages executed by the same mortgagor in respect of each of which he has a right to obtain the same kind of decree under Section 67 and who sues to obtain such decree on any one of the mortgages, shall, in the absence of a contract to the contrary, be bound to sue on all the mortgages in respect of which the mortgage-money has become due. This section was inserted by the Amending Act 20 of 1929 in view of certain conflict among the High Courts in this country, with regard to the right of the mortgagee to sue at different times on different mortgages although the mortgagor was the same. As pointed out in Mulla's Transfer of Property Act, 5th Edn. at page 481 Sections 61 and 67-A of this Act lay down the simple rule that if a mortgagor has made two or more mortgages of the same property or of different properties to the same mortgagee the mortgagor may redeem each separately but that the mortgage must enforce all or none. To attract the applicability of Section 67-A it is essential that the mortgagor must be the same and he should have executed two or more mortgages in respect of each of which he has a right to obtain the same kind of decree under Section 67. In the present case it is not possible to hold that the mortgagor in the suit on the foot of the mortgage dated October 14, 1950 is the same as the mortgagor in the previous suit which was filed on the foot of the mortgages in favour of the appellant and his wife. In the other two mortgages there were two mortgagors, one the appellant and the other his wife. There is no statutory provision or rule or principle by which the wife and

the husband could be treated as one entity for the purpose of the mortgages. Each was owner of a separate and distinct property and both joined in mortgaging their respective properties. In *Moro Raghunath v. Balaji*, (1889) ILR 13 Bom 45 the first mortgage was by two brothers and the second mortgage of part of the same property was by one brother. The Bombay High Court held that the suit to enforce the first mortgage did not bar a suit to enforce the second mortgage. This was before the insertion of Section 67-A but the principle embodied in that section is clearly illustrated by that case. The bar of Section 67-A, therefore, could not possibly come in the way of the institution of the present suit.

5. On the question of interest we are of the view in the light of the provisions of the mortgage deed and all the circumstances that the rate of 12% is unfair and penal. We are inclined, therefore, to give this relief that the interest should be calculated at the rate of 10½% (which was the original contractual rate) from the date of the mortgage to the date of the preliminary decree. Thereafter the interest shall be payable as directed by the trial court at the rate of 6% per annum till realisation. With this modification the appeal is dismissed but in view of the entire circumstances the parties are left to bear their own costs in this court.

Decree modified.

AIR 1971 SUPREME COURT 885 (V 58 C 181)

(From : Bombay)*

M. HIDAYATULLAH, C. J., A. N. RAY AND I. D. DUA, JJ.

Noor Mohammad Mohd. Yusuf Momin, Appellant v. The State of Maharashtra, Respondent.

Criminal Appeal No. 24 of 1968, D/- 24-3-1970.

(A) Constitution of India, Art. 136 — Supreme Court normally does not review and appraise evidence for itself.

Under Art. 136 the Supreme Court does not normally proceed to review

*(Criminal Appeal No. 389 of 1966, D/- 14-12-1967 — Bom.)

LN/LN/B516/70/DHZ/D

and appraise the evidence for itself and the conclusions of the High Court on questions of fact on appreciation of evidence are considered to be final. This is so even if the Supreme Court were to feel that a different view of the evidence is possible. But where it was represented that the evidence on the record did not support the conclusion of the High Court and that grave and substantial injustice had been caused, the Supreme Court undertook to go into the evidence to satisfy itself if there was any sufficient ground for interference on appeal by special leave.

(Para 8)

(B) Penal Code (1860), Ss. 34, 109, and 120B — Distinction — Under Section 34 participation in the commission of offence necessary — Under S. 109 accused need not be present — Under S. 120B mere agreement is sufficient — Conspiracy need not be proved by direct evidence.

Section 34 embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109 on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission. Criminal conspiracy differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by S. 107, I.P.C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed, in most cases proof of conspiracy is largely inferential though

the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto.

(Para 7)

Mr. A. S. R. Chari, Sr. Advocate (Mr. A. G. Ratnaparkhi, Advocate, with him), for Appellant; M/s. G. L. Sanghi and S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

DUA, J:— In this appeal by special leave we are only concerned with the conviction of one out of four accused persons jointly tried for the murder of one Mohd. Yahya. The appellant Noor Mohammed Mahamed Yusef Momin, accused no. 4, in the trial court was jointly tried with three others in the court of the second Additional Sessions Judge, Thana on the following three charges:

"That you accused nos. 1 to 4 on or about the 16th day of April, 1965 at Bhiwandi entered into an agreement to commit the murder of Mohamed Yahya and that the same illegal act was done in pursuance of the said agreement and thereby you committed an offence punishable under S. 120B of the Indian Penal Code and within my cognizance.

That you accused Nos. 1, 2 and 3 on or about the 17th day of April, 1965 at about 11 p.m. at Bhiwandi in furtherance of common intention of you all and accused no. 4 to commit the murder of the deceased Mohamed Yahya did commit his murder by intentionally causing his death by assaulting him by knife and thereby committed an offence punishable under S. 302 read with Section 34 of the Indian Penal Code and within my cognizance.

In the alternative you accused No. 4 on 17th of April, 1965 at Bhiwandi abetted the commission of the offence of murder of Mohamed Yahya

by accused Nos. 1 to 3 which offence was committed in consequence of your abetment and that you thereby committed an offence punishable under sections 109 and 302 of the Indian Penal Code and within my cognizance.' The trial court convicted Mohd. Taki Haji Hussein Momin, accused no. 1 under Section 302, I.P.C. and sentenced him to imprisonment for life. He was acquitted of the other charges. His three co-accused were acquitted of all the charges. Accused No. 1 appealed to the Bombay High Court against his conviction whereas the State appealed against the acquittal of the other three. The High Court, after considering the evidence on the record, upheld the conviction of accused No. 1 and reversed the order of acquittal of the other three. Accused Nos. 2, 3 and 4 (Chinwa alias Ahamed Hussan Momin, Abdul Rahamen Bacchu Momin, and Nur Mohamed Mahamed Yusef Momin respectively) were held guilty of the offence under Section 120-B, I. P. C. as also of the offence under Section 302, read with Section 34, I. P. C. Accused No. 4 was in addition held guilty of the offence under Section 302 read with Section 109, I. P. C. Accused Nos. 2, 3 and 4 were sentenced to imprisonment for life both under Section 120-B, I. P. C. and Section 302 read with Section 34, I. P. C. Accused No. 4, appellant in this Court, was also separately sentenced to imprisonment for life for the offence under Section 302 read with Section 109, I. P. C. Incidentally it may be mentioned that Jaitunbi, widow of the deceased Mohd. Yahya, had also appealed to the Bombay High Court challenging the acquittal of accused Nos. 2, 3 and 4 on all charges and of accused No. 1 on the charges other than that of murder under Section 302, I. P. C. This appeal which was treated as an application under Section 417 (3), Criminal P. C. was held not to be maintainable.

2. As already indicated, this Court granted special leave only to the appellant who was accused No. 4 in the trial Court.

3. Before narrating the prosecution story the inter se relationship of the accused persons may be stated. Abdul Rehman Bacchu Momin, accused No. 3, is the husband of the sister of the appellant Ncor Mohammed's wife. Chinwa alias

Ahmed Hussan Momin, accused No. 2, is the brother of Kallu, who is the son-in-law of the appellant, accused No. 4. Mohd. Taki, accused No. 1, is the servant of Kallu. All these persons are the residents of the same place and the deceased Mohd. Yahya was a close neighbour of the appellant. According to the prosecution there were constant disputes between the appellant and the deceased over the right of passage and the right to tap water, and it is not disputed that both sides had made reports and counter-reports with the police against each other. The climax reached on April 16, 1965. In the morning at 7 O'clock on that day Mohd. Yahya, when going out of his house, found that there was a heap of earth and a cot belonging to the appellant obstructing his way. A cow belonging to the appellant was also standing in the passage. In order to clear his way the deceased picked up a stone and hurled it at the cow. This offended the appellant and he in retaliation threw a glass which he was holding towards the deceased and also abused him. The deceased reported this incident to the police station. The appellant also went to the police station and made a counter-complaint against the deceased. When the deceased and the appellant had gone to the police station the two wives of the appellant abused Jaitunbi, wife of the deceased, with the result that Jaitunbi also went to the police station to lodge a report. But this report was not recorded. A little later, the wives, sisters and children of the appellant again abused Jaitunbi and pelted stones at her. Jaitunbi went to the police station again to lodge a complaint. The same day at about 10 A. M. when the deceased was lying on a cot in his house the appellant came up to the door of the former's house asking him to get down. On enquiry by the deceased as to why he should get down the appellant replied that he would serve the deceased with his last tea. At that time the appellant was accompanied by four or five persons including Chinwa, accused No. 2. It is said that all of them abused the deceased. Chinwa, accused No. 2, held a knife in his hand which he is stated to have opened by pressing the button and as he tried to enter the house of the deceased, the latter's daughter, Noorjahan, went by the

back door to the police station to lodge a complaint. This part of the story is not admitted by the accused. On Noorjahan's complaint the police came to the spot in a van and after interrogating the persons present the police party took with them accused Nos. 2 and 3. The appellant is stated to have offered to reach the police station himself a little later.

4. In view of these incidents Jaitunbi apparently felt somewhat frightened and advised her husband, deceased Mohd. Yahya, to go to Bombay to avoid further clashes with the appellant. Mohd. Yahya, acting on his wife's advice, went away to Bombay but returned on the evening of April 17, 1965 bringing with him some female guests. In those days an Urus was being held near Par Naka and it appears that it was to attend this Urus that the female guests came with him. Seeing Mohd. Yahya back from Bombay, the appellant asked his nephew Latif, who has sleeping on a cot outside the house, to go in, loudly uttering that a dead body was to be kept on that cot. The deceased who had reached home at about 9.30 p.m. a little later went out to a pan shop near the Navyug Hotel. The deceased accompanied by two unidentified persons followed him. Soon after, Mohd. Yahya was stabbed with a knife and this news reached his house. At the Par Naka two constables, Bhika Bahiram and Suvarnasing, who were on duty in connection with the Urus, on learning of some disturbance near the Navyug Hotel and noticing some commotion, proceeded to the lane where a crowd had collected. On the way, accused No. 3 told them that nothing untoward had happened; but the two constables nevertheless proceeded further and reached the spot where Mohd. Yahya was lying in injured condition. Someone from the upper storey of a house nearby shouted that the assailants were running away. Constable Bhika Bahiram asked Suvarnasing to attend to the injured person and he himself chased the two persons trying to escape. He caught Mohd. Taki, accused No. 1, in a lane near the municipal office. The other person who could not be caught was identified by Bhika Bahiram as Chinwa, accused No. 2, who was known to him. Suvarnasing in the meantime, feeling that Bhika Bahiram would need his help also followed him and found

him grappling with Mohd. Taki. Both the constables over-powered Mohd. Taki, who had a knife in his pocket and whose clothes were blood-stained. Mohd. Taki was brought back to the place where Mohd. Yahya was lying injured. Mohd. Yahya was taken to the hospital in a bullock cart but he expired soon thereafter. In the report lodged by constable Bhika Bahiram, the names of accused Nos. 1 and 2 were mentioned and accused No. 3 was described as an old man with moustaches, wearing a lungi. The appellant was not arrested, though his statement was recorded during the investigation on April, 19, 1965. He appears to have absconded soon thereafter and was arrested on June 18, 1965.

5. The case against the appellant is to be considered in the background of the order of conviction against the other three co-accused which has become final, this Court having declined special leave against conviction.

6. The High Court, on a consideration of the entire evidence, came to the conclusion that all the accused (Nos. 1 to 4) had hatched a plan to commit the murder of Mohd. Yahya after his return from Bombay and it was in pursuance of that conspiracy that he was murdered on the night of April 17, 1965. The appellant, along with accused Nos. 2 and 3, was also held guilty of an offence under Section 302 read with Section 34 Indian Penal Code. He was further held guilty of an offence under Section 302 read with Section 109, Indian Penal Code. The appellants' conviction on all these counts is challenged in this Court.

7. So far as S. 34, Indian Penal Code is concerned, it embodies the principle of joint liability in the doing of a criminal act, the essence of that liability being the existence of a common intention. Participation in the commission of the offence in furtherance of the common intention invites its application. Section 109, Indian Penal Code on the other hand may be attracted even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes

place or has intentionally aided the commission of an offence by an act or illegal omission. Turning to the charge under Section 120-B, Indian Penal Code criminal conspiracy was made a substantive offence in 1913 by the introduction of Chapter V-A in the Indian Penal Code. Criminal conspiracy postulates an agreement between two or more persons to do, or cause to be done, an illegal act or an act which is not illegal, by illegal means. It differs from other offences in that mere agreement is made an offence even if no step is taken to carry out that agreement. Though there is close association of conspiracy with incitement and abetment the substantive offence of criminal conspiracy is somewhat wider in amplitude than abetment by conspiracy as contemplated by Sec. 107, I. P. C. A conspiracy from its very nature is generally hatched in secret. It is, therefore, extremely rare that direct evidence in proof of conspiracy can be forthcoming from wholly disinterested quarters or from utter strangers. But, like other offences, criminal conspiracy can be proved by circumstantial evidence. Indeed in most cases proof of conspiracy is largely inferential though the inference must be founded on solid facts. Surrounding circumstances and antecedent and subsequent conduct, among other factors, constitute relevant material. In fact because of the difficulties in having direct evidence of criminal conspiracy, once reasonable ground is shown for believing that two or more persons have conspired to commit an offence then anything done by anyone of them in reference to their common intention after the same is entertained becomes, according to the law of evidence, relevant for proving both conspiracy and the offences committed pursuant thereto. In the present case the High Court, after referring to the evidence of Laxmibai, (P. W. 7) and Hari Chavan (P. W. 13) (whom that Court expressly described as independent witnesses) and also of Murlidhar (P. W. 12), expressed its opinion in these words:

"All this evidence would show that at least since the 16th of April, 1965 the accused Nos. 2, 3 and 4 were acting in concert and had something common in their mind. It would also show the presence of the accused No. 2 with a knife at the incident of the 16th April, 1965 and his threatening the deceased

with the knife and the acts and words used by the accused No. 4 Mohammad Noora inspiring the accused No. 2 and some other persons who were with him to beat and kill Mohammad Yahya, the subsequent utterances of the accused No. 4 when the deceased returned from Bombay on the night of the 17th of April, 1965, the following of the deceased Mohammad Yahya by the accused No. 4 along with two persons when Mohammad Yahya went out to have a paan, the death of Mohammad Yahya soon thereafter, then running of the four persons from the scene of the offence, the accused No. 3 misleading the police constable with respect to the incident, the accused Nos. 1 and 2 running away from the scene of the offence eluding the police constables, the accused No. 1 being caught after some struggle near the Municipal Office and found with his clothes stained with blood and having a knife in his shirt pocket, all these circumstances, taken together, would show that the accused Nos. 1 to 4 must have met previously before causing of the injuries to deceased and must have hatched out a plan of causing the death of the deceased or causing at least grievous injuries to the deceased. Otherwise the presence of all the four accused near the scene of the offence at the time the incident occurred cannot be satisfactorily explained. The accused No. 4 had known that the deceased had returned from Bombay and the ominous words he used while asking his nephew Lateef to get down from the cot would suggest that he had still in mind that idea of doing away with the deceased and must have collected the other colleagues of his to carry out the plan which must have been hatched out prior to the incident. That inference can reasonably be drawn from the circumstances established in the case and it is in pursuance of that pre-planning to do away with the deceased, all the four accused must have followed the deceased when he went out that night and the deceased was stabbed by at least some of these accused persons". The High Court also believed the evidence of Noorjehan (F. W. 11) and Jaitunbi, (P. W. 5). In its opinion though these two witnesses were, to a certain extent, interested their evidence appeared to it to be natural and its tenor did not show that they were deposing falsely. On a consideration

of the entire material on the record the High Court felt that all the four accused persons must have hatched a plan to commit the murder of Mohd. Yahya after his return from Bombay and it was in pursuance of this conspiracy that Mohd. Yahya was murdered on the night of April 17, 1965. The Court took into account the facts that accused No. 1 was caught after some chase near the scene of occurrence, accused No. 2 was identified though he had made good his escape, accused No. 3, who was also identified by description, tried to mislead the police constables, and that accused No. 4 was seen following the deceased just before the murder with two or three persons. On this material the High Court upheld the appellant's conviction.

8. Under Article 136 of the Constitution, this Court does not normally proceed to review and appraise the evidence for itself and the conclusions of the High Court on questions of fact on appreciation of evidence are considered to be final. This is so even if this Court were to feel that a different view of the evidence is possible. But in this case, as it was represented that the evidence on the record does not support the conclusion of the High Court and that grave and substantial injustice had been caused, we undertook to go into the evidence, with the help of the counsel for the parties, to satisfy ourselves if there is any sufficient ground for interference on appeal by special leave. Hari Chavan, (P. W. 13), has deposed that on April 16, 1965 at about 10.30 P. M. the appellant, while standing near the steps of Mohd. Yahya's house, exhorted three of his companions, one of whom was accused No. 2 who had a knife in his hand, to beat the deceased: the actual words used being, "Beat him: Kill him: I shall look to the consequences". This evidence is corroborated by Laxmibai, (P. W. 7) and both of these witnesses have been believed by the High Court. Laxmibai (P. W. 7) actually saw the appellant with the two others following the deceased about 15 or 20 minutes before the murder. We are unable to find any cogent ground for disagreeing with the High Court. On this evidence not only animus on the part of the appellant but also instigation by him must be held to be fully established. This evidence would also

support the charge of criminal conspiracy against the appellant. Indeed, the evidence of Jaitunbi (P. W. 5) and Noorjehan (P. W. 1) also shows that the appellant on April 16, 1965 and on the evening of April 17, on Mohd. Yahya's return from Bombay and a short time before his murder, openly gave expression to his strong feelings of animosity against the deceased which leaves little doubt that he was thinking of doing away with Mohd. Yahya's life. The admitted strained relations between the parties which reached the climax on April 16, 1965 and the evidence just discussed, in our opinion, clearly establishes the complicity of the appellant in the murder of the deceased. The charges under Section 302 read with Section 109, I. P. C. and of conspiracy are thus fully supportable on the evidence. In regard to the charge under Section 302 read with Section 34, I. P. C. also Jaitunbi (P. W. 5) has deposed that on the date of the occurrence at about 9.30 P. M. the appellant asked his nephew Latif who was sleeping on the cot outside to go inside the house because a dead body was to be kept on that cot. Thereafter it is in the evidence of Laxmibai (P. W. 7), that the appellant accompanied by two persons followed the deceased when the latter went to the pan shop. About 20 minutes later the news of Mohd. Yahya's murder reached his house. From this evidence it seems highly probable that at the time of the actual murder of Mohd. Yahya the appellant was either present with the other three co-accused or was somewhere nearby. But this evidence does not seem to be enough to prove beyond reasonable doubt his presence at the spot in the company of the other accused when the murder was actually committed. For it may be that after leaving the house he stayed away and the persons actually taking part in the murder were only the other three co-accused. We are, therefore, inclined to give to the appellant the benefit of doubt in regard to the charge under Section 302 read with Section 34, I. P. C. This would, however, be of little practical benefit to the appellant because he has already been given the lesser sentence. This appeal is, therefore, accepted only to the extent that the appellant's conviction under Section 302 read with Sec. 34 is set

aside. In all other respects this appeal fails and is dismissed.

Appeal partly allowed.

**AIR 1971 SUPREME COURT 891
(V 58 C 182)**

(From: Andhra Pradesh)*

J. C. SHAH, G. K. MITTER, K. S. HEGDE, A. N. GROVER AND A. N. RAY, JJ.

Kakinada Annadana Samajam etc. Appellants v. Commr. of Hindu Religious & Charitable Endowments, Hyderabad & others, Respondents. L. V. Gopal Rao, Intervener.

Civil Appeals Nos. 1249-1251, 1271, 1358, 1360, 1381, 1382, 1521, 1522, 1544, 1612, 1668, 1669, 1879, 1880, 1912, 1973 & 1974 of 1970, D/- 2-12-1970.

(A) Constitution of India, Arts. 19 (1) (f) and 31 — Office of hereditary trustee is not "property" within meaning of Article 19 (1) (f) or Article 31 — W. P. Nos. 2871 of 1968 etc. D/- 31-12-1969 (A. P.) Reversed; AIR 1954 Mad 385, Overruled.

The hereditary trustees of the institutions generally have only a bare right to manage and administer the secular estate of the institution or the endowment and they do not have proprietary or beneficial interest either in the corpus or in the usufruct of the estate. The position of a hereditary trustee does not appear to be in any way different from that of a Dharamkartha or a mere manager or custodian of an institution or endowment. There is one exception only. The hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession. But in all other respects his duties and obligations are the same as that of Dharamkartha. A hereditary trustee cannot be equated to a Shebait of a religious institution or a Mathadhipati or the Mahant. The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant as also a shebait and a Mathadhipati. The position of Dharamkartha, on the other hand, is not that of a Shebait of a religious institution or of the head of a math. These functionaries have

*(Writ Petition Nos. 2871 of 1968 etc. D/- 31-12-1969 — Andh-Pra.)

LN/LN/F932/70/DVT/G

a much higher right with larger power of disposal and administration and they have a personal interest of beneficial character. A bare right to manage an institution or an endowment cannot be treated as property within Article 19 (1) and Article 31. Consequently, the right of hereditary trusteeship is not property within meaning of Article 19 (1) (f) or any other Article of the Constitution. W. P. Nos. 2871 of 1968, etc., etc. D/- 31-12-1969 (A. P.), Reversed; AIR 1954 Mad 385, Overruled; Contrary observation in (1970) 2 SCR 424, held obiter, AIR 1963 SC 1638 and AIR 1964 SC 1501, Rel. on.

(Paras 7, 10 to 12)

(B) Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act (17 of 1966), Pre., Ss. 2 (15) and 15 — Restrictions imposed by the Act on hereditary trustee are reasonable — Constitution of India, Art. 19 (5).

Even assuming that the rights of hereditary trustee constitute, "property" their regulation by the relevant provisions of the Act is protected by Article 19 (5) as the restrictions imposed are reasonable and are in the interest of the general public. W. P. Nos. 2871 of 1968, etc. D/- 31-12-1969, (AP), Affirmed. (Obiter). (Para 13)

Cases Referred: Chronological Paras

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|---|--------|
| (1970) 2 SCR 424, Sambudamurthi Mudaliar v. State of Madras | 12 |
| (1964) AIR 1964 SC 1501 (V 51) = | |
| (1964) 7 SCR 32, Raja Bira-kishore v. State of Orissa | 11, 12 |
| (1963) AIR 1963 SC 1638 (V 50) = | |
| (1964) 1 SCR 561, Tilkayat Shri Govindlalji v. State of Rajasthan | 11, 12 |
| (1954) AIR 1954 Mad 385 (V 41) = | |
| ILR (1955) Mad 356, Narayanan Nambudripad v. State of Madras | 8 |
| (1951) AIR 1951 SC 293 (V 38) = | |
| (1951) SCR 1125, Angurbala Mullick v. Debabrata Mullick | 8 |
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| ILR (1943) 2 Cal 137, Bhaba Tarini Debi v. Ashalata Debi | 8 |
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| (1900) 27 Ind App 69 = ILR 23 Mad 271 (PC), Gnanasambanda Pandara Sannadhi v. Velu Pandaram | 9 |

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85 (PC), Jatindra Mohan Tagore
v. Ganendra Mohan Tagore 8, 9
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bhat v. Kapabhat 9

In C. As. Nos. 1249 to 1251, 1360, 1382, 1521 and 1522 of 1970: Mr. M. Natesan, Senior Advocate, (Mr. A. Subba Rao, Advocate, with him), for Appellants; In C. As. Nos. 1381, 1544, 1879, 1880, 1912, 1973 and 1974 of 1970: Mr. A. Subba Rao, Advocate, for Appellants; In C. A. No. 1271 of 1970: Mrs. Shyamla Pappu, M/s. Balarameshwari Rao and Vineet Kumar Advocates, for Appellant; In C. A. No. 1358 of 1970: Mr. M. Natesan, Senior Advocate, (Mr. A. V. V. Nair, Advocate, with him), for Appellant; In C. A. No. 1663 of 1970: K. Jayaram, Advocate, for Appellant; In C. A. No. 1669 of 1970: Mr. M. Natesan, Sr. Advocate, (Mr. K. Jayaram Advocate, with him), for Appellant; In C. A. 1612 of 1970: A. V. Rangam, for Appellant; Mr. A. K. Sen, Sr. Advocate, (M/s. R. Venugopala Reddy and P. Parameswara Rao, Advocates, with him) for Nos. 1 to 4 (in C. A. No. 1522 of 1970), and for Nos. 1 and 2 (in C. A. No. 1669 of 1970) and in other Appeals, for Respondents; In C. A. No. 1669 of 1970: Mr. P. Basi Reddy, Sr. Advocate, (Mr. G. Narayana Rao, Advocate, with him), for Respondent No. 6; Mr. K. Rajendra Chowdhary, Advocate for Intervener.

The following Judgment of the Court was delivered by

GROVER, J.: These appeals by certificate are from a common judgment of the Andhra Pradesh High Court and involve the question of the constitutionality of certain provisions of the Andhra Pradesh Charitable and Hindu Religious Institutions and Endowments Act, 1966 (Act 17 of 1966), hereinafter called the 'Act'.

2. A number of petitions under Article 226 of the Constitution were filed before the High Court on behalf of the institutions of endowments some of which were public and some private in character. A few institutions were societies registered under the Societies Registration Act while others claimed to be religious endowments or public bodies like municipalities which were managing the institutions. We might, for the sake of convenience state the facts in Civil Appeal No. 1360 of 1970. In the affidavit of Nalam Rama-

lingaiah it is stated that he is the hereditary trustee of the Nalam Choultry and Vysya Seva Sadanam which are private trusts. They were founded by his ancestor in the year 1879 and 1920 respectively. He had been the managing trustee from 1943. The Choultry was endowed with immovable property comprising an area of 453 acres of land which, by careful management, was now fetching an income of Rs. 40,000/-. Besides feeding the poor and affording free lodging facilities to pilgrims scholarships were being given to deserving students. The Sevasadan was endowed with huge properties which were fetching Rupees 18,000/- as income. The objects of this charity were (1) to impart education and training in handicraft to women; (2) to feed poor girls; (3) provide free shelter to women students and (4) run women's Sanskrit School. At no time there had been any complaint about mismanagement of the aforesaid trust. A number of other Choultries were also mentioned which were being managed by the hereditary trustee or trustees. Some of them were providing food and shelter to students and travellers of all castes and creeds including Muslims and Christians. Among the objects of some of the Choultries was included the performing of pujas in temples. These Choultries were founded in the last century and ever since their inception the members of the family of the founder or founders had been managing them. At no time there had been any complaint of any kind against the management. On the contrary the hereditary trustees had improved the endowment properties and added several charitable activities to the existing objects.

3. The validity of the main provisions of the Act was challenged on the grounds that the office of the hereditary trusteeship was property within the meaning of Art. 19 (1) (f) and that these provisions were ultra vires and void as violative of that Articles as also of Arts. 14, 25, 26 and 31 of the Constitution. On behalf of the respondents the position taken up was that all the institutions in question were public and none of them was private in character that they were religious and charitable institutions and endowments within the meaning of the Act. It was denied that the office of hereditary trustee was property within the meaning of Art. 19 (1) (f) or that

there was infringement of any of the fundamental rights mentioned in the various petitions. It was maintained that the hereditary trustees etc. had only a bare right to manage the affairs of the institution and the secular matters which could not be regarded as property within the meaning of the aforesaid Article.

4. The High Court formulated five questions for decision but it is unnecessary to mention or go into all of them as the matters in controversy before us relate to two of these questions. These are (1) whether on the facts and in the circumstances the office of hereditary trusteeship is or is not property within the meaning of Art. 19 (1) (f) and Art. 31 and (2) whether all or any of the material provisions of the Act are hit by Art. 14, 19 (1) (f), 25, or 31. The High Court was of the view that the office of hereditary trustee was property within the meaning of Art. 19 (1) (f). It was, however, held that the impugned provisions only imposed reasonable restrictions on the exercise of the right of the trustees, in the interest of general public and good administration of the public institution. It was further found that none of the impugned provisions were violative of Arts. 14, 19 (1) (f), 25, 26 and 31 of the Constitution. According to the High Court the material provisions of the Act were only intended to regulate and ensure proper, efficient and better administration and management of the institution. All the writ petitions were dismissed.

5. The learned counsel for the appellants has invited our attention to the various sections of the Act but has confined his challenge mainly to the provisions contained in S. 15 read with Ss. 17, 27, 97 and 36 of the Act. We may advert to the main provisions and the general scheme of the Act. According to the preamble the Act has been enacted to consolidate and amend the law relating to the administration and governance of charitable and Hindu religious charitable institutions and endowments in the State of Andhra Pradesh. It applies to all public charitable institutions and endowments other than wakfs governed by the provisions of the Wakf Act 1954. According to the explanation to S. 1 (3) (a) the expression "charitable institutions and endowments" shall include every charitable institution or endowment the administration of which is, for the time

being, vested in any department of Government or civil court, Zila Parishad or other local authority or any company, society, organisation, institution or other person. The act also applies to all Hindu public religious institutions and endowments. "Charitable endowment" has been defined by S. 2 (3) to mean all property given or endowed for any charitable purpose. "Charitable institution" has been defined by S. 2 (4) to mean any establishment, undertaking organisation or association formed for a charitable purpose and includes a specific endowment. Various sub-clauses of S. 2 define "charitable purpose", "Commissioner", "Executive Officer", "Hereditary Office-holder", "Hereditary Trustee", "religious charity", "religious endowment", "specified endowment", etc. The definition of "hereditary trustee" contained in sub-clause (15) and a "trustee" in sub-clause (28) may be reproduced:

" "Hereditary trustee" means the trustee of a charitable or religious institution or endowment the succession to whose office devolves according to the rule of succession laid down by the founder or according to usage or custom applicable to the institution or endowment or according to the law of succession for the time being in force as the case may be."

" "Trustee" means any person whether known as mathadhipati, mohant, dharamakarta, mutwalli, muntazim, or by any other name, in whom either alone or in association with any other person, the administration and management of a charitable or religious institution or endowment are vested; and includes a Board of Trustees".

Chapter II deals with the appointment of Commissioner, Joint Commissioners etc., and their powers and functions. Section 6 provides for preparation and publications of list of charitable and religious institutions and endowments on the basis of income. By Section 7 the Commissioner is to be a corporation sole having a perpetual succession and common seal. Section 8 provides that subject to other provisions of the Act the administration of all charitable and Hindu religious institutions and endowments shall be under the general superintendence and control of the Commissioner and such superintendence and control shall in-

clude the power to pass any order which might be deemed necessary to ensure that such institutions and endowments are properly administered and their income is duly appropriated for the purpose for which they are founded or exist. Section 12 empowers the Commissioner to enter and inspect institutions and endowments. Chapter III relates to administration and management of charitable and Hindu religious institutions and endowments. Section 14 declares that all properties belonging to or given or endowed to a charitable or religious institution or endowment shall vest in the charitable or religious institution or endowment as the case may be. It is unnecessary to set out Section 15 in extenso: It provides for the constitution of a Board of trustees, whose number has been specified, in respect of charitable or religious institution or endowments of the various categories mentioned in the section. The power to constitute the Board has been conferred on the Government, Commissioner, Deputy Commissioner or the Assistant Commissioner, as the case may be. It is discretionary where there is a hereditary trustee but a Board must be constituted in every other case. In making the appointment of trustees it has been enjoined that due regard should be given to the religious denomination or other section thereof to which the institution belongs or the endowment is made and wishes of the founder. All properties belonging to the institution or endowment shall stand transferred to such Board of trustees or trustee, as the case may be. Section 16 gives the disqualifications for trusteeship. Section 17 deals with the appointment of a Chairman of the Board of trustees. It has been provided, inter alia, that where there is only one hereditary trustee he shall be the Chairman. Where there are more than one the Government etc., may nominate by rotation one of them to be the Chairman. Section 22 gives the duties of the trustee. He is bound to produce books, accounts, returns relating to the administration of the institution or endowment for inspection by the Commissioner and other functionaries whenever required to do so. Section 27 provides for the appointment of the Executive Officer by the Government and the Commissioner respectively. It also lays down the

duties of the Executive Officer. It is declared that the Executive Officer shall be the employee of the Government who shall determine the conditions of his service. Section 31 lays down how the vacancies amongst the office-holders or servants of charitable or religious institution or endowment have to be filled up by the trustees. Section 32 deals with the punishment of office-holders and servants. The general control vests in the trustees who can take disciplinary action in accordance with the prescribed procedure for the various matters mentioned in sub-section (1). In case of an institution or endowment whose annual income exceeds two lakhs the power to impose any penalty has been conferred on the Executive Officer. Section 35 gives power to the Executive Officer not to implement orders or resolutions of the trustee or Board of Trustees in certain cases. Section 36 gives overriding effect to the provisions of Chapter III over the existing corresponding provisions. Chapter IV deals with registration of charitable and religious institutions and endowments; Chapter V with muths and endowments attached thereto; Chapter VII with budget, accounts and audit; Chapter VIII with finance; Chapter X with alienation of immovable property and resumption of Inam Lands; Chapter XII with inquiries and Chapter XIII with appeals, revisions and review, etc. Section 95 empowers the Government to dissolve the Board of Trustees in certain cases and Sec. 97 enables it to appoint a specific authority where the board of trustees has ceased to function or has been dissolved. Section 102 is in the following terms:

"Nothing in this Act shall—

(a) save as otherwise expressly provided in this Act or the rules made thereunder, affect any honour, emoluments or perquisites to which any person is entitled by custom or otherwise in any charitable or religious institution or endowment, or its established usage in regard to any other matter, or

(b) authorise any interference with the religious or spiritual functions of the head of a math including those relating to the imparting of religious instruction or the rendering of spiritual service".

Under Section 110, Sections 92 and 93 of the Code of Civil Procedure, 1908

can no longer be applicable to charitable institutions and Hindu religious institutions and endowments to which the Act applies.

6. The main stress, on behalf of the appellants, has been laid on the effect of the provisions of the Act and in particular Section 15 read with the other sections mentioned before on the office of the hereditary trustee. It has been contended that a hereditary trustee has to manage the institution or the endowment in accordance with the directions of the founder. It was his duty and responsibility to appoint the staff and take disciplinary action whenever necessary and to regulate the expenditure and carry out generally the objects of the charitable institution or endowment. By the appointment of a Board of trustees the hereditary trustee can no longer manage and exercise control over the institution alone or in association with other hereditary trustees. He has to share the management and responsibility with other members of the Board who may be drawn from the section or faction which may be politically motivated and may be hostile to him. The appointment of the Board, it is pointed out, rests with the Government, the Commissioner or the Deputy Commissioner, as the case may be and although hereditary trustee or trustees have to be included in the Board, the entire administrative power is vested in the Executive Officer. This officer is a permanent Government servant and the Board or the trustee cannot either remove him or take any disciplinary action against him which means that the Board or the trustee cannot exercise any effective control over him. The Executive Officer can in certain eventualities even refuse to implement orders of the Board. The hereditary trustee has thus been left only with what may be called the "husk of the title" and his right to hold property has been seriously interfered with.

7. The first and the main question is whether the office of the hereditary trustee is "property" within the meaning of Art. 19 (1) (f). For the reasons, which will be presently stated, we are unable to agree with the High Court that the office of hereditary trustee is "property" within that Article.

8. The view that the office of hereditary trustee was itself "pro-

perty" within Article 19 (1) (f) even if no emoluments were attached to it found favour with many High Courts. We need refer only to the leading judgment of a Division Bench of the Madras High Court in *Kidangazhi Manakka Narayanan Nambudripad v. The State of Madras*, ILR (1955) Mad 356 = (AIR 1954 Mad 385). The line of reasoning which prevailed was that the office of hereditary trusteeship descended like partible property on the heirs of a trustee and even females were entitled to the office if they happened to succeed as heirs. The rule in the Tagore case, (1872) 9 Beng LR 377 (PC), has been applied to the devolution of the office of hereditary trustee as if it was property; (vide *Ganesh Chunder Dhur v. Lal Behary Dhur*, (1936) 71 Mad LJ 740 = (AIR 1936 PC 318) and *Bhaba Tarini Debi v. Asha Lata Debi*, ILR (1943) 2 Cal 137 = (AIR 1943 PC 89) both decisions of the Privy Council). Support was also sought from the observations in *Angurbala Mullick v. Debabrata Mullick*, (1951) SCR 1125 = (AIR 1951 SC 293) relating to the office of a Shebait which was held to be property. Another reason given was that "property" in Article 19 (1) (f) was of wide import and was of sufficient amplitude to take in hereditary trusteeship.

9. The High Court in the judgment under appeal delved into the history and the background in which hereditary office had been equated to property in Hindu Law. Starting from *Krishnabhat v. Kapabhat*, (1869) 6 Bom HCR 137 most of the later decisions of the Privy Council and the High Courts were discussed. We need refer only to *Gnanasambanda Pandara Sannadhi v. Velu Pandaram*, (1900) 27 Ind App 69 (PC) in which their Lordships pointed out that the rule in Tagore's case, (1872) 9 Beng LR 377 (PC) that all estates of inheritance created by gift or will so far as they were inconsistent with the general law of inheritance were void was applicable "to an hereditary office and endowment as well as the other immoveable property."

10. In cases in which the office of hereditary trusteeship has been held to be property within the meaning of Article 19 (1) (f) the true character and incidents of that office do not appear to have been fully kept in view. It was common ground before

the High Court and has not been disputed before us that the hereditary trustees of the institutions with which we are concerned have only claimed a bare right to manage and administer the secular estate of the institution or the endowment and in no case any hereditary trustee has claimed proprietary or beneficial interest either in the corpus or in the usufruct of the estate. The position of a hereditary trustee does not appear to be in any way different from that of a Dharmakartha or a mere manager or custodian of an institution or endowment. There is one exception only. The hereditary trustee succeeds to the office as of right and in accordance with the rules governing succession. But in all other respects his duties and obligations are the same as that of Dharmakartha. No one has ever suggested that a hereditary trustee can be equated to a Shebait of a religious institution or Mathadhipati or the Mahant. The ingredients of both office and property, of duties and personal interest are blended together in the rights of a Mahant as also a Shebait and a Mathadhipati. The position of Dharmakartha, on the other hand, is not that of a Shebait of a religious institution or of the head of a math. These functionaries have a much higher right with larger power of disposal and administration and they have a personal interest of beneficial character; (See *Srinivasa Chariar v. Evalappa Mudaliar*). There would thus be no justification for holding that since the office of the aforesaid functionaries has been consistently held by this Court to be property the office of a hereditary trustee is also property within Article 19 (1) (f).

11. In *Tilkayat Shri Govindlalji v. State of Rajasthan*, (1964) 1 SCR 561 = (AIR 1963 SC 1638) the distinction between the office of mahant and that of the Tilkayat of Nathdwara temple was clearly enunciated. It was pointed out that the mahant or Shebait was entitled to be maintained out of the property of the math or the temple. The Tilkayat never used any income from the property of the temple for his personal needs or private purposes nor did he claim any property interest therein. What he claimed was merely the right to manage the property, to create leases in respect of it in a reasonable manner and the right to alienate it

for the purposes of the temple. These rights were exercised by him under the absolute and direct supervision of the Durbar of Udeipur. It was laid down by this Court that the aforesaid rights could not be equated with the totality of the powers generally possessed by the mahant or the Shebait. In our judgment the hereditary trustee cannot in any way claim any higher rights of managing the properties of the institution or the endowment than the Tilkayat. His rights fall far short of those of the Mahant and the Shebait. It may be that in the case of the Tilkayat his rights were governed by the firman issued by the Durbar which had the force of law but the ratio of decision essentially is that a bare right to manage an institution or an endowment cannot be treated as property within Article 19 (1) and Article 31. In *Raja Birakishore v. State of Orissa*, (1964) 7 SCR 32 = (AIR 1964 SC 1501) the constitutionality of *Shri Jagannath Temple Act, 1954* (Act 2 of 1955) was challenged. The attack was based mainly on the ground that that Act took away the perquisites of Raja of Puri which had been found to belong to him in the record of rights. The Raja had two-fold connection with the temple. In the first place he was the *Adyasevak* i. e., the Chief Servant of the temple and in that capacity he had certain rights and privileges. He was also the sole superintendent of the temple and was incharge of the management of the secular affairs of the temple. After reviewing the provisions of Act 2 of 1955 this Court observed that it provided for the management of the secular affairs of the temple and did not interfere with the religious affairs thereof. The rights which the Raja possessed had been exercised by the predecessor also but because he had been deprived only of the rights of management which carried no beneficial interest in the property the attack based on the provisions of Arts. 19 (1) (f) and 31 (2) could not be sustained. One of the features common to that case and the present one is that the management had been transferred from the sole control of the Raja to the control of a committee. This was regarded as a purely secular function which did not carry with it any right to property and could not be hit by Art. 19 (1) (f).

12. It is true that in the latest decision of this court in *Sambudamurthi Mudaliar v. State of Madras*, (1970) 2 SCR 424, it was taken to be well established that the office of a hereditary trustee is in the nature of "property" and this is so whether the trustee has beneficial interest of some sort or not. This observation, we apprehend, was not necessary for a decision of that case. There the question was whether the appellant was a hereditary trustee within the meaning of Section 6 (9) of the Madras Act 1961 and there was no discussion or determination of the point that the office of the hereditary trustee was property within Art. 19 (1) (f) or any other Article. Nor do we consider that the various pronouncements of the Privy Council that the rule in the *Tazore* case, (1872) 9 Beng LR 377 (PC) applies to succession of hereditary trustees can afford much assistance in deciding whether an office holder who has a bare right of management can claim to have any right or interest in the nature of property within the meaning of Art. 19 (1) (f). Following the principles laid down in the *Tilkayat*, (1964) 1 SCR 561 = (AIR 1963 SC 1638) and *Raja Birakishore*, (1964) 7 SCR 32 = (AIR 1964 SC 1501) cases we are unable to endorse the view that the office of hereditary trusteeship is property within Art. 19 (1) (f) or any other Article of the Constitution.

13. We may add that even if it was held that the rights in question constituted "property" their regulation by the relevant provisions of the Act would undoubtedly be protected by Art. 19 (5). We have no hesitation in concurring with the decision of the High Court that restrictions which have been imposed by the provisions of the Act on the hereditary trustees are reasonable and are in the interest of the general public. The power to appoint non-hereditary trustees or Executive Officers where there is already a hereditary trustee or trustees notwithstanding there is no mismanagement is only for the purpose of ensuring better and efficient administration and management of the institution or endowment. Non-hereditary trustees have been associated with the hereditary trustee who has not been removed from his office. As a matter of fact complete safeguards have been provided for ensuring that he remains

his office. He or one of the hereditary trustees has to be the Chairman of the Board. He has various powers under the provisions of the Act already noticed. All that can be said is that instead of managing the institution alone he has to administer it in collaboration with other trustees who are non-hereditary. In matters of religion such a puja, dattam, rituals etc. there can be no interference. It has been provided in categorical terms that the same must be continued to be performed according to Agansastras or usage or custom prevalent in the institution. It is only the secular aspect that has been touched and there can be no manner of doubt that the same has been done in interest of better and efficient administration. It must be remembered that the legislation relating to public and charitable institutions or endowments has taken place as a result of careful deliberation by high powered bodies.

14. In the report of the Hindu Religious Endowment Commission prescribed over by Dr. C. P. Ramaswami Iyer which was appointed in March 1960 it has been pointed out that legislation relating to endowments became necessary in the States as a result of the almost invariable mismanagement of the endowment properties of temples by the trustees, misappropriation of the funds of the endowment for purposes unconnected with the original aims and objects of such endowments, utilisation of funds of the endowment by the trustees or managers for their personal purposes etc. All this fully supports the decision of the High Court that the restrictions which have been placed on the hereditary trustees as also on others in whom the management of the institution in question vests are reasonable and in the public interest. Thus the appellants cannot succeed on the principal point which has been argued before us.

15. A faint attempt was made to sustain the attack under Arts. 14 and 26 (d) of the Constitution but finally hardly any arguments were addressed worth noticing on these points. It is unnecessary to deal with individual appeals some of which were filed by societies registered under the Societies Registration Act i.e. Civil Appeal No. 1249 of 1970, C. A. No. 1271 of 1970 by the Municipal Council, Visakhapatnam, related to the Turner's Choultry which, according to the Municipal

Council, was its private property. So far as the validity of the impugned provisions is concerned the same must be sustained in these cases on the same reasoning as in the case relating to the hereditary trustee. The High Court has rightly left open the question whether the Turner's Choultry is a private or a public charitable institution. This the Municipal Council is entitled to agitate before the Deputy Commissioner under S. 77 of the Act. Before the High Court some of the Writ Petitioners had claimed that their institutions were religious denominations within Article 26 and were therefore entitled to the protection guaranteed by that Article. The High Court has, quite rightly, observed that these matters should be agitated in a proper forum and they have been left open for determination if and when so desired. This indisputably was the correct course to follow.

16. The appeals fail and are dismissed with costs. One set of hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 898
(V 58 C 183)

(From: Punjab)*

J. M. SHELAT AND
C. A. VAIDIALINGAM, JJ.

National Bell Co. (In C. A. No. 1952/1966) and Gupta Industrial Corporation (In C. A. No. 1953 of 1966), Appellants v. Metal Goods Mfg. Co. (P) Ltd. and another (In both the Appeals), Respondents.

Civil Appeals Nos. 1952 and 1953 of 1966, D/- 18-3-1970.

(A) Trade and Merchandise Marks Act (1958), Section 56 (2) — "Aggrieved person" — Expression includes person who has, before registration, used trade mark in question as also person against whom infringement action is taken or threatened.

(Para 9)

(B) Trade and Merchandise Marks Act (1958), Sections 32 (c), 9 (3) — Word "distinctive" is used in Sec. 32 (c) in same sense as is used in Sec. 9 (3) — Expression "for the purpose of

* (Letters Patent Appeals Nos. 38-D, 42-D, 39-D and 43-D of 1963, D/- 25-2-1965 — Punj at Delhi.)

this Act" in Section 9 (3) indicates that word "distinctive" has uniform meaning all throughout the Act.

(Para 9)

(C) Trade and Merchandise Marks Act (1958), Sections 32 (c), 56 — Presumption under Section 32 as to registered trade mark — Rebuttal on ground that mark is not distinctive — Fact that mark is not distinctive must exist as on date of filing rectification application under Section 56 and not on date of registration.

While Clause (b) of Section 32 relates to facts existing at the time of and after registration Clause (c) relates to facts which are post-registration facts, existing at the date of the commencement of rectification proceedings. If the trade mark at such date is not distinctive in relation to the goods of the registered proprietor, the rule as to conclusiveness enunciated in Section 32 would not apply. Therefore, a person can apply for cancellation on the ground that the trade mark in question was not at the date of the commencement of the rectification proceedings distinctive in the sense of Section 9 (3). The burden of proof, however, in such a case is on the applicant applying under Section 56. (Paras 9, 11)

(D) Trade and Merchandise Marks Act (1958), Sections 2 (j), 9 (3) — Trade mark consisting of numeral — It can be distinctive — Registration of numerals not limited to textile goods — Registrable for other goods also on proof of extensive use. (Point conceded). (Para 10)

(E) Trade and Merchandise Marks Act (1958), Sections 11 (e), 32 (b) — Registration of non-registrable trade mark, it not being distinctive — Rule under Section 32 as to its conclusiveness — Applicability — Clause (e) of Section 11 — Construction of.

The true construction of Clause (e) of Section 11 is that even assuming that the trade marks in question were not distinctive and for that reason not registrable as not falling within Section 9 that fact by itself would not mean that they became disentitled to the protection in a Court. Therefore, the rule as to conclusiveness of the validity of registration embodied in Section 32 applies even to those cases where if full facts had been ascertained at the time of the registration that registration would not have been

allowed provided of course that it does not offend against the provisions of Section 11, i. e., in addition to the matters in Clauses (a) to (d) in Section 11 be disentitled to protection in a Court. Clause (e) of Section 11 deals with prohibition and not with requisites of registration. Therefore, although a mark cannot be registered for instance, because it is not distinctive as provided by Section 9, such a mark is not for that reason only one the registration of which is prohibited by Section 11. The Section lays down positive objection to registration and not to mere lack of qualification. This is clear from Clause (e) of Section 11, which uses the expression "disentitled to protection", and not the expression "not entitled to protection". The former contemplates some illegal or other disentanglement inherent in the mark itself. (1913) 35 RPC 185, Rel. on. (Paras 14, 16)

(F) Trade and Merchandise Marks Act (1958), Section 32 (c) — Distinctiveness of trade-mark — Loss of — Cancellation of registered trade mark on ground under Section 32 (c) — When possible.

The principle underlying Cl (c) of Section 32 is that the property in a trade mark exists so long as it continues to be distinctive of the goods of the registered proprietor in the eyes of the public or a section of the public. If the proprietor is not in a position to use the mark to distinguish his goods from those of others or has abandoned it or the mark has become so common in the market that it has ceased to connect him with his goods, there remains no justification in retaining it on the register. The distinctiveness of the trade mark in relation to the goods of a registered proprietor of such a trade mark may be lost in a variety of ways, e. g., by the goods not being capable of being distinguished as the goods of such a proprietor or by extensive piracy so that the marks become publici juris.

(Para 17)

Where the evidence does not show that there were repeated breaches of registered trade mark which went unchallenged though known to proprietor, the mere fact that the trade mark was also used by other person would not, in absence of proof that use was substantial, attract Clause (c) of Section 32 so as to disentitle the

registered proprietor from claiming its exclusive use. (Para 17)

(G) Trade and Merchandise Marks Act (1958), Section 32 (c) — Expression "commencement of proceedings" — Interpretation of.

Under Section 32 (c) the marks have to be distinctive at the commencement of the proceedings. Prima facie, the expression "commencement of the proceedings" means the commencement of proceedings in which the question as to the conclusive character of the registration, as laid down in Section 32, arises. Such a question may arise in a suit for infringement of the trade mark in which the registered proprietor may rely on Section 32 to prove his title to the registered trade mark as also in rectification proceedings filed as a result of such a suit or otherwise, and the period of seven years would have to be calculated according to the particular proceedings in which the conclusive nature of the validity of registration is relied on.

(Para 17)

(H) Trade and Merchandise Marks Act (1958), Section 32 (c) — Infringement of registered trade mark — Negligence to proceed against — When amounts to abandonment of trade mark.

Mere neglect to proceed does not necessarily constitute abandonment if it is in respect of infringements which are not sufficient to affect the distinctiveness of the mark even if the proprietor is aware of them. Where neglect to challenge infringement is alleged, the character and extent of the trade of the infringers and their position have to be reckoned in considering whether the registered proprietor is barred by such neglect.

(Para 17)

(I) Trade and Merchandise Marks Act (1958), Section 56 — Power to rectify is discretionary — Order allowing or refusing rectification — Appeal against — No interference when discretion is properly exercised.

(Para 18)

Cases Referred: Chronological Paras

(1954) 1954 Ch 50 = (1953) 2 All	
ER 1160, Reuter v. Mulhens	10
(1918) 35 RPC 185 = (1918) 2	
Ch 207, Imperial Tobacco Co.	
Ltd. v. De Pasquali & Co.	15
(1897) 14 RPC 37 = (1897) 1	
Ch 71, Rowland v. Mitchell	17

(1893) 10 RPC 217 = (1893) 2
Ch 567, Paine & Co. v. Daniells
& Sons' Brewaries Ltd. 11
(1879) 27 WR 456, Re Farina
(No. 2) 17

Mr. S. T. Desai, Senior Advocate (Mr. Naunit Lal, Advocate, with him), for Appellants; Mr. C. B. Agarwala, Senior Advocate (M/s. K. P. Gupta and R. C. Chadha, Advocates, with him), for Respondent No. 1 (In both the Appeals).

The following Judgment of the Court was delivered by

SHELAT, J.:— These two appeals, under certificate, are directed against the common judgment and order of the High Court of Punjab, dated February 25, 1965, passed in four Letters Patent appeals filed by the two appellants-companies and the respondent-company against the judgment and order of a learned Single Judge of the High Court.

2. The said appeals were the outcome of two applications filed in the High Court under Section 111 of the Trade and Merchandise Marks Act, XLIII of 1958 (referred to hereinafter as the Act) for rectification of the register in respect of two registered Trade Marks, Nos. 161543 and 161544, registered on November 20, 1953 in respect of cycle bells manufactured by the respondent-company. Registered Trade Mark No. 161543 was the numeral '50' and Trade Mark No. 161544 was the figure 'Fifty'.

3. The two appellants companies carry on business in Kapurthala in Punjab. One of them the National Bell Co. Ltd., claimed to be manufacturing bells with numerals '33', '50', '51' and '40' inscribed on them since 1957, and the other M/s. Gupta Industrial Corporation since 1947 with numerals, '20', '50' and '60' inscribed on cycle bells manufactured by it. The two applications for rectification arose out of suit filed in the District Court, Lucknow by the respondent-company against the two appellant companies on the ground of infringement of its said registered trade marks the numeral '50' and the figure 'Fifty'. On April 24, 1961 the District Court stayed the said suits at the instance of the appellant companies giving them time for filing the said rectification applications in the High Court.

4. The grounds alleged in the applications were (1) that the numerals

'50' and the word 'Fifty' were common to the trade at the time of the original registration and were therefore not distinctive of the bells manufactured by the respondent-company, (2) that many other manufacturers in the market were using the numeral '50' and word 'Fifty' on or in relation to cycle bells, and therefore, the distinctiveness of the said marks in relation to the bells manufactured by the respondent-company, if any, had been lost, (3) that the respondent-company did not get the registration of these marks with any bona fide intention of using them in relation to their cycle bells and that in fact there had been no bona fide use of the said trade marks in relation to their goods before the date of the applications. They also alleged that the respondent-company had fraudulently declared at the time of registration that they were the originators or proprietors of the said two marks '50' and 'Fifty'. Both sides led evidence, oral and documentary, the latter including several price-lists from the possession of some of the dealers in cycle spare parts.

5. The learned Single Judge, who in the first instance tried the applications, found on a consideration of the evidence that cycle bells with different numerals and in particular the numeral '50' were being sold in the market before the respondent-company put its cycle bells with the numeral '50' and the figure 'Fifty' inscribed on them in the market and continued to be sold right upto 1952 when import of foreign manufactured cycle bells was prohibited, and that despite such prohibition those cycle bells were being sold in the market as late as 1958, presumably from old stocks still lingering in the market, though not from any new imported stock. The learned Single Judge also found that there was no evidence of the original registration having been fraudulently obtained by the respondent-company, that there was no averment by the appellant companies that Lucas or any other concern had obtained registration of any mark either of the numeral '50' or the figure 'Fifty', and that therefore, Clause (a) of Section 32 did not apply. He further found that Clause (b) of Section 32 also did not apply. He held, however, that the trade mark, namely, the numeral '50' was not at the commencement of the proceedings distinc-

tive of the goods of the respondent-company as (a) numerals are *prima facie* not distinctive except in the case of textile goods as recognised by Part III of the Trade and Merchandise Marks Rules, 1959, and (b) that the numeral '50' was being commonly used by several dealers and manufacturers subsequent to the registration thereof by the respondent-company, and that therefore, the registered trade mark, the numeral '50' was hit by Clause (c) of Section 32. So far as the trade mark of the figure 'Fifty' was concerned, he held that there was no evidence that it was used by other parties either prior to or after the registration thereof by the respondent-company and in that view declined to rectify or expunge the trade mark 'Fifty' as seven years had already elapsed by the time the rectification proceedings were launched and could not, therefore, be challenged on the ground of absence of distinctiveness as laid down in Section 32. The learned Single Judge, on the basis of his aforesaid conclusions, cancelled the trade mark No. 161543, i. e., of the numeral '50'.

6. In the appeals filed against the said judgment the Division Bench of the High Court held (1) that though the use of the numeral '50' in relation to cycle bells dated back at least 30 years as in the case of Lucas and certain other foreign concerns, the imports of such goods stopped from about 1952, though some bells were being sold till 1958 presumably from the remaining previous stock, (2) that the numeral '50' in connection with those foreign made bells was never intended as a trade mark but was used only as an indication of the type or quality, and (3) that statements Exs. R-2, R-3 and R-4 produced by the respondent-company showed that sales of its bells with the trade marks '50', and 'Fifty' inscribed on them had risen from the value of Rs. 19,644 in 1949-50 to Rs. 14.83 lacs in 1961-62. The Division Bench agreed with the Trial Judge. Clause (a) of Section 32 did not apply as there was no question of the original registration having been fraudulently procured in 1953. It also held that the trade marks in question could not be cancelled merely on the ground that if their registration had been opposed they would not have been registered, and that therefore, the question for determination was

whether it was liable to cancellation in view of Section 32 (c), which lays down that the section would not apply in cases where the trade mark in question was not distinctive at the commencement of the proceedings. According to the Division Bench, the words "commencement of proceedings" in Clause (c) of Section 32 mean the commencement of the infringement suits filed by the respondent-company as the proceedings for cancellation were the offshoots arising from those suits, that therefore, the situation in respect of Sec. 32 (c) had to be assessed in the light of the state of affairs existing in 1959. According to the Division Bench, the earliest use of the mark '50' by any concern other than Lucas and other foreign manufacturers was in 1953 by M/s Indian Union Manufacturers Ltd. The respondent-company, however, had filed a suit against that company in 1954 which resulted in a compromise dated February 5, 1955 whereunder the said company recognized the exclusive right of the respondent-company to the use of the words 'Fifty', 'Thirty' and the numerals '50' and '30', while the respondent-company recognised the right of the said company to the exclusive use of the words and numerals 'Thirty one', 'Forty one' and 'Fifty one' and '31' '41' and '51' that the respondent-company had also in 1955 similarly taken action against K. R. Berry & Co. of Julludhur for use by that company of the mark 'Five 50'. The suit, however, had to be withdrawn in 1958 on account of lack of jurisdiction of the Banaras Court where it was filed, though no fresh suit was filed against that company, the respondent-company had opposed an application by that company for registration of the mark 'Five Fifty' before the Registrar and that application was then pending in 1962, and lastly, that the respondent-company had filed in 1959 the two suits against the appellant companies out of which these rectification proceedings arose. The Division Bench held that though there was some evidence of the use of the numeral '50' by certain other concerns after 1953, no importance could be attached to such breaches as there was hardly any evidence as to when the infringers started manufacturing and the extent of their manufacture and sales, and that the correct principle applicable in such cases was that a few unchalleng-

ed, scattered infringements by a number of traders did not render a registered trade mark common. As regard the earlier use of the 'Fifty' and the numeral '50' by Lucas and other foreign concerns, the Division Bench held that they were not the registered trade marks of those companies and that those concerns had used those marks as merely type marks. Though the idea of using '50' and 'Fifty' was not the original idea of the respondent-company when it obtained registration in 1953, the foreign concerns had ceased importing the goods and though sales of these bells continued until 1958, such sales were from the stock still remaining unsold. Such sales could not be in any appreciable bulk. Even if the idea of using the two marks might have been conceived by the respondent-company from the marks used by Lucas and other foreign concerns, there was no question of any piracy or infringement of those marks as the respondent-company was the first to convert what were originally type marks into registered trade marks. Lastly, it held that the statements of sales produced by the respondent-company demonstrated that its sales had been steadily increasing and that some concerns, finding the use by the respondent-company of its marks '50' and 'Fifty' highly successful, had sought in recent years to take advantage of the popularity of the cycle bells of respondent-company by imitating its marks. This fact, however, could not mean that either in 1959 when the respondent-company filed the suits or in 1961 when rectification proceedings commenced, the marks had ceased to be distinctive in relation to the goods of the respondent-company or were, therefore, liable to cancellation under Section 56 by reason of Clause (c) of Section 32. Accordingly, the Division Bench allowed the respondent-company appeals and set aside the order of the learned Single Judge cancelling the registration of its trade mark No. 161543 in respect of the numeral '50' and dismissed the appeals of the appellant companies.

7. Mr. S. T. Desai for the appellant companies contended that the two trade marks in question were liable to cancellation on the grounds that (1) they were common and not distinctive at the date of their registration, and therefore, ought never to

have been registered, (2) that in any event, the numeral '50' is prima facie not distinctive unless shown to be of such extensive use as to make it distinctive, (3) that there was clear evidence that the respondent-company had imitated the use of these marks by Lucas and other manufacturers, and that therefore, these marks would be disentitled to protection in a court of law, and (4) that the said marks were not, at the commencement of the proceedings distinctive, that is, adapted to distinguish the goods of the respondent-company. Mr. Agarwala, on the other hand, argued that, (1) the two marks having been registered in 1953 and seven years since then having elapsed at the commencement of these proceedings, the question whether they were distinctive at the time of registration was not open to dispute, (2) that that being so, there was no question of any alleged piracy by the respondent-company of the marks of Lucas and other concerns, and therefore, the marks could not be said to be disentitled to protection by a Court, (3) that the marks had not lost their distinctiveness at the dates of these proceedings under Section 56 and (4) that the Letters Patent Bench was, therefore, justified in dismissing these proceedings by the appellant companies.

8. A mark under Section 2 (j) includes a word, letter or numeral or any combination thereof. A trade mark, as defined in Section 2 (v) means in relation to Chapter X (i. e., for offences and penalties provided in that chapter) a registered trade mark or a mark used in relation to the goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right of proprietor to use the mark, and in relation to the other provisions of the Act a mark used or proposed to be used in relation to the goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered user, to use the mark and includes a certification trade mark registered as such under the provisions of Chapter VIII. Under Sec. 9, a trade mark is not registrable in Part A of the register unless it contains on (or?) consists of at least one of the essential particulars mentioned

therein. One of these particulars is "any other distinctive mark". Clause (3) of Section 9 defines the expression "distinctive" in relation to the goods in respect of which a trade mark is proposed to be registered, as meaning "adapted to distinguish goods with which the proprietor of the trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsists either generally or, where the trade mark is proposed to be registered subject to limitations, in relation to use within the extent of the registration". In determining whether a trade mark is distinctive, regard is to be had whether it is inherently distinctive or is inherently capable of distinguishing and by reason of its user or any other circumstances it is in fact adapted to distinguish or is capable of distinguishing the goods. Section 11 prohibits certain trade marks from being registered. These are marks the use of which would be likely to deceive or cause confusions, or the use of which would be contrary to any law or which comprises or contains scandalous or obscene matters or any matter likely to hurt the religious susceptibilities of any class or section of the citizens, or "(e) which would otherwise be disentitled to protection in a Court". On registration of a trade mark, the registered proprietor gets under Section 28 the exclusive right to the use of such trade marks in relation to the goods in respect of which the trade mark is registered and to obtain relief in respect of any infringement of such trade mark. Under S. 31, registration is prima facie evidence of its validity. The object of the section is obviously to facilitate proof of title by a plaintiff suing for infringement of his trade mark. He has only to produce the certificate of registration of his trade mark and that would be prima facie evidence of his title. Such registration is prima facie evidence also in rectification applications under Section 56 which means that the onus of proof is on the person making such application. Being prima facie evidence, the evidence afforded by the registration may be rebutted, but in view of Section 32 that can be done if seven years have not elapsed since the original registration. Even where such rebuttal is possible, i. e., where seven years have not elapsed, and it is shown that the mark

in question was not registrable under Section 9 as no evidence of distinctiveness was submitted to the Registrar, the registration would not be invalid if it is proved that the trade mark had been so used by the registered proprietor or his predecessor-in-interest as to have become distinctive at the date of registration.

9. Section 32, with which we are immediately concerned, read as follows:—

"Subject to the provisions of Section 35 and Section 46, in all legal proceedings relating to a trade mark registered in Part A of the Register (including applications under Sec. 56), the original registration of the trade mark shall, after the expiration of seven years from the date of such registration, be taken to be valid in all respects unless it is proved—

(a) that the original registration was obtained by fraud; or

(b) that the trade mark was registered in contravention of the provisions of Section 11 or offends against the provisions of that section on the date of commencement of the proceedings; or

(c) that the trade mark was not, at the commencement of the proceedings, distinctive of the goods of the registered proprietor."

We are not concerned with Clause (a) as no such case was even averred in the applications as pointed out both by the Trial Judge and the Division Bench. As regards Clause (b), it will be at once noticed that the clause relates to facts existing both at the time of and after registration. If a mark at the time of registration was such that it was likely to deceive or cause confusion or its use would be contrary to any law or contained or consisted of scandalous or obscene matters or matter likely to hurt religious susceptibilities or which would otherwise be disentitled to protection of a Court, and therefore, was under Section 11 prohibited from being registered, Clause (b) would apply, and the rule as to conclusiveness of the validity of the registration cannot be invoked. That would also be so, if the trade mark at the date of the rectification proceedings was such as to offend against the provisions of Section 11. But, unlike Clause (b), Clause (c) relates to facts which are post-registration facts, existing at the date of the commencement of the pro-

ceedings. If the trade mark at such date is not distinctive in relation to the goods of the registered proprietor, the rule as to conclusiveness enunciated in Section 32 again would not apply. It would seem that the word 'distinctive' in Clause (c) is presumably used in the same sense in which it is defined in Section 9 (3), as the definition of the expression therein commences with the words "for the purposes of this Act" and not the words "for the purposes of this section", the intention of the legislature, thus, being to give uniform meaning to that expression all throughout the Act. Section 56 deals with the power to cancel or vary registration and to rectify the register. Sub-section (2) thereof confers a right to any person "aggrieved" by an entry made in the register without sufficient cause or by an entry wrongly remaining in the register to apply to the tribunal for expunging or varying such an entry. The expression "aggrieved person" has received liberal construction from the Courts and includes a person who has, before registration, used the trade mark in question as also a person against whom an infringement action is taken or threatened by the registered proprietor of such a trade mark. The words "without sufficient cause" in the section have clearly relation to the time of the original registration. Therefore, a person can apply for cancellation on the ground that the trade mark in question was not at the date of the commencement of the proceedings distinctive in the sense of Section 9 (3). The burden of proof, however, in such a case is as aforesaid, on the applicant applying under Section 56.

10. The contention was that numerals, such as '50', are *prima facie* not considered distinctive and to be registrable there must be evidence of extensive use. The contention was sought to be fortified by showing that contrary to the practice in England, Rules 139 and 140 of the Rules of 1959 permit numerals to be registered as trade marks only in the case of textile goods. But that is permitted on account of a long standing practice in that particular trade of using numerals with a view to distinguish goods of a particular manufacturer or a particular type or quality. It will, however, be noticed that although in the 8th edition of Kerly on Trade Marks,

page 135, it was stated that numerals are considered to be *prima facie* not distinctive and registrable only upon proof of their extensive use, the 9th edition of the same work does not reproduce that passage. On the contrary, at p. 284, the learned editor states that numerals are capable of registration and that such marks exist. For this change the learned editor relies on the registered trade mark "4711", for *cau-de-Cologne*, which was the subject-matter of dispute in *Reuter v. Mulhens*, 1954 Ch 50. In that case, however, no contention was raised as to whether the trade mark consisting of a numeral could be distinctive or not and the Court, therefore, was not called upon to decide such a point. But the parties appear to have proceeded on the assumption that the numeral "4711" was validly registered as a trade mark for that particular brand of *cau-de-Cologne* by reason of its having gained distinctiveness by extensive use. It is, therefore not an inflexible rule and that was also conceded by Mr. Desai, that a mark consisting of a numeral is necessarily not distinctive and is not registrable, except (except?) only in the case of textile goods, in spite of proof of extensive use.

11. Section 32 in clear terms provides that the original registration of a trade mark, after expiry of seven years from the date of its registration, shall be taken to be valid in all respects in all legal proceedings including those under Section 56, except in the three categories of cases mentioned therein. It follows, therefore, that no objection that the trade mark in question was not distinctive and therefore was not registrable under Section 9 can be entertained if such an objection is raised after seven years have lapsed since the date of its registration as in the present case, nor can an objection be entertained that no proof of distinctiveness was adduced or insisted upon at the time of the original registration. This is clear also from the fact that the three exceptions set out in Section 32 against conclusiveness as to the validity of the registration relate to, (1) fraud, (2) contravention of Section 11, and (3) absence of distinctiveness at the commencement of the proceedings in question and not at the time of registration. No contention, therefore, can be raised that the trade marks '50' and

'Fifty' were not distinctive, i. e., adapted to distinguish the cycle bells of the respondent-company at the date of the registration, and therefore, were not registrable as provided by Section 9, *Paine & Co. v. Daniells & Sons' Breweries Ltd.*, (1893) 10 RPC 21" at page 232.

12. But the argument was that the appellant companies were entitled to show under Clauses (b) and (c) in Section 32, (1) that these marks were registered in contravention of Sec. 11; or that they offended against the provisions of that section on the date of the commencement of these proceedings, and (2) that they were not distinctive at the date of the commencement of these proceedings.

13. Section 11, as already noticed, does not, as Section 9 does, lay down the requisites for registration, but lays down prohibition against certain marks from being registered. Clauses (b), (c) and (d) of Section 11 obviously do not apply in the present case but reliance was placed on Cls. (a) and (e), i. e., that the use of these trade marks would be likely to deceive or cause confusion and that they were such that they were otherwise entitled to protection in a court. The burden of proof being on the appellant companies, the question is: has that burden been satisfactorily discharged? The evidence relied on by them was that of dealers in cycle spare parts including bells, certain price-lists produced through them and the two representatives of the two appellant companies. That evidence, no doubt, shows, (1) that for a number of years prior to 1952 bells manufactured by Lucas and certain other foreign concerns with various numerals such as '30', '50' and '61' inscribed either on the bells or on their cartons were in the market, (2) that even after 1952 bells with inscriptions thereon, such as 'Berry 50', 'National 50' manufactured by one of the appellant companies, 'Five 50', 'Padam 50' 'Balco 50' etc., were sold in the market, (3) that Gupta Industrial Corporation, one of the appellant companies, claimed to have started the manufacture of bells since 1947, calling the "Gupta 50" and the National Bell Company likewise began to produce bells, calling them "National 50" since 1957. But both the learned Single Judge and the Division Bench clearly found, (i) that there was no

evidence of any fraud having been committed by the respondent-company at the time of the registration; (2) that there was no averment by the appellant companies, much less any evidence that Lucas or any other foreign concerns had obtained registration of trade marks either of the numeral '50' or the word 'Fifty', that the indication, on the contrary, was that those concerns used the different numerals, '30', '61' '50' etc., for distinguishing one type of bell from the other manufactured by them; and (3) that about a year prior to the registration of the trade marks in question in 1953 foreign bells were prohibited from being imported. Obviously, therefore, the evidence as to purchases and sales by the dealers examined by the appellant companies related to bells which had remained unsold from out of the stock earlier imported. As regards the bells called "Gupta 50" said to have been manufactured by one of the appellant companies since 1947, no evidence was led to show either the extent of manufacture or sale between 1947 and 1953 or thereafter from which the High Court could be asked to draw any inference as to the likelihood of deception or confusion. Though there was some evidence that foreign made bells such as Lucas "30", "50" and "61" were being sold as late as 1958, such sales must have been few and far between as they could only be from the remaining stock out of the earlier imports. Such sales could hardly be considered as evidence showing a likelihood of confusion or deception as contemplated by Sec. 11 (a). In fact, the evidence was that purchasers used to call those bells not by their numerals but simply as Lucas' bells and those manufactured by the respondent company as "Asia bells", and in some cases "Asia 50". As against the voluminous sales by the respondent-company shown by the statements filed by it for the years 1949-50 to 1961-62, there was no such corresponding evidence indicating the sales of other bells with numerals, such as "50" inscribed on them from which any likelihood of confusion or deception could be deduced. Regarding deception, there was indeed no evidence whatsoever in that regard. There was no question of piracy also on the part of the respondent-company as argued by counsel as there was nothing to show that Lucas or any other foreign concerns used this nume-

ral except for distinguishing one type of bell from another manufactured by them. In our view, Cl. (a) of Sec. 11, therefore, is clearly not attracted.

14. The next question is whether the trade mark "50" or "Fifty" is one which would otherwise be disentitled to protection in a Court as laid down in cl. (e) of Section 11 so as to attract cl. (b) of Section 32. While construing cl. (e) of Section 11, it is necessary to repeat that it deals with prohibition and not with requisites of registration. Therefore, although a mark cannot be registered for instance, because it is not distinctive as provided by Section 9, such a mark is not for that reason only one the registration of which is prohibited by Section 11. The Section lays down positive objection to registration and not to mere lack of qualification. This is clear from cl. (e) of Section 11, which uses the expression "disentitled to protection", and not the expression "not entitled to protection." The former contemplates some illegal or other disentanglement inherent in the mark itself. (See Kerly, 9th ed. 344).

15. In *Imperial Tobacco Co., Ltd. v. De Pasquali & Co.*, (1918) 35 RPC 185 the appellant company was the proprietor of two trade marks consisting of "Regimental Cigarettes" and "Regimental Tobacco". The company brought an action for infringement of its trade marks and for passing off against the respondent who sold cigarettes under the name of "Pasquali's the Regiment" in packets and boxes decorated with regimental crests. The respondent moved to have the trade marks expunged contending that the word "regimental" was only a laudatory adjective in common use. It was proved that for many years it had been the practice of regiments to have their crests stamped on their mess cigarettes which were known as "Regimental Cigarettes". The appellant company, on the other hand, contended that under Section 41 of the Trade Marks Act, 1905 (equivalent to Sec. 32 of our Act) their trade mark could not be expunged and that Section 11 (equivalent also to our Section 11) read in conjunction with Section 41 was not relevant to the question whether or not a trade mark was registrable. The Trial Court held against the appellant company stating that if the appellant company's contention was correct, the combined effect of Sections 11 and 41

would be to perpetuate as distinctive a trade mark that was incapable of being distinctive and that such a contention was erroneous. On appeal, the Court of Appeal reversed the judgment and held that Section 11 was a qualification of Section 9, that Sections 11 and 41 must be construed together, that the mere fact that a mark did not comply with the requisites of Section 9 (i. e., not being distinctive and therefore not registrable) did not bring it within Section 11, that the marks did not offend against Section 11 and that under Section 41 their registration was valid. At page 203 of the Report, Swinfen Eady, M. R. observed that Section 11 contained a prohibition as to what it shall not be lawful to register and it followed upon Section 9 which provided for the essentials of trade mark. Section 9 laid down what a registrable trade mark must contain and unless it contained one or the other requisites there set out, it was not registrable and it was only registrable trade marks which were entitled to registration. But even if a mark were to fall within Section 9, that alone was not necessarily sufficient to entitle it to registration because it might offend against Section 11. Section 11, being a qualification of Section 9 and being a provision laying down a prohibition, it did not contemplate any enquiry on the question whether the trade mark complied with one or the other requisites enumerated in Section 9, e. g., whether it had the quality of being distinctive or not. Dealing with Section 41, he observed that it formed a new departure in dealing with trade marks and differed widely from the earlier Acts. The present section expressly enacted that the original registration shall, after a lapse of seven years be taken to be valid in all respects, that is to say, whether the mark originally consisted of or contained one or the other essential proofs, or not, that cannot be enquired into after the lapse of seven years. It had to be taken to be valid in all respects and what had to be taken to be valid in all respects was the registration of the trade mark unless it offended against the provisions of Section 11. That section was a prohibitive section as to a matter which was disentitled to protection in a Court, that is, it was intended to exclude from registration what would other-

wise be included or covered under Section 9. It did not extend to a mark disentitled to protection because originally not containing one of the essential particulars. It applied to a different set of circumstances such as that its use was likely to deceive or confuse etc. The words "disentitled to protection", he further observed, were not equivalent to "not entitled to protection", which was the expression used in the earlier Acts. In other words, they did not mean that a trade mark was not entitled to protection because it ought not originally to have been registered as a valid trade mark falling within Section 9.

16. The construction of Cl. (e) of Section 11 contended for on behalf of the appellant companies is, therefore, not correct. The true construction of Clause (e) is that even assuming that the trade marks in question were not distinctive and for that reason not registrable as not falling within Section 9, that fact by itself would not mean that they became disentitled to the protection in a Court. That being the true import of Section 11 (e), the rule as to conclusiveness of the validity of registration embodied in Section 32 applies even to those cases where if full facts had been ascertained at the time of the registration that registration would not have been allowed provided of course that it does not offend against the provisions of Section 11, i. e., by there being a likelihood of deception or confusion or its being contrary to any law or containing obscene matter etc., or which would otherwise, i. e., in addition to the matters in Clauses (a) to (d) in Section 11 be disentitled to protection in a Court. Consequently, the appellant companies cannot bring their case for cancellation of the trade marks in question under Cl. (b) of Section 32.

17. There then remains the question whether Clause (c) of Section 32 applies, i. e., that the trade marks were not at the commencement of the proceedings distinctive of the goods of the respondent company. The distinctiveness of the trade mark in relation to the goods of a registered proprietor of such a trade mark may be lost in a variety of ways, e. g., by the goods not being capable of being distinguished as the goods of such a proprietor or by extensive

piracy so that the marks become publici juris. The principle underlying Clause (c) of Section 32 is that the property in a trade mark exists so long as it continues to be distinctive of the goods of the registered proprietor in the eyes of the public or a section of the public. If the proprietor is not in a position to use the mark to distinguish his goods from those of others or has abandoned it or the mark has become so common in the market that it has ceased to connect him with his goods, there would hardly be any justification in retaining it on the register. The progressive increase in the sales of 'Asia Fifty' and 'Asia 50' bells from 1949-50 and onwards together with the evidence of witnesses examined by the respondent company shows that the said trade marks distinguished the goods of the respondent company from those of other manufacturers in the field. Under Section 32 (c) the marks have to be distinctive at the commencement of the proceedings. Prima facie, the expression "commencement of the proceedings" would mean the commencement of proceedings in which the question as to the conclusive character of the registration, as laid down in Section 32, arises. Such a question may arise in a suit for infringement of the trade mark in which the registered proprietor may rely on Section 32 to prove his title to the registered trade mark as also in rectification proceedings filed as a result of such a suit or otherwise, and the period of seven years would have to be calculated according to the particular proceedings in which the conclusive nature of the validity of registration is relied on. In the present case, whether the crucial date for the purpose of Section 32 (c) is taken to be 1959 when the suits were filed or 1961 when the appellant companies took out the rectification proceedings it makes no difference as it is not possible from the evidence on record to say that the trade marks in question were not or had ceased to be distinctive. The indication, on the contrary, is that they were distinctive. That is to be found from the zeal with which the respondent company tried to maintain its right in them. The evidence shows that when the respondent company found in 1954 that M/s. Indian Union Manufacturers Ltd., Calcutta had been inscribing the word

'Fifty' on its bells, it at once filed an infringement action. The action ended in a compromise by which the said company acknowledged the respondent company's rights in its trade marks of 'Fifty' and '50'. Again, when the attention of the respondent company was drawn to an advertisement "Five 50", it addressed a notice to the manufacturers of those bells. The case of the respondent company was that Gupta Industrial Corporation started using the word 'Fifty' on its bells in 1958 and not in 1948 as contended by Mr. Desai. In the absence of any evidence as to the extent of manufacture and sale of those bells it would not be possible to say with any certainty that the respondent company did not come to know about it till 1958, and therefore, presumed that Gupta Corporation had started using the word 'Fifty' on its bells in that year. According to the appellant National Bell Co., it went into production only in 1957 and in 1959 the respondent company commenced action against it. A similar notice of infringement followed by a suit was also given to M/s. Berry and Co., but the suit became infructuous on account of lack of the jurisdiction of the Court of Banaras where it was filed. This evidence negatives any abandonment of trade marks or letting infringements go unchallenged or misleading the other manufacturers that the respondent company would not interfere if they were to use the same marks. Rights in a mark can, of course be abandoned by its owner but so long as he remains the registered proprietor of the mark and carries on the business to which the mark is attached, a plea of abandonment is difficult to sustain. It would, however, be a different matter if it is shown that there were repeated, undisturbed infringements. The evidence in the present case does not show that there were repeated breaches which went unchallenged though known to the proprietor. Mere neglect to proceed does not necessarily constitute abandonment if it is in respect of infringements which are not sufficient to affect the distinctiveness of the mark even if the proprietor is aware of them [See *Re. Farina*, (1879) 27 WR 456]. Where neglect to challenge infringement is alleged, the character and extent of the trade of the infringers and their position have to be reckoned in considering whether the re-

gistered proprietor is barred by such neglect. [See *Rowland v. Mitchell*, (1897) 14 RPC 37]. The plea of common use must fail, for, to establish it the use by other persons should be substantial. Though evidence was produced by the appellant companies to show that there were other bells in the market with 'Fifty' or '50' inscribed on them, no evidence was led to show that the use of the word 'Fifty' or the numeral '50' was substantial. In these circumstances, it is impossible to sustain the contention founded on Clause (c) of Section 32.

18. Under Section 56, the power to rectify is undoubtedly discretionary. Where such discretion has been properly exercised, a court of appeal would refuse to interfere. In the present case, however, the Trial Court did not appreciate the principle embodied in Sections 32 and 11, with the result that the Division Bench was justified in interfering with the discretion exercised by the Trial Court.

19. In our view, the contentions urged on behalf of the appellant companies cannot be sustained and consequently the two appeals fail and are dismissed with costs. There will be one hearing fee.

Appeals dismissed.

AIR 1971 SUPREME COURT 908 (V 58 C 184)

(From Bombay: (1966) 18 STC 424)

J. C. SHAH AND K. S. HEGDE, JJ.

State of Maharashtra and others,
Petitioners v. Champalal Kishanlal
Mohota, Respondent.

Review Petn. No. 29 of 1969, D/-
17-3-1970.

Sales Tax — Bombay Sales Tax Act (51 of 1959), Section 2 (13) (as amended by Act 15 of 1967) — Contract of sale — Standing timber agreed to be severed under — Sale of timber can be regarded as sale of goods. (1966) 18 STC 424 (Bom), Reversed — Civil Appeal No. 1878/1967, D/- 17-7-1969 (SC), Reviewed. (Constitution of India, Schedule VII, List II, Entry 54) — (Sale of Goods Act (1930), S. 2 (7)).

The sale of standing timbers agreed to be severed under the contract of sale is sale of goods chargeable to sales tax under the Act. (1966) 18 STC 424 (Bom), Reversed, Civil Ap-

JN/JN/B425/71/YPB/B

peal No. 1878 of 1967, D/- 17-7-1969 (SC), Reviewed. (Para 5)

Standing timber may ordinarily not be regarded as "goods" but by inclusive definition given in Section 2 (7), Sale of Goods Act, things which are attached to the land may be the subject matter of contract of sale provided that under the terms of the contract of sale they are severed before sale or under the contract of sale. Since it was expressly provided that the timber agreed to be sold shall be severed under the contract of sale, the timber was "goods" within meaning of Section 2 (7), Sale of Goods Act and the expression 'Sale of goods' in Entry 54, List II of Schedule VII having the same meaning as that expression has in the Sale of Goods Act, sale of timber agreed to be severed under the terms of the contract may be regarded as sale of goods. AIR 1958 SC 560 and AIR 1958 SC 909, Rel. on. (Paras 5, 6)

Cases Referred: Chronological Paras

(1958) AIR 1958 SC 560 (V 45) =

(1959) SCR 379, State of Madras v. Gannon Dunkerley and Co.

(Madras) Ltd. 4

(1958) AIR 1958 SC 909 (V 45) =

1959 SCR 427, Banarsi Das Bhanot v. State of Madhya Pradesh 4

Mr. N. S. Bindra, Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Petitioners; Mr. A. G. Ratnaparkhi, Advocate, for Respondent.

The following Judgment of the Court was delivered by

SHAH, J.: — Appeal No. 1878 of 1967 was ordered to be dismissed by this Court on July 17, 1969. The Court held that the sale of standing trees is not sale of goods chargeable to sales tax under the Bombay Sales Tax Act, 1959.

2. A petition for review of Judgment has been filed by the State contending that after the judgment of the High Court and before the appeal was heard, the Bombay Sales Tax Act, 1959 was amended by the Maharashtra Act 15 of 1967 with retrospective operation, and by the amendment "standing timber" was included in the definition of goods, but counsel for the State failed to invite the attention of the Court to that Act. Since the judgment of this Court it is claimed suffers from an error apparent from

the face of the record, we have granted review of judgment.

3. The expression "goods" was defined in Section 2 (13) of the Bombay Sales Tax Act, 1959. By Maharashtra Act, 15 of 1967 by Section 2 the definition of "goods" was altered by providing that:

"In Section 2 of the Bombay Sales Tax Act, 1959 * * * in Clause (13), after the words "and commodities" the following shall be, and shall be deemed always to have been, added, namely:—

"and all standing timber which is agreed to be severed before sale or under the contract of sale".

The definition was retrospective in operation and the expression "goods" included at all relevant times standing timber agreed to be severed before sale or under the contract of sale.

4. The expression "sale of goods" in Entry 54, List II of Sch. VII of the Constitution has the same connotation as it has in the Sale of Goods Act, 1930. This Court in State of Madras v. Gannon Dunkerley and Co. (Madras) Ltd., (1959) SCR 379 = (AIR 1958 SC 560) observed that the expression "sale of goods" was, at the time when the Government of India Act, 1935, was enacted, a term of well-recognised legal import in the general law relating to sale of goods and in the legislative practice relating to that topic and must be interpreted in Entry 48 in List II in Sch. VII of the Act as having the same meaning as in the Sale of Goods Act, 1930: see also Banarsi Das Bhanot v. State of Madhya Pradesh, 1959 SCR 427 = (AIR 1958 SC 909). The expression "sale of goods" in Entry 54 in List II of Sch. VII of the Constitution has also the same meaning as that expression had in Entry 48 in List II of the Government of India Act, 1935. The State Legislature may not therefore extend the import of the expression "sale of goods" so as to impose liability for tax on transactions which are not sales of goods within the meaning of the Sale of Goods Act.

5. By Article 366 (12) of the Constitution the expression "goods" is defined as inclusive of "all materials, commodities and articles." That is, however an inclusive definition and does not throw much light on the meaning of the expression "goods." But the definition of "goods" in the

Sale of Goods Act, 1930, as meaning "every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale". Standing timber may ordinarily not be regarded as "goods", but by the inclusive definition given in Section 2 (7) of the Sale of Goods Act things which are attached to the land may be the subject-matter of contract of sale provided that under the terms of the contract they are to be severed before sale or under the contract of sale.

6. In the present case it was expressly provided that the timber agreed to be sold shall be severed under the contract of sale. The timber was therefore "goods" within the meaning of Section 2 (7) of the Sale of Goods Act and the expression "sale of goods" in the Constitution in Entry 54 List II having the same meaning as that expression has in the Sale of Goods Act, sale of timber agreed to be severed under the terms of the contract may be regarded as sale of goods.

7. The appeal is allowed and the petition filed by the respondent must be dismissed. Since the State succeeds in this appeal, relying upon a statute which was passed after the Judgment of the High Court, there will be no order as to costs throughout.

Appeal allowed.

AIR 1971 SUPREME COURT 910 (V 58 C 185)

(From Rajasthan: ILR (1966) 16 Raj 497)

S. M. SIKRI AND V. BHARGAVA, JJ.

Pt. Jayvant Rao and others, Appellants v. Pt. Chandrakant Rao and others, Respondents.

Civil Appeal No. 1370 of 1966, D/- 26-2-1970.

Constitution of India, Article 372 — "All the law in force" — Order dated 22-1-1938 passed by former Ruler of Kota determining nature of 'Sarola Jagir' and giving it the status of impartible estate governed by the rule of primogeniture, although in the past it had been treated as joint

family property — Held Legislative and not executive.

Held, on facts and circumstances that order passed by the ruler was in exercise of his powers of laying down the law with respect to this single Jagir and was not a mere executive order. Since the law applicable to Jagir was changed for future, such order could only be made in exercise of his prerogative of laying down the law for this particular jagir specially when there was nothing to indicate that there was any recognised procedure of law-making in that State. AIR 1964 SC 1793, Applied; AIR 1964 SC 1043, Distinguished; ILR (1966) 16 Raj 497, Affirmed.

(Paras 4, 5 and 7)

Cases Referred: Chronological Paras

- | | |
|---|---|
| (1967) Civil Appeals Nos. 982 and 983 of 1964, D/- 19-7-1967, Major Ranjit Singh Rao Phalke v. Smt. Rajabai Sahiba (dead) by her legal representatives & Vice Versa | 7 |
| (1964) AIR 1964 SC 888 (V 51) = (1964) 4 SCR 190, Bengal Nagpur Cotton Mills Ltd. v. Board of Revenue, Madhya Pradesh | 6 |
| (1964) AIR 1964 SC 1043 (V 51) = (1964) 6 SCR 461, State of Gujarat v. Vora Fiddali Badruddin Mithibarwala | 6 |
| (1964) AIR 1964 SC 1793 (V 51) = (1964) 7 SCR 112, Raj Kumar Narsingh Pratap Singh Deo v. State of Orissa | 5 |

M/s. R. K. Garg, S. C. Agarwal and D. P. Singh, Advocates of M/s. Ramamurthi and Co. and Mr. V. J. Francis and Miss. S. Chakravarty Advocates, for Appellants; Mr. D. V. Patel, Sr. Advocate, (Mr. Janendra Lal, Advocate and Mr. B. R. Agarwala Advocate of M/s. Gagrut and Co., with him), for Respondents.

The following Judgment of the Court was delivered by

BHARGAVA, J.: — This appeal arises out of a suit for partition of properties in the family of one Lalaji Ramchandra who was the common ancestor of the parties to the suit. He had two sons, Govindraoji and Motilal alias Krishnaraoji. The plaintiffs/appellants and the non-contesting pro forma respondents are the descendants of Motilal, while the contesting respondents are the descendants of Govindraoji, the principal one being

Chandrakant Rao who was defendant No. 1 in the suit. The appellants sought partition of all the family properties, including eight villages known as "the Sarola Jagir" which were situated in the erstwhile State of Kota. The trial Court dismissed the suit in its entirety, holding that none of the properties in suit was ancestral property. On appeal by the present appellants, the High Court of Rajasthan upheld the dismissal of the suit insofar as the appellants had claimed a share in the eight villages forming the Sarola Jagir, while the suit in respect of the other properties was decreed and a preliminary decree passed in respect of those properties. The appellants have come up to this Court in this appeal, by certificate granted by the High Court, against the order of the High Court refusing to grant partition of the eight villages of the Sarola Jagir.

2. In order to appreciate the point raised in this appeal, the history of this Jagir in this family may be recited briefly. Lalaji Ramchandra and his eldest son Govindraoji were awarded this Jagir by means of a Parwana, dated 8th April, 1838 issued by His Highness Maharao Ramsingh, Ruler of Kotah. It appears that the Maharao had contracted debts with the family of Lalaji Ramchandra even in the time of his ancestors and, at the relevant time, the amount of debt exceeded Rs. 9 lakhs. This debt was guaranteed by the British Government. In lieu of this debt, this Jagir, which was already being enjoyed by Lalaji Ramchandra with certain limitations, was given jointly to him and his son Govindraoji, stating that it was being conferred in perpetuity and was always to remain from sons to grandsons and was to be free from all taxes which were being exacted up to that time, such as Barar and Sewai. At the same time, Govind Raoji executed a deed of release by which he accepted the adjustment of the amount due from the Maharao against this grant of Jagir. These documents thus show that this Jagir was originally granted by Maharao Ramsingh, Ruler of Kotah, jointly in the names of Lalaji Ramchandra and his son, Govindraoji in lieu of the debt which the Maharao owed to them. Subsequently, this property was treated as property of the joint family of Lalaji Ramchandra. Motilal, the second son

of Lalaji Ramchandra, was born after this grant and his name was also mutated against the Jagir villages. On the death of Govindraoji, the name of his adopted son, Ganpat Raoji, was brought in, while Motilal, the uncle, managed the property on behalf of the family. Motilal executed a will in respect of his properties including these villages, specifically stating that half of this property belonged to Ganpatraoji, while half would belong to his adopted son, Purshottam Raoji. After the death of Motilal, Ganpatraoji became the manager of the property and Purshottam Raoji's name was also entered against this property. On the death of Ganpat Raoji, the name of his eldest son Chandrakant Rao was mutated, while Purshottam Raoji, in the capacity of the eldest member of the family, started managing the property. The property thus remained in the family, being treated as joint family property and, even during the years between 1852 and 1868 when efforts were made by the Maharao of Kotah to dispossess this family, the British Government had intervened to ensure that the property remained with this family, insisting that the Maharao could only resume the Jagir on repayment of the loan in respect of which discharge had been obtained when this Jagir was conferred. The property was thus continued to be treated as joint family property until the death of Purshottam Raoji when a question arose as to the mutation of names of his descendants in his place. Chandrakant Rao desired that his name alone should be shown as the holder of this Jagir and, on 22nd October, 1937, gave a statement before the Revenue Commissioner claiming that the eldest son in the eldest branch had the right over the Jagir according to the custom and usage in Rajputana and, consequently mutation in the records should be in his name alone. A report was sent by the Revenue Commissioner and the matter was dealt with by the Maharao of Kota himself in Mehakma Khas. The order of the Maharao on that report was passed on 22nd January, 1938. By this Order, a direction was made that this Jagir, like all other Jagirs, should be given the status of an impartible estate and it should be given proper shape by being liable to render 'Chakri' and 'Subhchintki' to the Ruler. It was further ordered that

the Jagir will be governed by the rule of primogeniture, so that Chandrakant Rao alone would be held to be the Jagirdar. As a result, all these eight villages of the Sarola Jagir came to be shown as the property of Chandrakant Rao alone.

3. The claim of the plaintiffs in this suit was that the Jagir having been joint Hindu family property, the rights of the plaintiffs, who are the successors-in-interest of Purshottam Raoji, cannot be defeated by the order of the Maharao dated 22nd January, 1938 and, consequently, the appellants together with the pro forma respondents who are also descendants of Purshottam Raoji are entitled to 1/2 share, whereas the other 1/2 share only can be claimed by the contesting defendants, including Chandrakant Rao, who are descendants of Ganpat-raoji. Both the trial Court and the High Court have held that, after the order of the Maharao of Kota dated 22nd January, 1938, this Jagir came to be governed by the rule of primogeniture, with the result that Chandrakant Rao alone was the owner of this property, while all other members of the family could only claim maintenance out of this property. Consequently, the claim of the appellants for a share in these villages on partition was negatived. It is the correctness of this decision that has been challenged before us.

4. Since, in this case, no effort was made on behalf of the respondents to contest the correctness of the finding given by the High Court that all these villages were joint family property and were treated as such right up to the year 1937 when Purshottam Raoji died, we need not enter into the details of the evidence on the basis of which this finding has been recorded. The question that falls for decision is whether the Maharao of Kota, by his Order dated 22nd January, 1938, could validly change the nature of the property, make it impartible and governed by the rule of primogeniture when the property was already joint family property. In deciding this question, the crucial point is that the Maharao of Kota was an independent and sovereign Ruler whose orders in his State were law. He had absolute power to make any orders, and the Order dated 22nd January, 1938 has, therefore to be given the

force of law which, when it was passed, could not be challenged as invalid.

Counsel for the appellants, however, urged that all orders passed by an independent and sovereign Ruler do not have the force of law. It is only those orders which purport to lay down a law for the State which cannot be challenged and which would remain in force even after the merger of the Kota State in India and after the enforcement of the Constitution under Article 372 of the Constitution. His submission was that, when passing the Order dated 22nd January, 1938, the Ruler was only exercising executive powers of directing mutation of names and was not exercising any legislative powers. The nature of the Order passed by him, however, shows that this submission cannot be accepted. No doubt that Order was made on a report which was put up before the Maharao for deciding who should be held to be the owner of the Jagir when Purshottam Raoji died. The Order shows that the Maharao took notice of the fact that the Sanad had been granted in the name of Lalaji Ramchandra and his eldest son Govind Rao on executing a deed of release in respect of the debt, but it added that, when the unpaid debt was changed in the form of a Jagir and no special condition was laid down regarding it and the name of only the eldest son was written in the 'Sanad' though another brother was present there, it has to be held that the Jagir was intended to be given on the same rules on which the other Jagirs were granted. The Order then proceeds to take notice of the fact that, though the mutation should have been in the name of Chandrakant after the death of Ganpat Rao, a practice had developed of entering more than one person as the holders of this Jagir. It appears that, in order to give effect to the original intention that this Jagir should be governed by the same rules as all other Jagirs, the Maharao proceeded to lay down that this Jagir should also be impartible and should be held by the eldest member of the family in the eldest branch. The Ruler considered it desirable to make this Order, because it was envisaged that, if the entire Jagir was distributed amongst all the members of the family, then even the name of 'Thikana' would disappear. It was considered desira-

ble that this Jagir should be governed according to the custom of the States in Rajputana including Kota State, under which the eldest son of the senior branch alone was entitled to hold the property. Thereafter, the Maharao proceeded to lay down that this Jagir should be equated with other Jagirs by making a direction that the holders of this Jagir should also render 'Chakri' and should continue to do 'Subhchintki'. Having made this direction, the Ruler then held that, since this 'Thikana' was being given proper shape, its custom and status must be similar to that of all other Jagirdars in the State. These directions given by the Ruler clearly show that, though the proceedings came to him on the basis of a report for directions as to the mutation entry to be made on the death of Pursnotam Rao, he proceeded to lay down the principles which were to govern this Jagir thereafter. The Ruler decided that this Jagir should be placed on equality with all other Jagirs in the State and should be governed by the same laws. The Order thus made was clearly an exercise of legislative power by which the Ruler was competent to lay down that, though this Jagir had in the past been joint family property, it was to be thereafter impartible property governed by the rule of primogeniture and Chandra Kant Rao as the eldest member of the senior branch was to be the sole Jagirdar. This was, therefore, a case where the Maharao exercised his powers of laying down the law with respect to this one single Jagir. It cannot be said that the Order passed by him was a mere executive order and did not result in exercise of his powers of making the law.

5. In this connection, counsel for the appellants relied on the principle laid down by this Court in Rajkumar Narsingh Pratap Singh Deo v. State of Orissa, (1964) 7 SCR 112 = (AIR 1964 SC 1793) to canvass his submission that the Maharao, in this case, was not exercising legislative powers when he passed the Order dated 22nd January, 1938. In that case, the effect of a Sanad granted by the Ruler of Dhenkanal State had to be considered and the question arose whether the Sanad could be treated as existing law within the meaning of Art. 372 of the Constitution. The Court, after taking notice of previous decisions, drew dis-

inction between orders made by a Ruler having the force of law and orders which may be of executive nature and held:—

"The true legal position is that whenever a dispute arises as to whether an order passed by an absolute monarch represents a legislative act and continues to remain operative by virtue of Clause 4 (b) of the Order, all relevant factors must be considered before the question is answered; the nature of the order, the scope and effect of its provisions, its general setting and context, the method adopted by the Ruler in promulgating legislative as distinguished from executive orders, these and other allied matters will have to be examined before the character of the order is judicially determined."

On an application of these principles in that case, it was held that the Sanad in question could not be held to be a legislative act. In our opinion, even if these principles are applied to the case before us, it has to be held that the Order of the Maharao dated 22nd January, 1938 amounted to exercise of legislative power. As we have already indicated earlier, the very nature of the Order, which changes the law applicable to the Jagir, indicates that it was legislative act and not a mere executive order. The Maharao did not purport to lay down that the Jagir was already governed by the rule of primogeniture; what he did was to apply the rule of primogeniture to this Jagir for future. Such an order could only be made in exercise of his prerogative of laying down the law for the State. The mere fact that it was laid down for one single Jagir and was not a general law applicable to others in the State is immaterial, because it does not appear that there were any other similar Jagirs which also required alteration of the law applicable to them. There is also nothing to show that during the period of his rule, the Maharao had adopted any special procedure for promulgating the laws in his State. The manner in which the Order was passed indicates that, in this State, the Maharao considered himself competent to lay down the law at any time he liked.

6. Reliance was also placed on the decision of this Court in State of Gujarat v. Vora Fiddali Badruddin Mithibarwala, (1964) 6 SCR 461 = (AIR 1964 SC 1043), but that case, in

our opinion, has no application at all. In that case, the question arose whether an agreement entered into by a Ruler had the force of law. In the case before us, there is no such question of any agreement. In dealing with that question, the Court relied on the following extract from a decision of the Court in an earlier case of *Bengal Nagpur Cotton Mills Ltd. v. Board of Revenue, Madhya Pradesh*, AIR 1964 SC 888.—

"It is plain that an agreement of the Ruler expressed in the shape of a contract cannot be regarded as a law. A law must follow the customary forms of law-making and must be expressed as a binding rule of conduct. There is generally an established method for the enactment of laws, and the laws, when enacted, have also a distinct form. It is not every indication of the will of the Ruler, however expressed, which amounts to a law. An indication of the will meant to bind as a rule of conduct and enacted with some formality either traditional or specially devised for the occasion, results in a law but not an agreement to which there are two parties, one of which is the Ruler".

Emphasis was laid by counsel on the views expressed in this passage that a law must follow the customary forms of law-making and must be expressed as a binding rule of conduct. In the present case, there is nothing to show that, in the State of Kota, there was any other customary form of law making. The Order of 22nd January, 1938 clearly expresses the direction of the Ruler that the Jagir must be governed by the same customary law as other Jagirs as a binding direction which was to govern the future conduct of the holders of this Jagir. The principle relied on, therefore, does not show that this Order of 22nd January, 1938 did not amount to a legislative act on the part of the Maharao.

7. Reference was also made to the decision of this Court in *Major Ranjit Singh Rao Phalke v. Smt. Raja Bai Sahiba (dead)* by her legal representatives & Vice Versa, Civil Appeals Nos. 982 and 983 of 1964, D/- 19-7-1967, where the Court said:—

"It is now settled law that every order of the Maharaja cannot be regarded as law, particularly those which were in violation of his own laws".

and again repeated:—

"The position today is that every order of the Ruler cannot be regarded as law but only such orders as contain some general rule of conduct and which follow a recognized procedure of law-making".

In that case, the particular order of the Ruler which was questioned had been made in contravention of one of the existing laws of the State and it was held that such an order could not be treated as law. In the case before us the position is quite different. There was no law of the Kota State which could be held to be contrary to the Order dated 22nd January, 1938. In fact, the general law governing all Jagirs in the State was the customary law under which the Jagirs were owned by the eldest member of the senior branch, and all that this Order did was to apply the same law to this Jagir also. It is true that no special procedure of law-making was adopted by the Maharao when making this Order; but that circumstance cannot change the nature of the Order specially when there is nothing to indicate that there was any recognised procedure of law-making in the Kota State at that time. In these circumstances, we hold that the High Court was quite correct in arriving at the decision that these eight villages, at the time when the suit for partition was instituted, were impartible property governed by the law of primogeniture and Chandrakant Rao respondent alone had to be treated as the owner of these villages.

8. It, however, appears that, during the pendency of the suit, Jagirs were resumed in Rajasthan including this Jagir which stood in the name of Chandrakant Rao and cash compensation was paid in respect of it. It was urged by counsel for the appellants that, even if the Jagir was impartible and governed by the rule of primogeniture, the right, which earlier vested in the members of the family when it was joint family property, would be exercisable when the Jagir was converted into cash and lost its status of impartible estate. It was, therefore, claimed that, after the Jagirs had been converted into cash under the Rajasthan Land Reforms and Resumption of Jagirs Act No. VI of 1952, the appellants should have been granted a share in the compensation received by Chandrakant Rao on the basis that

this property was earlier joint Hindu family property. In the alternative, it was also urged that, even if this claim of the plaintiffs/appellants is not accepted, they would at least be entitled to claim a part of the compensation in lieu of their right of maintenance. These two aspects do not seem to have been considered by the trial Court and even the High Court in one sentence disposed of this matter by saying that, since the appellants were only entitled to maintenance, they could not claim any share in the compensation money paid under the Rajasthan Act VI of 1952. In dealing with this aspect, we are handicapped by the circumstance that the suit was instituted before this Act VI of 1952 was passed, so that there was no specific pleading in this behalf by the plaintiffs/appellants. The trial Court, therefore, ignored this aspect altogether and even the High Court did not take into account the effect of Act VI of 1952 in the two aspects which have been mentioned by us above. Since, however, this is an appeal against a preliminary decree in the suit and the suit is still to continue in the trial Court, we think it appropriate to direct that these questions should be properly raised in the trial Court by amendment of the pleadings in the plaint, if necessary, and should be considered and decided by that Court. It will be for that Court to give a fresh decision whether the appellants are entitled to claim a share in the compensation money received in lieu of these eight villages under Rajasthan Act VI of 1952.

9. The result is that this appeal is dismissed, subject to the modification that the case will go back to the trial Court for deciding the question whether the plaintiffs/appellants can claim a share in the compensation money or not, as indicated above. Costs of this appeal shall abide the decision on this claim of the plaintiffs/appellants to a share in the compensation money.

Case remanded.

AIR 1971 SUPREME COURT 915
(V 58 C 186)

(From: Gujarat)*

J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.

Commissioner of Wealth Tax, Gujarat, Appellant v. Mrs. Arundhati Balkrishna, Respondent.

Civil Appeals Nos. 1991, 1992, 2010 and 2011 of 1968, D/- 25-2-1970.

(A) Wealth Tax Act (1957), S. 2 (e) (iv) — 'Annuity' — Meaning of — Trust deeds — Trustees to pay annually to assessee a share of income from trusts funds after deducting expenses — Assessee having only life interest in such payments which were not fixed sums of money — Payments are not annuities — Assessee not entitled to exclude them under Section 2 (e) (iv) from computation of net wealth.

The expression 'annuity' in S. 2 (e) (iv), means a right to receive a specified sum and not an aliquot share in the income arising from any fund or property. Ordinarily, an annuity is a money payment of a fixed sum annually made and is a charge personally on the grantor. (1859) 4 Drew 343 = 113 R. R. 390; Halsbury's Laws of England 3rd Edn. Vol. 32 P. 534 Para 899 & Jarman on Wills p. 1133, Rel. on. (Para 14)

Under certain trust deeds the trustees were required to pay each year the income of the trust fund after deducting expenses of administering the trust, to the assessee and her two brothers in equal shares. But after the death of the assessee her heirs were not entitled to any share in that income. For disposition of the corpus of the trust, it was provided that notwithstanding anything contained to the contrary in the deed of Trust after assessee attained majority and after the birth of her first child when and so often as might be required by the assessee, the trustees were required to pay a portion of the corpus of the trust fund not exceeding in the whole one-half thereof to the assessee and this payment of the corpus was to be absolutely freed and discharged from the trust and provisions of the trust deed.

Held that the payments which the assessee was entitled to receive under

*(Wealth Tax Ref. 3 of 1964, D/-9-10-1967 — Guj.)

those deeds were not annuities and as such she was not entitled to the benefit of S. 2 (e) (iv). (1966) 59 ITR 230 (Cal) & (1968) 69 ITR 586 (Cal), Rel. on. (Paras 15, 16)

(B) Wealth Tax Act (1957), S. 5 (1) — Jewellery intended for personal use of assessee only comes within S. 5 (1) (viii) — Its value cannot be included in computation of net wealth of assessee—S. 5 (1) (xv) deals with jewellery in general.

There are four provisions in Section 5 (1), dealing with jewellery viz. (1) jewellery intended for personal use of the assessee, S. 5 (1) (viii); (2) jewellery that is heirloom, S. 5 (1) (xiii); (3) jewellery in the possession of any ruler, S. 5 (1) (xiv) and (4) jewellery in general, S. 5 (1) (xv). Under S. 5 (1) (xv) as it stood at the relevant time every assessee was entitled to deduct a sum of Rs. 25,000/- from out of the value of the jewellery in her possession whether the same was intended for her personal use or not but under S. 5 (1) (viii) the value of all the jewellery intended for the personal use of the assessee stands excluded in the computation of the net wealth of an assessee. (Para 18)

Cases Referred: Chronological Paras

(1968) 69 ITR 586 = (1969) 1	
ITJ 311 (Cal), Commr. of	
Wealth Tax v. Mrs. Dorothy	
Martin	15
(1966) 59 ITR 230 (Cal), Ahmed	
G. H. Ariff v. Commr. of Wealth	
Tax, Calcutta	15
(1859) 4 Drew 343 = 113 R. R.	
390, Bignold v. Giles	13

Mr. B. Sen, Sr. Advocate, (M/s. S. K. Aiyar and B. D. Sharma, Advocates, with him), for Appellant (In C. As. Nos. 1991 and 1992 of 1968) and for Respondent (In C. As. Nos. 2010 and 2011 of 1968); Mr. N. A. Palkhivala, Sr. Advocate, (I. N. Shroff, Advocate, with him), for Respondent (In C. As. Nos. 1991 and 1992 of 1968) and for Appellant (In C. As. Nos. 2010 and 2011 of 1968).

The following Judgment of the Court was delivered by

HEGDE, J.:— These appeals by certificate under section 29 of the Wealth Tax Act, 1957 (to be hereinafter referred to as the Act) arise from a reference under section 27 (1) of the Act to the High Court of Gujarat. Therein four questions were referred to the High Court for its opin-

ion. These four questions really gave rise to two questions of law viz. (1) whether under the three trust deeds referred to therein the assessee got annuities falling within the scope of section 2 (e) (iv)? and (2) whether the value of the jewels owned by the assessee was exempt under section 5 (1) (viii) in computing the net wealth of the assessee?

2. The assessee is an individual and the assessment years with which we are concerned in these appeals are 1957-58 and 1958-59, the corresponding valuation dates being December 31, 1956 and December 31, 1957.

3. By a deed of settlement dated September 7, 1945 the father of the assessee settled certain shares of the Indian Companies of the estimated value of Rs. 5,50,325 upon trust for the benefit of his two sons and his daughter, the assessee. By another deed of settlement dated October 12, 1945 he settled certain other shares upon trust for the benefit of the assessee and her two brothers. All the terms of the two trust deeds relevant for our present purpose are identical. By a deed of settlement dated September 30, 1945, the mother-in-law of the assessee settled upon trust a sum of Rupees 3,88,931 and shares of some Indian Companies of the aggregate market value of Rs. 11,81,670. The assessee is one of the beneficiaries named in that deed. The assessee also possessed jewellery of the value of Rs. 80,000.

4. As regards the payments to be made to the assessee under the aforementioned three trust deeds, the contention of the assessee is that under each of those deeds, she has only a right to an 'annuity' and the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant and hence in view of Section 2 (e) (iv), the value of those annuities cannot be included in the computation of her net wealth. As regards the jewellery her case is that they are articles of her personal use and therefore their value cannot be taken into consideration in ascertaining her net wealth. She contends that the value of those jewellery is exempt under section 5 (1) (viii). The Wealth Tax Officer rejected both those contentions and assessed her after including in her net wealth the value of the benefits receivable by her under the trust deeds in question as well as the value of the jewellery minus

Rs. 25,000, deduction given under S. 5 (1) (xv) as it stood at the relevant time.

5. Against that order the assessee went up in appeal to the Assistant Appellate Commissioner. That officer agreed with the conclusions reached by the Wealth Tax Officer and he accordingly dismissed the appeal of the assessee. Thereafter the assessee appealed to the Tribunal. The Tribunal held that the payments to be made to the assessee under the trust deed executed by her mother-in-law is an 'annuity' entitled to exemption under section 2 (e) (iv). As regards the payments to be made to the assessee under her father's settlement deeds, it opined that as the assessee was entitled to withdraw from the trust fund at her own discretion after she attained majority and after she gave birth to one child, one half of the corpus, to that extent commutation was possible. Therefore to the extent of one half of the value of the annual payments to be made to her under those deeds, the assessee was not entitled to exemption under section 2 (e) (iv) but she was entitled to exemption as regards the other half. The Tribunal rejected the assessee's claim for exemption under S. 5 (1) (viii) i.e. in respect of the value of the jewellery.

6. On a reference under S. 27 (1), the High Court of Gujarat held that the payments to be made to the assessee under the three settlement deeds do not come within section 2 (e) (iv) but the value of the jewellery is exempt under section 5 (1) (viii). Both the assessee as well as the Revenue have appealed against that decision.

7. We shall first take up the contention of the assessee that the payments to be made to her under the trust deeds are annuities which by the terms and conditions relating thereto preclude the commutation of any portion thereof into a lump sum grant and hence are within the scope of section 2 (e) (iv). If those payments fall within the scope of that provision, they cannot be considered as the assets of the assessee and therefore their value cannot be reckoned in determining her net wealth under section 2 (m). Under section 3, the charging section, only the net wealth of an assessee can be brought to tax. Hence we have to examine the terms of the settlement deeds to find out whether the benefits con-

ferred on the assessee by any or all of those deeds can be considered as annuity.

8. As stated earlier the two settlement deeds executed by the father of the assessee are expressed more or less in identical language. It was conceded at the bar that whatever construction we may place on one, would be equally applicable to the other. Therefore we shall take up the deed executed on September 7, 1945 by the father of the assessee. Under Clause 3 of that deed it is provided that the trustees, after deducting from the income of the shares in question, all costs and expenses incurred in or about the administration of the trust, should at the end of every calendar year pay the whole residue to the assessee and her two brothers in equal shares. But after the death of the assessee her heirs are not entitled to any share in that income. Therein provision is made by the settlor for disposition of the corpus of the trust. But it is provided that notwithstanding anything contained to the contrary in the deed of Trust after assessee attained majority and after the birth of her first child when and so often as might be required by the assessee, the trustees are required to pay a portion of the corpus of the trust fund not exceeding in the whole one-half thereof to the assessee and this payment of the corpus was to be absolutely freed and discharged from the trust and provisions of the trust deed. The other provisions of the trust deed are not relevant for our present purpose.

9. Under the trust deed executed by the assessee's mother-in-law on December 30, 1945, the husband of the assessee and her two brothers-in-law were constituted as the Trustees. Under Clause (a) of that deed, the trustees were required to pay the income of the trust fund after deducting the expenses to the assessee during her lifetime. The rest of the clauses in that trust deed relate to disposition of the corpus to different beneficiaries after the lifetime of the assessee.

10. It is clear from the terms of the three trust deeds referred to earlier that the assessee had a life interest in each of those funds. Further under the trust deeds executed by her father, she was also entitled to a portion of the corpus under certain circumstances. The question for

decision is whether the benefits obtained by the assessee under those deeds can be held to come within Section 2 (e) (iv).

11. The expression "annuity" is not defined in the Act. In Halsbury's Laws of England, 3rd Edn. Vol. 32 at p. 534 (paragraph 899), the meaning of the word "annuity" is explained thus:

"An annuity is a certain sum of money payable yearly either as a personal obligation of the grantor or out of property not consisting exclusively of land".

12. In Jarman on Wills at p. 1113 "annuity" is defined thus:

"An annuity is a right to receive de anno in annum a certain sum, that may be given for life, or for a series of years; it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that, although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate".

13. In Williams on Executors and Administrators "annuity" is described as a yearly payment of a certain fixed sum of money granted for life or for years charging the person of the grantor only. In Bignold v. Giles, (1859) 4 Drew 343 = 113 RR 390 Kindersley V. C. described "annuity" in these words:

"An annuity is a right to receive de anno in annum a certain sum; that may be given for life, or for a series of years; it may be given during any particular period, or in perpetuity; and there is also this singularity about annuities, that although payable out of the personal assets, they are capable of being given for the purpose of devolution, as real estate; they may be given to a man and his heirs, and may go to the heir as real estate—so an annuity may be given to a man and the heirs of his body; that does not, it is true, constitute an estate tail, but that is by reason of the Statute De Donis, which contains only the word "tenements", and an annuity, though a hereditament, is not a tenement; and an annuity so given is a base fee". Proceeding further the learned Judge observed:

"But this appears to me at least clear; that if the gift of what is called an annuity is so made, that, on the

face of the will itself, the testator shows his intention to give a certain portion of the dividends of a fund, that is a very different thing; and most of the cases proceed on that footing. The ground is, that the Court construes the intention of the testator to be, not merely to give an annuity, but to give an aliquot portion of the income arising from a certain capital fund".

14. Illustrations of annuity given in Section 173 of the Indian Succession Act also show that it is a right to receive a specified sum and not an aliquot share in the income arising from any fund or property. Ordinarily an annuity is a money payment of a fixed sum annually made and is a charge personally on the grantor.

15. On an analysis of the relevant clauses in three trust deeds, it is clear the assessee was given thereunder a share of the income arising from the funds settled on trust. Under those deeds she is not entitled to any fixed sum of money. Therefore it is not possible to hold that the payments that she is entitled to receive under those deeds are annuities. She has undoubtedly a life interest in those funds. In Ahmed G. H. Ariff v. Commr. of Wealth Tax Calcutta, (1966) 59 ITR 230 (Cal) a Division Bench of the Calcutta High Court held that the right of a person to receive under a wakf an aliquot share of the net income of the wakf property is an 'asset' within the meaning of the Wealth Tax Act, 1957 and the capital value of such a right is assessable to wealth tax. Therein the Court repelled the contention that the right in question was an 'annuity'. This decision was approved by the Court in Civil Appeals Nos. 2129—2132 of 1968 decided on August 20, 1969 and the same is binding on us. A similar view was taken by another Bench of the Calcutta High Court in Commr. of Wealth Tax v. Mrs. Dorothy, Martin, (1968) 69 ITR 586 (Cal). In that case under the will of the assessee's father the assessee was entitled to receive for her life the annual interest accruing upon her share in the residuary trust fund. The Wealth Tax Officer included the entire value of the said share in the assessable wealth of the assessee and subjected the same to tax under Section 16 (3) of the Wealth Tax Act, 1957. That order was confirmed by the Assistant Appellate Commissioner

but the Tribunal in appeal excluded the same in the computation of the net wealth of the assessee. On a reference made to the High Court, it was held that on a construction of the various clauses in the will, the assessee was entitled to an aliquot share in the general income of the residuary trust fund and not a fixed sum payable periodically as "annuity" and, therefore, the value of her share was an asset to be included in computing his net wealth. These decisions in our view correctly lay down the legal position. In this view it is not necessary to consider whether the income receivable by the assessee under those deeds either wholly or in part is capable of being commuted into a lump sum grant.

16. For the reasons mentioned above we agree with the High Court that payments to be made to the assessee under the three trust deeds cannot be considered as annuities and hence she is not entitled to the benefit of Section 2 (e) (iv).

17. This takes us to the question whether the High Court was right in its view that the value of the assessee's jewellery should not be taken into consideration in determining her net wealth. The Tribunal has taken the view and the High Court has agreed with that view that the jewellery in question are articles intended for the personal use of the assessee. As mentioned earlier those jewels were valued at Rs. 80,000/-; out of that amount Wealth Tax Officer deducted Rs. 25,000/- under Section 5 (1) (viii). The assessee claims that in view of Section 5 (1) (viii), the value of those jewels cannot be included in the computation of her net wealth. Section 5 (1) (viii) reads:

"5. (1) Wealth-tax shall not be payable by the assessee in respect of the following assets, and such assets shall not be included in the net wealth of the assessee—

* * * * *

(viii) furniture, household utensils, wearing apparel, provisions and other articles intended for the personal or household use of the assessee."

18. There is no dispute that the jewels in question were intended for the personal use of the assessee; but it is said on behalf of the revenue that Section 5 (1) (viii) does not apply to

jewels as those articles are specifically provided for under Section 5 (1) (xv). On the other hand it is urged on behalf of the assessee that Section 5 (1) (xv) deals with jewellery which are not intended for personal use of the assessee such as heirloom or other jewellery which are retained as valuable assets or intended for the use of persons other than the assessee whereas Section 5 (1) (viii) takes in only such jewellery as are intended for personal use of the assessee. We think the contention advanced on behalf of the assessee is the correct one. It is well known that the jewellery is widely used as articles of personal use by the ladies in this country specially by those belonging to the richer classes. That being so jewellery intended for the personal use of the assessee comes within the scope of Section 5 (1) (viii). But the jewellery mentioned in Section 5 (1) (xv) need not be articles intended for personal use of the assessee. That provision deals with jewellery in general. The two provisions deal with different classes of jewellery. That is made further clear by Section 5 (1) (xiii) which says that wealth Tax shall not be payable by assessee in respect of any drawings, paintings, photographs, prints and other heirloom not falling within Clause (xii) and not intended for sale but not including jewellery. If the contention that the jewellery is exclusively dealt by Section 5 (1) (xv) is correct then there was no occasion for the legislature to refer to jewellery in Section 5 (1) (xiii). From an analysis of the various provisions in Section 5, it appears to us that therein there are four provisions dealing with jewellery viz., (1) jewellery intended for personal use of the assessee — Section 5 (1) (viii); (2) jewellery that is heirloom — Section 5 (1) (xiii); (3) jewellery in the possession of any ruler — Section 5 (1) (xiv) and (4) jewellery in general — Section 5 (1) (xv). Under Section 5 (1) (xv) as it stood at the relevant time every assessee was entitled to deduct a sum of Rs. 25,000 from out of the value of the jewellery in her possession whether the same was intended for her personal use or not but under Section 5 (1) (viii) the value of all the jewellery intended for the personal use of the assessee stands excluded in the computation of the net wealth of an assessee.

19. For the reasons mentioned above we think the High Court was right in answering the question relating to the value of the jewellery in favour of the assessee.

20. In the result these appeals fail and they are dismissed—no costs.

Appeals dismissed.

**AIR 1971 SUPREME COURT 920
(V 58 C 187)**

(From: Madhya Pradesh)*

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

M/s. The Alote Estate, Alote and another, Appellants v. R. B. Seth Hiralal Kalyanmal Kasliwal and others, Respondents.

Civil Appeal No. 1010 of 1966, D/- 20-2-1970.

Companies Act (1913), Sections 156, 184 — Liability as contributory of present and past members — Shareholder of fully paid shares — Cannot be placed on list of contributories without rectifying register and determination of liability in appropriate proceedings.

The consideration for the allotment of shares may be money or money's worth e. g., the transfer to the company of property. If a valid contract is made for the acceptance by the company of specified property in payment of shares the Court will not whilst the contract stands inquire into the value of the consideration even at the instance of the liquidator. Where, however, the contract is fraudulent or shows on the face of it that the consideration given to the company is illusory or is clearly not equivalent to the nominal value of the shares the shares cannot, to this extent, be treated as fully paid and the shareholder may be held liable to pay for them in full if the register is rectified and it is determined in appropriate proceedings that he is not a fully paid up shareholder. L. P. A. No. 24 of 1962, D/- 9-7-1965 (MP), Reversed. (Para 9)

Cases Referred: Chronological Paras
(1903) (1903) 2 Ch Div 254 = 72

LJ Ch 643, In re Innes and Co. Ltd.

9

*(Letters Patent Appeal No. 24 of 1962, D/- 9-7-1965 — Madh Pra — Indore Bench.)

JN/KN/B130/70/BNP/M

M/s. S. V. Gupte and N. D. Karkhanis, Sr. Advocates, (Mr. A. G. Ratnaparkhi, Advocate, with them), for Appellants; Mr. Mohan Behari Lal, Advocate, for Respondent No. 1; Mr. C. K. Daphtary, Sr. Advocate, (M/s. C. P. Lal and N. N. Sharma, Advocates, with him), for Respondents Nos. 2 to 4.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal by special leave from a judgment of the Division Bench of the Madhya Pradesh High Court reversing the order of the Company Judge in an application made by respondent No. 1 for an inquiry into that allegation that the consideration for 18,000 shares of the Vikram Sugar Mills Ltd. (now under liquidation) valued at Rs. 18 lakhs was not fully paid up by the shareholders, namely, the present appellants.

2. The facts may be succinctly stated. Appellant No. 1, the Alote Estate, was a firm consisting of two partners at the material time. It came into existence in 1944 when Vikram Sugar Mills Ltd., hereinafter called the "company", was proposed to be floated. The two partners of the firm were His Highness Col. Sir Vikram Singh Rao Pawar, Ruler of the State of Dewas (senior) and R. K. N. Gajapati Raju of Vaizagapatnam who died sometime in 1946 with the result that the firm was dissolved. In 1947 the ruler of Dewas (senior) was taken in adoption by Her Highness the Senior Dowager Maharanisahaba of Kolhapur. He assumed the name and title of His Highness Maj. Gen. Sir Shahaji Chhatrapati Maharaja of Kolhapur. After the constitution of the firm called the Alote Estate, the company was incorporated in February, 1944. The firm held extensive agricultural land which was suitable for cultivation of sugarcane. It had transferred 6,000 acres out of its holding to the company in lieu of 18,000 fully paid shares of Rs. 100/- each which were registered in the name of the firm.

3. Respondent No. 1 was originally a director of the company. He made a proposal for advancing debenture loan of Rs. 20 lakhs to the company which proposal was accepted by the Board of Directors as also at an extraordinary general meeting of the company on September 16, 1946. He

was appointed Managing Agent of the company. On the same date at the meeting the shareholders of the company passed a resolution that out of 6,000 acres of land acquired by the company from the Alote Estate 2,000 acres selected by respondent No. 1 or his representative be returned and retransferred to the Estate. In consideration of such transfer 9,000 shares were to be surrendered by the Estate. Effect was given to this resolution and in the list of shareholders the number of shares held by the firm was shown as 9,000 instead of 18,000 subject to confirmation by the Court. A resolution was passed on October 27, 1947 for reduction of the capital from 60 Lakhs to Rs. 35 lakhs. The Court was also moved for giving permission for reduction of the capital. On January 23, 1950, Prabhakar Parashuramji Pandit — a shareholder — filed before the High Court a petition under Sections 166 and 162 of the Companies Act 1913 for winding up the company. On April 2, 1951 two joint liquidators were appointed.

4. The liquidators took steps to settle the list of contributories and objections were raised by His Highness the Maharaja of Kolhapur as also by the firm against inclusion of their names in that list. While these proceedings were pending an application was filed by respondent No. 1 on October 31, 1961 praying that an inquiry be made in respect of the price paid for 6,000 acres of land before the allotment of the shares and "to hold the Alote Estate and His Highness the Maharaja of Kolhapur liable as contributories to the extent of money's worth not found to have been fully paid in addition to and independently of the liability for Rs. 9 lakhs" which according to the joint liquidators was the amount of liability of the Maharaja as a contributory. It was alleged, inter alia, that on an average the price per acre paid for 6,000 acres of land before the allotment of the shares was approximately Rs. 30/-. On that basis the Maharaja and the Alote Estate were liable as contributories in the sum of Rs. 16 lakhs as the shares were not fully paid by value in kind. The Maharaja and the Alote Estate in reply took up the position that in the absence of rectification of register by appropriate action they were not liable to pay as contributories because they held shares which were fully paid up. As

regards the company's resolution to give up 2,000 acres out of 6,000 acres and reduce the value of shares allotted to 9 lakhs it was maintained that the same was an independent transaction and its effect could be considered only in appropriate proceedings in accordance with law.

5. The Learned Company Judge by his order dated July 31, 1962 held that in a proceeding for winding up and while settling the list of contributories it was not open to go behind the transaction entered into at the time of the formation of the Company and that the consideration which had been freely accepted by the company could not be challenged as being inadequate in the absence of any allegation of fraud. He was further of the view that the contention of respondent No. 1 that the valuation of the land was Rs. 30 and not Rs. 300/- per acre could not be inquired into and it was not necessary to consider whether such inquiry was barred by limitation in view of Section 235 of the Act. It was, however, observed that if the allegation of respondent No. 1 was that the Alote Estate as an officer of the company was guilty of misfeasance or breach of trust the application having been made more than three years from the date of first appointment of liquidators would be clearly barred. Reference was made to numerous English and Indian decisions for coming to the conclusion that a fully paid shareholder could not be called upon to contribute towards the assets of the company in respect of such shares held by him. Other points were left for decision after the petition for confirmation of the resolution of the company was disposed of.

6. Respondent No. 1 filed an appeal under the Letters Patent. The Division Bench hearing the appeal seems to have been influenced by the possibility that the land had been purchased by the Alote Estate at a small fraction of value for which it had been sold to the company largely owing to the Maharaja being all powerful in the conduct of its affairs. It was considered that an inquiry would be necessary when there was a prima facie indication that the allottee of the shares had paid only a fraction of the nominal value.

7. Now Section 156 of the Act deals with the liability as contributories. Clause (iv) of sub-section (1)

provides that in the case of a company limited by shares no contribution shall be required from any member exceeding the amount unpaid on the shares in respect of which he is liable as a present or past member. Section 158 defines the term "contributory". It means every person liable to contribute to the assets of a company in the event of its being wound up. Under Section 184 the Court shall settle the list of contributories with power to rectify the register of members in all cases where rectification is required in pursuance of the Act. Sections 185 and 186 confer power on the Court to require delivery of property from a contributory and to order payment of debts determined by it.

8. The material question, therefore, was whether the appellants could be placed on the list of contributories. It could hardly be disputed that a shareholder of fully paid up shares will not be placed on the list of contributories and made to contribute towards the assets of the company unless the register is rectified and it is determined in appropriate proceedings that he is not a fully paid up shareholder.

9. In England the rule which has been accepted as settled is that although the court can inquire into an allegation that owing to fraud the contract relating to fully paid up shares was vitiated but unless the contract is impeached mere inadequacy of price is not sufficient of itself to invalidate the contract. In the words of Vaughan Williams L.J. in *In re Innes and Co., Ltd.*, (1903) 2 Ch Div 254, at page 262.

"You must shew that, these shares not having been paid for at all, the contract for purchase was a colourable transaction, and that in truth and in fact, qua value, these shares were not part of the consideration...."

As stated in *Palmer's Company Law*, 21st Edition, pages 190-191, the consideration for the allotment of shares may be money or money's worth e. g., the transfer to the company of property. If a valid contract is made for the acceptance by the company of specified property in payment of shares the court will not whilst the contract stands inquire into the value of the consideration even at the instance of the liquidator. Where, however, the contract is fraudulent or

shows on the face of it that the consideration given to the company is illusory or is clearly not equivalent to the nominal value of the shares the shares cannot, to this extent, be treated as fully paid and the shareholder may be held liable to pay for them in full. It is significant that no steps were taken by the liquidators to have the register rectified or the contract entered into by the company with the appellants avoided by means of appropriate proceedings. Even in the application filed by respondent No. 1 in October 1961 there was no allegation of fraud. The fact stated related more to inadequacy of price or consideration and not to its being illusory or the like. In our judgment the learned single judge was right and the Division Bench was in error in directing an inquiry into the question whether the appellants had paid consideration which was inadequate.

10. The appeal is consequently allowed and the order of the Division Bench is set aside and that of the learned single judge restored with costs.

Appeal allowed.

AIR 1971 SUPREME COURT 922 **(V 58 C 188)**

(From: Bombay)*

S. M. SIKRI, V. BHARGAVA AND
I. D. DUA, JJ.

Burmah Shell Oil Storage and Distributing Co. of India, Ltd. (in C. A. No. 1477 of 1970); *The Burmah Shell Management Staff Association* (in C. A. No. 1478 of 1970), Appellants v. *The Burmah Shell Management Staff Association and others* (in C. A. No. 1477 of 1970); *Burmah Shell Oil Storage and Distributing Co. of India Ltd. and others* (in C. A. No. 1478 of 1970), Respondents.

Civil Appeals Nos. 1477 and 1478 of 1970, D/- 12-11-1970.

(A) **Industrial Disputes Act (1947), Section 2 (s)** (as amended by Act 36 of 1956) — **Workman, who is — A person may not be a workman even though he does not come within the exceptions — Workman must be held**

*(Ref. (I. T.) No. 378 of 1967, D/- 9-1-1970 — Bom.)

LN/LN/F434/70/DHZ/P

to be doing that work which is his main work.

A person cannot be assumed to be a workman on the ground that he does not come within the four exceptions in Section 2 (s). The specification of the four types of work in the definition in Section 2 (s) obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word 'workman' without having to resort to the exceptions.

In practice, quite a large number of employees are employed in Industries to do work of more than one of the kinds mentioned in the definition. In such cases, it would be necessary to determine under which classification he will fall for the purpose of finding out whether he does or does not go out of the definition of 'workman' under the exceptions. For this purpose, a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other type of work. Case law discussed. (Paras 5, 6)

(B) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Transport Engineer in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Comes within exception (iv) and is not a workman.

A person with technical qualifications can on that account, be employed in a supervisory capacity and, in such a case, he will be held to be employed to do supervisory work, so that, in order to be a workman, he must not be exempted under exception (iv). In the case of Transport Engineer the major part of his duties consists of supervisory work rather than his own personal technical work which is only incidental to the main work of repair, servicing, maintenance and fabrication inasmuch as, in his supervisory capacity, he diagnoses the defects and later on inspects the work done, makes his personal test and certifies that it has been properly carried out. Even if the Transport Engineer uses his technical knowledge, it is used primarily for the purpose of supervising the work done by the skilled manual labourers who carry

out the actual repairs, do the servicing or maintenance or complete the fabrication. Admittedly the Transport Engineer draws salary in excess of Rs. 500/- per mensem and ceases to be a workman under exception (iv) of the definition. (1938) 1 All ER 20 and AIR 1965 Mad 263 and (1958) 2 Lab LJ 556 (First Labour Court, West Bengal) and AIR 1966 SC 305, Rel. on.

(Paras 12, 13, 16, 18)

(C) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — District Engineer in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Comes within exception (iv) and is not a workman.

The duties, which the District Engineer performs, consist of assessing suitability of sites for depots from the point of view of the technical and engineering aspects, suggesting layout for construction of depots, or service stations, seeing that the estimates prepared by the draughtsmen are correct from the technical point of view, scrutinising tenders for construction checking the construction work given to the contractor, certifying bills submitted by contractors for the work done by them, and preparing estimates for maintenance work in respect of depots. He also gives certificate as required by the Inspector of Explosives after satisfying himself about the technical fitness of the installation facilities. On the other hand, the principal work, for which he is employed, is that of supervision inasmuch as he is required to supervise work done by others instead of doing the work himself. Even though he has to use his technical knowledge for the purpose of properly carrying on supervision, it cannot be held that he is employed to do technical work. A District Engineer draws a salary in excess of Rs. 500/- per mensem and, consequently, he cannot be held to be a workman. (Para 19)

(D) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Foreman (Chemicals) in Burmah Shell Oil Storage and Distributing Co. of India, Ltd. — His principal duties are of a supervisory nature and the manual work done by him personally is only incidental — Since he draws a salary in excess of Rs. 500 per mensem, he must be held not to be a workman under exception (iv). (Para 20)

(E) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Fuelling Superintendent in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Main and substantial work which he does is not that of supervising the work done by the few workmen who assist him, but his own manual work which he carries out at the depot as well as when delivering oil to the aircraft — Fact that a Fuelling Superintendent is leader of the team which carries out the work of fuelling, cannot convert his work into that of a supervisory nature — Exception (iv) does not apply to a Fuelling Superintendent and, even though the salary exceeds Rs. 500 per mensem, must be held to be a workman.

(Paras 21, 22)

(F) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Chemist in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Work of chemist is of technical nature — Small amount of supervision in ensuring that workmen assisting him do their work properly is only incidental to his own technical work of testing and giving results of tests to the Company — He is a workman.

(Para 23)

(G) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Sales Engineering Representative in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Main work to be performed by Sales Engineering Representative is promotion of sales which are canvassed primarily by District Sales Representative — The amount of technical work that a Sales Engineering Representative does is all ancillary to his chief duty of promoting sales and giving advice — He is not a workman.

(Para 25)

(H) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Blending Supervisors in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Some are workmen and some are not.

The major part of Blending Supervisor working in the blending section of Waditube plant consists in himself operating various parts of the machinery and ensuring that oils are blended properly. The supervisory work is a minor part of his duties and,

to some extent, incidental to the main work which is manual in character. Blending Supervisors, who work at the plant in such manner are, therefore, persons employed on manual work and have to be held to be workmen.

(Para 28)

Other type of work done by a Blending supervisor is at a stage when the blending of oils has been completed and the oils have been transferred to the settling tanks. No doubt, as a Supervisor, he has to set the weights on the machines and has to take samples of the products and send them to the laboratory; but the principal work entrusted to him is that of seeing that the barrels and other containers are properly filled up by the large number of workmen placed under his charge who actually carry out the physical work for that purpose. His duties are, thus, primarily supervisory; and he is not a workman because he draws a salary in excess of Rs. 500/- and comes within exception (iv).

(Para 29)

(I) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Foreman in Burma Shell Oil Storage and Distributing Co. of India Ltd. — Foreman (Tank Farm and Pump House) is not workman being employed in supervisory capacity and drawing salary in excess of Rs. 500 per mensem — Foreman (Tank Lorry loading, Tank Wagon Loading and Tank Wagon unloading) is also not workman for same reason.

(Paras 31, 32)

(J) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — Depot Superintendent in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — His principal duties are of a supervisory and managerial nature, while the clerical duties are only incidental — He is not workman as he draws salary in excess of Rs. 500 per mensem and comes under exception (iv) — (1954) 1 Lab LJ 21 (LATI — Luck) and (1954) 2 Lab LJ 155 (Mad) Distinguished; (1955) 2 Lab LJ 153 (LATI — Bom) and (1955) 2 Lab LJ 228 (LATI — Mad), Rel. on.

(Paras 33, 34, 35)

(K) Industrial Disputes Act (1947), Section 2 (s) (as amended by Act 36 of 1956) — Workman — District Sales Representative in Burma Shell Oil Storage and Distributing Co. of India, Ltd. — Not a workman.

District Sales Representative is principally employed for the purpose of promoting sales of the Company. His main work is to do canvassing and obtain orders. In that connection, of course, he has to carry on some correspondence, but that correspondence is incidental to the main work of pushing sales of the Company. The case of District Sales Representative is clearly that of a person who cannot fall within any of the four classes, in the definition because his work cannot be held to be either manual, clerical, technical or supervisory. He is, therefore, not a workman at all within the principal part of the definition. (Para 36)

Cases Referred: Chronological Faras

- (1969) 1969-2 Lab LJ 670 = 18
Fac LR 186 (SC); Ananda Bazar Patrika (Private) Ltd. v. Its Workmen 8
- (1968) 1968 AC 157, J. & F. Stone Lighting & Radio Ltd. v. Havgarth 11
- (1967) AIR 1967 SC 678 (V 54) = (1961) 2 Lab LJ 94, May and Baker (India), Ltd. v. Their Workmen 5, 6
- (1966) AIR 1966 SC 305 (V 53) = (1966) 1 SCR 25, All India Reserve Bank Employees' Association v. Reserve Bank of India 18
- (1965) AIR 1965 Mad 263 = (1964) 2 Lab LJ 164, Murugalli Estate Hardypet v. Industrial Tribunal, Madras 16
- (1964) AIR 1964 SC 1522 (V 51) = (1964) 5 SCR 625, South Indian Bank Ltd. v. A. R. Chacko 7
- (1958) 1958-2 Lab LJ 556 (Cal) (First Labour Court West Bengal), Indamer Company (Private) Ltd. v. Barin De 17
- (1955) 1955-2 Lab LJ 153 (LATI — Bom), Burmah Shell Oil Storage and Distributing Co. of India Ltd. v. Their Workmen 35
- (1955) 1955-2 Lab LJ 228 (LATI — Mad), Burmah Shell Oil Storage and Distributing Co. of India, Ltd. v. Their Workmen 35
- (1954) 1954-1 Lab LJ 21 (LATI — Luck), Burmah Shell Oil Storage and Distributing Co. of India Ltd., Madras v. Their Employees 34
- (1954) 1954-2 Lab LJ 155 (Mad), Burma Shell Oil Storage and Distributing Co. of India, Ltd., Madras v. Labour Appellate Tribunal of India 34
- (1938) 1938-1 All ER 20 = 158 LT 174, Appeal of Gardner, Re Maschek, Re Tyrrell 14
- (1921) 1921-2 AC 339 = 90 LJKB 1325, Jaques v. Owners of Steam Tug Alexandra 10
- (1921) 1921-2 KBD 319 = 90 LJKB 480, Reid v. British and Irish Steam Packet Co. Ltd. 10
- (1911-12) 28 TLR 587 = 107 LT 342, Re Dairymen's Foremen, and Re Tailors' Cutters 9
- Mr. S. D. Vimadalal, Sr. Advocate, (M/s. F. N. Kaka and I. N. Shroff, Advocates, with him), for Appellant (In C. A. No. 1477 of 1970) and for Respondent No. 1 (in C. A. No. 1478 of 1970); Mr. A. S. R. Chari, Sr. Advocate (M/s. H. K. Sowani, K. Rajendra Chaudhuri and Pratap Singh, Advocates, with him), for Appellant (In C. A. No. 1478 of 1970) and for Respondent No. 1 (in C. A. No. 1477 of 1970).

The following Judgment of the Court was delivered by

BHARGAVA, J.: — These two connected appeals by special leave are directed against an interim award of the Industrial Tribunal, Maharashtra, Bombay, in a dispute referred by the Government, relating to the revision of scales and grades of pay, dearness allowance, overtime payment, duty allowance, other allowances, and bonus for the year 1965-66, between the employers, Messrs. Burmah Shell Oil Storage and Distributing Company of India Ltd., Bombay (hereinafter referred to as "the Company") and a set of employees who were designated as junior management staff and were members of the Burmah Shell Management Staff Association registered as a trade union. The reference was confined to the members of the junior management staff working in Maharashtra region. The main business of the Company is marketing of petroleum products and oils and the Marketing Area is the whole of India which is divided into four areas, viz., Bombay, Calcutta, Madras and Delhi. This reference related to the Bombay area. The organisation and management of each area is divided into four functions, Marketing, Distribution, Personnel and Finance. Each one of the four Areas is itself divided into several Marketing Divisions and each Division is further sub-divided into five or seven sales districts as the case

may be. For the sale of commodities, in which the Company deals, there are various outlets, such as petrol pumps, storage depots, etc. The Company also undertakes the work of fuelling of aircraft at the Airfields which work is done by the Airfield Service Stations. For purposes of storage and distribution of products handled by the Company, the Company maintains port installations as well as upcountry depots. The staff concerned in this reference is employed at the installations or the depots in the Maharashtra region.

2. Though the members of the Association are described as junior management staff, they claimed that they were workmen as defined in the Industrial Disputes Act No. 14 of 1947 (hereinafter referred to as "the Act") and, on that basis, raised an industrial dispute relating to salary, etc., as mentioned above. The Association served a charter of demands on the Company on 29th November, 1966. The Government referred the dispute to the Industrial Tribunal on 28th October, 1967. On 2nd December, 1967, the Association put forward its statement of claim before the Tribunal. On behalf of the Company, a preliminary written statement was filed on 15th January, 1968, contending that none of the members of the Association was a workman, so that the reference was incompetent. In this written statement, it was stated that the Company would request the Tribunal to decide this question as a preliminary issue and that a written statement on merits would only be filed subsequently, if it is held that all or any of members of the Association are workmen within the Act. A rejoinder statement was filed on behalf of the Association on 27th March, 1968. The Tribunal gave its finding on the preliminary issue as an interim award on 9th January, 1970. The members of the Association were classified into various categories of whom we need mention only 10 which are involved in these two appeals. Out of these 10, members of 6 categories were held to be workmen and these are:—

- (1) Transport Engineer
- (2) District Engineers
- (3) Foreman (Chemicals)
- (4) Fuelling Superintendent.
- (5) Chemists.
- (6) Sales Engineering Representatives,

Members belonging to 4 categories were held not to be workmen. These categories are:—

- (1) Blending Supervisors
- (2) Foreman
- (3) Depot Superintendents
- (4) District Sales Representatives.

Civil Appeal No. 1477 of 1970 has been brought up by the Company challenging the decision of the Tribunal in respect of the 6 categories held to be workmen, while Civil Appeal No. 1478/1970 has been filed by the Association challenging the correctness of the decision of the Tribunal in respect of the 4 categories held not to be workmen.

3. Some general features with regard to the members of the Association involved in these appeals may be stated. At the time of the reference, the lowest basic salary drawn by a member of the Association was Rs. 535 per mensem, while the highest was Rs. 1500/- per mensem. In addition, the members of the Association are paid dearness allowance equal to 30 per cent of basic salary, House-rent allowance, leave fare assistance, and bonus. Medical benefits are also provided for them and their families. The company contributes to the Provident Fund of the members at 10 per cent of basic salary and these members on retirement are also entitled to pension which varies between 30 per cent and 50 per cent of basic salary. The number of persons involved in the reference in the Maharashtra region is 140. The effect of the decision of the Tribunal is that 98 employees belonging to 4 categories have been held not to be workmen, while 42 employees belonging to 6 categories have been held to be workmen. The decision in these appeals can, however, have wider repercussions because, in the whole of India, the total number of persons belonging to these categories would be 648. If the Tribunal's decision is upheld, 154 of them would be workmen and 494 would be non-workmen. It may also be noticed that the majority of the persons concerned in this reference originally started at a salary of Rs. 100/- to Rs. 200/- per mensem and it is only as a result of promotions, revision of salaries and length of service that they are now drawing basic pay at the rates mentioned above. All persons appointed to the posts now held by them were originally describ-

ed as Supervisors or field staff; but, in the year 1962, they came to be designated as 'junior management staff. The Association got itself registered under the name "Burmah Shell Management Staff Association."

4. In order to decide whether the decision of the Tribunal with respect to the various categories is correct, it is necessary to consider the definition of "workmen" in the Act as amended by Industrial Disputes Amendment Act 36 of 1956. That definition is reproduced below:—

"2. (s) "workman" means any person (including an apprentice) employed in any industry to do any skilled or unskilled manual, supervisory, technical or clerical work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person—

(i) who is subject to the Army Act, 1950, or the Air Force Act, 1950, or the Navy (Discipline) Act, 1934; or

(ii) who is employed in the police service or as an officer or other employee of a prison; or

(iii) who is employed mainly in a managerial or administrative capacity; or

(iv) who, being employed in a supervisory capacity, draws wages exceeding five hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him functions mainly of a managerial nature".

For an employee in an industry to be a workman under this definition, it is manifest that he must be employed to do skilled or unskilled manual work, supervisory work, technical work or clerical work. If the work done by an employee is not of such a nature, he would not be a workman. Mr. Chari on behalf of the Association, however, put forward the argument that this definition is all comprehensive and contemplates that all persons employed in an industry must necessarily fall in one or the other of the four

classes mentioned above and, consequently, the Court should proceed on the assumption that every person is a workman; but he may be taken out of the definition of 'workman' under the four exceptions contained in the definition. The two exceptions with which we are primarily concerned are exceptions (iii) and (iv). Under exception (iii), even a workman, who is employed mainly in a managerial or administrative capacity, goes out of the definition of 'workman', while under exception (iv), persons, who are employed in a supervisory capacity, go out of the definition, provided they either draw wages exceeding Rs. 500/- per mensem or exercise, by the nature of the duties attached to the office or by reason of the powers vested in them, functions mainly of a managerial nature.

5. We are unable to accept this submission. In the case of *May and Baker (India), Ltd. v. Their Workmen*, (1961) 2 Lab LJ 94 = (AIR 1967 SC 678) this Court had to consider the correctness of a decision of a Tribunal which had held that one Mukerjee, an employee in an industry, was a workman under the Act, because he was not employed in a supervisory capacity. The Court held:—

"The Tribunal seems to have been led away by the fact that Mukerjee had no supervisory duties and had to work under the directions of his superior officers. That, however, would not necessarily mean that Mukerjee's duties were mainly manual or clerical. From what the tribunal itself has found it is clear that Mukerjee's duties were mainly neither clerical nor manual. Therefore, as Mukerjee was not a workman, his case would not be covered by the Industrial Disputes Act and the tribunal would have no jurisdiction to order his reinstatement".

In that case, the Court thus held Mukerjee not to be a workman on the ground that his work was neither clerical nor manual which was the nature of the work envisaged in the definition to make an employee a workman. It is true that that decision was given on the definition of "workman" as it stood before the Amendment of 1956 when the words "supervisory" and "technical" did not occur in the definition. Mr. Chari's submission is that the amendment in 1956 introduced the words "super-

visory" and "technical" with the object of making the definition all comprehensive; but, on the face of it, it cannot be so. If every employee of an industry was to be a workman except those mentioned in the four exceptions, these four classifications need not have been mentioned in the definition and a workman could have been defined as a person employed in an industry except in cases where he was covered by one of the exceptions. The specification of the four types of work, obviously is intended to lay down that an employee is to become a workman only if he is employed to do work of one of those types, while there may be employees who, not doing any such work, would be out of the scope of the word "workman" without having to resort to the exceptions. An example, which appears to be very clear, will be that of a person employed in canvassing sales for an industry. He may not be required to do any paper work, nor may he be required to have any technical knowledge. He may not be supervising the work of any other employees, nor would he be doing any skilled or unskilled manual work. He would still be an employee of the industry and, obviously, such an employee would not be a workman, because the work, for which he is employed, is not covered by the four types mentioned in the definition and not because he would be taken out of the definition under one of the exceptions.

6. The next aspect that has to be taken notice of is that, in practice, quite a large number of employees are employed in industries to do work of more than one of the kinds mentioned in the definition. In cases where an employee is employed to do purely skilled or unskilled manual work, or supervisory work, or technical work, or clerical work, there would be no difficulty in holding him to be a workman under the appropriate classification. Frequently, however, an employee is required to do more than one kind of work. He may be doing manual work as well as supervisory work, or he may be doing clerical work as well as supervisory work. He may be doing technical work as well as clerical work. He may be doing technical work as well as supervisory work. In such cases, it would be necessary to determine under which classification he will fall for the pur-

pose of finding out whether he does or does not go out of the definition of "workman" under the exceptions. The principle is now well settled that, for this purpose, a workman must be held to be employed to do that work which is the main work he is required to do, even though he may be incidentally doing other type of work. In the case of *May & Baker (India), Ltd.*, (1961) 2 Lab LJ 94 = (AIR 1967 SC 678) (supra), the Court, in the quotation cited above, noticed the fact that Mukerjee's duties were mainly neither clerical nor manual. The significance attaches to the word "mainly", because Mukerjee's duties did involve some clerical and manual work; yet, he was held not to be a workman.

7. In *South Indian Bank Ltd. v. A. R. Chacko*, (1964) 5 SCR 625 = (AIR 1964 SC 1522) the Court applied a similar test when it held:—

"We can find no mistake in the approach of the Labour Court to the question nor can we see any justification for interfering with its conclusion on the evidence in the case. All the relevant documents produced have been duly considered by the Labour Court in the light of the oral evidence given; and on such consideration it has come to the conclusion that though on paper certain rights and powers were assigned to him and occasionally he acted in the place of the Agent when the Agent was absent, such duties did not form part of his principal and main duties". The Court, thus, approved of the test of finding out which duties were the principal and main duties.

8. In *Ananda Bazar Patrika (Private) Ltd. v. Its Workmen*, (1969) 2 Lab LJ 670 (SC) this Court clearly enunciated the principle by stating:

"The principle which should be followed in deciding the question whether a person is employed in a supervisory capacity or on clerical work is that if a person is mainly doing supervisory work but incidentally or for a fraction of the time also does some clerical work, it would have to be held that he is employed in supervisory capacity, and, conversely, if the main work done is of clerical nature, the mere fact that some supervisory duties are also carried out incidentally or as a small fraction of the work done by him will not convert his

employment as a clerk into one in supervisory capacity".

Dealing with the facts of that case, the Court found that Gupta, the employee concerned, was employed on clerical work and not in supervisory capacity. The principal work that Gupta was doing was that of maintaining and writing the cash-book and of preparing various returns. Being the senior-most clerk, he was put in charge of the provident fund section and was given a small amount of control over the other clerks working in his section. The only powers he could exercise over them was to allocate work between them, to permit them to leave during office hours, and to recommend their leave applications. These few minor duties of a supervisory nature could not convert his office of senior clerk in charge into that of a supervisor.

9. Assistance in this matter is also available from decisions by Courts in England where, in connection with the applicability of the Factories Act and other Acts, the Courts had to decide whether an employee was employed on manual labour or not. The earliest case is *Re Dairymen's Foremen and Re Tailors' Cutters*, (1911-12) 28 TLR 587. After referring to decisions on the Employers and Workmen's and Compensation Acts, Swinfen Eady, J., held that those cases really afforded assistance in determining the true meaning of this statute. In his opinion, although they might perform manual labour, the question was whether that was the real substantial employment for which they were engaged or whether it was not incidental or accessory to it. Applying this principle to the case of *Tailors' Cutter*, it was held:—

"The actual labour of cutting out cloth might be manual labour, but the position he really occupied was a manager of a business department. His duties therefore substantially were not those involving manual labour and he was not within the Act".

10. In *Reid v. British and Irish Steam Packet Co. Ltd.*, (1921) 2 KBD 319, reference was made to an earlier decision by that very Court in *Jacues v. Owners of Steam Tug Alexandra*, which decision was rendered on November 18, 1920, and in which the Court adopted the definition which was given by the late Master of the Rolls sitting as a Judge of first instance, of the meaning of "employed otherwise than

by way of manual labour". That meaning was approved by saying:—

"What that learned Judge said was, that the question whether a person is employed otherwise than by way of manual labour within the meaning of that section is to be determined by considering whether any manual labour that he may do in the course of his service is the real substantial work for which he is engaged, or whether it is only incidental or accessory thereto; if it be the latter, the employment is not in manual labour".

This principle was also later approved by the House of Lords in the appeal, which came before it against the decision in the case of *Jacques v. Owners of Steam Tug Alexandra*, decided on July 4, 1921, (1921) 2 AC 339, where Lord Buckmaster in his speech said:

"The difficulty that arises in the construction of the statute is due to the number of employments in which it is impossible to assert that the employment is solely manual labour or is solely exclusive of manual labour, and it has been held in a series of cases approved in the present instance by the Court of Appeal that in these circumstances the real test is the substantial nature of the employment. If that be manual labour the fact that there are other duties performed that could not be so described does not take the employee outside the benefit of the statute. If, on the other hand, the substantial part of the employment cannot be described as "manual" labour, the fact that manual work has to be performed does not bring him within. This test, which in my opinion is the only reasonable one that can be applied to the statute is, I think, the one that was accepted by the learned county Court Judge, and if that be so, unless the proved facts are of such a character that it was not open to him to hold that by their proper application the deceased was excluded from the Act, his finding is conclusive and cannot be questioned". A similar principle was indicated by Lord Wrenbury in the following words:—

"The question to be answered I think is this: When the employer offered and the man accepted the employment, was it substantially an offer of manual labour although it involved some other work, or was it an offer of other work although there was attached to it an obligation to do some

manual labour? To put this particular case: Was the employment that of master of the tug with the duties and responsibilities attaching to that office but coupled with an obligation to take part with the crew in the manual work, or was the employment that of a manual labourer who was to be responsible for the tug as senior man among the crew?"

11. In *J. & F. Stone Lighting & Radio Ltd. v. Havgarth*, 1968 AC Pt. 3, 157 the same test of the substantial nature of the employment was applied in interpreting the words "employed in manual labour" in the Factories Act. Thus, in the present case also, in determining which of the employees in the various categories are covered by the definition of "workman", we have to see what is the main or substantial work which they are employed to do? If it is supervisory work, it would be held that they were employed to do supervisory work even though they may also be doing some technical, clerical or manual work. If, on the other hand, the supervisory work be incidental to the main or substantial work of any other type, viz., clerical, manual or technical, the employment would not be in a supervisory capacity. It is in the light of these principles that we shall now proceed to examine the correctness of the decision of the Tribunal in respect of various categories of workmen involved in this reference. We shall take them up in the order in which they were discussed by the counsel for parties in the course of their arguments.

1. Transport Engineer:

12. The Transport Engineer works in the Central Garage at Sewree Installations which is maintained for the purpose of repairs and maintenance of all motor vehicles owned by the Company as well as for fabrication of bodies of lorries. The Tribunal in its award has mentioned various duties carried on by the Transport Engineer, after considering the evidence given by Mathai who is working as a Transport Engineer and was examined as a witness by the Association, as well as the evidence of Varkie, the witness examined on behalf of the Company, and who was in charge of the Sewree Installations as a whole. It appears that Mathai obtained some technical qualifications by working as an apprentice in the Bombay Garage at

Santa Cruz for a period of 4 years and thus, gaining knowledge as an automobile mechanic. He worked as Fitter, Mechanic and, later, Assistant Foreman in the Bombay Garage. After that, he worked in the Bombay Electric Supply and Transport Undertaking as a Foreman. He was appointed as Transport Engineer in the Company in 1951. Previously, there used to be three Transport Engineers in the Central Garage with about 115 workmen under them. Since a period of six months preceding the order of reference, Mathai was the sole Transport Engineer posted in the Central Garage and he admitted that he was the senior-most officer in it. According to him, the Transport Engineer is responsible for the entire work of repairing, servicing and maintenance of vehicles as well as for the work of modification and fabrication of motor lorries. In that connection, he himself checks the vehicles that are brought to the Central Garage for repairs, has to locate faults by actually driving the vehicle for a road test, and then explains the manner in which the fault is to be removed or repaired to the workmen working under him. He has to see that the work of repair, servicing and maintenance is properly carried out by the mechanics, fitters, etc. After the work is completed, he has himself to inspect and check the vehicle and thereafter certify its roadworthiness. Originally, when there were three Transport Engineers in the Central Garage, they had 115 workmen carrying on the work of repair, servicing and maintenance and fabrication, etc. From the time that Mathai has been the sole Transport Engineer, the persons working under him are 58 in number. Amongst these 58 workmen are 13 Mechanics, 22 Fitters in three different grades, 3 Turners, 2 Welders, 5 Auto-electricians, 2 Carpenters, 3 Painters and remaining 8 are semi-skilled or unskilled Mazdoors. All these men work as direct subordinates of Mathai. Mathai admits that he has to guide them as to how the job is to be done, though he adds that, in fact, he works with them. He gives them directions as to how the work is to be done if it is not being carried out properly. He allocates the job to the workmen and also re-allocates the jobs when necessary. Every-day, there are roughly 15 to 20 jobs to be carried

out. He goes round to see how the jobs are being done by the workmen. The work of dismantling, repairing, etc., is generally done by skilled or highly skilled workmen and it is only when the work is of a special technical character that he himself has to attend to it. Varkie's evidence, as reproduced by the Tribunal in the award, shows that Mathai supervises the work of the mechanics, fitters, etc., and ensures that repair schedules are adhered to by them. Varkie also stated that Mathai instructs and guides the workmen in diagnosing the defects as and when necessary, so that he partly contradicts Mathai who stated that defects in all vehicles are first diagnosed by him. Varkie also stated that the Transport Engineer maintains discipline in his department, initiates disciplinary action as and when necessary, ensures that operations in the Garage are carried out efficiently, reports on the performance of the workmen working under him, and sanctions leave in the case of labour staff working under him, while, in some other cases, he recommends leave to be granted to a workman. The statement of Varkie that Mathai sanctions leave is denied by Mathai in his evidence. The Tribunal has not recorded a clear finding accepting the version of one witness or the other. Some documentary evidence was produced to show that, in cases where the leave asked for did not exceed 18 days, the chits were signed by Mathai as In-charge Department which, according to Mathai, indicated that he was recommending leave and not sanctioning leave. In this connection, our attention was also drawn to Rule 19 (b) of the Standing Orders of the Company under which only the Manager was authorised to grant leave, except in cases where he may delegate his authority to some other officer. Varkie stated that he had delegated his authority to Foreman working under him and equated a Transport Engineer with a Foreman; but no written authority was produced. We shall, therefore, proceed on the basis that, in the matter of leave, all that is established is that Mathai had to recommend leave applications and, as admitted by him, his recommendations were almost invariably accepted. It is not necessary to give further details of other minor duties carried on by Mathai; but the above facts relied upon

by the Tribunal show that the major part of the work done by Mathai is that of supervision of the work of repair, maintenance, servicing and fabrication which is actually carried on by mechanics, fitters and other skilled or unskilled workmen working under him. His own personal work comes in at the first stage when he may have to diagnose the defect by actually driving a vehicle, if necessary, and, again, when he himself tests the vehicle after the work on it has been completed and certifies it as road-worthy. As many as 15 to 20 jobs are carried on in a day simultaneously and it is obvious that he could not himself perform those jobs personally. In respect of these jobs, all he could do was to supervise the work being done by the skilled and unskilled workmen to ensure that the jobs were properly done. On the face of it, the major part of his duties, thus, consists of supervisory work rather than his own personal technical work which is only incidental to the main work of repair, servicing, maintenance and fabrication inasmuch as, in his supervisory capacity, he diagnoses the defects and later on inspects the work done, makes his personal test and certifies that it has been properly carried out.

13. Despite these facts, the Tribunal held the Transport Engineer to be a workman on the ground that he was employed because of his technical knowledge and, even in supervising the work of the workmen, he is required to make use of his technical knowledge, and, consequently, rejected the plea of the Company that the Transport Engineer cannot be said to be employed to do supervisory work. It appears to us that, in giving this decision, the Tribunal misdirected itself. Even if the Transport Engineer uses his technical knowledge, it is used primarily for the purpose of supervising the work done by the skilled manual labourers who carry out the actual repairs, do the servicing or maintenance or complete the fabrication. The other supervisory duties, mentioned above, have been ignored by the Tribunal on the ground that, in the matter of allocation of work, the Transport Engineer does it on equitable basis, that it is his duty to get the job done in a proper manner, that, in distributing or allocating or reallocating the work, the main con-

sideration which weighs with the Transport Engineer is whether the work is executed efficiently from a technical point of view. These appear to us to be no grounds for holding that the main and substantial work being done by the Transport Engineer is not supervisory in character.

14. In this connection, we may take notice of the argument advanced by Mr. Chari on behalf of the Association that, whenever a technical man is employed in an industry, it must be held that he is employed to do technical work irrespective of the manner in which and the occasions on which the technical knowledge of that person is actually brought into use. The general proposition put forward by him was that, if a technical employee even gives advice or guides other workmen, it must be held that he is doing technical work and not supervisory work. He elaborated this submission by urging that, if we hold the supervisory work done by a technician as not amounting to his being employed to do technical work, the result would be that only those persons would be held to be employed on technical work who actually do manual work themselves. According to him, this would result in making the word "technical" redundant in the definition of 'workman' even though it was later introduced to amplify the scope of the definition. We are unable to accept these submissions. The argument that, if we hold that supervisory work done by a technical man is not employment to do technical work, it would result in only manual work being held to be technical work, is not at all correct. There is a clear distinction between technical work and manual work. Similarly there is a distinction between employments which are substantially for manual duties, and employments where the principal duties are supervisory or other type, though incidentally involving some manual work. Even though the law in India is different from that in England, the views expressed by Branson, J., in *Appeal of Gardner*; In re *Maschek*; In re *Tyrrell*, (1938) 1 All ER 20 are helpful, because, there also, the nature of the work had to be examined to see whether it was manual work. As examples of duties different from manual labour, though incidentally involving manual work, he mentioned cases where a worker (a) is mainly

occupied in clerical or accounting work or (b) is mainly occupied in supervising the work of others, or (c) is mainly occupied in managing a business or a department, or (d) is mainly engaged in salesmanship, or (e) if the successful execution of his work depends mainly upon the display of taste or imagination or the exercise of some special mental or artistic faculty or the application of scientific knowledge as distinguished from manual dexterity. Another helpful illustration given by him of the contrast between the two types of cases was in the following words:—

"If one finds a man employed because he has the artistic faculties which will enable him to produce something wanted in the shape of a creation of his own, then obviously, although it involves a good deal of manual labour, he is employed in order that the employer may get the benefit of his creative faculty".

The example (e), given above, very appropriately applies to the case of a person employed to do technical work. His work depends upon special mental training or scientific or technical knowledge. If the man is employed because he possesses such faculties and they enable him to produce something as a creation of his own, he will have to be held to be employed on technical work, even though, in carrying out that work, he may have to go through a lot of manual labour. If, on the other hand, he is merely employed in supervising the work of others, the fact that, for the purpose of proper supervision, he is required to have technical knowledge will not convert his supervisory work into technical work. The work of giving advice and guidance cannot be held to be an employment to do technical work.

15. We may, to clarify this aspect, take an example of a qualified technical Engineer who is concerned with manufacture of machines. If he himself creates a machine with the use of his technical knowledge, he will certainly be held to be employed to do technical work. On the other hand, if the machine is being made by others and all he does is to give advice or guidance, the actual technical work will have to be held to be done by the mechanics carrying on the work, while his duty will only be supervisory. A more clear illustration which may be useful is that of a painter. If a per-

son is employed to paint walls of a house or paint furniture, it would clearly be employment to do manual labour. If, on the other hand, he is an artist who paints works of art as a result of his own creative and imaginative faculty, he would be held to be employed on technical work, even though, in creating the work, he will all the time be using his own hands to paint the picture. There can be a third case where a good artist may have pupils working under him who paint artistic pictures and he only guides their work. He may, on occasions, even make some improvements by re-touching the work done by the pupils. On the face of it, such a person cannot be held to be employed to do technical work; he would be a technical supervisor. These examples clearly indicate that, in the case of the Transport Engineer, whose principal duties are to see that the work is properly done by the skilled and unskilled workmen working under him, he is really employed to do supervisory work and not technical work.

16. Reference may be made in this connection to a decision of a learned single Judge of the Madras High Court in *Murugalli Estate, Hardypet v. Industrial Tribunal, Madras*, (1964) 2 Lab LJ 164 = (AIR 1965 Mad 263). In that case, he was considering the question whether one Dr. Srinivasan, a medical attendant employed in an industry, was a workman. The learned Judge held:—

"In my opinion, this view overlooks the fact that Dr. Srinivasan was charged with particular duties of supervisory character, because of his technical qualification and level of his ability and skill. It is that qualification which the management recognized as enabling the doctor to be in charge of the supervisory work of the nature mentioned above. That being the purpose of the employment, merely because, being a technical man Dr. Srinivasan was called upon to attend to patients, it could not be stated that he did any the less supervisory work. It may be that if the duties are measured by time, he spent more time in attending to patients. But that, I consider, cannot be regarded as determining the main functions of Dr. Srinivasan. The main function for which he was appointed may not occupy as much time as the medical

attendance on patients. All the same, the fact that it is a technical employment for a particular purpose, because of particular qualifications, they should not be lost sight of in determining the character of the employment. The test to be applied, to my mind, to cases of technical employment, such as in this case, should be the purpose for which the employment is made, irrespective of whether the performance of the duties may or may not occupy the entire time of the employee. That is because the employment is made on the basis of the particular level of professional efficiency and technical qualifications. If an employee is found suitable for supervisory work, because of those reasons, it cannot be said that his functions are mainly those of a medical attendant, as, on account of his professional qualification, he happened to be engaged in that capacity as well".

This case, thus, recognises that a person with technical qualifications can on that account, be employed in a supervisory capacity and, in such a case, he will be held to be employed to do supervisory work, so that, in order to be a workman, he must not be exempted under exception (iv).

17. The First Labour Court, West Bengal, in *Indamer Company (Private) Ltd. v. Barin De*, (1958) 2 Lab LJ 556 (Cal), applied the same test in determining whether an Aircraft Maintenance Engineer (A. M. E.) is a workman or not. The Court found that the Aircraft Company was employing 5 A. M. Es. and they had 30/35 skilled and unskilled mechanics working under them. The daily maintenance of an aircraft was a considerable task and the work had to be done at recurring intervals. The A. M. Es. could not physically undertake all the task and that was why the Company had a larger staff of qualified mechanics, who actually did the job under the supervision of the A. M. Es. After the actual servicing work of the aircraft was done, the A. M. E. was to inspect that the various jobs had been completed to his satisfaction, and he then certified the aircraft as air-worthy. For this purpose, he proceeded to the various machines, gave advice to the mechanics, so that the job was completed, visually inspected the job installation or repair, and gave a certificate if it was found to be to his satisfaction. He signed the log book

entries. On these facts, the Labour Court held that the A. M. Es. were employed to do supervisory work and, since they were drawing a salary in excess of Rs. 500/- per mensem, they were not workmen. That Labour Court distinguished the decision given by the National Industrial Tribunal, Lucknow, in the case of *The Indian Airlines Corporation v. The Air Corporation Employees' Union*, Bombay and others which Award is printed in the Gazette of India Extraordinary Part II—Section 3 — Sub-section (ii) dated March 20, 1958. That case was distinguished on the ground that the duties of the A. M. Es. were not specified in the Award and there was, furthermore, an admission in that case that certain parts of checking work had to be done by the A. M. Es. themselves. We have been taken through the Award of the National Industrial Tribunal, Lucknow, and we are unable to hold that that decision can be of any assistance in determining the general question whether a person, possessing technical qualifications, employed on supervisory duties, must be held to be employed to do technical work and not supervisory work.

18. In determining the nature of employment of Mathai, and in holding that he is employed to do supervisory work, we have taken into account not only the work of supervision which he carries on in ensuring that the skilled and unskilled manual workmen employed under him are properly doing the work of repairs, maintenance, servicing and fabrication, etc., but also the fact that the workmen function under his control and directions that he allocates and re-allocates work to them, that he initiates disciplinary proceedings, etc. The exercise of such powers is clearly a part of his supervisory duty. That such functions indicate that the employment is of supervisory character was laid down by this Court in *All India Reserve Bank Employees' Association v. Reserve Bank of India*, (1966) 1 SCR 25 = (AIR 1966 SC 305) where Hidayatullah, J., as he then was, expressed the view of the Court in the following words:—

"These employees distribute work, detect faults, report for penalty, make arrangements for filling vacancies, to mention only a few of the duties which are supervisory and not merely clerical."

Thus, in the case of a Transport Engineer, there is a combination of supervisory duties of two types. The Transport Engineer actually supervises the work of repairs, maintenance, servicing and fabrication which is carried on in the Central Garage by the skilled mechanics, fitters, and other workmen, and, at the same time, he has the supervision over those men in the matter of giving directions, recommending leave, initiating disciplinary proceedings, etc. In this view, the decision of the Tribunal holding that the Transport Engineer is a workman has to be set aside, because, admittedly, the Transport Engineer is drawing salary in excess of Rs. 500/- per mensem and ceases to be a workman under exception (iv) of the definition.

2. District Engineers:

19. In the case of District Engineers, the Tribunal had to consider the evidence of the Association's witness, Sirdesai, one of the District Engineers employed by the Company, and the evidence of the Company's witness, Manoharlal Chopra. The duties, which the District Engineer performs, consist of assessing suitability of sites for depots from the point of view of the technical and engineering aspects, suggesting lay-out for construction of depots or service stations, seeing that the estimates prepared by the draughtsman are correct from the technical point of view, scrutinising tenders for construction, checking the construction work given to the contractor, certifying bills submitted by contractors for the work done by them, and preparing estimates for maintenance work in respect of depots. He also gives certificate as required by the Inspector of Explosives after satisfying himself about the technical fitness of the installation facilities. On the other hand, it appears that the principal work, for which he is employed, is that of supervision inasmuch as he is required to supervise work done by others instead of doing the work himself. The estimates are prepared by draughtsman and he only checks them. The scrutiny of tenders given by the contractors as well as checking the construction work done by the contractors is in the nature of supervision, so as also certification of bills. He himself admitted that he controlled and directed construction and maintenance and looked after construction and maintenance work of the company-

owned depots in his district. He had to look after filling and servicing stations and company's office and staff quarters. He controlled and directed the work of draughtsmen, fitters and painters throughout the district. He also kept contact with Electric Supply Undertakings, Public Works Department and Municipality in connection with the construction work. He has one draughtsman and eight fitters working under him. In view of these admissions made by him, a question was put to him at the end of his cross-examination as follows:—

"I put it to you that you are employed principally to supervise, control and coordinate the activities of the contractors and the company's men in the district for all the construction and maintenance work?"

His answer was:—

"Yes, that is true".

The Tribunal took notice of the admission made by Sirdesai that he was employed principally to supervise, control and co-ordinate the activities of the contractors and the company's men in the district for all construction and maintenance work, but added that the nature of supervision and control was essentially technical, and, so far as fitters and draughtsman were concerned, the guidance and instructions given by the District Engineer to them were also of technical character. Holding that there was no supervision in the sense of any administrative control or powers exercised over them, the Tribunal concluded that the District Engineer was employed to do technical work and not supervisory work. On the face of it, the decision is incorrect. The principles that we have explained above, in dealing with the case of Transport Engineer, manifestly show that a District Engineer is also principally employed to do work which is of a supervisory character and, even though he has to use his technical knowledge for the purpose of properly carrying on supervision, it cannot be held that he is employed to do technical work. A District Engineer also draws a salary in excess of Rs. 500 per mensem and, consequently, he cannot be held to be a workman. The decision of the Tribunal is, therefore, set aside in respect of the District Engineers also.

3. Foreman (Chemicals):

20. The Foreman (Chemicals) examined is M. D. Daniel. The claim

of the Association was that he was employed essentially to do technical and manual work. In his evidence, he first described the work done by a Chemist which was a post held by him earlier. Giving the duties of the Foreman (Chemicals), he stated that the main part of his duties as Foreman is to be responsible for the blending of the chemicals. He admitted that the work of packing, capping and filling is done by labourers under his supervision. He himself makes only random checks in order to ensure that the labourers are doing the work properly. He admitted that he allots the work to the workmen under him who are 20 in number. Further, he had another 20 workmen under him for lorry filling of furnace oil. Though he denied that he was responsible for their discipline, he admitted that he makes reports to the officer-in-charge, chemicals, whenever an occasion arises. He signs gate passes and material vouchers. He recommends promotions of the men working under him and he is entitled to select a person for acting in a higher capacity for the day when the person occupying the higher job is absent. It is his duty to ensure maximum utilisation of man-power. Like Mathai, he has also signed chits for leave not exceeding 18 days as I/C. Department; but he has also pleaded that this signature was made in token of recommendation, and not sanction. The 20 workmen working under him in the chemical department include checkers, general workmen, packers and chemical mixers. These duties, which are performed by Daniel, on the face of it, are primarily and substantially those of a supervisory nature. His own manual work is only incidental and forms a small part of his duties. In dealing with his case, the Tribunal got slightly mixed up inasmuch as the facts relating to duties of Chemists were also taken into account. Daniel, who is now Foreman (Chemicals) was earlier a Chemist. The work performed by a Chemist should not, therefore, have been taken into account when determining what work Daniel is employed to do. The duties, mentioned above, clearly show that his principal duties are of a supervisory nature and the manual work done by him personally is only incidental. Since he also draws a salary in excess of Rs. 500/- per mensem, he must be held

not to be a workman under exception (iv).

4. Fuelling Superintendents:

21. The duties of a Fuelling Superintendent were given to the Tribunal in the affidavit and evidence of V. M. Nabar who has been working as such since 1953. These duties can be broadly divided into two parts. Some duties he has to carry on at the depot where he personally takes charge and checks and counts the packed stocks, that is, cans, barrels, full and empty, and he maintains the packed stocks register. He dips every storage tank for quantity, quality and water. He himself carries to every storage tank equipment like manhole cover, dip tape, water finding paper and other articles. He takes the dip with the tape and notes down the reading. He checks the condition of the water finding paper by gently rubbing a finger on it. He removes water traces from the tank by swabbing, if necessary. He conducts continuity tests of discharge hoses. He calculates the quantity according to the dip from the calibration tables and completes the paper showing the dips and quantities for all the storage tanks. He makes similar entries in every tank book, and enters the loss or gain in the same book. He also carries out checks of static facilities, and maintains a book called quality control register. He himself notes down the time of arrival of the tank lorry on log sheet and carries out checks in accordance with the details of consignment forms. In the other part of the work, whenever oil is required to be delivered to an aircraft, the Fuelling Superintendent himself drives the tractor, on which are loaded oil pourers and a ladder, to the aircraft. It is he who takes the oil tank to the aircraft and then ensures the delivery of that oil to the aircraft in the required quantity. In this work, of course, he is assisted by some other workmen who actually do the work of connecting the oil tank to the tank of the aircraft or disconnecting it. Similar other minor manual work is done by the workmen who function under his control and direction. It is, however, clear that the main and substantial work which he does is not that of supervising the work done by the few workmen who assist him, but is his own manual work which he carries out at the depot as well as when delivering oil to the aircraft.

22. The Company's witness in respect of the Fuelling Superintendent is Des Raj Bhatia who tried to indicate that the manual or clerical work carried on by the Fuelling Superintendent is incidental or in emergent situations, while the Fuelling Superintendent is employed primarily to take over responsibility for all matters connected with the fuelling and oiling of aircraft with the use of oil dispensers, fuellers, and/or hydrant fuelling equipment. He compared the position of a Fuelling Superintendent to that of a playing captain of a hockey or football team and says that, while he himself has to work along with other members of the team, he is also required to assume over all responsibility for all operations prior to, during and after the delivery of fuel/oil to aircraft including the observance of a time schedule, safety and quality control. The fact that a Fuelling Superintendent is the leader of the team which carries out the work of fuelling, cannot convert his work into that of a supervisory nature. In fact, the admission that he is a member of the team implies that his principal work would be to do his own personal manual work as such member and, incidentally, he has also to be in charge of seeing that others, whose work has to be coordinated with his, do their work properly. The Tribunal was, therefore, correct in holding that a Fuelling Superintendent is not employed mainly or substantially to do supervisory work. On the other hand, his duties are mainly manual. Exception (iv) does not, therefore, apply to a Fuelling Superintendent and, even though the salary exceeds Rs. 500/- per mensem, a Fuelling Superintendent must be held to be a workman.

5. Chemists:

23. On the question of the duties carried out by a Chemist, the Association examined three witnesses. One of them is M. D. Daniel who had once worked as a Chemist and is now Foreman (Chemicals). The other two are A. N. Dalal and P. N. Marolia who are both working as Chemists. They have given their qualifications and the nature of work done by them. There are, no doubt, Assistants who assist the Chemists in the laboratory where their work is carried on; but all the Chemists do their own work which is of technical nature. The Chemists have

to personally test the various products received, and also test the products as they are altered in the installations at various stages. All the tests are carried out by the Chemists personally and there are only a few Assistants who do mere routine work in order to assist the Chemist. The Chemists no doubt, ensure that the workmen assisting them do their work properly; but that small amount of supervisor is only incidental to their own technical work of testing and giving the results of tests to the Company. Even the Company's witness Harish Bhargava admitted that the Chemists do a large part of the work themselves, though he added that the Chemists do guide and direct the Analysts and Laboratory Attendant so as to ensure that the work in the laboratory is performed efficiently and properly. Even his evidence does not show that this guidance and direction to the laboratory attendant and analysts is the principal or substantial work for which a Chemist is employed. In fact, that work is ancillary to the main work which is done by the Chemists themselves. The decision of the Tribunal, consequently, in respect of the Chemists, holding them to be employed on technical work and not in supervisory capacity, must be upheld. They have rightly been held to be workmen.

6. Sales Engineering Representatives:

24. The witness on behalf of the Association is K. V. Rajan who filed an affidavit and was also cross-examined. He holds a Diploma in Mechanical and Electrical Engineering and has worked as a Sales Engineering Representative since 1955 at various places. In giving the duties of the Sales Engineering Representative, he first mentioned items of work that the Representative has to do himself. According to him, he has to guide the industrial concerns in use of different grades of fuels and lubricants, and has to give demonstrations and trials of Company's fuels and lubricants in major industrial concerns which are the customers. He says that the manual labour by him consists of demonstrating the method and manner in which the fuels and lubricants should be used and applied. He explains all details with regard to application of fuels and lubricants to the staff of the customer concerns, and he

also attends to the difficulties experienced by the customers in the use of Company's products. He writes to the Divisional Office which, in turn, instructs the Sales Engineering Representative to attend to such complaints of the customers. He also gives technical advice to eliminate the complaints of the customers, and writes down the survey reports and submits them to the Divisional Office. He has to maintain files up-to-date regarding lubrication recommendation sheets sent by the Head Office to his Division. Then, in cross-examination, he admitted that the work that he does is for promoting the sales of lubricants and fuel oils, though he added that, in doing so, he uses his technical knowledge.

25. Manmohan Singh, Marketing Services and Planning Manager of the Company, explained that a Sales Engineering Representative is employed primarily to support the sales efforts by providing after sales service and advice to the customers on optimum utilisation of fuels and lubricants. According to him, the principal duty of a Sales Engineering Representative is to provide such service and to guide and supervise the workers employed in customers' plants to ensure efficient use of fuels and lubricants. His duties have been described as complementary to the duties of the District Sales Representative. He, however, did admit that the Sales Engineering Representative has to give demonstrations regarding use of fuels and lubricants, and such demonstrations are conducted by him, though part of the work in the demonstration is done by the workers of the customer concerns. It is true that there is no subordinate personnel attached to him. The Tribunal itself held that the main work to be performed by Sales Engineering Representative is promotion of sales which are canvassed primarily by District Sales Representative. This the Sales Engineering Representative does by giving technical advice, holding demonstrations and suggesting methods for making best use of the products sold. On these facts, the Tribunal, in our opinion, rightly held that the Sales Engineering Representative is not employed on supervisory work; but the Tribunal did not proceed further to examine whether he was employed on any other work of such a type that he

could be brought within the definition of a workman. There is no suggestion at all that he was employed on clerical work or manual work. Reliance was placed on the word "technical" used in the definition of a workman. The amount of technical work that a Sales Engineering Representative does is all ancillary to his chief duty of promoting sales and giving advice. As we have held earlier, the mere fact that he is required to have technical knowledge for such a purpose does not make his work technical work. The work of advising and removing complaints so as to promote sales remains outside the scope of technical work. Consequently, the Tribunal's decision that the Sales Engineering Representative is a workman is set aside.

26. Next we take up the categories of members of the Association whose cases have been brought up by the Association in Civil Appeal No. 1478/1970. Mr. Chari on behalf of the appellant in this appeal did not argue all the cases of the four categories mentioned above. We, therefore, proceed to deal with only those categories of members of the Association whose cases have been argued before us by him.

1. Blending Supervisors:

27. It appears that there are two sets of persons working at the Wadilube Installations who are all designated as Blending Supervisors. Harish Bhargava, the Manager of the Installations, has described all Blending Supervisors as Foreman-Blending Supervisors. As we have said earlier, the mere description is, however, immaterial. What we have to see is the actual work done by them and to determine whether the work, which they are employed to do, makes them workmen or not.

28. V. V. Lele is the witness in respect of one set of Supervisors who work in the blending section of Wadilube plant. He works in the blending pump house and in the plant where the actual blending takes place. According to Lele, in connection with the duties to be performed by him, he receives a daily blending programme from the Operations Officer, and the blending has to be done in accordance with that programme and in conformity with the formulations supplied by the laboratory. For that purpose, he receives a test note from the labo-

ratory before he starts the work of blending. He has himself to test the tank in order to find out whether it is clean or not. He personally connects by means of a hose pipe the blending tank to the pump line coming from the pump house on the ground floor. He then advises the pump house Foreman to start the pump, while he himself has to be constantly vigilant at the tank to ensure that the required quantity is taken up in the tank. As soon as the required quantity is received, he stops the pump by means of a remote control. He changes the hose pipe and puts it on to another line and keeps on this process as each tank is filled up. While receipt of the oil in the tank is going on, he himself operates steam and air valves in order to keep the oil at the required temperature and also maintains air agitation for mixing different basic oils. After the blending in the tank is over, he takes out samples personally, labels them properly and sends them to the laboratory for test purposes. On receipt of the test reports from the laboratory, he fills in the blending test notes quantity of different oils taken and sends them back to the laboratory. There are about 25 blending tanks which have to be attended to in this manner by two Blending Supervisors. After the blending is over, the Supervisor advises the barrel filling section and, if the blended oil is needed in that section, he sends the blended oil to that section; if that section does not require it, he transfers the blended oil to the settling tank. For these purposes, he again operates different line valves, so that the blends may drop into the particular settling tank. There are 20 such settling tanks. He has also to note the readings of the levels of the blending tanks as well as the settling tanks. He has to take stock personally of the barrels and other packages used and left unused in his section and writes down the same in the prescribed form. It is true that he has two persons working under him as Mazdoors and a Clerk comes to assist him only at the time of monthly checking. The Mazdoors, according to him, do only incidental work in aid of the main process of blending, such as moving empty tins, cleaning them, etc. He also does some work at the Port when a tanker arrives with oil from a foreign country and has to discharge it at the Port.

At that stage, no doubt, he supervises the work of discharge of the oil from the tanker and its receipt in the tanks at the Port. This supervisory work, it is clear, is a very minor part of his duties. The major part of his duties consists in himself operating various parts of the machinery and ensuring that oils are blended properly. Mr. Chari, in these circumstances, rightly claimed that a person employed as Blending Supervisor in the type of the work done by Lele is employed to do manual work and not supervisory work. The supervisory work is a minor part of his duties and, to some extent, incidental to the main work which is manual in character. Blending Supervisors, who work at the Plant in the manner indicated by Lele, are, therefore, persons employed on manual work and have to be held to be workmen. The decision of the Tribunal in respect of them is incorrect and is set aside.

29. Another set of persons are employed as Blending Supervisors at a different stage of the operations. The witness, who has come to give the duties of such Blending Supervisors, is M. C. Gomes. The Tribunal, in dealing with the work done by Gomes, appears to have got mixed up when it held that his duties are similar to the duties mentioned by Lele. Consequently, we were taken through the relevant evidence of Gomes and of Harish Bhargava on this point. It appears that, though Gomes is described as a Blending Supervisor, his employment is at a stage where the blending of oils has already been completed and the oils have been transferred to the settling tanks. According to Gomes, the Operations Officer gives him the programme for filling different oils in different packages, and he has to carry out that programme. He has first to see that oil in the settling tank is transferred to the small package tank by operating a pump. At this stage, he himself operates the pump by starting it, watching the gauge and stopping the running of the pump when the small package tank is full. Then, the oil is transferred from the small package tank to the filling machines. The fillers at the filling machines are then operated by other workmen to transfer the oil into the small package containers. Gomes has to see that this work of transferring the oil from the small package tank

to the filling machines and from the filling machines into the containers is properly carried out by the persons working under him. All the work of bringing the barrels to the filling machines, of actually seeing that the barrels are filled up properly, and of sealing and labelling them properly, is physically done not by Gomes himself, but by men working under him whose work he supervises. No doubt, as a Supervisor, he has to set the weights on the machines and has to take samples of the products and send them to the laboratory; but the principal work entrusted to him is that of seeing that the barrels and other containers are properly filled up by the large number of workmen placed under his charge who actually carry out the physical work for that purpose. His duties are, thus, primarily supervisory; and the Tribunal's decision that Blending Supervisors doing the work of the nature done by Gomes are not workmen because they are all drawing a salary in excess of Rs. 500/- per mensem, is correct and is upheld.

30. It was mentioned that there was a third type of Blending Supervisors described as Supervisors (Small Packages Filling). Their work is quite similar to the work done by Gomes and, consequently, the decision of the Tribunal in respect of them is also correct and is upheld.

2. Foremen:

31. (i) One class of Foremen, whose case was argued before us by Mr. Chari, are described as Foremen (Tank Farm and Pump House) at the Sewree Installations. The witness on behalf of the Association is D. M. Telang. In his affidavit and evidence he tried to make out that he has to carry out three types of duties, technical, skilled manual and supervisory; but, on a careful examination of his evidence, the Tribunal has come to the finding that, of the three types of duties, his supervisory duties are the main and substantial part of his work, while other duties are only incidental. We are unable to find any error in the view taken by the Tribunal. He has about 25 workmen under him whose work he supervises. The Tribunal accepted the evidence of Company's witnesses, Harish Bhargava and Varkie for holding that such Foremen are primarily entrusted with the duty of supervising the work of

the workmen in their respective sections. No technical knowledge is involved. Even when the oils are tested, the dips are not necessarily taken by the Foremen. The dips are usually taken by gaugers. The work of taking the dips, of reading the dips and of temperature readings does not require any technical knowledge. All that is necessary is to push a button. Varkie stated that quality control in Burmah Shell is a simple process which has to be carried out with the object of ensuring a clean product free of impurities. Even the work of draining of water from the tank is done by the gaugers under the supervision of the Foreman. It is the gauger who takes the pressure and, if it is abnormal, he informs the Foreman. Even Telang himself admitted that he was employed in a supervisory capacity, though he insisted that the work done by him was of technical, skilled manual, and supervisory character. It also appears that he has to supervise the work of as many as 25 workmen. It is for him to decide whether a man, who has asked for leave, can be spared. The Company's case was that, in fact, he grants leave to men working under him; but he denied this suggestion. Documentary evidence was, however, brought to our notice which shows that he has been actually sanctioning leave to workmen subordinate to him, when the leave asked for is earned leave. We looked at the leave applications and found that, in one case at least, he signed as recommending the leave, but cut out that signature and then signed it again at the place where the officer sanctioning the leave is required to sign. Even other persons, doing the same duty as Telang, were found to be similarly sanctioning leave. There was even one application where the recommendation for leave was by some other person, while Telang signed as the sanctioning officer. In a third case, Telang actually recorded reasons for refusing to sanction the leave. It appears that, at least in the case of Foremen (Tank Farm and Pump House), Varkie is right in stating that he had empowered the Foremen to grant leave, and Harish Bhargava is also correct in saying that powers of sanctioning leave are not retained by the Operations Officer. Telang admitted that he has to maintain discipline and has to report cases of indiscipline in his depart-

ment. He allocates work to those who are working under him, and then gets it done by giving guidance. It is his job to see that the man-power is so utilised as to give maximum output. Considering all these duties, it is quite clear that the Tribunal was right in holding these Foremen not to be workmen, as they are employed in supervisory capacity and are drawing salary in excess of Rs. 500/- per mensem.

32. (ii) The other class of Foremen are described as Foremen (Tank Lorry Loading, Tank Wagon Loading and Tank Wagon Unloading). Mr. Chari claimed that these persons should be held to be workmen as they were employed to do skilled manual work. The facts found by the Tribunal clearly show that the actual loading and unloading in all cases is done by other persons and not by the Foremen themselves. The Foremen are, no doubt, responsible for proper loading and unloading; but this duty is discharged by supervising the work of manual labourers who actually perform the work of loading and unloading. Of course, when occasions arise, the Foreman may also lend a hand; but that would not make him a skilled manual worker. On the findings of fact recorded by the Tribunal, therefore, the decision that Foremen (Tank Lorry Loading, Tank Wagon Loading, and Tank Wagon Unloading) are not workmen is correct, as they also all draw a salary in excess of Rs. 500/- p. m.

3. Depot Superintendents:

33. With regard to the classification of Depot Superintendents, reliance was placed by the Association on the evidence of G. B. Athalye, and on some decisions in respect of Depot Superintendents of this very Company in other regions. After considering the evidence of Athalye and the Company's witnesses, the Tribunal, as a fact, held that a Depot Superintendent is in charge of all the stocks at a depot and his principal duty is to see that these stocks are properly received, stored and sent out. These stocks range in value between Rs. 4 lakhs to Rs. 6 lakhs. The Tribunal found that a Depot Superintendent has a complement of men working under him, the strength of which may vary from depot to depot. On an average, the persons employed are 5 to 7 out of

whom 2 would be clerks, 3 to 4 would be workmen and one or two drivers. The Depot Superintendent has to get all the jobs done by these men and he guides them in their work. He is the senior-most officer at the Depot. He is not required to have any technical background. He allocates the work to the men working under him and sanctions leave to them. He is empowered to engage casual labour. He takes a review of the position of the strength prevailing and makes recommendations about the required strength. Within the area which is served by the depot, the Depot Superintendent plans and delivers the necessary supply. He can take decision regarding overtime work of the staff subordinate to him. He has to maintain discipline and has to report cases of indiscipline to the Head Office. Sometimes, he is empowered to hold inquiry in cases of indiscipline. Cases of minor indiscipline can be dealt with by him himself. In addition, the Depot Superintendent functions as Factory Manager under the Factories Act and also under the Shops and Establishments Act. The Depot Superintendent does the merit-rating of the clerks working under him. He also represents the management to some extent before outsiders. He is authorised to spend amounts within prescribed limits on behalf of the Company. He represents the Company and the Depot in dealings with the Railway and Municipal authorities. Of course, while carrying on these duties, he has also to ensure that the stock-registers are properly maintained. Where there is a clerk, the actual work of writing is done by the clerk; but, where there is no clerk, the Depot Superintendent may himself have to do all the writing work. This writing work done by the Depot Superintendent cannot be treated to be the substantial and main duty entrusted to him. On the facts enumerated above, it is quite clear that his principal duties are of a supervisory and managerial nature, while the clerical duties are only incidental.

34. Reliance was placed on the decision of the Labour Appellate Tribunal in *Burmah-Shell Oil Storage and Distributing Company of India, Ltd. v. Their Employees*, (1954) 1 Lab LJ 21 (LATI—Luck). In that case, it appears that the Depot Superintendent was found to be com-

parable with a mere store-keeper. The Depot Superintendent, in most cases, was the only person posted at the depot and, in very few cases, a clerk was given to assist him. It was found that the Depot Superintendent himself had to maintain the correspondence, and was responsible for stock receipt, storage and issue. He had to remain busy most of the time with completing company's standard forms and returns, and he had no powers of supervision over other members of the staff. On these facts, the Labour Appellate Tribunal held that his job was substantially of that of an intelligent and skilled clerk. This decision was upheld by the Madras High Court in *Burmah-Shell Oil Storage and Distributing Co. of India, Ltd. v. Labour Appellate Tribunal of India*, (1954) 2 Lab LJ 155 (Mad), when the decision of the Labour Appellate Tribunal was challenged by means of a writ. The High Court dismissed the writ petition and upheld the decision of the Labour Appellate Tribunal. These two decisions can be of no help, because the Depot Superintendents, with whom we are concerned, work under very different conditions. They are in charge of large depots and have, on an average, 5 to 7 employees working under them. The amount of clerical work done by them is only a minor part of their duties, while the principal duty is that of working as Manager of the depot and of supervising the work of the subordinates posted there.

35. As against these cases, there are two decisions of the Labour Appellate Tribunal in *Burmah-Shell Oil Storage and Distributing Co. of India, Ltd. v. Their Workmen*, (1955) 2 Lab LJ 153 (LATI—Bom) and *Burmah-Shell Oil Storage and Distributing Co. of India, Ltd. v. Their Workmen*, (1955) 2 Lab LJ 228 (LATI—Mad) in which the Labour Appellate Tribunal, after examining the evidence in detail, came to the view that the principal and substantial work done by a Depot Superintendent was administrative or supervisory and that the clerical work done was merely incidental. The facts of these two cases resemble more the facts found by the Tribunal in the case before us. Consequently, the decision given by the Tribunal that Depot Superintendents are employed on managerial

or supervisory work and are not workmen is correct, because they all also draw a salary in excess of Rs. 500/- per mensem.

parties to bear their own costs in both the appeals.

Appeals partly allowed.

4. District Sales Representatives:

36. The case of the last category, viz., District Sales Representatives could not be seriously pressed by Mr. Chari before us. He did state that his claim is that they are employed to do clerical work; but the facts make it manifest that District Sales Representative is principally employed for the purpose of promoting sales of the Company. His main work is to do canvassing and obtain orders. In that connection, of course, he has to carry on some correspondence, but that correspondence is incidental to the main work of pushing sales of the Company. In connection with promotion of sales, he has to make recommendations for selection of agents and dealers; extension or curtailment of credit facilities to agents, dealers and customers; investments on capital and revenue in the shape of facilities at Agents' premises or retail outlets; and selection of suitable sites for retail outlets to maximise sales and negotiations for terms of new sites. He is, in fact, Company's representative in his district responsible for all matters affecting the Company's interests and, in particular, the profitable sale of all its products. His case was urged primarily on the basis of the argument advanced by Mr. Chari that the definition of "workman" is now exhaustive and every employee of an industry must be classed amongst one of the four classes described in the definition of workman. We have already given our reasons for rejecting this submission. The case of District Sales Representative is clearly that of a person who cannot fall within any of the four classes, because his work cannot be held to be either manual, clerical, technical or supervisory. The work of canvassing and promoting sales cannot be included in any of these four classifications. He is, therefore, not a workman at all within the principal part of the definition, and the decision of the Tribunal is correct.

37. As a result, both the appeals are partly allowed, and the decision of the Tribunal is varied to the extent indicated above. In the circumstances of this case, we direct

AIR 1971 SUPREME COURT 942 (V 58 C 189)

(From Mysore: (1966) 2 Mys LJ 133)
S. M. SIKRI, V. BHARGAVA AND
C. A. VAIDIALINGAM, JJ.

M/s. Panchmal Narayana Shenoy,
Appellant v. Basthi Venkatesha
Shenoy, Respondent.

Civil Appeal No. 1552 of 1966, D/-
20-2-1970.

(A) Houses and Rents — Mysore Rent Control Act (22 of 1961), Section 21 (1), Proviso (j) — Eviction of tenant — Ground of — Reasonable and bona fide requirement of landlord for immediate demolition and rebuilding — Landlord need not prove that condition of building is such that it immediately requires demolition — (1964) 2 Mad LJ 147, Overruled.

A landlord who seeks recovery of possession of a premises under clause (j) of proviso to Section 21 (1) must satisfy the Court that he reasonably and bona fide requires the premises for the immediate purpose of demolishing it and erecting a new building in the place of the old one. Whether the landlord's requirement is reasonable and bona fide has to be judged by the surrounding circumstances, which will include his means for reconstruction of the building, and other steps taken by him in that regard. So also the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. It is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition. In view of the specific provision in Cl. (k) with regard to the condition of the building requiring immediate demolition, Clause (j) can have no reference to that condition. AIR 1963 SC 499, Approved; (1964) 2 Mad LJ 147, Criticised and overruled. (1966) 2 Mys LJ 133, Affirmed. (Paras 11 and 12)

(B) Houses & Rents — Mysore Rent Control Act (22 of 1961), Sec. 21

JN/JN/B137/70/KSB/M

— Proceedings for eviction of tenant and recovery of possession of premises — Claim for compensation for improvements cannot arise for consideration in such proceedings.

(Para 16)

Cases Referred: Chronological Paras

(1964) 2 Mad LJ 147 = 77 Mad

LW 194, Mehsin Bhai v. Hale

& Company

14

(1963) AIR 1963 SC 499 (V 50)

= (1962) Supp 2 SCR 623, Neta

Ram v. Jiwan Lal

13

Mr. M. C. Chagla, Sr. Advocate (Mr. R. Gopalakrishnan, Advocate, with him), for Appellant; Mr. M. K. Ramamurthi, Sr. Advocate (M/s. S. S. Javali and M. Veerappa, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: — This appeal, by special leave, is against the judgment of the Mysore High Court, dated June 8, 1966 in Civil Revision Petition No. 1118 of 1964.

2. The respondent landlord filed an application, dated July 6, 1962 under Sec. 21 (1) (i) of the Mysore Rent Control Act, 1961 (Mysore Act XXII of 1961) (hereinafter called the Act) before the Rent Controller for eviction of the tenants (the appellants herein) on the ground that the premises were reasonably and bona fide required by him for the immediate purpose of demolishing and erecting of a new building. According to the respondent the premises were old and were not suitable for continued occupation. The respondent had also stated in his application that he had obtained the necessary licence for erecting a new building after demolition of the existing building and that he had made all preparations for demolition and erection of new buildings on the site. The appellant-tenant contested the claim of the landlord on several grounds. He pleaded that the premises were not old and that it was quite suitable for occupation and it does not require any reconstruction or re-modelling. The allegations that the building was old and required to be re-constructed were not bona fide and had been made by the landlord only as a pretext for evicting the tenant. The tenant further pleaded that the requirement of the landlord was neither reasonable nor bona fide. In any event, the tenant claimed that he should be entitled to

be paid the value of the improvements that had been effected by him.

3. The Rent Controller, by his order dated January 22, 1964 accepted the claim of the respondent and ordered eviction of the appellant granting the tenant one month's time for delivering vacant possession. Though the Consulting Engineer who gave evidence as P. W. 2 on behalf of the respondent had stated that the building was over 60 years old but nevertheless it could go on for about 15 years more, the Rent Controller actually found that the building was more than 50 years old and that it was an old-fashioned one. He further found that when the landlord desired to pull it down and put up a modern building thereon, it could not, under the circumstances, be said that his claim was not bona fide or reasonable and that the intention of the landlord in pulling down the building and erecting a new one to get a better return was certainly understandable. The Rent Controller further found that the landlord had proved that he had sufficient means to construct the building and that he had also obtained the necessary sanction from the Municipality concerned for reconstruction of the building. In view of all these circumstances, the Rent Controller found that the requirement of the landlord was quite reasonable and bona fide. Regarding the claim of the tenant for payment of improvements before eviction is ordered, the Rent Controller found that such a claim even if established, could not stand in the way of landlord getting possession of the premises. Ultimately the application filed by the landlord was allowed.

4. The findings recorded by the Rent Controller were confirmed by the learned District Judge, by his judgment dated October 19, 1964 in A. S. No. 43 of 1964 taken before him by the tenant.

5. The revision filed by the appellant before the High Court was rejected by order dated June 8, 1966.

6. Mr. Chagla, learned counsel appearing for the appellant, contended that the interpretation placed by all the Courts on Section 21 (1) (i) of the Act was erroneous. According to the learned counsel, unless the landlord was able to establish that the condition of the building was such that it required immediate demolition and reconstruction, no eviction of the tenant

could be ordered under Section 21 (1) (j) of the Act. On the findings of the Courts, based upon the evidence of the Engineer, that though the building was old it could continue to exist for another 15 years, it should have been held that the conditions mentioned in Section 21 (1) (j) were not attracted to justify an order of eviction of the tenant.

7. Mr. Ramamurthi, learned counsel for the respondent, pointed out that in order to attract Sec. 21 (1) (j) it was not necessary that the landlord should establish that the condition of the building was such that it required to be demolished immediately. On the other hand, the sub-section made it clear that the requirement contemplated was that of the landlord and once his requirement had been held by all the Courts to be reasonable and bona fide, the order passed for eviction of the tenant was fully justified.

8. Having due regard to the scheme of the Act, we are satisfied that the interpretation placed upon Section 21 (1) (j) by the High Court is correct.

9. Section 21 (1), while placing a general embargo against a landlord from evicting a tenant, recognises, in its proviso the circumstances under which a landlord could seek recovery of possession of a premises. The ground upon which the landlord asked for eviction, in the present case, was based on Section 21 (1) (j). The material provision is as follows:

"21. (1) Notwithstanding anything to the contrary contained in any other law or contract, no order or decree for the recovery of possession of any premises shall be made by any Court or other authority in favour of the landlord against the tenant:

Provided that the Court may on an application made to it, make an order for the recovery of possession of a premises on one or more of the following grounds only, namely:—

(i) that the premises are reasonably and bona fide required by the landlord for the immediate purpose of demolishing them and such demolition is to be made for the purpose of erecting a new building in place of the premises sought to be demolished;

According to Mr. Chagla, the words 'reasonably and bona fide required',

occurring in this clause, must be interpreted to have reference to the condition of the building, the demolition of which is sought to be made and those words have no reference to any intention entertained by the landlord. The mere fact that a landlord may bona fide and reasonably entertain an idea of demolishing the building and reconstructing the same with a view to putting the property to a more profitable use after construction, will not satisfy the requirements of the said clause. That is, according to the learned counsel, the condition of the building must be such that it is immediately necessary to demolish it, in which case alone eviction under Clause (j) could be ordered.

10. We are not inclined to accept this construction sought to be placed by the appellant on the clause in question.

11. The proviso to Section 21 (1) enumerates the various circumstances under which a landlord may seek to recover possession of the property from his tenant. The requirement contemplated under clause (i) of the proviso to sub-section (1) is that of the landlord and it does not have any reference to the condition of the building as such. What is necessary under that clause is that the landlord must satisfy the Court that he reasonably and bona fide requires the premises for the immediate purpose of demolishing it and the demolition is for the purpose of erecting a new building in the place of the old one. No doubt, as to whether the landlord's requirement is reasonable and bona fide has to be judged by the surrounding circumstances, which will include his means for reconstruction of the building, and other steps taken by him in that regard.

12. In considering the reasonable and bona fide requirement of the landlord under this clause, the desire of the landlord to put the property to a more profitable use after demolition and reconstruction is also a factor that may be taken into account in favour of the landlord. In our opinion, it is not necessary that the landlord should go further and establish under this clause that the condition of the building is such that it requires immediate demolition. That the condition of the property may be such which requires immediate demolition is emphasized in clause (k) of the

proviso. When such a specific provision has been made in clause [k], the condition of the building cannot come into the picture nor could it have been dealt with again in Clause (j). So the requirement under Clause (j) is that of the landlord and cannot have any reference to the building.

13. This Court, in *Neta Ram v. Jiwan Lal*, (1962) Supp. 2 SCR 623 = (AIR 1963 SC 499) in interpreting no doubt a slightly differently worded provision in Section 13 (3) (a) (iii) of the Patiala and East Punjab States Union Urban Rent Restriction Ordinance, 2006 B. K. (8 of 2006 BK) held that one of the circumstances which could be taken into account in considering the requirements of the landlord with reference to the existing building is 'the possibility of its being put to a more profitable use after construction.' In the case before us all the Courts have concurrently held that the requirement of the landlord is reasonable and bona fide and that he had obtained the necessary sanction from the municipality concerned and that the landlord had also the means for reconstruction of the building. If the landlord does not commence demolition of the premises within the period specified in the order of the Court, the tenant is given a right under Section 26 (1) to issue a notice to the landlord of his intention to occupy the premises from which he had been evicted and also to apply to the Court for relief if the landlord does not comply with his request. Again, under Section 27, the tenant has got a right to occupy the new building on its completion provided he satisfies the requirements contained in that section. Under Section 28 (1), the landlord is bound to intimate the tenant from whom he had received a notice under Section 27 the date on which the erection of the new building will be completed from which date the tenant will be entitled to occupy the same.

14. Mr. Chagla has referred us to a decision of the Madras High Court in *Mehsin Bhai v. Hale & Company*, (1964) 2 Mad LJ 147. The section which came up for consideration before the Madras High Court was Section 14 (3) of the Madras Buildings (Lease and Rent Control) Act, 1960 (Act XVII of 1960) which was as follows:

"14 (1) (b) that the building is bona fide required by the landlord for the immediate purpose of demolishing

it and such demolition is to be made for the purpose of erecting a new building on the site of the building sought to be demolished, pass an order directing the tenant to deliver possession of the building to the landlord before a specified date."

That clause is substantially similar to Section 21 (1) (j) of the Act. In the Madras case it is seen that the building from which the tenant was sought to be evicted was in good condition and there was no danger of its falling for another 20 years though the building was old. Under those circumstances when the landlord applied under Section 14 (1) (h) of the Madras Act for eviction on the ground that he wished to demolish the building for the purpose of erecting a new building thereon, the High Court affirmed the decision of the Subordinate Court declining relief to the landlord. Though the learned Judge states that landlords may bona fide require such buildings, particularly old buildings in their own interest for demolition and reconstruction, he holds that it is equally possible that the mere fact that a building is old may be taken advantage of by a landlord to put forth such pretext, his real object being ulterior and not bona fide for the purpose of reconstruction.

15. We have no hesitation in agreeing with the learned Judge's observation that the landlord must prove the reasonableness and bona fide nature of his requirement. But, if the learned Judge intended to lay down a proposition of law that under Section 14 (1) (h) of the Madras Act, similar to Section 21 (1) (j) of the Act a landlord cannot recover possession of the property for the purpose of reconstruction so as to put the property to a more profitable use, we are of the view that the decision of the Madras High Court must be considered to be erroneous. There is absolutely no justification for putting such a narrow interpretation on the clause in question.

16. Mr. Chagla further urged that before his client is evicted his claim for compensation should have been considered by the Rent Controller. It is enough to say that, as pointed out by the High Court, that claim does not arise for consideration in these proceedings. We may also state that a further contention regarding the validity of the notice to quit issued

by the landlord which was taken before the High Court and held against the appellant, has not been canvassed before us.

17. In the result, the appeal fails and is dismissed with costs. The petitioner/appellant undertakes to vacate the premises within a month from today.

Appeal dismissed.

AIR 1971 SUPREME COURT 946
(V 58 C 190)

(From: Patna)*

M. HIDAYATULLAH, C. J.,
J. C. SHAH, K. S. HEGDE,
A. N. GROVER, A. N. RAY AND
I. D. DUA, JJ.

Ashoka Marketing Ltd., Appellant
v. The State of Bihar and another, Respondents.

Civil Appeal No. 2004 of 1966, D/-30-1-1970.

(A) Sales Tax — Bihar Sales Tax Act (19 of 1959) (as amended by Act 20 of 1962), Section 20-A (3), (4), (5) and (8) — Sub-sections (3), (4) and (5) are ultra vires State Legislature — Sub-sections (6) and (8), as corollary thereto, are invalid.

Sub-sections (3), (4) and (5) of Section 20-A are ultra vires the State Legislature. As a corollary thereto sub-sections (6) and (8) are deemed invalid. C. W. J. C. No. 143 of 1966 D/- 14-3-1966 (Patna), Reversed; AIR 1964 SC 922, Rel. on; AIR 1961 SC 1438, Dist. (Para 18)

The intention underlying sub-sections (3), (4) and (5) is to enable the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy that he has a claim, that the claim is in order and that it is within limitation. Notwithstanding the addition of sub-section (8) the amount received or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect.

(Para 14)

Entry 54, List II of the Seventh Schedule of the Constitution com-

*(C. W. J. C. No. 143 of 1966, D/- 14-3-1966 — Pat.)

IN/IN/B8/70/CWM/T

prehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State Legislature may under the Entry be competent to enact a law in respect of matters necessarily incidental to "taxes on the sale and purchase of goods". But the provision contained in sub-sections (3), (4) and (5) compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot be regarded as necessarily incidental to the entry. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected but which he was not entitled to collect. (Para 12)

The power to demand an amount collected by the dealer applies to transaction governed by the Bihar Sales Tax Act, 1959 as well as to the pre-existing Acts. There is no period of limitation prescribed within which the demand for payment of tax collected by the dealer may be made. But an application under sub-section (8) for refund by the purchaser from whom the dealer has collected the amount is to be made before the expiry of the period within which the purchaser could have claimed the amount from the dealer by a Civil suit. In the light of the scheme of the Act it would be futile to expect that a purchaser would normally be able to enforce the liability of the State to pay the amount collected by the dealer and which is deposited or deemed to be deposited with the Government. The period of limitation does not commence to run from the date on which the money is deposited or deemed to be deposited into the Government treasury but from the date on which the purchaser may be entitled to file a suit against the dealer in civil Court and the State is in law under no obligation to hold the amount as trustee of the purchaser.

(Para 13)

The power to legislate in respect of sub-sections (3), (4) and (5) does not fall under Entries 6, 7 and 13 of List III expressly nor can it be said that the power to legislate is necessarily incidental to the power contained in those entries. (Para 16)

It cannot be said that the first proviso of sub-section (8), which prescribes the period of limitation, alone may be declared ultra vires. For the first proviso does not invest the recovery with the character of tax. (Para 15)

(B) Sales Tax — Bihar Sales Tax Act (19 of 1959), Sections 3 and 7 — Liability of tax under Act is not on purchaser.

The liability to pay tax under the Act lies upon the dealer; he does not collect any tax for and on behalf of the Government. The dealer may recover from the purchaser the tax payable by him as part of the price but on that account the purchaser is not the person liable to pay tax on the sale to the State. (Para 11)

Cases Referred: Chronological Paras

- (1964) AIR 1964 SC 922 (V 51)
= (1964) 6 SCR 867, R. Abdul Quader and Co. v. Sales Tax Officer, Hyderabad 5, 6, 7, 9, 16
(1961) AIR 1961 SC 1438 (V 48)
= (1962) 1 SCR 549, Orient Paper Mills Ltd. v. State of Orissa 4, 8
(1953) AIR 1953 SC 252 (V 40)
= (1953) 3 SCR 1069, State of Bombay v. United Motors (India), Ltd. 8

Mr. S. V. Gupta, Sr. Advocate, (Mr. H. K. Puri, Advocate, for Mr. K. K. Jain Advocate, with him), for Appellant; Mr. Lal Narain Sinha, Advocate General for State of Bihar, (Mr. U. P. Singh, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SHAH, J.: — Ashoka Marketing Ltd.—hereinafter called 'the assessee'—returned for the year 1956-57 under the Bihar Sales Tax Act, 1947, an amount of Rs. 2,46,67,517-1-6 as its turnover from sale of cement and other commodities. The Superintendent of Sales Tax brought to tax an additional amount of Rs. 7,67,702-13-0 being the railway freight paid in respect of the goods supplied by the assessee. By order dated April 2, 1961 the Appellate Authority set aside the

order directing inclusion of the railway freight in the turnover, and ordered that the assessment be revised.

2. In the meantime the Bihar Sales Tax Act, 1947, was repealed and was replaced by the Bihar Sales Tax Act, 19 of 1959. By Act 20 of 1962, Section 20-A was introduced in the Bihar Sales Tax Act 19 of 1959. The relevant provisions of Section 20-A were:

"(1) No person who is not a registered dealer shall collect from any person any amount, by whatever name or description it may be called, towards or purporting to be tax on sale of goods.

(2) No registered dealer shall collect from any person any such amount, except in a case in which and to the extent to which such dealer is liable to pay tax under this Act.

(3) (a) Notwithstanding anything to the contrary contained in any law or contract or any judgment, decree or order of any Tribunal, Court or authority, if the prescribed authority has reason to believe that any dealer has or had, at any time, whether before or after the commencement of this Act, collected any such amount, in a case in which or to an extent to which the said dealer was or is not liable to pay such amount, it shall serve on such dealer a notice in the prescribed manner requiring him on a date and at a time and place to be specified therein either to attend in person or through authorised representative to show cause why he should not deposit into the Government treasury the amount so collected by him.

(b) On the day specified in the notice under Clause (a) or as soon thereafter as may be, the prescribed authority may, after giving the dealer or his authorised representative a reasonable opportunity of being heard and examining such accounts and other evidence as may be produced by or on behalf of the dealer and making such further enquiry as it may deem necessary, order that the dealer shall deposit forthwith into the Government treasury, the amount found to have been so collected by the dealer and not refunded prior to the receipt of the notice aforesaid to the person from whom it had been collected.

"(4) Where any amount so collected by the dealer and deposited by him into the Government treasury has already been refunded to the dealer in

pursuance of, or as a result of any judgment, decree or order of any Tribunal, Court or authority, but the dealer has not refunded the amount to the person from whom he had collected it, the prescribed authority shall, notwithstanding such refund to the dealer, proceed to take action in accordance with the provisions of sub-section (3) for securing deposit of such amount.

(5) Where any such amount has not been refunded to the dealer before the commencement of this Act but a refund has been directed by a Court, Tribunal or authority, the amount shall notwithstanding such direction, be deemed to be a deposit made in pursuance of an order under sub-section (3).

(6) * * *

(7) Notwithstanding anything to the contrary in any law or contract, when any amount is deposited by a dealer in compliance with an order under sub-section (3) or sub-section (4) or is deemed, under sub-section (5), to have been so deposited, such deposit shall constitute a good and complete discharge of the liability of the dealer in respect of such amount to the person from whom it was collected.

(8) The person from whom the dealer has collected the amount deposited in pursuance of an order under sub-section (3) or sub-section (4) or deemed, under sub-section (5), to have been so deposited shall be entitled to apply to the prescribed authority in the prescribed manner for refund of the amount to him and the said authority shall allow the refund if it is satisfied that the claim is in order:

Provided that no such refund shall be allowed unless the application is made before the expiry of the period within which the applicant could have claimed the amount from the dealer by a civil suit had his liability not been discharged in accordance with the provisions of sub-section (7):

Provided further that no claim for such refund shall be rejected without giving the applicant a reasonable opportunity of being heard.

* * *

3. On July 31, 1963, the Assistant Commissioner of Commercial Taxes, Shahabad Circle, issued a notice under Section 20-A (3) of the Bihar Sales Tax Act, 1959, requir-

ing the assessee to show cause why an amount of Rs. 23,990-11-0 being the sales-tax on the railway freight which had become refundable under the order of assessment be not forfeited. The assessee in reply contended, inter alia, that Section 20-A of the Bihar Sales Tax Act was ultra vires the State Legislature and that in any case it had no application to his case. The Assistant Commissioner of Commercial Taxes rejected the contention and passed an order directing that the amount of Rs. 23,990-11-0 do stand forfeited to the Government and further directed that the amount be deposited in the Government treasury.

4. The assessee then moved a petition before the High Court of Patna under Article 226 of the Constitution for a writ quashing the order of the Assistant Commissioner of Commercial Taxes and for consequential orders restraining recovery of the amount. The High Court of Patna, relying upon the judgment of this Court in *The Orient Paper Mills Ltd. v. The State of Orissa*, (1962) 1 SCR 549 = (AIR 1961 SC 1438) rejected the petition. With special leave, this appeal has been preferred.

5. Two questions fall to be determined in this appeal:—

(1) Whether Section 20-A of the Bihar Sales Tax Act, 1959 is within the competence of the State Legislature; and

(2) Whether an order may be made under Section 20-A for depositing with the State Government an amount collected by a registered dealer from his constituent to recoup himself for payment of sales-tax under the Bihar Sales Tax Act, 1947 which amount, according to law then in force the constituent was not liable to pay. Counsel for the assessee, relying upon the judgment in *R. Abdul Quader and Co. v. Sales Tax Officer, Hyderabad*, (1964) 6 SCR 867 = (AIR 1964 SC 922) contended that an Act passed by a State Legislature authorising the State Government to recover an amount collected under a sale, by a registered dealer from the purchaser, to recoup himself for payment of sales-tax, which was not liable to tax, is beyond the competence of the State Legislature. In *Abdul Quader's case*, (1964) 6 SCR 867 = (AIR 1964 SC 922) the Court was dealing with the interpretation of Section 11 (2) of the Hyderabad

General Sales Tax Act 14 of 1950. By Section 11 (2) it was provided:

"Notwithstanding anything to the contrary contained in any order of an officer or tribunal or judgment, decree or order of a Court, every person who has collected or collects on or before the 1st May, 1950, any amount by way of tax otherwise than in accordance with the provisions of this Act shall pay over to the Government within such time and in such manner as may be prescribed the amount so collected by him, and in default of such payment the said amount shall be recovered from him as if it were arrears of land revenue".

This Court held that Section 11 (2) of the Hyderabad General Sales Tax Act provided for recovery of an amount collected by way of tax, as arrears of land revenue though the amount was not due as tax under the Act. In rejecting the contention that the provision fell within Entry 54, List II, the Court observed (at p. 872 of SCR) = (at p. 924 of AIR):

"The provision however is attempted to be justified on the ground that though it may not be open to a State legislature to make provision for the recovery of an amount which is not a tax under Entry 54 of List II in a law made for that purpose, it would still be open to the legislature to provide for paying over all the amounts collected by way of tax by persons, even though they really are not exigible as tax, as part of the incidental and ancillary power to make provision for the levy and collection of such tax. * * * * *

"* * * But where the legislation under the relevant entry proceeds on the basis that the amount concerned is not a tax exigible under the law made under that entry, but even so lays down that though it is not exigible under the law, it shall be paid over to Government, merely because some dealers by mistake or otherwise have collected it as tax, it is difficult to see how such provision can be ancillary or incidental to the collection of tax legitimately due under a law made under the relevant taxing entry".

An attempt to sustain the validity of the provision as one imposing a penalty was also negatived, and the Court held that Section 11 (2) of the Hyderabad General Sales Tax Act was not within the competence of the State Legislature.

6. In Abdul Quader's case, (1964) 6 SCR 867 = (AIR 1964 SC 922) this Court held that in exercise of the power under Entry 54 List II, the State Legislature is incompetent to enact a law authorising the State Government to call upon a dealer to pay an amount which he has collected from the purchaser of goods under a sale, to recoup himself for payment of tax which he is not liable to pay in respect of that transaction, for such a law authorises a levy of tax which the State Legislature is incompetent to levy.

7. The learned Advocate General for the State of Bihar, however, contended that the legislation impugned in this case is in truth not for levy or collection of an amount as tax which the State is not competent to levy or collect, but for compelling a registered dealer to pay over the amount collected on behalf of the State as tax so that it may be made available to a person from whom it was unlawfully recovered. He contends that the legislation which is not of the nature which this Court was called upon to interpret in Abdul Quader's case, (1964) 6 SCR 867 = (AIR 1964 SC 922) falls within Entry 54, List II, and that in any event it falls within Entries 6, 7 and 13 of List III.

8. Counsel strongly relied upon the judgment of this Court in The Orient Paper Mill's case, (1962) 1 SCR 549 = (AIR 1961 SC 1438). But the principle of that case, in our judgment, has no bearing on the question whether the State by statute was competent to enact Section 20-A of the Bihar Sales Tax Act in exercise of the power under Entry 54, List II of the Seventh Schedule. In that case a registered dealer had collected, in respect of sales-tax, from the purchasers amounts for recoupment of tax which he would have to pay to the State Government under the Orissa Sales Tax Act, 1947, in the belief that the tax was payable. The dealer was assessed to and paid tax on the turnover which included inter-State sales. After the decision of this Court in State of Bombay v. United Motors (India), Ltd., (1953) 3 SCR 1069 = (AIR 1953 SC 252) the dealer applied under Section 14 of the Act for refund of tax paid on the plea that the turnover from inter-State sales was not taxable. The High Court of Orissa issued writs

directing the amount of tax collected by the State to be refunded. Therefore by an amendment of the Act, the State Legislature incorporated Section 14, providing that refund of tax may be claimed only by the person from whom the dealer had realised the amount by way of sales-tax or otherwise. At the hearing of the petition, the tax-payer challenged the levy on the ground that it infringed his fundamental right under Article 19 (1) (f) and did not press the contention that the State Legislature was incompetent to enact Section 14-A of the Orissa Sales Tax Act. This Court observed that the power to legislate with respect to a tax comprehends the power to impose the tax, to prescribe machinery for collecting the tax to designate the officers by whom the liability may be enforced and to prescribe the authority, obligation and indemnity of these officers. It was then observed:

"The Legislature of the Orissa State was therefore competent to exercise power in respect of the subsidiary or ancillary matter of granting refund of tax improperly or illegally collected, and the competence of the Legislature in this behalf is not canvassed by counsel for the assessee. If competence to legislate for granting refund of sales-tax improperly collected be granted, is there any reason to exclude the power to declare that refund shall be claimable only by the person from whom the dealer has actually realised the amounts by way of sales-tax or otherwise? We see none."

The Court then rejected the contention that Section 14-A was invalid, because it impaired the fundamental right under Art. 19 (1) (f) of the Constitution. That case does not support the plea that the State Legislature is competent to legislate for demanding payment of or retaining amounts recovered by registered dealer but which are not due as sales-tax to the State.

9. The learned Advocate-General contended that in any event the impugned provision is not of the nature which this Court was concerned to interpret in *Abdul Quader's case*, (1964) 6 SCR 867 = (AIR 1964 SC 922). He said that whereas in *Abdul Quader's case*, (1964) 6 SCR 867 = (AIR 1964 SC 922) the Court was dealing with a case in which the State Legislature enacted a law authorising the State to

recover and appropriate to itself amounts collected by a dealer on the representation that he—the dealer was entitled to recoup himself for payment of sales-tax which he was not liable to pay, in the present case the amount either collected or retained by the State from the dealer is to be held for the benefit of the person from whom it has been improperly collected. On that account, the Advocate-General contended, the Legislature exercised its power for setting up machinery for compelling refund of amounts collected by the dealer under the authority of the Legislature (sic) which he could not in law collect. Counsel, argued that Entry 54, List II authorises the State Legislature to legislate for collection of an amount which has been improperly collected by a registered dealer as tax on behalf of the State and for refunding the amount to the person from whom it has been improperly collected.

10. This argument proceeds upon two assumptions: (1) that under the Bihar Sales Tax Act the purchaser of goods is liable to pay sales-tax to the State, and the registered dealer collects the tax from the purchaser as an agent of the State; and (2) that the amount recovered from the registered dealer under Section 20-A is intended only to be refunded to the person from whom it has been collected by the registered dealer, and the State is merely an agency for enforcing the obligation of the dealer.

11. The first assumption is plainly contrary to the scheme of the Bihar Sales Tax Act, 1959. By Section 3 charge of tax lies upon every dealer whose gross turnover during a period not exceeding twelve months immediately preceding exceeds the specified amount. The expression "gross turnover" is defined in Section 2 (k) as meaning "the aggregate of the amounts of sale-prices received and receivable by a dealer, during any given period, in respect of sale of goods (x x x)", and the expression "sale-price" is defined in Section 2 (q) as meaning "the amount payable to a dealer as valuable consideration in respect of the sale of goods". By subsection (2) of Section 3 tax is made payable by a dealer on sales made inside the State, and when the dealer sells goods, the price received by him for sale of goods forms a component of the gross turnover and the dealer

is liable to pay tax on the turnover. The Act does not impose liability to pay tax upon the purchaser either directly or indirectly. Under Section 7, it is true, the taxable turnover of a dealer is determined to be that part of the gross turnover which remains after deducting several items including the amount of sales-tax actually "collected as such", along with the sale-price received or receivable in respect of sale of goods. It is implicit that the dealer may recover from the purchaser in addition to the value of the goods a certain amount which he will have to pay as tax on that value. The price payable by the purchaser on that account is the value of the goods and the amount paid for recouping the dealer for payment of tax. The Act enables the dealer to pass on the liability of sales-tax to the purchaser and if by invoice or otherwise the dealer charges in respect of the goods sold by him the value of the goods and the tax which he may have to pay on the value, sales-tax will be computed on the value of the goods and not on the total amount paid by the purchaser. The amount payable by the purchaser is however the consideration paid by him for purchasing the goods. The dealer may apportion the value of the goods and the sales-tax payable by him on the sale to the State. If he does so, he is liable to pay sales-tax only on the value and not on the amount of tax collected by him which he is payable as sales-tax to the State. If he does not apportion the value and the tax, he is liable to pay sales-tax on the total amount received by him, calculated at the appropriate rate. In either case the liability to pay tax under the Act lies upon the dealer: he does not collect any tax for and on behalf of the Government. The dealer may recover from the purchaser the tax payable by him as part of the price, but on that account the purchaser is not the person liable to pay tax on the sale to the State.

12. A provision which enables the dealer to pass on the liability for payment of tax is incidental to legislation for sales-tax. But we are unable to hold that a provision under which a dealer is called upon to pay to the State an amount which has been collected by him on a representation—express or implied—that an equal amount is payable by him under the

Bihar Sales Tax Act, is a provision incidental to the power to levy "tax on sale or purchase of goods" within the meaning of Entry 54, List II of the Seventh Schedule. Entry 54, List II of the Seventh Schedule, comprehends the power to impose tax, to prescribe machinery for collecting the tax, to designate officers by whom the liability may be imposed and to prescribe the authority, obligation and indemnity of the officers. The State Legislature may under Entry 54, List II be competent to enact a law in respect of matters necessarily incidental to "taxes on the sale and purchase of goods". But a provision compelling a dealer who has deliberately or erroneously recovered an amount from the purchaser on a representation that he is entitled to recover it to recoup himself for payment of tax, to pay over that amount to the State cannot, in our judgment, be regarded as necessarily incidental to Entry 54, List II. In effect the provision is one for levying an amount as tax which the State is incompetent to levy. A mere device cannot be permitted to defeat the provisions of the Constitution by clothing the claim in the form of a demand for depositing the money with the State which the dealer has collected, but which he was not entitled to collect.

13. The learned Advocate-General contended that sub-section (8) of Section 20-A authorises the person from whom the dealer has collected the amount deposited in pursuance of an order under sub-sections (3), (4), or deemed to have been so deposited under sub-section (5), to apply to the prescribed authority for refund of the amount to him and the authority is obliged, if satisfied about the claim, to make that refund. The power to demand an amount collected by the dealer applies to transactions governed by the Bihar Sales Tax Act, 1959, as well as to the pre-existing Acts. There is no period of limitation prescribed within which the demand for payment of amounts collected by the dealer may be made. But an application for refund is to be made before the expiry of the period within which the purchaser could have claimed the amount from the dealer by a civil suit. In the light of the scheme of the Act and the various provisions made, it would be futile to expect that a purchaser would normally be able to

enforce the liability of the State to pay the amount collected by the dealer and which is deposited or deemed to be deposited with the Government. The period of limitation does not commence to run from the date on which the money is deposited or deemed to be deposited into the Government treasury but from the date on which the purchaser may be entitled to file a suit against the dealer in a civil Court. The State is in law under no obligation to hold the amount as trustee for the purchaser. The amount to be recovered or appropriated remains part of the Consolidated Fund of the State and becomes the property of the State.

14. Sub-section (8) of S. 20-A, in our judgment does not alter the true nature of the demand or appropriation which can be made under sub-sections (3), (4) and (5) of Section 20-A. The intention underlying sub-sections (3), (4) and (5) is to enable the State to collect from the dealer tax which the State is not entitled to levy and to appropriate it to itself except in the very rare cases in which the purchaser may approach the State and be able to satisfy that he has a claim, that the claim is in order, and that it is within limitation. Notwithstanding the addition of sub-section (8), in our judgment, the amount received by the State or appropriated by the State continues to have the character of a tax collected which the State is not entitled to collect.

15. The learned Advocate-General contended that assuming that the first proviso of sub-section (8) of Section 20-A which prescribes the period of limitation is indicative of the nature of the claim, that proviso alone may be declared ultra vires, and the remaining provisions declared valid. But the first proviso to sub-section (8) does not invest the recovery with the character of tax: the provisions of sub-sections (3), (4) and (5) invest the recovery with the nature of a levy of tax which the State is not entitled to collect, and sub-section (8) is merely an attempt to disguise the true nature of the claim. We are, therefore, unable to accede to the contention of the learned Advocate-General.

16. It was then contended that the power to legislate in respect of recovery of the amount collected by a

dealer which in law he is not entitled to collect, falls within Entries 6, 7 and 13 of List III. These entries are in the Concurrent List and provide:

"6. Transfer of property other than agricultural land; registration of deeds and documents.

7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.

13. Civil Procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration."

We fail to appreciate how power to legislate in respect of Entries 6, 7 and 13 would authorise the State Legislature to legislate in respect of recovery from the dealer of an amount which the dealer was in law not entitled to collect, but which he has collected. The power to legislate in respect of sub-sections (3), (4) and (5) of Sec. 20A does not fall under Entries 6, 7 and 13 of List III expressly, nor can it be said that the power to legislate is necessarily incidental to the power contained in Entries 6, 7 and 13 List III. As already pointed out, this Court in the judgment in Abdul Quader's case, (1964) 6 SCR 867 = (AIR 1964 SC 922) has clearly held that the State has no power to legislate for recovering amount which is collected by the taxpayer in order to recoup himself for payment of tax which under the law he is not bound to pay. Even though the competence of the State to legislate was not sought to be supported under Entries 6, 7 and 13 of List III, the decision of the Court plainly implies that the State has no such power under any Entry in the third List.

17. On the view we have expressed, we do not deem it necessary to express any opinion on the second question. We may observe that validity of sub-sections (1) and (2) of Section 20-A has not been challenged.

18. We are of the view that the appeal must be allowed, and the petition of the assessee must be granted. It is declared that sub-sections (3), (4) and (5) of Section 20-A are ultra vires the State Legislature. As a corollary thereto sub-sections (6) and (8) shall be deemed invalid. The assessee will be entitled to its costs in

this Court and the High Court. There will be one hearing fee in C. As. 2004 and 2005 of 1966.

Appeal allowed.

**AIR 1971 SUPREME COURT 953
(V 58 C 191)**

(From: Bombay)*

**S. M. SIKRI, C. J. AND
P. JAGANMOHAN REDDY, J.**

Keshav Ganga Ram Navge and another, Appellants v. The State of Maharashtra, Respondent.

Criminal Appeal No. 100 of 1968,
D/- 2-2-1971.

Criminal P. C. (1898), Section 423 (1) (a) — High Court has no power to set aside acquittal in appeal without giving due weight to the reasons given by trial Court in rejecting prosecution evidence — AIR 1968 SC 1390, Rel. on; Judgment of Bom. High Court in Criminal Appeal No. 1758 of 1966, decided on 15-1-1968, Reversed.

In appeals against acquittal while the powers of the High Court are no different from its powers in ordinary appeal against conviction, the High Court has to consider all the matters which weighed with the Trial Court and the reasons given by it for disbelieving the witnesses whose demeanour it had opportunity of observing. The High Court must dispel the reasons effectively before taking a contrary view of the matter.

(Para 8)

Cases Referred: Chronological Faras (1968) AIR 1968 SC 1390 (V 55)

= (1968) 3 SCR 685, Laxman

Kalu v. State of Maharashtra 8

Mr. H. R. Pardivala, Sr. Advocate, (M/s. Naunit Lal and R. K. Lala, Advocates, with him), for Appellants; M/s. S. B. Wad and S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J. — The High Court of Bombay reversed the order of acquittal of 1st and 2nd Appellant passed by the Additional Sessions Judge for Greater Bombay and convicted and sentenced each of them to life sentence for an offence

*(Criminal Appeal No. 1758 of 1966,
D/- 15-1-1968 — Bom.)

BO/BO/A558/71/VBB/C

of murder under Section 302 read with Section 34 of the Indian Penal Code. Against this Judgment the Appellants have come up in an Appeal before us by special leave.

2. The prosecution case is that the deceased Shantaram Sakharam Chawan, Dinker Pednekar P. W. 1. Sadu Shetty, P. W. 8 and Krishnan Chandan P. W. 10 as well as the first accused Keshav Gangaram Navge and one Gopal Parab were working in the Digvijay Mills at Bombay. In the Mills there were two workers Unions. one was Rastriya Mill Mazdur Sangh (also known as INTUC) hereinafter called Mazdur Sangh and the other was Girri Kamgar Union hereinafter called the Kamgar Union. A large number of workers belonged to the Mazdur Sangh while the Kamgar Union which was stated to have communist affiliation did not have sufficient following and was generally engaged in trying to get more workers to join it in which attempt it came into conflict with the Mazdur Sangh. The deceased Shantaram and the prosecution witnesses Dinker, Sadu Shetty and Krishnan Chandan belonged to the Kamgar Union while the accused Keshav and Gopal who is not examined, belonged to the Mazdur Sangh.

3. It appears that the Digvijay Mills had declared bonus for the year 1963 in consultation with the Government and the leaders of the Mazdur Sangh but the Kamgar Union was of the view that that bonus was very low, and blamed the Mazdur Sangh for not making sufficient efforts to procure a higher rate of bonus. This dispute between the two Unions went on for about a year before the incident. On 19th October, 1965 the deceased and the prosecution witnesses referred to above and the accused and Gopal Parab hereinafter referred to as Gopal worked in the 1st shift which started at 7 a. m. and ended at 3 p. m. The prosecution case is that after the first shift was over the workers gathered in the Mill compound in the open space in front of the Manager's office and wanted the Manager to give an explanation as to why the bonus for the year 1963 was low and how it was that the Mazdur Sangh had been party to the agreement arrived at between the owners and the leaders of that Mazdur Sangh. At that meeting which it is

said was not pre-arranged but spontaneous, the deceased and Dinker spoke on behalf of the Kamgar Union. They said that though the Mills have made good profit in the year 1963 the bonus declared by them were very low and wanted to know from the Manager as to why that bonus was so low. The Manager told the workers that the bonus was declared after consultation with the Mazdur Sangh leaders and it was justified. The first accused also spoke at the meeting as representative of the Mazdur Sangh. He told them that the bonus was decided in consultation with the Mill owners and the leaders of the Mazdur Sangh, that he as ordinary worker of the Mazdur Sangh could not give any explanation as to why the bonus for 1963 was low. The workers however, insisted that the Manager should send for the Mazdur Sangh leaders and should be asked to give their explanation. The Manager accordingly phoned the Mazdur Sangh office and asked them to send their representative to address the meeting but the Mazdur Sangh told the Manager that they were not in a position to send anybody from the office and if any worker wanted to know the real position they should be directed to the Mazdur Sangh Office. This message the Manager conveyed to the workers but the workers were in no mood to go to the Mazdur Sangh Office. After some discussion amongst the workers the meeting came to an end at about 5.30 p. m. After the meeting the deceased Shantaram, Dinker, Sadu Shetty left the Mills to go to the Bus stop which is some distance away from the Mills as Sadu Shetty wanted to go by bus to Chembur where he lived. They reached the bus stop and as they were waiting for a bus Accused 1, Accused 2 Bhagwan who was not working in the Mills and Gopal who also worked in the Mills came from the direction of Digvijay Mills to the bus stop and on seeing the deceased Shantaram, Dinker and Sadu Shetty, Accused Bhagwan rushed at Dinker, caught hold of his shirt and gave a fist blow in his stomach. Keshav A-1 took out a knife and gave a stab blow in the abdomen of Shantaram. On receiving the stab blow Shantaram pressed his injury with one hand and bent down. Gopal tried to intervene but accused 2 took out a hammer from under his shirt

and hit the deceased on his head. Thereafter both the accused and Gopal ran away. Dinker took Shantaram across the Lalbaug Road which is on the other side of the Road, hailed a Taxi and took him in that Taxi to Kala-Chowki Police Station. At the Police Station Dinker reported about the incident to S. I. Jayawantrao Suryavanshi P. W. 17. Suryavanshi immediately directed the P. C. Kadam P. W. 4 to take Shantaram to the K. E. M. Hospital in that Taxi which he did. After sending the deceased to the Hospital Suryavanshi recorded the statement of Dinker and issued the F. I. R. at about 6 p. m. after which he went to the K. E. M. Hospital and recorded Shantaram's statement at about 6.45 or 7 p. m. It is also the prosecution case that on the way to the Hospital Kadam asked the deceased about the incident and the deceased is said to have made a statement to him which he recorded in his notebook at the Hospital before he left for the Police Station at 7 p. m. It is after this, that the S. I. Suryavanshi came and recorded the statement of Shantaram. Sita Ram P. W. 15 brother of Shantaram, who is said to have learnt from his wife that Shantaram was stabbed by some one went to the K. E. M. Hospital after first making enquiries at the Police Station. On seeing the deceased when Sita Ram enquired from him as to what had happened, the deceased told him that Keshav Navge had stabbed him in the stomach and Bhagwan hit him on his head with the hammer. After recording the statement of the deceased Suryavanshi along with Dinker went to Lalbaug bus stop where the assault on Shantaram is said to have taken place and made a Panchnama. He made enquiries from the persons living near the bus stop where there were shops and returned to the Police Station. It may be stated that the deceased died at 2 A. M. on the 20th. Accused 2 was arrested on the morning of 21st while Accused 1 came to the Kala Chowki Police Station and surrendered himself.

3-A. The case of the accused in the statement under Section 342, Criminal Procedure Code is that he has been working for the INTUC for the past 16 years and before the incident he was working for the Digvijay Mills and that the incident did not take place as alleged by the

prosecution nor did it take place at the bus stop. According to him there has always been rivalry between him and the deceased because of the activities of the rival Trade Unions. In the afternoon of the day of the incident a meeting had taken place of the workers of the Mill in the Mill compound immediately after the end of the 1st shift at 3 p. m. and that in the meeting the bonus issue was discussed and he spoke at that meeting. He narrated all that took place at that meeting and how Shantaram and Dinkar attacked him while speaking in that meeting, etc., and how he had to defend himself and had to give an explanation. According to him the workers insisted that he should go to the INTUC office and get INTUC leaders to the Mill but he said this was beyond his powers. Bhagwan A-2 who was once employed in the Mills but had lost his job and wanted him to help, did come to see him that afternoon as he had asked him to do so. After leaving the Mills Bhagwan, Gopal and he went to a tea shop which is near the Mill and after spending 10/15 minutes there all of them started for the INTUC office. A-1 further stated that as generally there are gangs of communists on the way to the INTUC office he avoided going through the lane, but all of them walked along the Ambedkar Road and went to the cross roads and when they were near the Lamp post on that road he heard Shantaram accosting him by name and began to abuse him. The deceased said, "You are a pimp of the Mill owners, you take money from the Mill owners and do harm to the workers". When the accused protested Shantaram took out a knife on seeing which the accused got frightened and caught his hand in which he was holding the knife. Gopal intervened. Dinkar, Sadu Shetty and Krishnan Chandan came to Shantaram's help. He and Shantaram struggled with each other but A-1 says he caught hold of Shantaram's hand tightly. Dinkar took out a hammer from below his shirt and wanted to rush at him and hit him on the head but when he moved aside and evaded the blow, the hammer blow accidentally landed on Shantaram's head. On receiving this blow on his head the deceased started falling down and while falling down the knife which the deceased was holding in his hand struck against his

stomach and he fell down. He further states that he was warned and as he apprehended being assaulted he did not go to his house or the Mills. Accused Bhagwan also made a similar statement and denied that he had assaulted Dinkar or that he had assaulted the deceased Shantaram.

4. The learned Sessions Judge disbelieved the evidence of the 3 eye witnesses Dinkar, Sadu Shetty and Krishnan Chandan and held that these three, the deceased and all other Union workers of the Mill were in a fighting mood, that the deceased, spoke contemptuously about Accused No. 1 and he and the aforesaid persons were on the war path on the day of the incident. He disbelieved the version of the eye witnesses that the incident took place at Lalbaug bus stop and gave four reasons for this conclusion which are: (1) No blood was found on the Lalbaug bus stop; (2) No persons from the locality were examined by the prosecution to support this version; (3) The eye witnesses were admittedly members of the Kamgar Union which is on inimical terms with the INTUC to which Accused No. 1 belongs, and; (4) All the three eye witnesses have personal enmity with accused No. 1 and that they had insulted him in the open meeting.

5. The evidence of the eye witnesses was examined in great detail and the discrepancies in each of the witnesses was pointed out. For the reasons stated by him the Additional Sessions Judge disbelieved the evidence of the eye witnesses who he said had spoken about the incident in a parrot like manner. He likewise examined the probative value of the 3 dying declarations and rejected them. He placed no reliance on the version of P. C. Kadam that he had made an entry of what the deceased told him in the Taxi immediately after he went to the Hospital nor on the statement of Inspector Keshav Kagji P. W. 18 because when he recorded the statement of Kadam who had produced the entry he did not take charge of his Diary. The learned Judge did not therefore attach any credence either to the oral evidence of Kadam or on the entry made in the Diary. The dying declaration spoken to by Sitaram brother of the deceased was also disbelieved because not only was there a possibility of Sitaram finding

out from the Police Station that the deceased had been assaulted by accused Keshav and Bhagwan but also that he could not be considered to be disinterested. The dying declaration recorded by Suryavanshi was rejected because on his own version the possibility of Suryavanshi putting some leading question to the deceased and recording suitable answers from the deceased could not be ruled out. He also disbelieved the evidence relating to the recovery of the hammer from accused No. 2. The learned Judge further held that the evidence given by the witnesses Dinkar, Sadu Shetty and Krishnan Chandan supports and corroborates the version of Accused No. 1 that he was apprehending danger to his life and therefore had gone to the house of a relation in Bombay and consequently his absence from the Mill and his residence would not amount to his having absconded.

6. The High Court relied on the dying declaration made by deceased to Kadam as also on that recorded by Suryavanshi though it rejected the dying declaration spoken to by Sitaram, the brother of the deceased.

7. In so far as the evidence of eye witnesses was concerned the reasons given by the Additional Sessions Judge, the discrepancies and the improbabilities of the version of those witnesses pointed out by him have not been considered by the learned Judges of the High Court. The general comment of the High Court was that the allegation that Dinker and the deceased referred to the incident of India United Mills and their speeches in which violence was advocated against Accused 1 and the office bearers of the Mazdur Sangh and the alleged previous enmity between accused 1 and the deceased due to which there was a likelihood of the deceased, Dinkar and Krishnan Chandan planning an attack against accused 1 who was going along with Accused 2 was ingeniously built up and depended only on mere suggestions which was denied by witnesses. The criticism that Dinkar did not take deceased to the Police Chowki which was opposite but had taken him to the Kala Chowki Police Station or that the Police did not get independent witnesses even though the incident is said to have taken place in front of shops when

there would be passers-by, was not considered valid. With respect to the allegation that the police did not try to contact the Taxi driver or examine him, the High Court observed that there is another aspect of this matter namely that the police had no inkling about the case which the accused were going to develop till it was made in the Sessions Court and had it been set up earlier probably the Police Officers would not have left this lacuna in their investigation. On this aspect it was observed "when Accused No. 2 was arrested and when Accused No. 1 surrendered himself at the Police Station, the Police would have examined the spot now spoken of by these two accused. In every probability the accused may either have admitted their guilt before the police or may have kept their mouth shut which they are, in law, entitled to do any..... Therefore it is impossible to think that the police officer should have inquired of the whole of Bombay city in order to find out whether at any of the place there was blood on the ground in support of the case of the accused. In this connection we must also point out that it was only during the examination of the witnesses that the defence story was suggested". On an appraisal of the evidence the High Court came to a contrary view and convicted the accused.

8. The evidence against the accused depends upon the oral testimony of the eye witnesses, the recovery of the hammer alleged to be at the instance of Accused 2 and the dying declaration said to have been made by the deceased to Kadam and to S. I. Suryavanshi. We have gone through this evidence and find that the High Court has not given due weight to the reasons given by the Additional Sessions Judge in rejecting that evidence. In appeals against acquittal while the powers of the High Court are no different from its powers in ordinary appeal against conviction, the High Court has to consider all the matters which weighed with the Trial Court and the reasons given by it for disbelieving the witnesses whose demeanor it had opportunity of observing. This Court had in *Laxman Kalu v. State of Maharashtra*, AIR 1968 SC 1390 observed at page 1392:

"We may say here that it is now the settled law that the powers of the High Court in an appeal against the

acquittal are not different from the powers of the same Court in hearing an appeal against a conviction. The High Court in dealing with such an appeal can go into all questions of fact and law and reach its own conclusions on evidence provided it pays due regard to the fact that the matter had been before the Court of Session and the Sessions Judge had the chance and opportunity of seeing the witnesses depose to the facts. Further the High Court in reversing the Judgment of the Sessions Judge must pay due regard to all the reasons given by the Sessions Judge for disbelieving a particular witness and must attempt to dispel those reasons effectively before taking a contrary view of the matter. It may also be pointed out that an accused starts with a presumption of innocence when he is put up for trial and his acquittal in no sense weakens that presumption and this presumption must also receive adequate consideration from the High Court".

9. The Additional Sessions Judge had pointed out in respect of each eye witness a large number of contradictions and given detailed reasons for disbelieving them. He had also given cogent grounds for not accepting the evidence relating to the dying declarations and for disbelieving the evidence relating to the recovery of the hammer. No doubt the defence version of the accused admits the prosecution story that a meeting was held immediately after the 1st shift and that after the meeting the deceased, Dinkar and Sadu Shetty and the 2 accused and Gopal had left the mill though at different times and that an incident took place at about 5.30 p. m. in which all these persons were involved but with respect to the place of the incident and the manner in which it took place the story of the prosecution has not been admitted by the accused. The prosecution case is that the incident took place at the bus stop while the defence case is that it took place at cross roads where the Hospital Road and Shirodkar Road meet. While the prosecution alleges that the accused were the aggressors and had attacked the deceased, the defence version is that the deceased and the eye witnesses were the aggressors and had attacked the accused but in the scuffle in which they tried to defend them-

selves, the deceased who had a knife in his hands injured himself when falling down after a hammer blow which was aimed by Dinkar at A-1, missed and hit the deceased. Whether the defence story is probable or not is not immediately relevant as what we have to see is whether the prosecution has established beyond doubt that the incident took place at the bus stop and as alleged by the prosecution the accused had attacked the deceased and caused his death. That there was trade Union rivalry between the accused and the deceased who are members of the rival Unions is clearly established on the evidence. The two eye witnesses Dinkar and Shetty and the deceased took leading part in the affairs of their Union while accused 1 was an active worker in the Kamgar Union. The meeting at which the question of bonus was discussed on the day of the incident was accremonious is also established by the evidence. The only question is whether the accused had any immediate motive to cause injuries. It is stated that the deceased and the eye witnesses had called accused 1 and hurled abuses against him and it said that according to the deceased and Dinkar the only way that the Mazdur Sangh will settle the bonus question is when they are given a good beating, like in the case of India United Mills where the bonus was less but subsequently when the INTUC group was flogged the bonus was increased. The case of the defence was put to all the 3 eye witnesses.

10. In so far as the evidence of the three eye witnesses are concerned the learned Advocate for the Appellants contends that at least the presence of Krishnan Chandan has nowhere been mentioned either in the F.I.R. or in any of the alleged dying declarations but that he has been subsequently got up. Similarly he submits that Bhagwan Accused 2 was not an employee of the Mill nor did he have any enmity with the deceased but it is said that he was the first one to attack which is not credible. Dinkar is a partisan and is inimical to Accused 1. There is no doubt that neither in the F. I. R. which is recorded at about 6 p. m. nor in the dying declaration Ex. 10 recorded by Kadam, nor in that recorded by the P. S. I. Suryavanshi Ex. 19 is the name of Krishnan Chandan mentioned as the

person who was with the deceased. Dinkar in the F. I. R. merely states that he along with Shantaram and Sadu Shetty went walking to Lalbaug Naka. Similarly in Ex. 10 and Ex. 18 there is only a mention of presence of Dinkar and Sadu Shetty along with the deceased.

11. According to Krishnan Chandan he came to the bus stop later, witnessed the incident did not shout or go to the assistance of the deceased, nor help Dinkar take the deceased across the Road but went home had his dinner and slept. The next morning he went to the Mills took leave for the day and went to the Police Station to give his statement. The explanation given by him for going to the Police is that a Police constable had come to his house but when informed that he was asleep went away. This story is difficult to believe because there was no indication either in the statement of Dinkar or in the dying declarations that he was present; if so there was no way in which police could have known of his presence that night. The Additional Sessions Judge was justified in his comment that the witness had invented the story to explain the delay that was made in recording his statement. It may also be noticed that Dinkar one of the eye witnesses denies that Krishnan Chandan was present. Apart from this defect, the witness all through refers to Gopal as Bable and in spite of persistent cross-examination tried to pretend that he did not know who Gopal Parab was but in the end when he was confronted with his Police statement admitted that he referred to this person as Gopal Parab. When asked why he pretended he attributed it to the failure of his memory. There is no doubt on a perusal of his evidence which is contrary to the evidence of other witnesses he was got up to buttress the evidence of the other two eye witnesses who incidentally were partisan witnesses. Though Krishnan pretends to be an independent witness Dinkar admitted this witness and Sadu Shetty were workers of the Communist party.

12. Dinker and Sadu Shetty's evidence is full of contradictions, improbabilities and on relevant matters unreliable. A reading of their evidence shows that they have little

regard for truth and are constantly prevaricating.

13. The reason for the deceased, Dinker and Sadu Shetty going to the bus stop was that Sadu Shetty wanted to catch a bus to Chembur, when it is admitted Sadu Shetty has a Railway pass, which is cheaper than by going in bus. It is also not probable that he would go in a bus when the Railway Station Chinchpokli from which he catches the train is in the lane opposite to the Mills. His explanation that because he had to change trains and wait for the connecting train to Chembur he sometimes goes in a bus particularly when it is late, has been found to be not free from doubt by the Trial Court. Further when he was having a pass it was not considered possible that he would spend money to go in a bus, and also when the houses of Dinker and the deceased are in the lane opposite to the Digvijay Mills there was no reason for these persons to go to the bus stop which is somewhat farther away from the Mills. It may be pointed out that Dinker when questioned about the residence of deceased Shantaram said that he was having residence at two places but later admitted that he was living in a Chawl situated in a lane opposite to the Mill. This was indeed an attempt to meet the objections that there was no reason for them to go to the bus stop. Similarly in order not to disclose that any provoking speeches were made at the meeting by reference to what happened about the bonus dispute of India Mills he disclaimed all knowledge. Later, however, he not only admitted knowledge of the dispute but admitted that he told his audience that it was only when the workers of INTUC were flogged by the workers of the Kamgar Union that they exerted themselves and got a higher bonus for the workers of those Mills. Again he at first denied all knowledge of who called the meeting but later admitted after persistent cross-examination that the deceased, Sadu Shetty and another worker Shanker called the meeting. For fear he will be confronted with the question why he did not take the deceased to the Police Chowky opposite to the Bus stop instead of waiting for a taxi to take him to a Police Station which was far off he said the Police Chowky was closed but it appears from the evidence of

Inspector Kogje that the Chowky is open 24 hours and a police constable is present throughout. Another important contradiction which is motivated and is deliberate falsehood is that he did not see any blood coming after the deceased was injured but later admitted when confronted by his Police statement that the deceased was bleeding heavily from his injuries on the stomach and in the head. Even while forced to admit this he nonetheless wants it to be believed that all this blood flowed on the clothes of the deceased but did not fall on the ground. This explanation shows an anxiety to meet the criticism that the site of the incident was not the bus stop as otherwise blood should have been found at that place.

14. Sadu Shetty's evidence also suffers from similar infirmities and is unreliable. The witness creates a third Union of workers namely Kamgar Sangatna which is not spoken to by any other witness. He said he was a member of the Sangatna because he was anxious to avoid admitting that he belongs to the Kamgar Union to which the deceased and Dinker belongs. He is anxious like Krishnan to show that he is an independent witness but in the end he had to admit that there are only two Unions. The witness is also anxious to show that he was not at the meeting because he says he went to the office of the Co-operative Society to get some money but when he was made to produce the passbook which showed that no amount was credited he was forced to invent an explanation that as the Clerk was on leave he could not draw any money and no entries were made. Again the witnesses conduct at the Bus stand when the deceased was being stabbed was unnatural. He says that throughout the attack on the deceased he stood in the queue and did not shout for help nor leave it to go to the help of the deceased nor did he accompany Dinker to take the deceased across the Road or try to help him get a taxi. As pointed out by the Trial Judge the statement of this witness that after the incident he went to the house of the deceased and informed his people is also untrue because he was unable to say where the deceased lived nor was he able to give the location of that house. There are other infirmities in his statement to which it is unnecessary to refer. None of

these matters adverted to by the Additional Sessions Judge were considered by the High Court nor the reasons given by the Additional Sessions Judge for disbelieving the witnesses noticed or dealt by it. The Additional Sessions Judge said that the evidence of the eye witnesses is not rejected by him simply because they have shifted the scene of offence but because he has heard their evidence carefully and had perused it in detail. He gave cogent and convincing reasons for rejecting this evidence and we agree that no reliance can be placed on these witnesses without a corroboration in material particulars which is lacking in this case.

15. There is no evidence of blood being found at the bus stop nor at the place where Dinker hailed a taxi to take the deceased to the Police Station. Even if the explanation is accepted that because it was a thoroughfare and signs of bloodstains may have been obliterated, there was other evidence which could have been produced. The evidence of Dinker is that blood was dripping in the Taxi but the Taxi driver has not been examined though he was present at the Police Station and a constable had accompanied him to the Hospital in that taxi. The Taxi driver's name could have been taken and the Taxi number noted. We, however, cannot assume that neither the name of the Taxi driver nor the Taxi number was taken. It is no answer for the prosecution to say that since accused had not disclosed his defence till the Trial in the Sessions Court they could not have examined the Taxi driver. Even apart from the defence, the Taxi driver was an independent witness and could have corroborated the prosecution case as to the place of the incident which the prosecution in any case has to prove. When the oral evidence in respect of this matter is partisan it could have been only proved either from the discovery of the bloodstains on the spot through independent Panch witness by Panchnama of the scene of occurrence or by some independent evidence such as the evidence of the taxi driver. Further the discovery of the hammer alleged to be at the instance of A-2 has not been satisfactorily proved. The story of the hammer being brought out from under the shirt also appears to be somewhat incongruous. In any

case there is nothing to connect that story of the hammer with the accused.

16. The dying declarations also as we have noticed earlier have not been relied upon by the Additional Sessions Judge and cannot therefore corroborate the testimony of the eye witnesses. A perusal of the Ex. 10 the Diary entry of Kadam would negative his statement that he made this entry in his diary on the day of the incident at about 7 p. m. in the Hospital. The entry is as follows:

"Attended 'parade' at 4.30 p. m. At 5.5 p. m. relieved the District Staff on day duty. At 6 p. m. as per the order of S. I. Suryavanshi I was taking, the injured person, Shantaram Sakharam Chavan to K. E. M. Hospital in a taxi. I then asked him as to what had happened. He said 'Keshav Nagave hit me with a knife in the abdomen and Bhagwan hit me with a hammer on the rear portion of my head'. He further said that along with him there were on the Lalbaug Bus stop Dinker, Sitaram and Sadu Shetty. The injured person Shantaram Sakharam was admitted in Ward No. 20 of the Hospital. Just then Suryavanshi Saheb came and I joined him in the investigation of the case. After we arrived at the Police Station the Inspector recorded my statement. Thereafter at 10.30 p. m. I went for tea and returned at 11 p. m. Thereafter at 9 a. m. on the date the 20-1-65, I went home".

A perusal of this entry would show that this is a continuous record and would indicate as if it is made after 9 a. m. on 20-10-65, before he went home. The High Court said that the fact of this entry being made next day was not put to Kadam in cross-examination but a reference to the evidence of Kadam would show that the diary entry was put to him, suggesting that he had not made an entry in the personal diary of what Shantaram told him but he denied that suggestion as false. It could not be expected that what could be inferred from the contents of the diary have also to be put to him. In this view the Additional Sessions Judge was right in rejecting the evidence in respect of the several matters referred to above. Similarly the dying declarations recorded by Suryavanshi cannot also be relied upon. Suryavanshi says that he first asked the deceased how the incident took place and after he had told him

what happened he put him questions in Marathi and got the answers also in Marathi but recorded it in a narrative form in English. It is pointed out by the learned Advocate for the Appellant that there is nothing to indicate what questions were put and what answers were given nor is there anything to show that it was correctly recorded. The suggestion is that the Police Inspector may have added his own version of it while recording the dying declaration. To some extent this contention seems to be justified because Suryavanshi in his deposition stated "In the narration made by him the injured persons had given detail but he did not state what I wanted regarding his address, profession and other things. It is not that my questions put to the injured person were directed only to his address and profession. I wanted to get other details too from him". This shows that he was not content to record what the deceased wanted to say but wanted him to say what he wanted. That apart, there was sufficient time for him to have called a Magistrate, and although he admits that a Magistrate should be called he did not do so because according to him the injured was in a serious condition. We have already pointed out that the injured died at 2 a. m. There was considerable time, for him to have called a Magistrate. At any rate there is nothing to show that the injured became unconscious immediately or that he made any attempt to call the Magistrate.

17. In view of this we cannot rely on this dying declaration also. Our own conclusion on a re-appraisal of the evidence is that the eye witnesses account of where the incident took place and how it took place is not reliable nor is there any corroboration of any of their statements in material particulars. In this view it is unnecessary to determine whether the version given by the accused as to what actually took place and where it took place is credible. The probability that it did not take place at the bus stand but it took place elsewhere and in a manner different to that spoken to by the eye witnesses which does not exclude the possibility of the deceased and the eye witnesses being the aggressors or the incident taking place as alleged to by the accused, cannot be ruled out.

18. The Appeal is accordingly allowed, the conviction and sentences are set aside and the accused acquitted. They are directed to be released if not required for any other offence.

Appeal allowed

AIR 1971 SUPREME COURT 361
(V 58 C 192)

(From: Calcutta)*

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.

S. M. Nandy and others, Appellants v. The State of West Bengal and others, Respondents.

Civil Appeal No. 500 of 1967, D/-19-2-1971.

W. B. Land (Requisition and Acquisition) Act (2 of 1948) — Act is not ultra vires the Constitution under Article 19 (1) (f) read with Article 19 (5) — (X-Ref: Constitution of India, Article 19 (1) (f)). (Para 10)

It cannot be held that restrictions imposed by the impugned Act are unreasonable. Fair compensation has been provided for requisitioning, which is determinable by a Civil Court and ultimately by the High Court or the Supreme Court. Regarding the necessity for requisitioning it must necessarily be left to the State Government. It is true that there is no express provision to make a representation against an order of requisition but there is no bar to a representation being made after an order is served under Section 3 (2) of the Act. If the representation raises a point which overrides the public purpose it would be favourably considered by the State Government or other Government authorities as the case may be. (Para 9)

M/s. Arun Kumar Dutta and D. N. Mukherjee, Advocates, for Appellants; Mr. Niren De, Attorney General for India, (Mr. P. K. Chakravarti, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SIKRI, C. J.: — The following question has been referred to the Constitution Bench under the proviso to Article 145 (3) of the Constitution:

*(A. F. O. O. No. 104 of 1963 D/-13-1-1965 — Cal.)

CO/CO/A928/71/VBB/P

1971 S. C./61 V G—10

“Whether the West Bengal Land (Requisition and Acquisition) Act, 1948 is ultra vires the Constitution under Article 19 (1) (f) read with Article 19 (5)?”

2. The learned counsel for the appellants, Shri Arun Kumar Dutta, challenges the West Bengal Land (Requisition and Acquisition) Act, 1948 — hereinafter referred to as the impugned Act — on the ground that it does not impose reasonable restrictions within Article 19 (5) of the Constitution. He urges three grounds in this respect. First, he says, that there is no provision for a notice to the owner or the occupier of the property before an order of requisition is passed. Secondly, there is no provision for an appeal against the order of requisition, and thirdly, a civil suit is barred under Section 11 of the impugned Act.

3. In order to appreciate the points raised by the learned counsel it is necessary to set out the scheme of the Act. The impugned Act was enacted in order to provide for requisitioning and speedy acquisition of land for a number of public purposes. These purposes are: (1) maintaining supplies and services essential to the life of the community; (2) provide proper facilities for transport, communication, irrigation or drainage; and (3) creation of better living conditions in urban or rural areas by the construction or re-construction of dwelling places in such areas. The State of West Bengal was faced with many emergent problems created by the partition of India, and this Act was designed to meet these problems in a speedy manner. Section 3 enables the State Government to requisition land for the purposes mentioned above. A Collector of a district, an Additional District Magistrate or the First Land Acquisition Collector, Calcutta, when authorised by the State Government in this behalf, may exercise within his jurisdiction the powers of requisitioning conferred by sub-section (1). Sub-section (2) of Section 3 provides for service of this order in the prescribed manner on the owner of land and also on the occupier not being owner of land. Under sub-section (3) of Section 3 the Collector, or any person authorised by him in writing in this behalf, is entitled to execute the order in the manner mentioned therein, if the order passed

under sub-section (2) is not complied with by any person. There is nothing in the impugned Act which prevents a person on whom an order has been served under sub-section (2) to make a representation to the Collector or the State Government against the order of requisition. Section 4 enables the State Government to use or deal with the land for the purposes aforesaid.

4. We are not concerned with acquisition in this case but we may mention that the State Government may acquire any land requisitioned under the Act by publishing a notice in the official gazette that such land is required for a public purpose referred to in sub-section (1) of Section 3.

5. Section 6 enables the State Government to derequisition or release from requisition any land.

6. The impugned Act provides for fair compensation in respect of the requisitioned land under Section 7 (3) and Section 7 (4). Sub-section (3) provides that where any land is requisitioned under Section 3, there shall be paid to every person interested compensation in respect of—

(a) the requisition of such land; and

(b) any damage done during the period of requisition to such land other than what may have been sustained by natural causes.

Sub-section (4) lays down the principles to be followed in determining the compensation. If the Collector and the person interested agree to the compensation the Collector is enabled to make an award ordering payment of the agreed compensation. If there is disagreement, sub-section (4) provides that the compensation payable shall be the amount determined by the Court on reference made by the Collector under Clause (b) of sub-section (1) of Section 8. Under Section 8 the Collector is obliged to refer the matter to the decision of the Court if there is any disagreement with regard to compensation, and sub-section (2) of Section 8 prescribes the same procedure as the Land Acquisition Act, 1894, in this regard, and the State Government is directed to apply the principles set out in sub-section (1) of Section 23 of that Act, and in Clause (a) of sub-section (2) of Section 7 of the impugned Act, which provides:

"7 (2) (a) When the compensation has been determined under sub-section

(1) the Collector shall make an award in accordance with the principles set out in Section 11 of the Land Acquisition Act, 1894, and no amount referred to in sub-section (2) of Section 23 of that Act, shall be included in the award:

Provided that interest at the rate of six per centum per annum on the amount of compensation under the award from the date of the publication of the notice under sub-section (1-A) of Section 4 until payment shall be included in the amount payable under award".

7. It seems to us that these provisions give fair compensation and enable a Civil Court to determine the question in case of a dispute. An appeal lies under Section 8-A from the award made by a Court on a reference under Section 8 as if such award was an original decree passed by the Court in exercise of its civil jurisdiction. Not only therefore a fair compensation is provided but the determination of the amount of compensation rests with a Civil Court in case of a dispute. Although the learned counsel took objection to the Court which has to make an award, we see nothing wrong with the definition of the word "Court". The word "Court" has been defined to mean:

" "Court" means a principal civil Court of original jurisdiction, and includes the Court of any Additional Judge, Subordinate Judge or Munsif whom the State Government may appoint, by name or by virtue of his office, to perform concurrently with any such principal Civil Court, all or any of the functions of the Court under this Act within any specified local limits and, in the case of a Munsif, up to the limits of the pecuniary jurisdiction with which he is vested under Section 19 of the Bengal, Agra and Assam Civil Courts Act, 1887".

8. Section 11 provides that "save as otherwise expressly provided in this Act, no decision or order made in exercise of any power conferred by or under this Act shall be called in question in any Court". It seems to us that if any order is made for any collateral purpose or has been made for purposes not mentioned in Section 3, or is mala fide, it can always be challenged.

9. We are, therefore, of the opinion that it is difficult to hold that

restrictions imposed by the impugned Act are unreasonable. Fair compensation has been provided for requisitioning, which is determinable by a Civil Court and ultimately by the High Court or the Supreme Court. Regarding the necessity for requisitioning it must necessarily be left to the State Government. It is true that there is no express provision to make a representation against an order of requisition but there is no bar to a representation being made after an order is served under Section 3 (2) of the Act. We have no doubt that if the representation raises a point which overrides the public purpose it would be favourably considered by the State Government or other Government authorities as the case may be.

10. Accordingly the question referred to us is answered in the negative. The case will now go back to the Division Bench for disposal according to law.

Answered in the negative.

**AIR 1971 SUPREME COURT 963
(V 58 C 193)**

(From: Calcutta)*

S. M. SIKRI C. J., C. A. VAIDIALINGAM AND V. BHARGAVA, JJ.

Sachindra Mohan Nandy and others, Appellants v. The State of West Bengal and others, Respondents.

Civil Appeal No. 500 of 1967, D/- 19-2-1971.

Chandernagore (Merger) Act (1954), S. 17—W. B. Land (Requisition and Acquisition) Act (2 of 1948), applies to Chandernagore. — It was "law" within S. 2 (c) of Chandernagore (Assimilation of Laws) Act (W. B. Act 4 of 1955)—(X-Ref.: W. B. Land (Requisition and Acquisition) Act (2 of 1948), S. 17) — Judgment of Calcutta High Court in Appeal From Original Order No. 104 of 1963, dated 13-1-65 (Cal), Affirmed. (Para 10)

Section 3 of the Chandernagore (Merger) Act, 1954, made Chandernagore part of the State of West Bengal and S. 17 extended the W. B. Land (Requisition and Acquisition) Act, 1948, to it. The W. B. Act was a law as contained in S. 2 (c) of the Chan-

dernagore (Assimilation of Laws) Act because it related to a matter enumerated in Entry 36 List II (as it then existed) in the Seventh Schedule to the Constitution. (Para 10)

In so far as the Acquisition Act related to entry 42 of List III it was applied by S. 3 of the Chandernagore (Assimilation of Laws) Act, 1955, and S. 17 of the Chandernagore (Merger) Act, 1954, read with the definition of the word "law" in S. 2 (d) of the latter Act. (Para 10)

As by virtue of S. 3 of the Assimilation of Laws Act, the Acquisition Act became applicable to Chandernagore, all privileges and immunities from requisitioning available in the French territory, in conflict with that Act ceased to exist. (Para 13)

The Collector of Hooghly had the authority to issue the orders of requisition under the Acquisition Act of 1948, in respect of land situated in Chandernagore by virtue of Notification No. 3775-LA dated 11-5-48 because Chandernagore had come within the limits of his jurisdiction. The notification must be construed to refer to the limits of the District as it exists on the date of the exercise of the powers conferred by the notification. (Para 14)

M/s. Arun K. Dutt, D. N. Mukherjee and S. Dey, Advocates, for Appellants; Mr. Niren De, Attorney General for India (Mr. P. K. Chakravarti, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

SIKRI, C. J.: In our order dated March 10, 1970, we stated that we will give our reasons later for rejecting the points raised before us. We now proceed to give those reasons.

2. This is an appeal against the judgment of the High Court of Calcutta (Bose, C. J., and Mitra, J.) dismissing the appeal of Sachindra Mohan Nandy and Jnanendra Mohan Nandy, now appellants before us, against the judgment of Mukherjee, J., discharging the rule obtained by the appellants under Art. 226 of the Constitution. In order to appreciate the points raised before us it is necessary to state the relevant facts.

3. On October 9, 1960 and October 10, 1960, the Collector of Hooghly made two orders under S. 3 (1) of the West Bengal Land (Requisition

* (A. F. O. O. No. 104 of 1963, D/- 13-1-1965 — Cal.)

and Acquisition) Act, 1948 hereinafter referred to as the Acquisition Act. The Collector purported to requisition land belonging to the appellants for certain public purposes. He had issued the orders in exercise of the powers which had been conferred upon him by notification No. 3775-L. A. dated May, 11, 1948, published in the Calcutta Gazette, Part I, on May 27, 1948. This notification had authorised the Collector to exercise the powers under S. 3 (1) of the Acquisition Act. When this notification was passed Chandernagore, where the requisitioned land is situate, was not part of West Bengal and it is on this fact that one argument, shortly to be mentioned, rests.

4. According to the appellants the Acquisition Act has never been extended and made applicable to Chandernagore. For appreciating this particular point it is necessary to state the history of Chandernagore. It is well known that it was a French settlement in India, and it was only on October 2, 1954, that it was merged in the State of Bengal. Section 3 of the Chandernagore (Merger) Act, 1954 (XXXVI of 1954) provided that Chandernagore shall form part of the State of West Bengal, District of Hoogly, and the State Government shall provide for the administration of Chandernagore by constituting it into a new sub-division of the District of Hoogly. Section 17 provided that "all laws which immediately before the appointed day extend to, or are in force in, the State of West Bengal generally shall, as from that day, extend to, or, as the case may be, come into force in, Chandernagore." Section 18 has not much relevance but the learned counsel relied on it. Section 18 (1) reads thus:

"18 (1) Repeal of corresponding laws and savings:— Any law in force in Chandernagore immediately before the appointed day (hereafter in this Act referred to as the "corresponding law") which corresponds to any law referred to in section 17, whether such corresponding law is in force in Chandernagore by virtue of the Chandernagore (Application of Laws) Order, 1950, or by virtue of any notification issued under the Chandernagore (Administration) Regulation, 1952 (Reg. 1 of 1952) or otherwise, shall, as from that day, stand repealed in Chandernagore."

5. The word "law" was defined in the Chandernagore (Merger) Act, 1954, as follows (S. 2 (d)):

" "law" means so much of any enactment, Ordinance, Regulation, order, rule, scheme, notification, bye-law or any other instrument having the force of law as relates to matters enumerated in List I and List III in the Seventh Schedule to the Constitution."

6. After this the Legislature of West Bengal enacted the Chandernagore (Assimilation of Laws) Act, 1955. Section 2 (c) of this Act defined "law" to mean "so much of any Act, Ordinance, Regulation, order, rule, scheme, notification, bye-law or any other instrument having the force of law as relates to matters enumerated in List II in the Seventh Schedule to the Constitution of India." Section 3 provides that "all laws which immediately before the appointed day extend to, or are in force in, the State of West Bengal generally shall, as from that day, extend to, or, as the case may be, come into force in Chandernagore." Section 4 (1) provided for repeal of corresponding laws and reads:

"4 (1) Any law in force in Chandernagore immediately before the appointed day (hereinafter in this Act referred to as "corresponding law") which corresponds to any law referred to in section 3, whether such corresponding law is in force in Chandernagore by virtue of the Chandernagore (Application of Laws) Order, 1950 or by virtue of any notification issued under the Chandernagore (Administration) Regulation, 1952, or otherwise, shall as from the day stand repealed in Chandernagore"

Section 8, which was inserted in 1959, removed certain doubts regarding the extension of certain Acts to Chandernagore, in the following terms:

"8. Notwithstanding anything to the contrary, in any judgment or decision of any court, tribunal or authority, the following Acts, that is to say, The West Bengal Land Development and Planning Act, 1948, The West Bengal Non-Agricultural Tenancy Act, 1949 and The West Bengal Estates Acquisition Act, 1953 shall extend to and be deemed always to have extended to Chandernagore with effect from the appointed day."

7. We may here set out the notifications empowering Sri B. K.

Chatterjee, I. A. S., to perform the functions of the Collector in the District of Hooghly under the Acquisition Act. By the first notification dated September 15, 1959, the Governor was pleased "to specially appoint Sri B. K. Chatterjee, I. A. S., Additional District Magistrate, Hooghly, to perform the functions of a Collector under the said Act in the District of Hooghly." Another notification issued on the same day had authorised Sri B. K. Chatterjee, I. A. S., Additional District Magistrate, Hooghly, to requisition by order in writing any land within the local limits of the District of Hooghly. The two requisition orders purport to have been signed by the Collector of Hooghly.

8. The notification dated May 11, 1948, to which reference has been made above reads as follows:

"No. 3775 L. A. (P. W.) 11th May, 1948. In exercise of the powers conferred by Sub-section (1) of Section 3 of the West Bengal Land (Requisition and Acquisition) Act 1948 (West Bengal Act II of 1948), the Governor is pleased hereby to authorise each of the Collector and the Deputy Commissioners mentioned in the Schedule below to requisition, by order in writing, in pursuance of the provisions of the said sub-section (1) of the said Section 3, (torn) land within the local limits of his jurisdiction and (torn) to make such further orders as appear to him to be necessary or expedient in connection with the requisitioning Schedule.

Collector of Hooghly District

9. The learned counsel has raised the following points before us: (1) that the orders of requisition were illegal as the Acquisition Act under which they were issued did not apply to the territory previously known as French Chandernagore; and (2) that under the notification dated May 11, 1948, the Collector could exercise the powers of requisition only in respect of lands within the local limits of the territories then forming part of the Hooghly District.

10. Regarding the first point, it seems to us that there is no force in the contentions. Section 3 of the Chandernagore (Merger) Act, 1954, made Chandernagore part of the State of West Bengal and S. 17 extended the Acquisition Act to it. The Acquisition

Act was a law within the meaning of "law" contained in S. 2 (c) of the Chandernagore (Assimilation of Laws) Act because it related to a matter enumerated in List II in the Seventh Schedule to the Constitution. List II, as it then existed, contained the following entries:

"36. Acquisition or requisitioning of property, except for the purposes of the Union, subject to the provisions of entry 42 of List III."

Entry 42 of List III was to the following effect:

"Principles on which compensation for property acquired or requisitioned for the purposes of the Union or of a State or for any other public purpose is to be determined, and the form and the manner in which such compensation is to be given."

Insofar as the Acquisition Act related to entry 42 of List III it was applied by S. 3 of the Chandernagore (Assimilation of Laws) Act, 1955, and S. 17 of the Chandernagore (Merger) Act, 1954, read with the definition of the word "law" in S. 2 (d) of the latter Act.

11. The learned counsel further urged before us that this law was not in force in the State of West Bengal "generally" because it provided that it shall remain in force upto a certain date and this date had been changed from time to time. In 1954 it was provided that it shall remain in force upto March 31, 1957. We are unable to appreciate how the word "generally" has any reference to the duration of the time during which an Act has to operate. We agree with the High Court that the word "generally" refers to the territory of West Bengal.

12. Another argument that was urged before us was that because there was no corresponding law within the meaning of S. 17 of the Chandernagore (Merger) Act, 1954, and S. 4 of the Chandernagore (Assimilation of Laws) Act, 1955, S. 3 of the latter Act did not have the effect of extending the Acquisition Act to Chandernagore. We are unable to appreciate this reasoning. Section 4 has a limited effect and that is that if there is a corresponding law then that law shall, as from that date, stand repealed in Chandernagore. If there is no corresponding law then S. 4 does not operate and it has no effect on the scope of S. 3.

13. It was finally urged in this connection that there was no law

on the subject of requisitioning of property in French territory, the citizens enjoyed the privilege of immunity and any order to deprive the citizens of that immunity should have been much more specific. We agree with the High Court that there is no force in this contention. If by virtue of S. 3 of the Assimilation of Laws Act an Act becomes applicable to Chandernagore all privileges and immunities in conflict with that Act would cease to exist.

14. Coming to the second point, we agree with the High Court that the Collector of Hooghly had the authority to issue the orders of requisition in question. If the order of requisition is by a Collector then the notification of 1948 applies and the Collector of Hooghly would be authorised to issue orders requisitioning land existing in Chandernagore because Chandernagore had come within the limits of his jurisdiction. The notification must be construed to refer to the limits of the District as it exists on the date of the exercise of the powers conferred by the notification. If the orders of requisition were issued by Shri B. K. Chatterjee, I. A. S., Additional District Magistrate, then he had authority by virtue of the notification dated September 15, 1959, mentioned above.

15. The learned counsel, referring to the Acquisition Act, as it stood in 1959, and the definition of "Collector" ("the Collector of a district and includes a Deputy Commissioner and any officer specially appointed by the State Government to perform the functions of a Collector under this Act) urged that the Additional District Magistrate was not "specially appointed." There is no force in this point. The notification of September 15, 1959, amounts to special appointment within the definition of "Collector."

16. We referred the following question to the Constitution Bench which has answered it in the negative:

"Whether the West Bengal Land (Requisition and Acquisition) Act 1948 is ultra vires the Constitution under Art. 19 (1) (f) read with Art. 19 (5)?"

17. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 966
(V 58 C 194)

S. M. SIKRI C. J., G. K. MITTER,
K. S. HEGDE,
P. JAGANMOHAN REDDY AND V.
BHARGAVA, JJ.

Writ Petn. No. 91 of 1964

Smt. Damyanti Naranga, Petitioner v. The Union of India and others, Respondents.

and

Civil Appeal No. 358 of 1966*

The Hindi Sahitya Sammelan and others, Appellants v. Shri Jagdish Swarup and others, Respondents.

Writ Petn. No. 91 of 1964 and Civil Appeal No. 358 of 1966, D/- 23-2-1971.

(A) Constitution of India Art. 19
(1) (c) — Hindi Sahitya Sammelan Act (1962) violates Art. 19 (1) (c) — (X-Ref: Hindi Sahitya Sammelan Act (1962), Section 4).

The right to form an association, necessarily implies that the persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. The Hindi Sahitya Sammelan Act does not merely regulate the administration of the affairs of the original society; what it does is to alter the composition of the society itself. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The Act, therefore, violates the right of the original members of the Society to form an association guaranteed under Art. 19 (1) (c). Article 19 (4), on the face of it, cannot be called in aid to

*(Civil Writ Petn. No. 1885 of 1962, D/- 9-9-1963 — All.)

CO/CO/A947/71/DHZ/P

claim validity for the Act. The alteration of the constitution of the Society in the manner laid down by the Act is not in the interests of the sovereignty and integrity of India, or in the interests of public order or morality. Once section 4 is declared void, the whole Act becomes ineffective inasmuch as the formation of the new Sammelan is the very basis for all the other provisions contained in the Act. AIR 1963 SC 812, AIR 1952 SC 196, Rel. on; Judgment of Allahabad High Court dated 9-9-1963 in C. W. P. No. 1885 of 1962, Reversed. (Paras 6, 7, 8)

(B) Constitution of India, Seventh Schedule List I entry 63 List II entry 32 — As under S. 2 of the Hindi Sahitya Sammelan Act (1962) the only institution that was declared as of national importance under List I entry 63 was the original society — Parliament was not competent to legislate in respect of the newly constituted Sammelan which at no stage had been declared as an institution of national importance.

(Para 9)

(C) Constitution of India, Art. 19 (1) (f) — If it is held that Parliament passed Hindi Sahitya Sammelan Act (1962) so as to transfer all the properties and assets of the original society to the new Sammelan the Act would contravene Art. 19 (1) (f) — If the law is passed not merely for ensuring proper management and administration of the property, but for totally depriving the persons, in whom the property vested, of their right to hold the property, the law cannot be justified as a reasonable restriction under Art. 19 (5). AIR 1962 SC 458, Distinguished.

(Para 9)

Cases Referred: Chronological Paras

(1963) AIR 1963 SC 812 (V 50) =

(1963) Supp 1 SCR 789, O. K.

Ghosh v. E. X. Joseph 6

(1962) AIR 1962 SC 458 (V 49) =

(1962) Supp 1 SCR 156, Board

of Trustees, Ayurvedic & Unani

Tibia College, Delhi v. State of

Delhi 10

(1952) AIR 1952 SC 196 (V 39) =

1952 SCR 597 = 1952 Cri LJ

966, State of Madras v. V. G.

Row 7

(1951) AIR 1951 Mad 147 (V 38) =

52 Cri LJ 515 (FB), V. G. Row

v. State of Madras 7

M/s. J. P. Goyal and Raghunath Singh, Advocates, for Petitioner (In W. P. No. 91 of 1964); Mr. A. K. Sen, Sr. Advocate, (M/s. J. P. Goyal and

Raghunath Singh, Advocates with him), for Appellants (In C. A. No. 358 of 1966); Mr. B. Sen, Sr. Advocate (Mr. S. P. Nayar, Advocate, with him), for Respondent 1 (In W. P. No. 91 of 1964) and Respondents Nos. 3 and 4 (in C. A. No. 358 of 1966); M/s. C. P. Lal and N. N. Sharma, Advocates for Respondent No. 2 (In W. P. No. 91 of 1964) and Respondents Nos. 16 and 17 (In C. A. No. 358 of 1966).

The following Judgment of the Court was delivered by

BHARGAVA, J.: This writ petition and the appeal challenge the validity of the Hindi Sahitya Sammelan Act No. 13 of 1962 (hereinafter referred to as "the Act"). The facts leading up to the passing of this enactment are that, in the year 1910, some eminent educationists assembled at Banaras and founded an Association for the development of Hindi and its propagation throughout the country. This Association was named as the Hindi Sahitya Sammelan. On the 8th January, 1914, it was registered as a Society under the Societies Registration Act No. 21 of 1860, with Head Office at Allahabad, under the name of Hindi Sahitya Sammelan. The rules and bye-laws of the Society laid down the objects of this Association and the manner of its working. It had three classes of members, viz., special members (Vishisht Sadasya), permanent members (Sthayi Sadasya), and ordinary members (Sadharan Sadasya). Under the bye-laws, apart from the original members constituting the Society, further members could be admitted under those three classifications on being elected by the working committee of the Society. Under the Rules and bye-laws of the Society, other bodies could be constituted for carrying on activities of the Society. These included a Governing Body, a Working Committee, a Hindi University Council, Literary Council (Sahitya Samiti), Library Committee, Parchar Samiti, and Rashtriya Bhasha Prachar Samiti. Through the agencies of these various Committees, the Society carried on the work of development and propagation of Hindi, of spreading the use of Devnagri script, of holding examinations, and of conferring Degrees for proficiency in Hindi. The Society owned landed properties and buildings at Allahabad as well as at some other places such as Wardha, and was holding considerable

funds for carrying on its activities. The Society worked very successfully for a number of years. It appears that in the year 1950, some differences arose between the members of the Society, and attempt was made to alter the constitution of the Society. While one section wanted the alterations another section was opposed to it. This resulted in litigation. Three different suits were instituted in the civil courts at Allahabad in this connection and injunctions were sought by one party against the other. Ultimately, the Court appointed a Receiver.

2. In view of these circumstances, the U. P. Legislature passed an Act known as the U. P. Hindi Sahitya Sammelan Act No. 36 of 1956, under which a statutory body was created under the name of Hindi Sahitya Sammelan, and the word "Sammelan" was defined as referring to the Hindi Sahitya Sammelan constituted under the Act. Under that Act, the management and properties of the original Hindi Sahitya Sammelan, which was a registered Society, were to be taken over by the new statutory Sammelan. That Act was, however, declared void by the Allahabad High Court on the ground that that Act had made the original Sammelan cease to exist and had provided for the constitution of a new Sammelan under its terms in which the members of the original Sammelan had no say, so that that Act infringed the right of the members of the original Sammelan of forming an association guaranteed by Art. 19 (1) (c) of the Constitution. It was further held that that Act was not saved under Art. 19 (4) of the Constitution. Thereafter, the present Act, now challenged in this writ petition and the appeal, was passed by Parliament under Entry 63 of List I of the Seventh Schedule to the Constitution. The Act itself, in section 2, contained the necessary declaration to give legislative competence to Parliament under that Entry.

3. The Act first contained in section 2 a declaration in the following words:

"Whereas the objects of the institution known as the Hindi Sahitya Sammelan which has its head office at Allahabad are such as to make the institution one of national importance, it is hereby declared that the institution known as the Hindi Sahitya Sam-

melan is an institution of national importance."

Having declared this institution as an institution of national importance, the Act proceeded to define "Sammelan" as meaning the institution known as the Hindi Sahitya Sammelan incorporated under this Act, while the word "Society" was defined to mean "the Hindi Sahitya Sammelan which has its head office at Allahabad and is registered under the Societies Registration Act, 1860." Under Section 4 (1) of the Act, the Sammelan was constituted which was to consist of the first members of the Sammelan and all persons who may hereafter become members thereof in accordance with the rules made in that behalf. This statutory Sammelan was constituted as a body corporate by the name of the Hindi Sahitya Sammelan, and under sub-section (2) of Section 4, it was to have perpetual succession and a common seal with power, subject to the provisions of the Act, to acquire, hold and dispose of property and to contract and to sue and be sued by that name. The Head Office of the Sammelan was to be at Allahabad. Under sub-s. (4) of Section 4, the first members of the Sammelan were to consist of persons who, immediately before the appointed day,—

(a) were special members (Vishishṭ Sadasya) of the Society;

(b) were life members (Sthayī Sadasya) of the Society;

(c) had been Presidents of the Society; or

(d) were awarded the Mangla Prasad Paritoshik by the Society.

This sub-s. (4) of section 4 was amended retrospectively with effect from the date that the Act came into force by the Hindi Sahitya Sammelan (Amendment) Act No. I of 1963, and the first members of the Sammelan were, under this amendment, declared to be—

(a) all persons who, immediately before the appointed day, were members of the Society;

(b) all persons who, before that day, had been Presidents of the Society; and

(c) all persons who, before that day, were awarded the Mangla Prasad Paritoshik by the Society.

It is not necessary to give in detail the other provisions of the Act, except that it may be mentioned that the Act provided for vesting of all property,

movable or immovable, of or belonging to the Society in the Sammelan, transferring all rights and liabilities of the Society to the Sammelan, converting reference to the Society in any law to the Sammelan, and other similar necessary provisions. The Act itself did not make any provision for the future membership of the Sammelan; but under section 12 (1) (a), the first Governing Body of the Sammelan was directed to make rules in respect of matters relating to membership, including qualifications and disqualifications for membership of the Sammelan. The first Governing Body was to be constituted under section 8 and was to consist of a Chairman, a Secretary and 13 other members. This Governing Body was to be constituted by a notification in the Official Gazette by the Central Government. The thirteen members were to be chosen as follows:

(i) one member to represent the Ministry of the Central Government dealing with education;

(ii) one member to represent the Ministry of the Central Government dealing with finance;

(iii) not more than three members from among the former Presidents of the Society; and

(iv) the remaining number from among persons who are, in the opinion of the Central Government, eminent in the field of Hindi language or Hindi literature.

It was this first Governing Body which was to make rules on all matters relating to membership of the Sammelan under section 12 (1) (a) of the Act. These rules were not to have effect until they were approved by the Central Government and were published by the first Governing Body in such manner as the Central Government may, by order, direct. A copy of the rules was also to be laid before each House of Parliament. Counsel for respondent No. 1 placed before us a copy of the rules which, according to him, have been made by the first Governing Body with the approval of the Government and have been published as required. The Rules come into force on 1st of February, 1971. The petition under Art. 32, and the petition under Art. 226, out of which the civil appeal arises, were both moved much earlier and long before these Rules were framed. These petitions challenged the validity of the Act, without tak-

ing into account the actual Rules framed, mainly on the ground that the Act had interfered with the right of the petitioners to form association under Art. 19 (1) (c) of the Constitution and was not protected by Art. 19 (4). In the petition before the Allahabad High Court, that Court held that, since all the members of the Society had also become members of the Sammelan under the Act, there was no infringement of the right to form association, so that the Act could not be declared invalid on that ground. The writ petition in this Court has been filed by only one member of the Society, while the petition in the High Court and the appeal against the judgment of the High Court, which is before us, were filed by the original Hindi Sahitya Sammelan as one party and 72 members of that Sammelan joining as other petitioning parties. In the civil appeal, thus, the grievance that the Act has infringed the fundamental right has been put forward both by the Society itself as well as by 72 of its members, including members of the Working Committee and the Governing Body of the Society. They have all come up to this Court against the decision of the High Court in this appeal by special leave.

4. In the counter-affidavits filed on behalf of the respondents in the writ petition before the High Court as well as in the writ petition in this Court, the position taken up was that the Act, in fact, does not deprive the Society and its members of any rights which they had under the constitution of the Society and did not interfere with their right of association inasmuch as all the members of the Society have been included as members of the Sammelan under the Act. The High Court, in fact, dismissed the writ petition on accepting this submission put forward on behalf of the respondents. In the arguments before us, learned counsel for respondent No. 1, however, took up a different position and urged that the Act keeps the Society intact as it was, while a new Sammelan is constituted under the Act for the purpose of managing the institution which has been declared as an institution of national importance. He put this aspect of the case in the forefront, but, in the alternative, he also argued the case on the basis of the position taken up in the counter-affidavits in the High

Court and in this Court as mentioned above. We consider it convenient to first deal with the case as was specifically put forward in the counter-affidavits. In these counter-affidavits, the position taken up is that, having declared the old Hindi Sahitya Sammelan, which was a Society registered under the Societies Registration Act, 1860, as an institution of national importance, Parliament has proceeded to legislate in respect of it under Entry 63 of List I of the Seventh Schedule in order that its administration may not suffer as a result of the quarrels that were going on inter se between the members of the Society. It was for this purpose that a first Governing Body was constituted, to take over the management temporarily. The Act was designed to reconstitute the Sammelan in such manner that it could work successfully and without difficulties and, in making provision for this purpose, all members of the old Society were included as members of the Sammelan, so that their right of forming association may not be taken away from them. The Society was never dissolved; instead of the Society remaining a body registered under the Societies Registration Act, it was converted into a statutory Sammelan under the Act.

5. It, however, appears on examination of the provisions of the Act that the Sammelan under the Act is composed not only of persons, who were members of the Society, but of others who have been given the right to be members of the Sammelan without the consent of the pre-existing members. Under Section 4 (4) itself, as retrospectively amended in 1963, apart from persons, who were members of the Society, others, who have been made members of the Sammelan, are all persons who, before that day, had been Presidents of the Society and all persons who, before that day, were awarded the Mangla Prasad Paritoshik by the Society. These members have been added without any option being available to the existing members of the Society to elect or refuse to elect them as members which was the right they possessed under the constitution of the Society itself. Further, under Section 12 (1) (a), very wide powers were given to the first Governing Body to make rules in respect of matters relating to membership, including qualifications and dis-

qualifications for membership of the Sammelan. Under this power, the rules framed could make provision for admission of persons as members whom the original members of the Society may never have liked to admit in their Society. The number of such new members could even be so large as to leave the original members in a small minority with the result that those members could become totally ineffective in the Society. Even in the Rules actually framed, there is provision for admission of members under various classes. In addition to the persons mentioned in Section 4 (4) of the Act, Rule 6 provides for membership of persons who may become Sabhapatis of the Sammelan for any annual session subsequent to the Act coming into force, and persons who may be awarded Mangala Prasad Paritoshik subsequent to the Act coming into force. Under Rules 7, 8 and 9, new Vishisht Sadasyas, Sthayi Sadasyas, and Sadharan Sadasyas can be admitted to the membership of the Sammelan on payment of Rs. 1,000/- or Rs. 300/-, as the case may be. This admission to membership, according to the Rules, will be made by the new Karya Samiti to be elected under the Rules and not by the Working Committee of the original members of the Association. Further, under Section 7 (2) of the Act, the Governing Body of the new Sammelan is to consist of such number of persons, not exceeding 55, as the Central Government may from time to time determine; and out of these, a number not exceeding 7 are to be nominated by the Central Government from among educationists of repute and eminent Hindi scholars. These 7 nominees are to be chosen by the Central Government and on becoming members of the Governing Body, under Rule 11 they become members of the Sammelan. Under Rule 10, educational institutions can also be admitted as Sanstha Sadasyas of the Sammelan by the new Karya Samiti and, thereupon, a representative of each of such institution has a right to participate in the proceedings of the Sammelan, exercising all the rights of a member. It will, thus, be seen that the Sammelan, which has come into existence under the Act, is not identical with the Sammelan which was registered as a Society under the Societies Registration Act, 1860. Certain persons have been add-

ed as members by the Act and by the Rules. Admission of future members is no longer at the choice of the original members who had formed the Association. Persons, in whose admission as members the members of the Society had no hand, can become members and get the right of associating with them in the Sammelan, without the original members having any right to object. This is clear interference with the right to form an association which had been exercised by the members of the Society by forming the Society with its constitution, under which they were members and future members could only come in as a result of their choice by being elected by their Working Committee. We are unable to agree with the High Court that the new Sammelan, as constituted under the Act, is identical with the Society and that all the rights of forming an association, which were being exercised by members of the Society, have been kept intact under the Act.

6. It was argued that the right guaranteed by Article 19 (1) (2) is only to form an association and, consequently, any regulation of the affairs of the Association, after it has been formed, will not amount to a breach of that right. It is true that it has been held by this Court that, after an Association has been formed and the right under Article 19 (1) (c) has been exercised by the members forming it, they have no right to claim that its activities must also be permitted to be carried on in the manner they desire. Those cases are, however, inapplicable to the present case. The Act does not merely regulate the administration of the affairs of the Society; what it does is to alter the composition of the Society itself as we have indicated above. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The right to form an association, in our opinion, necessarily implies that the persons forming the

Association have also the right to continue to be associated with only those whom they voluntarily admit in the Association. Any law, by which members are introduced in the Voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. If we were to accept the submission that the right guaranteed by Art. 19 (1) (c) is confined to the initial stage of forming an Association and does not protect the right to continue the Association with the membership either chosen by the founders or regulated by rules made by the Association itself, the right would be meaningless because, as soon as an Association is formed, a law may be passed interfering with its composition, so that the Association formed may not be able to function at all. The right can be effective only if it is held to include within it the right to continue the Association with its composition as voluntarily agreed upon by the persons forming the Association. This aspect was recognised by this Court, though not in plain words, in the case of *G. K. Ghosh v. E. X. Joseph*, (1963) Supp 1 SCR 789 = (AIR 1963 SC 812). The Court, in that case, was considering the validity of Rule 4-B of the Central Civil Services (Conduct) Rules, 1955, which laid down that:

"No Government servant shall join or continue to be a member of any Service Association of Government servants:

(a) which has not, within a period of six months from its formation, obtained the recognition of the Government under the Rules prescribed in that behalf, or

(b) recognition in respect of which has been refused or withdrawn by the Government under the said Rules".

This Court held:—

"It is not disputed that the fundamental rights guaranteed by Article 19 can be claimed by Government servants. Article 33 which confers power on the Parliament to modify the rights in their application to the Armed Forces, clearly brings out the fact that all citizens, including Government servants, are entitled to claim the rights guaranteed by Article 19. Thus, the validity of the impugned rule has to

be judged on the basis that the respondent and his co-employees are entitled to form Associations or Unions. It is clear that Rule 4-B imposes a restriction on this right. It virtually compels a Government servant to withdraw his membership of the Service Association of Government Servants as soon as recognition accorded to the said Association is withdrawn or if, after the Association is formed, no recognition is accorded to it within six months. In other words, the right to form an Association is conditioned by the existence of the recognition of the said Association by the Government. If the Association obtains the recognition and continues to enjoy it, Government servants can become members of the said Association; if the Association does not secure recognition from the Government or recognition granted to it is withdrawn, Government servants must cease to be the members of the said Association. That is the plain effect of the impugned rule".

The Court in the above passage, thus, accepted the principle that the Government servants, who may have formed an Association, could not be compelled to resign from it by imposition of a condition of recognition of this Association by the Government and that, if the Government servants are required to cease to be members, that would be a violation of the right under Article 19 (1) (c). The Court, of course, in that case, further proceeded to examine whether such a restriction on the right could be justified under Article 19 (4) or not. That case, thus, supports our view that the right to form an Association includes the right to its continuance and any law altering the composition of the Association compulsorily will be a breach of the right to form the Association.

7. This Court had also proceeded on the same basis in the case of *State of Madras v. V. G. Row*, 1952 SCR 597 = (AIR 1952 SC 196). Though this aspect was not clearly brought out in the judgment, the point, which came up for consideration, was decided on the basis that persons forming an Association had a right under Article 19 (1) (c) to see that the composition of the Association continues as voluntarily agreed to by them. That decision was given in an appeal from a judgment of the High Court of Madras reported in *V. G. Row v. The*

State of Madras, AIR 1951 Mad 147 (FB). In the High Court, this principle was clearly formulated by Rajamannar, C. J., in the following words:-

"The word 'form' therefore, must refer not only to the initial commencement of the association, but also to the continuance of the association as such".

The Act, insofar as it interferes with the composition of the Society in constituting the Sammelan, therefore, violates the right of the original members of the Society to form an association guaranteed under Article 19 (1) (c).

8. Article 19 (4), on the face of it, cannot be called in aid to claim validity for the Act. Under Article 19 (4), reasonable restrictions can be imposed only in the interests of the sovereignty and integrity of India, or in the interests of public order or morality. It has not been contended on behalf of the respondent, nor could it be contended that this alteration of the constitution of the Society in the manner laid down by the Act was in the interests of the sovereignty and integrity of India, or in the interests of public order or morality. Not being protected under Article 19 (4), it must be held that the provision contained in the Act for reconstituting the Society into the Sammelan is void. Once that section is declared void, the whole Act becomes ineffective inasmuch as the formation of the new Sammelan is the very basis for all the other provisions contained in the Act.

9. In view of this position emerging in the course of arguments, Mr. B. Sen put forward an entirely different and alternative case before us which we have mentioned earlier. The position he took up was that the Act nowhere specifically lays down that the Society shall stand dissolved, while it does constitute a new Sammelan. According to him, therefore, it should be inferred that, while the Society still continues to exist in its original form, the law has brought into existence a new Sammelan to which all the functions, properties, etc., of the Society have passed under the Act. There are three reasons why this alternative submission cannot be accepted as ensuring the validity of the Act. The first is that the specific case taken by the respondents has been that the Act reconstitutes the Society and does not create a separate and in-

dependent body in the form of a new Sammelan. Secondly, even if it be accepted that a new Sammelan has been constituted by the Act, the question will arise of the legislative competence of Parliament to pass such a law. Constitution of Societies is under List II of the Seventh Schedule. Parliament purported to exercise legislative power under Entry 63 of List I on the basis of a declaration that the Hindi Sahitya Sammelan, Allahabad was an institution of national importance. The institution that was declared was the Society itself. It was not a case where the Society could be distinguished from some other institution which might have been declared as an institution of national importance. There can, of course, be cases where a Society may be running a college, a school or some other like institution, in which case Parliament may declare that particular institution as of national importance, without declaring the Society as such. In the present case, what Section 2 of the Act did was to declare the Society itself as an institution of national importance and, consequently, Parliament became competent to legislate in respect of the Society. On the interpretation now sought to be put forward, the Act keeps that Society intact, but deprives it of all its functions and properties and transfers them to a newly constituted body, viz., the Sammelan, as defined under the Act. This Sammelan is itself a body corporate, and that Sammelan has never been declared as an institution of national importance. The only institution that was declared as of national importance was the Society which, of course, earlier, carried the same name as the new Sammelan. Parliament was, therefore, not competent to legislate in respect of this newly constituted Sammelan which, at no stage, had been declared as an institution of national importance. The third reason why this submission must be rejected is that, if we were to hold that Parliament passed this Act so as to transfer all the properties and assets of the Society to the Sammelan, the Act would contravene Article 19 (1) (f) of the Constitution. On this interpretation, what the Act purports to do is to take away all the properties of the Society, leaving the Society as an existing body, and give them to the new Sammelan. This Sammelan

is a new, separate and distinct legal entity from the Society. The Society is, thus, deprived of all its properties by the Act. Such a law depriving the Society of its properties altogether cannot be held to be a reasonable restriction in the public interest on the right of the Society to hold the property. The property, under Section 5 of the Societies Registration Act, 1860, vested in the Governing Body of the Society. The members of the Governing Body, therefore, had the right to hold the property under Article 19 (1) (f) and they, having been deprived of that property, have rightly approached the Courts for redress of their grievance.

10. In this connection, counsel for the respondents relied on the decision of this Court in Board of Trustees, Ayurvedic & Unani Tibbia College, Delhi v. The State of Delhi, (1962) Supp 1 SCR 156 = (AIR 1962 SC 458) where the Board of Trustees of the Ayurvedic & Unani Tibbia College, Delhi was dissolved by the Tibbia College Act, 1952, and the property, which had vested in the Board of Trustees, passed to the newly constituted Board under the impugned Act. The Court held that there was no violation of the fundamental rights guaranteed by Article 19 (1) (f) or Article 31. That decision, however, proceeded on the basis that the property of the original Society registered under the Societies Registration Act had vested in the Board of Trustees which had been dissolved and the property, thereafter, did not vest in the members of the Society in view of the provisions of the Act of 1860. In these circumstances, it was held that no one could complain that his right to property under Article 31 or his right to hold the property under Article 19 (1) (f) had been violated by the impugned Act. In the present case, the applicability of Article 19 (1) (f) is being considered by us on the assumption that the old Society still exists as it was and, yet, all its properties have been transferred to the Sammelan. If the Society still exists, so does its Governing Body in whom the property of the Society vested. The Act, thus, deprives the members of the Governing Body of the property which still continued to vest in them in spite of the passing of the Act. This total deprivation of property, instead of regulating the management of the

affairs of the Society or its properties, cannot clearly be justified as a reasonable restriction in public interest. It is true that, at the time when the Act was passed, litigation was going on between the members of the Society, and the affairs of the Society were probably in a mess. The remedy, however, could not lie in depriving the Society of its property altogether. Reasonable restrictions could have been imposed so as to ensure the proper preservation of the property of the Society and its proper management. If the law is passed not merely for ensuring proper management and administration of the property, but for totally depriving the persons, in whom the property vested, of their right to hold the property, the law cannot be justified as a reasonable restriction under Article 19 (5). Consequently, even on this alternative position taken up by counsel for the respondents, the Act cannot be held to be valid.

11. As a result, the petition and the appeal are both allowed with costs. The Act is declared to be invalid, so that there will be restraint on the concerned bodies, including the Union Government, from taking or continuing any action under the Act. There will be one hearing fee.

Petition and appeal allowed.

**AIR 1971 SUPREME COURT 974
(V 58 C 195)**

(From: Madhya Pradesh)*

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE,

P. JAGANMOHAN REDDY AND
V. BHARGAVA, JJ.

Lalji Raja and Sons, Appellant v.
Firm Hansraj Nathuram, Respondent.

Civil Appeal No. 2427 of 1966, D/-
23-2-1971.

(A) Civil P. C. (1908), Section 2 (5) and (6) — A decree passed by Bankura Court in West Bengal in 1949 cannot be considered as a foreign decree vis-a-vis the Court at Morena in the former Madhya Bharat State for purposes of the Code — Bankura Court is neither a foreign Court nor its judgment a foreign judgment —

*(Misc. Appl. No. 20 of 1964, D/- 27-8-1964 — Madh Pra.)

(Misc. App. No. 20 of 1964, D/- 27-8-1964 (M. P.), Reversed). (Para 8)

(B) Civil P. C. (1908), Section 13 — Even a decree which is pronounced in absentem by a foreign Court is valid and executable in the country of the forum by which it was pronounced when authorised by special legislation — (X-ref:— International Law (Private)) — (1894) 21 Ind. App 171, Rel. on. (Para 12)

(C) Civil P. C. (1908), Section 38 — An ex parte decree passed in 1949 by Bankura Court in West Bengal in a personal action against a resident of Morena in former Madhya Bharat State is valid where the cause of action had arisen within the jurisdiction of Bankura Court and the notice of suit was served on him — Such a decree can be transferred to Morena Court for execution after the Indian Civil P. C. was made applicable to Madhya Bharat in 1951 — (X-ref:— Sections 2 (12), 20 (c), 39 and 40) — AIR 1963 SC 1180, Relied on; AIR 1962 SC 1737, Distinguished.

(Paras 12 to 15 and 20)

(D) Civil Procedure Code (Amendment) Act (1951), Section 20 (1) — The non-executability of a decree within a particular territory (Madhya Bharat) is neither a privilege nor a vested right within the meaning of Section 20 (1) (b) — By extension of the Code to the whole of India, including Madhya Bharat want of jurisdiction on part of Madhya Bharat Court to execute a decree of British Indian Court was remedied — (1922) 2 KB 422 and (1895) AC 429 and (1969) 1 All ER 121, Rel. on. (Paras 18, 19)

(E) Civil P. C. (1908), Section 48 — Period prescribed by Section 48 (1) of the Code was a period of limitation and was controlled by the provisions of Limitation Act (1908) including Section 14 (2) — (X-ref:— Limitation Act (1908), Section 14 (2)). (Case law referred). (Para 26)

Cases Referred: Chronological Paras (1969) 1 All ER 121 = 3 WLR

75, G. Ogden Industries P. Ltd.
v. Lucas

19

(1963) AIR 1963 SC 1180 (V 50)

= (1963) 2 SCR 619, Hansraj

Nathu Ram v. Lalji Raja and

Sons, of Bankura

1, 14, 15, 31

(1962) AIR 1962 SC 1737 (V 49)

= (1963) 2 SCR 577, Raj

Rajendra Moloji Narsingh Rao

Shitole v. Sri Shankar Saran

3, 12, 14, 16, 29, 31

(1958) AIR 1958 Andh Pra 407
(V 45) = ILR (1958) Andh Pra
891, Kishandas v. Indo-Carnatic
Bank Ltd. 29 31
(1955) AIR 1955 Cal 269 (V 42)
= 59 Cal WN 695, Amarendra
Lal v. Manindra Nath 26
(1953) AIR 1953 Orissa 13 (V 40)
= ILR (1952) Cut 522, Krishna
Chandra v. Siva Paravatamma 26
(1952) AIR 1952 Mad 186 (V 39)
= ILR (1952) Mad 421, Kanda-
swami Pillai v. Kannappa Chetty 26
(1944) AIR 1944 Nag 155 (V 31)
= ILR (1944) Nag 250, Sitaram
v. Chunnilalsa 26
(1943) AIR 1943 Bom 164 (V 30)
= 45 Bom LR 234, Ramgopal
v. Sidram 26
(1939) AIR 1939 All 403 (V 26)
= ILR (1939) All 647, Durg
v. Pancham 26
(1922) 2 KB 422 = 91 LJ (KB)
875, Hamilton Gell v. White 19
(1895) 1895 AC 425 = 64 LJPC
167, Abbat v. Minister for Lands 19
(1894) 21 Ind App 171 = ILR
22 Cal 222, Sirdar Gurdial
Singh v. Raja of Farid Kate 11, 29
M/s. S. C. Majumdar and R. K.
Jain, Advocates, for Appellant; Dr.
W. S. Barlingay, Sr. Advocate, (M/s.
Ramesh Malik and Ganpat Rai, Advoca-
tes, with him), for Respondent.

The following Judgments of the Court were delivered by

HEGDE, J. (with Sikri, C. J., Mitter and Bhargava JJ.): — This is an execution appeal. The decree-holders are the appellants herein. This case has a long and chequered history. The decree-holders obtained a decree against the respondents in the Court of Sub-Judge, Bankura (West Bengal) for a sum of over Rs. 12,000/-, on December 3, 1949. On March 28, 1950 they applied to the Court which passed the decree to transfer the decree together with a certificate of non-satisfaction to the Court at Morena in the then State of Madhya Bharat for execution. It was ordered accordingly. The execution proceedings commenced in the Court of Additional District Judge at Morena on September 21, 1950 (Money Execution Case No. 8 of 1950). The judgment-debtors resisted the execution on the ground that the Court had no jurisdiction to execute the same as the decree was that of a foreign Court and that the same had been passed ex

parte. The Court accepted that contention and dismissed the execution petition on December 29, 1950. On April 1, 1951 the Code of Civil Procedure (Amendment) Act, (Act II of 1951) came into force. As a result of that the Code of Civil Procedure (in short the 'Code') was extended to the former State of Madhya Bharat as well as to various other places. Meanwhile the decree-holders appealed against the order of the learned Additional District Judge, Morena dismissing the execution petition, to the High Court of Madhya Pradesh. The Madhya Pradesh High Court allowed their appeal. As against that the judgment-debtors appealed to this Court. This Court allowed the appeal of the judgment-debtors and restored the order of the learned Additional District Judge, Morena. The decision of this Court is reported in Hansraj Nathu Ram v. Lalji Raja and Sons of Bankura, (1963) 2 SCR 619 = (AIR 1963 SC 1180). Therein this Court ruled that the transfer ordered by the Bankura Court was without jurisdiction as on that date 'the Code' did not apply to the Morena Court. This Court held that Morena Court not being a Court to which 'the Code' applied, the decree could not have been transferred to it. It further held that Sections 38 and 39 of 'the Code' did not afford justification for such a transfer. It may be noted that at the time the Bankura Court ordered the transfer of the decree, the Morena Court was governed by the Indian Code of Civil Procedure as adapted by the Madhya Bharat Adaptation Order, 1948. In other words it was governed by a law passed by the then Madhya Bharat State. In the course of its judgment this Court observed that under 'the Code' "a decree can be executed by a Court which passed the decree or to which it was transferred for execution and the decree which could be transferred has to be a decree passed under the Code and the Court to which it could be transferred has to be a Court which was governed by the Indian Code of Civil Procedure". The first stage of the execution proceedings came to an end by the decision of this Court rendered on April 30, 1962.

2. On February 15, 1963, the decree-holders filed another execution case before the Bankura Court. Therein they prayed for the transfer of the decree again to the Morena Court for

execution. As noticed earlier, by that time 'the Code' had been extended to the Madhya Bharat State which later became a part of the State of Madhya Pradesh. The Bankura Court again ordered the transfer of the decree to the Morena Court. The execution proceedings were started afresh in the Morena Court on August 31, 1963 (Execution Case No. 1 of 1963). The judgment-debtors resisted the execution on various grounds viz., (a) that it is barred by res judicata in view of the decision of this Court referred to earlier; (b) that it is barred by Section 48 of 'the Code'; (c) that it is barred by limitation and (d) that the decree is not executable as it is a decree of a foreign Court.

3. The learned Additional District Judge rejected the objections raised by the judgment-debtors. The judgment-debtors appeals against that order to the High Court of Madhya Pradesh. The High Court agreed with the executing Court that the execution petition is neither barred by res judicata nor by Section 48 of 'the Code', nor is there any bar of limitation but it disagreed with that Court and held that the decree was not executable as the Court which passed the decree was a foreign Court. In arriving at that conclusion it purported to rely on the decision of this Court in *Raj Rajendra Sardar Moloji Narsingh Rao Shitole v. Sri Shankar Saran*, (1963) 2 SCR 577 = (AIR 1962 SC 1737). Aggrieved by that decision, the decree-holders have brought this appeal by special leave.

4. From the contentions advanced before us, two questions arise for decision. They are (1) whether the decree under execution is not executable by Courts situate in the area comprised in the former State of Madhya Bharat and (2) whether the decree is barred by Section 48 of 'the Code'.

5. The contention of the judgment-debtors is that the decree under execution being a decree of a foreign Court is a nullity qua the Courts in the former State of Madhya Bharat and therefore the same is not executable in the Morena Court. According to the decree-holders the decree in question is not a decree of a foreign Court as contemplated by 'the Code' and the Court to which the decree is transferred for execution namely the

Morena Court is a 'Court' as contemplated by Sections 38 and 39 of 'the Code' and therefore there can be no valid objection to its execution in the Morena Court. Before referring to the decided cases on the point it is necessary to read the relevant provisions of 'the Code' as the execution is sought in accordance with provisions therein.

6. 'Foreign Court' is defined in Section 2 (5) of 'the Code'. That definition as it stood on the date the decree under execution was passed read thus:

"'foreign Court' means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Central Government".

7. A new definition of "foreign Court" was substituted by the Code of Civil Procedure (Amendment) Act, II of 1951. That definition reads:

"'foreign Court' means a Court situate outside India and not established or continued by the authority of the Central Government".

8. Whether we take the earlier definition or the present definition into consideration the Bankura Court cannot be considered as a "foreign Court" within the meaning of that expression in 'the Code'. Foreign judgment is defined in 'the Code' as the judgment of 'a foreign Court'. (Section 2 (6) of 'the Code'). Hence the decree under execution cannot be considered as a foreign decree for the purpose of the Code.

9. Section 13 of 'the Code' provides that "A foreign judgment shall be conclusive as to any matter thereby directly adjudicated upon between the same parties or between parties under whom they or any of them claim litigating under the same title except.....

(b) where it has not been given on the merits of the case".

10. The judgment with which we are concerned in this case was an ex parte judgment. The Bankura Court had no jurisdiction over the judgment-debtors. The judgment-debtors did not submit themselves to the jurisdiction of that Court though they were served with a notice of the suit. Hence if the Bankura Court can be considered as a foreign Court then Section 13 (b) would have come to the rescue of the judgment-debtors and it

would have enabled them to plead that the judgment in question was not conclusive and consequently the decree is not binding against them. But as the judgment in question cannot be considered as a judgment of a foreign Court, they can take no assistance from Section 13 (b). But assistance was sought to be taken from Section 13 (d) which says that the foreign judgments are not conclusive "where the proceedings in which the judgment was obtained are opposed to natural justice". It was urged on behalf of the judgment-debtors that as the decree under execution was an *ex parte* decree, we must hold that the proceedings in which the judgment was obtained were opposed to natural justice. We are unable to accede to this contention. As mentioned earlier, the judgment-debtors were served with the notice of the suit. They did not choose to appear before the Court. Hence there is no basis for the contention that any principle of natural justice had been contravened. Further as held earlier the judgment in question is not a foreign judgment.

11. Reliance was placed on Private International Law in support of the contention that in a personal action, a decree pronounced in *absentem* by a foreign Court, to the jurisdiction of which the defendant had not in anyway submitted himself is an absolute nullity. It was urged that the Bankura Court had no jurisdiction over the judgment-debtors and therefore the decree passed being one pronounced in *absentem* is a nullity. In support of this contention reliance was placed on the decision of the Judicial Committee in *Sirdar Gurdial Singh v. The Rajah of Faridkote*, (1894) 21 Ind App 171. Therein the Judicial Committee observed:

"In a personal action, to which none of these causes of jurisdiction apply, a decree pronounced in *absentem* by a foreign Court, to the jurisdiction of which the Defendant has not in any way submitted himself, is by International Law an absolute nullity".

But the Board qualified those observations by the following words:

"He is under no obligation of any kind to obey it; and it must be regarded as a mere nullity by the Courts of every nation except (when authorised by special local legislation) in the

country of the forum by which it was pronounced".

12. The above remarks of the Board indicate that even a decree which is pronounced in *absentem* by a foreign Court is valid and executable in the country of the forum by which it was pronounced when authorised by special local legislation. A decree passed by a foreign Court to whose jurisdiction a judgment-debtor had not submitted is an absolute nullity only if the local legislature had not conferred jurisdiction on the domestic Courts over the foreigners either generally or under specified circumstances. Section 20 (c) of 'the Code' confers jurisdiction on a Court in India over the foreigners if the cause of action arises within the jurisdiction of that Court. Hence the observation of the Board quoted in some of the decisions of the Courts in India including the decision of this Court in *Shitole's case*, (1963) 2 SCR 577 = (AIR 1962 SC 1737) (*supra*) that such a decree is an 'absolute nullity' may not be apposite. It may be more appropriate to say that the decree in question is not executable in Courts outside this country. The board itself had noticed that this rule of Private International Law is subject to special local legislation. Clause (c) of Section 20 of 'the Code' provided at the relevant time and still provides that subject to the limitations mentioned in the earlier sections of 'the Code', a suit can be instituted in a Court within the local limits of whose jurisdiction the cause of action, wholly or in part, arises. There is no dispute in this case that the cause of action for the suit which led up to the decree under execution arose within the jurisdiction of Bankura Court. Hence it must be held that the suit in question was a properly instituted suit. From that it follows that the decree in question is a valid decree though it might not have been executable at one stage in Courts in the former Indian States.

13. This takes us to Ss. 38 and 39 of 'the Code'. Section 38 provides that a decree may be executed either by the court which passed it, or by the court to which it is sent for execution. Section 39 (1) to the extent it is material for our present purpose prescribes:

"The Court which passed a decree may, on the application of the decree-

holder, send it for execution to another Court—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, or personally works for gain within the local limits of the jurisdiction of such other Court. . . .”
Section 40 prescribes:

“where a decree is sent for execution in another State, it shall be sent to such Court and executed in such manner as may be prescribed by rules in force in that State.”

14. Rules are defined in S. 2 (12) as meaning Rules and Forms contained in the 1st Schedule or made under S. 122 or S. 125 of ‘the Code’. On a combined reading of Ss. 2 (12), 38, 39 and 40, it follows that a decree can be transferred for execution only to a court to which ‘the Code’ applies. This is what was ruled by this Court in (1963) 2 SCR 619 = (AIR 1963 SC 1180) (supra). But by the date the impugned transfer was made, ‘the Code’ had been extended to the whole of India. In fact the court to which the decree was transferred is now an entirely new court in the eye of the law—see the decision of this Court in Shitole’s case, (1963) 2 SCR 577 = (AIR 1962 SC 1737) (supra).

15. From the foregoing discussion, it follows that the decree under execution is not a foreign decree and its transfer to the Morena court is in accordance with the provisions of ‘the Code’. That being so, the decree under execution satisfies the dictum of this Court in (1963) 2 SCR 619 = (AIR 1963 SC 1180) (supra) that;

“a decree can be executed by a court which passed the decree or to which it was transferred for execution and the decree which could be transferred has to be a decree passed under the Code and the Court to which it could be transferred has to be a Court which was governed by the Indian Code of Civil Procedure.”

16. It was next urged on behalf of the judgment-debtors that in view of the decision of this Court in Shitole’s case, (1963) 2 SCR 577 = (AIR 1962 SC 1737) (supra) we must hold that the decree is a nullity and that it cannot be executed at all in the courts situate in the former State of Madhya Bharat. In Shitole’s case, (1963) 2 SCR 577 = (AIR 1962 SC 1737) (supra) this Court was called upon to

consider a converse case. Therein the decree under execution was one passed by a court in Gwalior State in a suit instituted in May 1947. The defendants were the residents of U. P. They did not appear before the Gwalior Court though served with the notice. An ex parte decree was passed against them in November, 1948. On September, 1951, the Gwalior court transferred the decree for execution to Allahabad and on October 16, 1951, the decree-holder filed an application for execution of the decree before the Allahabad court. The judgment-debtors contended that the decree being a decree of a foreign court to whose jurisdiction they had not submitted, was a nullity and the execution application in respect thereof was not maintainable. That contention was accepted by this Court. It may be noted that the Gwalior Court was not a court constituted under the provisions of ‘the Code’. It was admittedly a foreign court for the purpose of any proceedings under ‘the Code’. The ratio of that decision is wholly inapplicable to the present case. The question whether a decree is a foreign decree or whether it can be transferred to another court for execution has to be judged by the provisions of ‘the Code’.

17. It was next contended that in view of S. 20 cl. (1) of ‘the Code’ of Civil Procedure (Amendment) Act, 1951 by which the Code is extended to Madhya Bharat and other areas, the judgment-debtors’ right to resist the execution of the decree is protected. Section 20 (1) of the Act deals with Repeals and Savings. That section to the extent relevant for our present purpose reads:

“If, immediately before the date on which the said Code comes into force in any part B State corresponding to the said Code, that law shall on that date stand repealed. Provided that the repeal shall not affect—

(b) any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed. . . . as if this Act had not been passed.”

18. This provision undoubtedly protects the rights acquired and privileges accrued under the law repealed by the amending Act. Therefore the question for decision is whether the non-executability of the decree in the Morena court under the law in force in Madhya Bharat before

the extension of 'the Code' can be said to be a right accrued under the repealed law. We do not think that even by straining the language of the provision it can be said that the non-executability of a decree within a particular territory can be considered as a privilege. Therefore the only question that we have to consider is whether it can be considered as a 'right accrued' within the meaning of S. 20 (1) (b) of the Code of Civil Procedure (Amendment) Act, 1951. In the first place, in order to get the benefit of that provision, the non-executability of the decree must be a right and secondly it must be a right that had accrued from the provisions of the repealed law. It is contended on behalf of the judgment-debtors that when the decree was passed, they had a right to resist the execution of the decree in Madhya Bharat in view of the provisions of the Indian Code of Civil Procedure (as adapted) which was in force in the Madhya Bharat at that time and the same is a vested right. It was further urged on their behalf that that right was preserved by Section 20 (1) (b) of the Code of Civil Procedure Amendment Act, 1951. It is difficult to consider the non-executability of the decree in Madhya Bharat as a vested right of the judgment-debtors. The non-executability in question pertains to the jurisdiction of certain courts and not to the rights of the judgment-debtors. Further the relevant provisions of the Civil Procedure Code in force in Madhya Bharat did not confer the right claimed by the judgment-debtors. All that has happened in view of the extension of 'the Code' to the whole of India in 1951 is that the decrees which could have been executed only by courts in British India are now made executable in the whole of India. The change made is one relating to procedure and jurisdiction. Even before 'the Code' was extended to Madhya Bharat the decree in question could have been executed either against the person of the judgment-debtors if they had happened to come to British India or against any of their properties situate in British India. The execution of the decree within the State of Madhya Bharat was not permissible because the arm of 'the Code' did not reach Madhya Bharat. It was the invalidity of the order transferring the decree to the Morena court that stood in the way of

the decree-holders in executing their decree in that court on the earlier occasion and not because of any vested rights of the judgment-debtors. Even if the judgment-debtors had not objected to the execution of the decree, the same could not have been executed by the court at Morena on the previous occasion as that court was not properly seized of the execution proceedings. By the extension of 'the Code' to Madhya Bharat, want of jurisdiction on the part of the Morena court was remedied and that court is now made competent to execute the decree.

19. That a provision to preserve the right accrued under a repealed Act "was not intended to preserve the abstract rights conferred by the repealed Act. . . It only applies to specific rights given to an individual upon happening of one or the other of the events specified in statute": see Lord Atkin's observations in *Hamilton Gell v. White*, (1922) 2 KB 422. The mere right, existing at the date of repealing statute, to take advantage of provisions of the statute repealed is not a "right accrued" within the meaning of the usual saving clause: see *Abbot v. Minister for Lands* (1895) AC 425 and *G. Ogden Industries Pvt. Ltd. v. Lucas*, (1969) 1 All ER 121.

20. From what has been said above, it follows that the view taken by the High Court that the decree in question is a nullity qua the Morena court cannot be accepted as correct. The decree in question is neither a 'foreign decree' as contemplated by 'the Code' nor its transfer to the Morena court impermissible under 'the Code'. By the provisions of 'the Code' the Morena court is required to proceed with the execution unless there is any valid objection.

21. We now come to the question whether the execution is barred by S. 48 of 'the Code'. (That section was repealed in 1963). Both the executing court as well as the High Court have taken the view that on the facts of this case, the limitation prescribed in S. 48 of 'the Code' is extended under S. 14 (2) of the Limitation Act, 1908. Both those courts have concurrently come to the conclusion that the previous execution proceedings had been prosecuted by the decree-holders with due diligence and with good faith and the same became infructuous in view of the fact that the Morena Court had no

jurisdiction to proceed with the execution. The finding that the previous execution proceedings were carried on with due diligence and good faith and that the same became infructuous for want of jurisdiction on the part of the Morena court was not challenged before us. But it was urged on behalf of the judgment-debtors that S. 48 prescribed a bar and not a period of limitation and consequently the decree-holders cannot take the benefit of section 14 (2) of the Limitation Act. It is necessary to examine the correctness of this contention.

22. Section 48 read thus:

"(1) Where an application to execute a decree not being a decree granting an injunction has been made, no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of 12 years from—

(a) the date of the decree sought to be executed, or,

(Contd. on Col. 2)

"Description of application.	Period of Limitation.
To enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction or an order of the Supreme Court.	Twelve years.

24. At this stage it is also necessary to read Art. 181 of the Limitation Act of 1908. That Article prescribed that an application for which no period of limitation is provided elsewhere in the Schedule to the Limitation Act, 1908 or by S. 48 of the Code, the period of limitation is three years and that period begins to run when the right to apply accrues. Article 182 of that Act provided that for the execution of a decree or order of any Civil Court not provided for by article 183 or by S. 48 of 'the Code', the period of limitation is three years or where a certified copy of the decree or order has been registered.— six years. The time from which the period was to run is set out in the 3rd column of the Schedule.

25. The argument advanced on behalf of the judgment-debtors is that

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree.

(2) Nothing in this section shall be deemed—

(a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or

(b) to limit or otherwise affect the operation of article 183 of the First Schedule to the Indian Limitation Act, 1908".

23. Article 183 of the Indian Limitation Act, 1908 read thus:

Time from which period begins to run.

When a present right to enforce the judgment, decree or order accrues to some person capable of releasing the right:

Provided that when the judgment, decree or order has been revived, or some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest or his agent, to the person entitled thereto or his agent, the twelve years shall be computed from the date of such revivor, payment or acknowledgment or the latest of such revivors payments or acknowledgments, as the case may be."

S. 48 is a self-contained Code and the period prescribed therein is a bar and not a period of limitation and hence the decree-holders cannot take the benefit of S. 14 (2). In support of this argument reliance is placed on sub-section 2 (a) of S. 48 of 'the Code'. That sub-section undoubtedly lends some support to the contention of the judgment-debtors. It indicates as to when the period prescribed under S. 48 (1) can be extended. By implication it can be urged that the period prescribed under S. 48 (1) of the Code can only be extended under the circumstances mentioned in that clause and not otherwise. But in assessing the correctness of that contention we have to take into consideration cl. (b) of sub-section (2) of S. 48 of 'the Code' as well as Arts. 181 and 182 of the Limitation Act, 1908. These provisions

clearly go to indicate that the period prescribed under S. 48 (1) of 'the Code' is a period of limitation. This conclusion of ours is strengthened by the subsequent history of the legislation. By the Limitation Act 1963, S. 48 of 'the Code' is deleted. Its place has now been taken by Art. 136 of the Limitation Act of 1963.

26. At one stage, there was considerable conflict of judicial opinion as to whether S. 48 is controlled by the provisions of the Limitation Act 1908. But the High Courts which had earlier taken the view that S. 48 prescribes a bar and not limitation have now revised their opinion. The opinion amongst the High Courts is now unanimous that S. 48 of 'the Code' is controlled by the provisions of the Limitation Act, 1908—see *Kandaswami Pillai v. Kannappa Chetty*, AIR 1952 Mad 186 (FB) *Durg v. Pancham* ILR (1939) All 647 = (AIR 1939 All 403) *Sitaram v. Chunnilalsa*, ILR (1944) Nag 250 = (AIR 1944 Nag 155) *Amarendra v. Manindra*, AIR 1955 Cal 269 *Krishna Chandra v. Paravattamma*, AIR 1953 Orissa 13 and *Ramgopal v. Sidram*, AIR 1943 Bom 134.

27. We are of the opinion that the ratio of the above decisions correctly lay down the law. That apart, it would not be appropriate to unsettle the settled position in law.

28. For the reasons mentioned above this appeal is allowed and the order of the High Court is set aside and that of the trial court restored. The executing court is directed to proceed with the execution. The respondents shall pay the costs of the appellants both in this Court as well as in the High Court.

P. JAGANMOHAN REDDY, J.: 29.

I agree with my learned brother Hegde J., that the Appeal should be allowed. In the case of *Kishendas v. Indo Carnatic Bank Ltd.*, AIR 1958 Andh Pra 407, I had while delivering the Judgment of the Bench expressed certain views which may appear to conflict with the view now taken. In that case the executability of a decree passed by the Madras High Court in 1940 by the City Civil Court Hyderabad on the ground of its being a foreign decree was called in question. The Respondent went into liquidation and a liquidator was appointed by the original side of Madras High Court. The liquidator filed an application

under Section 191 of the Indian Companies Act for the recovery of a sum of Rs. 1375 from the Appellant who was a subject of H. E. H. the Nizam and a resident of Hyderabad on account of unpaid calls and the Court passed an ex parte decree on 15-8-1940 against the Appellant. The liquidator filed an execution petition in that Court praying for a transfer of the decree to the City Civil Court Hyderabad which was ordered on 15-3-1951 when the Hyderabad Civil Procedure Code was in force in the Hyderabad State, under which the decree of the Madras High Court would be a foreign decree and the only way in which the liquidator could recover the decretal amount was by filing a suit on that decree. No doubt the Madras High Court could not on that date i.e. 15-3-1951 pass an order directing the transfer of the decree as it was to a Court which was not governed by the Indian Civil Procedure Code (hereinafter called the Code) nor on that date were there any reciprocal arrangements for executing those decrees in the Hyderabad State. Madras High Court could not therefore transfer a decree passed by it for execution to a Court which did not satisfy the provisions of Sections 43 to 45 on that date. It did not also appear from the facts of that case whether any notice was served on the Appellant but following the decision of the majority of the High Courts in this Country and also relying on the observations of their Lordships of the Privy Council in (1894) 21 Ind App 171 that a decree pronounced in absentem by a foreign Court the jurisdiction to which the defendant has not in any way submitted himself is by international law a nullity. I also took the view that the non-executability of the decree is to be determined as on the date on which it was passed and that no distinction can conceivably be made between the decree passed by British Indian Courts before the merger or before the Independence when it was a foreign decree and a decree passed by the Courts of a native State before the Independence or merger—in both cases the character of the Judgment would be that of a foreign Judgment and if it suffers from any want of jurisdiction or otherwise it will continue to be subject to that defect. This Court had also expressed a similar view in *Raj Rajendra Sardar Maloji Narsingh Rao Shitole v. Sri Shankar Saran*,

(1963) 2 SCR 577 = (AIR 1962 SC 1737) when it held that an ex parte decree passed in 1948 by the Gwalior Court against residents of U. P. who did not appear was not executable in Allahabad even though the Gwalior Court had transferred the decree in October 1957 after the Civil Procedure Amendment Act II of 1951 came into force after which the Gwalior Court was a Court under the Code. It was held by a majority that the decree passed by the Gwalior Court did not change its nationality in spite of subsequent constitutional changes or amendments in the Code of Civil Procedure, that if a decree was unenforceable in a particular Court at the time it was passed it would not become enforceable and valid simply because of the political changes that took place unless there is a specific provision to the contrary and that the decree being a nullity outside the Courts of the United States (Madhya Bharat) in the absence of any specific provision it could not be enforced in the United States (Madhya Bharat). Kapur J., speaking for himself, Rajagopala Ayyangar and Mudholkar JJ., observed at page 594-595 (of SCR) = (at p. 1744 of AIR) thus:

"It will not be correct to say that the decree which was a nullity before the Constitution came into force suffered only from the defect of enforceability by execution. Section 13 creates substantive rights and is not merely procedural and therefore defences which were open to the Respondents were not taken away by any Constitutional changes in the absence of a specific provision to the contrary. It is erroneous to say therefore that the decree of the Gwalior Court was unenforceable when passed because of some impediment which the subsequent Constitutional changes had removed; but that decree suffered from a more fundamental defect of being a nullity and the rights and liabilities created under it remained unaffected by subsequent changes".

30. The contention that the decree of the Gwalior Court could be executed after its transfer on September 14, 1951 when the Civil Procedure Code came into force throughout India by virtue of Act II of 1951 and that therefore the Gwalior Court had the power to transfer the decree which the Allahabad Court had under the law authority to execute was also negated

for the reason that the "Court which made the order of transfer in September 1951 was then not the Court which passed the decree within the meaning of Section 39". Das Gupta J., with whom Sarkar J., as he then was, concurred, did not find it necessary to deal with the question of foreign decree which as he said the Allahabad Court rightly considered a nullity. On the second and third question he held that Allahabad Court had no power to execute the decree under Section 38 of the Civil Procedure Code as there was no valid transfer to it from 'the Court which passed the decree' nor did Section 43 of the Civil Procedure Code as it stood applied to the execution of that decree.

31. Even though the observations in Kishendas's case, AIR 1958 Andh Pra 891, find support in the above Judgment the ratio of the decision in that case being that the Madras Court on the date of the order could not transfer the decree to the Hyderabad Court, the facts of this case however do not warrant an application of the principles of international law or of the decree being a nullity. The earlier execution proceedings ended unsuccessfully with the decision in (1963) 2 SCR 619 = (AIR 1963 SC 1180). It was decided in that case, that Morena Court not being a Court to which the Code applied the decree could not have been transferred and that Sections 38 and 39 of the Code did not afford jurisdiction for such transfer as the Morena Court at the time of transfer was governed by the Madhya Bharat Civil Procedure Code and not by the Code. What is relevant in the present case is that when the decree-holder again applied to the Bankura Court for execution of his decree by the Morena Court after the decision of this Court in Hansraj's case, both the Court that passed the decree and the Court to which it is transferred for execution were Courts under the Code, as such no question of the Bankura decree being a foreign decree or it being a nullity could arise. The Morena Court on the date when the order of transfer of the decree was passed by the Bankura Court is not a Court governed by the Gwalior law or Madhya Bharat law as such the impediment to executability of the Bankura decree no longer exists nor could it be considered in the light of Section 20 (c) of the Amendment Act II of 1951 as

having saved any right or privileges under the repealed Procedure Code of Gwalior or Madhya Bharat. Whatever may be the views expressed in the several decisions a view which I was also inclined to take in the decision referred to, though on the facts of that case it may not have been necessary, on a further and fuller consideration I agree with great respect with the views of my learned brother Hegde J., that no question of a vested right or a privilege arises to entitle the Respondent to challenge the execution proceedings in Morena Court. The decree granted by Bankura Court was executable by the Courts governed by the same Code by the Court which passed it or by the Court to which it is transferred. Once the Code is made applicable to the whole of India by the Amendment Act II of 1951 the decree is no longer a foreign decree qua the Morena Court which is a Court under the Code to which the Bankura Court could transfer the decree for execution. No doubt in Shitole's case, (1963) 2 SCR 577 = (AIR 1962 SC 1757) it was observed that Section 13 of the Code creates substantive rights and not merely procedural and therefore defences that were open to the Respondents were not taken away by any Constitutional changes but the ratio of the decision was that the Gwalior Court not being a Court that passed the decree after the coming into force of Act II of 1951 the Allahabad Court could not execute it. That impediment does not exist now in that the Bankura Court has transferred the decree to a Court under the Code. The plea that Section 48 Civil Procedure Code presents a bar of limitation is also not tenable. In the result I agree that the Appeal should be allowed as directed by my learned brother.

Appeal allowed.

AIR 1971 SUPREME COURT 983
(V 58 C 196)

(From: Punjab and Haryana)*

**G. K. MITTER, K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.**

Kahan Singh and others, Appellants v. The State of Haryana, Respondent.

Criminal Appeal No. 266 of 1968,
D/- 24-2-1971.

*(Cri. Appl. No. 836 of 1967, D/- 25-3-1968 — Punj. & Har.)

CO/CO/A951/71/DVT/P

Criminal P. C. (1898), S. 236—
The defect of framing alternative charges in circumstances when it was not needed at all does not by itself vitiate the proceedings—Prejudice to accused by framing alternative charges must be proved. AIR 1956 SC 116 Rel. on. (X-ref. — Section 537).

Where though alternative charges were framed evidence was led solely in support of one for which accused were convicted and no prejudice to accused was shown, the proceedings did not vitiate. (Para 15)

Cases Referred: Chronological Paras
(1956) AIR 1956 SC 116 (V 43)=
(1955) 2 SCR 1140, Willie (William) Slaney v. The State of Madh Pra. 15

Mr. D. B. Mukherjee, Sr. Advocate (Mr. R. L. Kohli, Advocate, with him), for Appellants; Mr. Janardan Sharma, Advocate, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: At about 7 a.m. on October 31, 1966, two persons by name Moti Ram and Balak Ram were injured as a result of an attack on them. The attack in question is said to have been made when they were on their way to the field for cultivation. It is said that they fell unconscious at the spot itself. When they were being removed to the hospital, Moti Ram died on the way and later Balak Ram died in the hospital. The information about this offence was laid by P. W. 4, Harnam Das, the brother of the deceased Moti Ram at 9-30 a.m. on the same morning at Mullana Police Station which is about six miles from the scene of occurrence. In that information he accused the appellants as having attacked Moti Ram and Balak Ram. He claims to have seen the occurrence himself.

2. During the pendency of the investigation of the case one Rattan Lal, the brother of the appellant Gopi Chand sent a petition to the Superintendent of Police, Ambala on November 5, 1966. Therein he gave out a different version of the incident. According to the version given by him, the deceased persons and some of their relations attacked the appellants Nos. 1 to 3, when they were proceeding in a cart and that the appellant No. 4, Bhusan Lal was not present at the time of the occurrence. Therein he further stated that appellants Nos. 1 to 3 de-

fended themselves by removing the cart pegs. The Superintendent of Police forwarded this petition to the Dy. Superintendent of Police for enquiry. He in turn appears to have entrusted the same to the Inspector of Police. It is also seen from the evidence that the Superintendent of Police himself went to the locality some days later and supervised the investigation.

3. On January 31, 1967, P. W. 4, Harnam Das filed a petition before the Judicial Magistrate, 1st Class, Ambala Cantt. alleging that the police were sabotaging the prosecution case with a view to help the accused. The implied suggestion in that complaint was that with a view to undermine his complaint, the police were distorting the version showing that Bhushan Lal, appellant No. 4 was not present at the occurrence and thereby not only exonerate Bhushan Lal but also condemn the evidence adduced in support of his complaint as being unreliable.

4. After the investigation the police sent up a somewhat curious final report. Despite the fact that the complainant's version that the appellants including Bhushan Lal had attacked the deceased persons was supported by other evidence, it was recommended in that report that Bhushan Lal may be discharged and in his place Rattan Lal, the brother of the appellant Gopi Chand, who as seen earlier had sent a petition on Nov. 5, 1967, be included as an accused. At the trial of the case no evidence whatsoever was led against Rattan Lal. Therefore the complaint of P. W. 4, Harnam Das that the police were trying to sabotage the prosecution case cannot be dismissed as being frivolous.

5. Despite the report of the police, the learned Magistrate took cognizance against all the appellants as well as against Rattan Lal. But instead of framing one consolidated charge against all of them, he adopted a somewhat novel procedure. He framed two sets of alternative charges. In the first set he charged the present appellants under S. 302 read with S. 34, I. P. C. for the murder of Moti Ram and Balak Ram respectively; under the second set he charged appellants Nos. 1 to 3 and Rattan Lal for the murder of those very persons. After holding a preliminary enquiry, he committed the appellants as well as Rattan Lal to the court of the Ses-

sions Judge, Ambala for being tried under the charges mentioned above.

6. The learned Sessions Judge did not alter the charge which he could have and should have. But the prosecution adduced evidence only against the appellants. No evidence whatsoever was led against Rattan Lal, nor even the three court witnesses implicated Rattan Lal. The learned trial Judge believed the prosecution evidence, convicted the appellants under S. 302 read with S. 34, I. P. C. He acquitted Rattan Lal. For the murder of Moti Ram all the appellants were sentenced to death but in the charge for the murder of Balak Ram, appellant Bhushan Lal was sentenced to death but the other accused were sentenced to imprisonment for life. The death sentences imposed on them were subject to the confirmation by the High Court.

7. As against the decision of the learned Sessions Judge, the appellants went up in appeal to the High Court of Punjab and Haryana. The learned Sessions Judge sent up the records to the High Court with his report for confirmation of the death sentences imposed on the appellants. The appeal filed by the appellants and the reference made by the learned Sessions Judge were heard together by a division bench of the Punjab and Haryana High Court. The division bench accepted the prosecution case and confirmed the convictions of the appellants. But it reduced the sentence imposed on the appellants to imprisonment for life. Thereafter this appeal has been brought by special leave.

8. Before proceeding to consider the contentions advanced before this Court, it is necessary to set out the defence of the appellants. According to the appellant Bhushan Lal, he was not present at the time of the occurrence and that he had been falsely implicated in the case. According to the other appellants, when appellant Gopi Chand was proceeding in a cart on the morning in question, he was attacked by the deceased persons as well as by two others. Hearing his cries, appellants No. 2 and 3 rushed up to the place to rescue him. When they went there they were attacked by the party of the deceased. At that stage they defended themselves. In short their plea is one of self-defence.

9. From the two versions put forward by the prosecution and the accused, it is clear that an incident did take place at the place and time mentioned in the charge as a result of which the two deceased persons received serious injuries, one of them namely Moti Ram died very soon after the incident and the other Balak Ram on November 1, 1966. The medical evidence discloses that Moti Ram had received as many as 12 injuries, six of them were incised wounds and two were contusions. One of the contusions was in the right eye-brow. Its dimension was 4"x1". That injury had fractured his skull; the bones of the skull were broken into many pieces. The Medical Officer who had conducted the post-mortem of Moti Ram was of the opinion that primarily the deceased must have died as a result of that injury. Balak Ram had sustained six injuries; three of them were contusions, one was an incised injury. Further he had a big swelling extending from the angle of right mandible upwards above the ear and right side of the scalp. The post-mortem examination disclosed a big haematoma under the scalp. The Medical Officer was of the opinion that the death must have been the result of shock and haemorrhage due to the two blows given on the head of Balak Ram viz. injuries Nos. 1 and 5.

10. There is no doubt that both the deceased persons had received serious injuries. Both of them must have been mercilessly attacked. On November 3, 1966, the appellant Bhushan Lal, Kahan Singh and Gopi Chand were also produced for medical examination. On Bhushan Lal, there were two minor abrasions. Kahan Singh had two injuries, one was a contusion 1/2"x1/6th" on the middle of the scalp, the other was an abrasion. Gopi Chand had nine injuries, three contusions and six abrasions. One contusion was 3/4"x1/4" on the scalp, another 1/2"x1/4" again on the scalp and the third was 5/4"x1/4" on the forearm. The injuries sustained by the appellants are of very minor character.

11. There was bitter enmity between the party of the accused and the deceased. The accused and the deceased persons are close relations. Appellant Gopi Chand is the first cousin of deceased Moti Ram. As observed by the learned Judges of the

High Court when relations fall out, the bitterness is all the greater. A case and a counter-case was pending between the parties under Section 307, I. P. C. Both the parties were also being proceeded against under Section 107, I. P. C. About five days before the occurrence, the party of the deceased had purchased the land just in front of the house of the appellant, Gopi Chand. Appellant Gopi Chand wanted to purchase that land. His door opened to that land and it is admitted by P. W. 4 that because of the purchase of the land by his party, Gopi Chand might have had to close his door.

12. The prosecution case, as mentioned earlier, was that when the deceased persons were proceeding to their field for cultivation, they were attacked by the appellants; at that stage, the deceased persons put up a meek defence but they were overpowered and done to death. This version is supported primarily by the evidence of P. W. 4, Harnam Das and P. W. 5, Sadhu Singh. P. W. 4 is undoubtedly an interested witness. He is the brother of deceased Moti Ram. But his evidence gets corroboration from the First Information given by him. It must be remembered that that information was given very soon after the occurrence and therefore the possibility of putting up a false version is remote. P. W. 5 appears to be an independent witness. The evidence of P. Ws. 4 and 5 has been accepted as true both by the trial Court as well as by the High Court. Their evidence receives support from the evidence of P. W. 8, Gobind Ram and P. W. 9, Gurcharan Singh. According to P. W. 9, at about the time of the occurrence, he was returning to his house after answering the calls of nature. At that time he saw the four appellants proceeding to the scene of occurrence. At that time the appellants Kahan Singh and Gopi Chand were armed with burchas and Bahadur and Bhushan Lal were armed with Kulharis; sometime later he came to know about the murder of Moti Ram and Balak Ram. This witness also appears to be an independent witness, and his evidence had commended itself to the trial Court as well as to the High Court. The evidence of Gobind Ram is to the effect that on the morning in question he heard cries from the scene of occurrence. On hearing

those cries, he proceeded towards the scene. When he had covered about four killas, he saw the appellants coming from the opposite directions. At that time they were all armed. He enquired with them as to what had happened. They told him that they had taught a lesson to Moti Ram and Balak Ram. His evidence has also been believed by both the Courts. Ordinarily this Court does not reappraise evidence already considered by two Courts. We have found no reason to depart from that rule in this case. Apart from pointing out certain minor discrepancies in the evidence of these witnesses nothing substantial was shown to us to discredit the evidence in the case. The probabilities of the case lend support to the evidence of these witnesses. The party of the appellants must have been smarting at the rebuff they received from the deceased persons in the matter of purchase of land referred to earlier. This incident must have added to the already existing enmity between them and the party of the deceased persons, and must have served as an immediate provocation. The injuries found on the person of the deceased also go to indicate that the appellants must have been the aggressors.

13. The three Court witnesses examined in the case tried in a somewhat feeble manner to support the case of the appellants. Their evidence was mutually contradictory. Each one of them had a version of his own and further the evidence given by them in Court materially differs from the statements made by them during investigation. Hence the trial Court as well as the High Court were right in placing no reliance on their testimony. The learned Counsel for the appellants made a somewhat hesitant attempt to commend their evidence for our acceptance. Their evidence is discrepant and the version given by them is basically improbable.

14. Some comment was also made on the fact that the trial Court and the High Court erred in not taking into consideration the evidence of P. Ws. 6 and 7. It is clear from the evidence of these witnesses that they had turned hostile to the prosecution. The Public Prosecutor was allowed to cross-examine them. The trial Court and the High Court did not refer to this evidence. The contention of Mr. Mukherjee was that the trial Court

and the High Court should have attempted to salvage something out of their evidence. But there was nothing to salvage from their evidence. The effect of their evidence is that they had not seen the occurrence. Therefore there was no question of separating the grain from the chaff.

15. The only substantial argument advanced on behalf of the appellants is that the charges under which they were tried were defective and therefore the trial is vitiated. It is true that the trial Court should not have framed the alternative charges referred to earlier. If it wanted to proceed with the case against Rattan Lal as well as it should have included him along with the other accused and framed common charges. On the facts of this case there was no question of framing an alternative charge. It is not a case wherein the aid of Section 236, Cr. P. C. could have been taken. All the same there is absolutely no reason to think that the accused had been prejudiced by the alternative charges mentioned earlier. As seen earlier, the prosecution led evidence only in support of the charge that the four appellants were responsible for the murders of Moti Ram and Balak Ram. No evidence whatsoever has been led in support of the alternative charges. Counsel for the appellants was not able to show us how the accused can be said to have been prejudiced by the alternative charges. This Court has ruled in *Willie (William) Slaney v. The State of Madhya Pradesh*, (1955) 2 SCR 1140 = (AIR 1956 SC 116); that a mere defect in the charge is no ground for setting aside a conviction. Procedural laws are designed to subserve the ends of justice and not to frustrate them by mere technicalities. The object of the charge is to give an accused notice of the matter he is charged with. That does not touch jurisdiction. If the necessary information is conveyed to him and no prejudice is caused to him because of the charges, the accused cannot succeed by merely showing that the charges framed were defective. Some decisions were read to us showing that if the prosecution speaks in discordant voices as to the person or persons who are responsible for the offence, that would be a ground for acquitting the accused. It is not necessary to refer to those decisions in view of the decision of this

Court in William Slaney's case, (1955) 2 SCR 1140 = (AIR 1956 SC 116) (supra), the essential question being whether the accused were prejudiced by the charge. As mentioned earlier, we are unable to hold that the appellants in this case were prejudiced by the alternative charges referred to earlier.

16. In the result this appeal fails and the same is dismissed.

Appeal dismissed.

**AIR 1971 SUPREME COURT 987
(V 58 C 197)**

(From: Punjab and Haryana)*

I. D. DUA, V. BHARGAVA, JJ.

Chhotelal, Appellant v. Kewal Krishan Mehta, Respondent.

Civil Appeal No. 1947 of 1967, D/- 25-2-1971.

(A) Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Section 2 (i) — Where electric charges are not fixed and can only be ascertained at the end of each month after the electricity consumed is known while rent is payable in advance the electricity charges do not form part of the Rent — Civil Revision No. 1058/1966, D/- 20-11-1967 (Punjab and Haryana High Court), Reversed; (1966) 68 PLR 431, Distinguished. (Para 3)

(B) Houses and Rents — East Punjab Urban Rent Restriction Act (3 of 1949), Section 2 (i) — Whether a fixed amount paid every month as electric charges forms part of the Rent. (Quaere). (Para 3)

Cases Referred: Chronological Paras (1966) 68 Pun LR 431 = 1966 Cur

LJ 422, Hari Ram Jaggi v.

Des Raj Sethi 1, 3

M/s. R. V. Pillai, M. L. Aggarwal and N. K. Aggarwal, Advocates, for Appellant; Mr. S. P. Sinha, Sr. Advocate, (Mr. M. V. Goswami, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

BHARGAVA, J.: — This appeal by special leave is by a tenant who has been ordered to be ejected or the

*(Civil Revn. No. 1058 of 1966, D/- 20-11-1967 — Punj. & Har.)

CO/CO/A952/71/YPB/P

ground that he was in arrears of rent for more than three months and did not tender them even at the first hearing by the Rent Controller of the application for ejectment presented by the landlord under Section 13 of the East Punjab Urban Rent Restriction Act III of 1949. The High Court of Punjab and Haryana in its judgment stated that, admittedly, the rent of the premises was fixed at Rs. 20/- per month and was to be paid in advance each month. In addition, the rent of the electricity was to be paid separately. In dealing with the case, the High Court proceeded on the basis that, on the date of the application which was made on 22nd September, 1964, the rent that was in arrears amounted to Rs. 400/- calculated @ Rs. 20/- per mensem. In addition, Rs. 22.05p were due as interest on this amount up to that date, and the costs due could be taken at the figure of Rs. 25/-. This totals to a sum of Rs. 447.05p. It was argued that, in addition, a sum of Rs. 50/28p was due as electricity charges. The amount in deposit, according to the tenant, came to Rs. 469, while the various amounts due, mentioned above, made up a total of Rs. 497.33p. On these facts, the High Court further was of the view that the amount due in respect of electricity charges will certainly form part of the rent and, relying on an earlier decision of the same Court in Hari Ram Jaggi v. Des Raj Sethi, (1966) 68 Pun LR 431, it held that the deposit of Rs. 469/- did not cover the entire arrears of rent due, so that the tenant was liable to ejectment. On this view, the High Court upheld the order of the District Judge directing eviction of the tenant-appellant. This appeal is directed against this order of the High Court.

2. In deciding this case, neither the District Judge nor the High Court took care to examine the pleadings in the application for eviction put forward by the landlord-respondent, nor did they try to properly interpret the rent-note containing the terms of the tenancy. In para 1 of the application presented by the landlord, it was clearly stated that "the respondent is a tenant of the petitioner at a monthly rent of Rs. 20/-". There was no mention at this stage that there was any other amount which formed part of the rent. In Clause (c) of para. 2, it was stated that "the

respondent has installed a separate meter without the consent of the petitioner thereby causing damage to the property and has failed to pay the electricity charges from January, 1963 to November, 1963 (when he got a new meter) which come to Rs. 50/28np." In this pleading, all that was claimed was that the landlord was entitled to receive electricity charges from the tenant. It was nowhere stated that these arrears of electricity charges formed part of the rent. Consequently, no issue was framed in the trial Court on the question whether the electricity charges formed part of the rent or not. For the first time, the appellate Court took this point into consideration and held that the electricity charges formed part of the rent. On the face of it, there was no justification for accepting this new point when it was not pleaded at all in the original application. Further, even the rent note itself makes it clear that the electricity charges could not possibly form part of the rent. The rent note first mentions that the appellant is taking on rent the premises "on a monthly rent of Rs. 20/-, double of Rs. 10/-, for residential purposes, for a period of five months commencing from 1st May, 1954". Thereafter, the rent note, as translated in the paper book, shows that there was a further agreement as under:—

"I shall pay one month's rent in advance and shall remain paying rent every month in advance. I shall not sub-let the entire or any portion thereof. I shall pay the electric charges separately. I shall not make any alteration"

The agreement to pay the electric charges was, thus, separately mentioned. In Urdu, the language in which the rent note was scribed, the word which has been translated as charges was "Kiraya". It is because of the use of this word that the High Court seems to have held that the electric charges payable were part of the rent. It failed to notice that the clause itself said that this amount in respect of electric charges was to be paid separately. Further, this was not rent for electric fittings, but was the amount payable in respect of actual electric energy consumed in each month. The amount due for consumption of electricity each month could only be known at the end of that month, while, under the earlier clause

of the agreement, the rent had to be paid in advance. On the face of it, therefore, the electric charges for a month could not possibly be paid with the rent. These electric charges could not, consequently, form part of the rent. The charges were further variable and would depend on the amount of electricity consumed. No fixed amount was payable in respect of electricity charges. If electric charges were to be held to be part of the rent, it would lead to the inference that even the rent of the building was variable and was different each month. In view of these circumstances, it is clear that the District Judge and the High Court went wrong in proceeding on the basis that the electric charges formed part of the rent and that non-payment of electric charges due amounted to non-payment of arrears of rent.

3. As we have mentioned earlier, the High Court followed the decision of the same Court in the earlier case of Hari Ram Jaggi, (1966) 68 Pun LR 431 (supra). The High Court failed to notice that, in that case, there was a fixed amount payable every month as electric charges. We do not consider it necessary to express any opinion whether, in such a case, the electric charges could or could not form part of the rent. On the face of it, where the electric charges are not fixed and can only be ascertained at the end of each month, after the electricity consumed is known, while the rent is payable in advance, it is clear that the electric charges cannot be held to form part of the rent. The basis, on which that earlier case was decided, does not, therefore, exist in the present case.

4. The High Court has accepted that the amount in deposit was enough to cover arrears of rent, in case the electric charges are not treated as part of the rent. On this finding, the decision of the High Court upholding the order of eviction cannot be justified. It, however, appears that the District Judge had recorded another finding against the tenant. According to the District Judge, there was no deposit or tender even of the amount of Rs. 469/-. In the revision before the High Court, this finding of the District Judge was also assailed by the tenant. The High Court did not examine the propriety or correctness of this finding. Consequently, it is necessary that this aspect of the case should be examined by the High Court.

5. As a result, we set aside the order of the High Court dismissing the revision, and hold that, in case there was a proper deposit or tender of the sum of Rs. 469/- by the tenant, the tenant was not in arrears of rent and was not liable to ejectment. The case will now go back to the High Court for re-hearing of the revision on the question whether this sum of Rs. 469/- had been tendered or deposited in accordance with law so as to satisfy the requirements of Section 13 of Act III of 1949. The costs of this appeal will abide the result.

Order set aside; case remanded.

AIR 1971 SUPREME COURT 989
(V 58 C 198)

(From: Madras)*

S. M. SIKRI, C. J., J. M. SHELAT,
C. A. VAIDIALINGAM,
A. N. GROVER AND A. N. RAY, JJ.
Manali Ramakrishna Mudaliar,
Appellant v. State of Madras and another, Respondents.

Civil Appeal No. 168 of 1967, D/-
2-3-1971.

(A) Tenancy Laws — Madras Lease-holds (Abolition and Conversion into Ryotwari) Act (27 of 1963), Section 4 — The Act cannot be challenged as unconstitutional on the ground of violation of fundamental rights under Articles 19 and 31 as it is completely protected by Article 31-A — (X-Ref:— Constitution of India, Article 31-A) — AIR 1971 SC 161, Followed. (Para 8)

The Act is a part of an agrarian reform. Its provisions relating to acquisition on extinguishment of the rights of the intermediate holders fall within Article 31-A. (Para 8)

(B) Tenancy Laws — Madras Lease-holds (Abolition and Conversion into Ryotwari) Act (27 of 1963), Section 9 — There is no bar to applying the provisions of the Act to a particular village merely because proceedings under the Land Acquisition Act, 1894 have been taken in respect of certain lands especially when no award of compensation has been made and the lands have also not vested in the State. (Para 9)

The provisions of the Land Acquisition Act and the Act operate on

*(Writ Petition No. 1958 of 1965, D/-
24-6-1966 — Mad.)

CO/CO/B233/71/KSB/P

different fields. The proceedings taken under the Land Acquisition Act seek to acquire the entire interest of everyone in the lands and there is no restriction in the right sought to be acquired. The lessee will be entitled only to that portion of compensation which is relatable to his right; and other people interested in the land will be entitled to the other portion of compensation. If the lessee is granted, under Section 9 of the Act a ryotwari patta, then in respect of those lands, he will be entitled to get compensation under the Land Acquisition Act. (Para 9)

Cases Referred: Chronological Paras
(1971) AIR 1971 SC 161 (V 58)

= 1971 SCD 156, Khajamian

Wakf Estates v. State of Madras 8

Mr. P. Ram Reddy, Sr. Advocate, (Mr. A. V. V. Nair, Advocate, with him), for Appellant; Mr. S. V. Gupte, Sr. Advocate, (Mr. A. V. Rangam, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

VAIDIALINGAM J.: — This appeal on certificate, issued under Articles 132 (1) and 133 (1) (a) and (c), is directed against the judgment and order dated June 24, 1966 of the Madras High Court in Writ Petition No. 1958 of 1965.

2. The Madras Lease-holds (Abolition and Conversion into Ryotwari) Act, 1963 (Madras Act 27 of 1963), hereinafter to be referred as the Act, received the assent of the President on December 12, 1963 and was published in the Gazette on January 1, 1964. The Act extends to the lease-holds specified in the schedule to the Act. In exercise of the powers under Section 1 (3) of the Act, the State of Madras in G. O. Press No. 311, Revenue, dated February 9, 1965 notified that the Act shall come into force on February 15, 1965. Under Section 4 of the Act with effect on and from the appointed day, namely, February 15, 1965, the lease of every lease-hold shall cease and every lease-holds including all communal lands and parambokes, etc., stood transferred and vested in the Government free of all encumbrances. The Madras Irrigation Cess Act and all other enactments applicable to Ryotwari lands were also to apply to the lease-hold. The expression "leasehold" was defined as any village specified in the

first Schedule. Under Section 9, on and from the appointed day, every ryot was entitled to ryotwari patta in respect of all his owned lands and the lessee was also entitled to a ryotwari patta in respect of his owned lands. A "lessee" was defined in the Act as a person to whom the lease was granted by the Government and included his heirs, legal representatives and assigns. Grant Lyon in Saidapet taluk of Chingleput district was one of the leasehold villages specified in the first Schedule to the Act and as such on and from February 15, 1965 it stood transferred to the Government and vested in them free from all encumbrances as provided under Sec. 4 of the Act. The Tahsildar, Saidapet, issued a notice to the appellant on April 9, 1965 calling upon him to keep ready all documents, accounts, registers, pattas, muchilikas, etc., relating to the leasehold in respect of Grant Lyon in Saidapet taluk. The notice also mentioned that the Tahsildar will take possession of those items on April 17, 1965.

3. On receipt of the notice on April 20, 1965, issued by the Tahsildar, the appellant filed the writ petition in the Madras High Court praying for the issue of a writ of certiorari to quash the notification of the Government of Madras G. O. Press No. 311, Revenue, dated February 9, 1965 on the ground that the provisions of the Act are illegal and unconstitutional. The appellant also prayed for an order restraining the State of Madras and its officers from giving effect to the provisions of the Act and the notification issued thereunder relating to Grant Lyon village.

4. According to the appellant the lands in the Grant Lyon village had been granted on a lease on December 2, 1904 by the Secretary of State for India in Council to his paternal-grandfather. The lease was for a period of 99 years and the appellant's family as lessees were entitled to be in possession of the property paying to the Government every year a sum of Rs. 2100/- as lease amount. The appellant claimed that he and his predecessors in title were in continuous possession and occupation of the lands in accordance with the lease and have been paying the lease amount to the Government regularly. While so the Act was passed by the State of Madras providing for termination of leases of

certain leaseholds granted by the Government and the acquisition of the rights of lessees in such leaseholds and for introduction of ryotwari settlements. The appellant pleaded that the Act, if implemented, affects his fundamental right to hold and enjoy property in accordance with the lease deed and that the provisions for payment of compensation as provided in the Act were illusory and contrary to the provisions of the Constitution. The Act, according to the appellant, violates the provisions of Articles 19 and 31 of the Constitution. As the Government had been attempting to enforce the provisions of the Act in pursuance of the notice issued by the Tahsildar on April 9, 1965, the appellant had to approach the High Court under Article 226 seeking relief to strike down the Act. The appellant further stated that all the lands in the village have been notified for acquisition under the Land Acquisition Act, 1894 (Central Act 1 of 1894). The notification under Section 4 had been issued on April 4, 1963 and the declaration has also been made in January, 1964. In view of this the appellant further raised a contention that his right to receive the market value under the Land Acquisition Act was also sought to be interfered with by enforcing the provisions of the Act.

5. The State of Madras opposed the writ petition and contended that the Act does not violate any fundamental right of the appellant and that the Act is saved by Article 31-A of the Constitution. The State further contended that the mere fact that a notification under Section 4 and a declaration under Section 6 had been issued under the Land Acquisition Act, does not debar the State from enforcing the provisions of the Act.

6. The High Court by its order under attack upheld the validity of the Act. The High Court further held that as an award has not been made under the Land Acquisition Act and as the land has not vested in the State under Section 16 of the Land Acquisition Act, the State was entitled to enforce the provisions of the Act. In this view it upheld the validity not only of the Act but also of the Government Order dated February 9, 1965 bringing into force the provisions of the Act as also the legality of the notice issued by the Tahsildar on April 9, 1965.

7. In this appeal before us Mr. P. Ram Reddy, learned counsel for the appellant raised two contentions: The first contention related to the unconstitutionality of the Act on the ground that it affects the fundamental rights guaranteed to the appellant under Articles 19 and 31 of the Constitution. The second contention related to the enforceability of the Act in view of the proceedings under the Land Acquisition Act, already initiated.

8. So far as the first contention regarding the constitutional validity of the Act is concerned, it is now concluded against the appellant by the decision of this Court in *Khajamian Wakf Estates v. The State of Madras*, AIR 1971 SC 161. The Act, as well as the two other enactments, were attacked as violating the fundamental rights guaranteed under Articles 14, 19 and 31 of the Constitution. The Constitution Bench rejected this contention and held that the Act, as well as the other two enactments referred to in the decision, are completely protected by Article 31-A of the Constitution. It has been further held that the impugned Act provides for acquisition by the State of an 'estate' as contemplated by Article 31-A and it seeks to abolish all intermediate holders and to establish direct relationship between the Government and the occupants of the concerned lands. It is further held that the Act is a piece of legislation undertaken as a part of agrarian reform and that the provisions relating to the acquisition on the extinguishment of the rights of the intermediate holders fall within the meaning of Article 31-A. Though this decision of this Court was not available to the High Court, nevertheless, its conclusion that the Act is not invalid, is correct. Therefore, the first contention will have to be rejected.

9. So far as the second contention is concerned, in our opinion, the fact that proceedings under the Land Acquisition Act, 1894, have been taken is no bar to applying the provisions of the Act to the village in question. The dates given earlier show that no award under the Land Acquisition Act has been passed and the lands have also not vested in the State under Section 16 of the said Act. The provisions of the Land Acquisition Act and the Act operate on different fields. The appellant will be entitled to ryotwari

patta under Sec. 9 of the Act. The proceedings taken under the Land Acquisition Act seek to acquire the entire interest of everyone in the lands and there is no restriction in the right sought to be acquired. The appellant will be entitled only to that portion of compensation which is relating to his right; and other people interested in the land will be entitled to the other portion of compensation. If the appellant is granted, under Section 9 of the Act a ryotwari patta, then in respect of those lands, he will be entitled to get compensation under the Land Acquisition Act. In this view the application of the Act to the village in question will not affect his other rights in any manner. We are of the opinion that the stand taken by the State before the High Court in paragraph 7 of its counter-affidavit in the writ petition, is correct. Hence the second contention also fails.

10. The appeal fails and is dismissed. In view of the fact that the decision of this Court regarding the constitutional validity of the Act was given only after the decision of the High Court, there will be no order as to costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 991
(V 58 C 199)

(From: Gujarat)*

G. K. MITTER AND
A. N. GROVER, JJ.

Ahmed Suleman Bhorat and others, Appellants v. The State of Gujarat, Respondent.

Criminal Appeal No. 198 of 1969,
D/- 2-3-1971.

Evidence — Credibility — Even though the Court is unable to rely fully on the evidence of prosecution witnesses with regard to some of the accused persons it can still accept the evidence of these witnesses with regard to other accused persons and hold them guilty — (X-Ref: Evidence Act (1872), Section 3)—(X-Ref: Criminal P. C. (1898); Section 367).

(Para 14)

*(Cri. Appl. No. 601 of 1968, D/- 18-4-1969 — Guj.)

CO/CO/B234/71/DHZ/P

Mr. D. B. Mukherjee, Sr. Advocate, (M/s. D. K. Shah and N. N. Keswani, Advocates, with him), for Appellants; M/s. P. K. Chatterjee, B. D. Sharma and S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

MITTER, J.: — In this appeal by special leave from a judgment of the Gujarat High Court the point canvassed before us was that inasmuch as the High Court found itself unable to rely fully on the evidence of six of the main prosecution witnesses with regard to at least two of the appellants before it in view of the evidence as to alibi, it had gone wrong in accepting the evidence with regard to the appellants before us and upholding their conviction.

2. The relevant facts for the disposal of the appeal may be stated as follows. The village of Nani Naroli in the District of Surat has a population of roughly 3,500. The Bhora community to which the appellants belong command a majority thereof. The other community which has any strength is that of the Maleka commanding a population of about 1,000. Both these communities are Muslim. Besides these two there is a small population of other people composed of Hindus and Vasavas. There was a good deal of hostility between Bhoras and the Maleks mainly engendered as a result of the Gram Panchayat elections in the middle of the year 1967 whereat the Bhoras carried the day, and the original accused No. 1 and one Lalji were elected as Sarpanch and Deputy Sarpanch defeating the two Malek candidates. A Vasava by name Punia Jafra was murdered a few weeks before November 9, 1967 when the incident out of which this appeal arises took place. Some of the Maleks, namely, Gulab Amir and his sons Vazir and Kalu, the last two losing their lives in the aforesaid incident, had helped the police in tracing out the dead body of Punia and had taken part in the investigations. This was followed by the arrest by the police of the original accused 1 to 10 in this case. Although they were released by the Judicial Magistrate on bail on October 11, 1967 applications were made to him as well as to the Sessions Judge at Surat to cancel their bails. It was alleged in these applications that the

said accused were threatening to kill the persons who had helped the police in the investigation of Punia's murder and had given evidence against them. The Judicial Magistrate at Kathor had fixed the hearing of the application to cancel the bail of accused 1 to 10 on 7th November, 1967, but the application was not heard on that day because the notices had not been served on the accused persons. Not unnaturally this action of Gulab and his sons considerably angered the Bhora community and in particular the said ten accused. What exactly sparked off the trouble on the 9th November is not quite clear. The prosecution case and the defence version about its origin conflict with each other. However there can be little doubt that some sort of affray did take place a short while before this incident and accused No. 7 (one of the appellants before this Court), accused Nos. 28 and 36 and one Ayeshabibi were injured. A complaint was lodged at the police station against four of the Maleks including the three persons who lost their lives later. According to the prosecution, about 4.30 p. m. on November 9, 1967 a large crowd of Bhoras collected near a well about 140 feet from the house of Vazir armed with weapons like dharias, spears, axes and sticks and proceeded towards the house of Vazir. Two of the accused i.e., Nos. 12 and 13 (appellants before this Court) were also in the crowd with their guns. On seeing the crowd approaching, Vazir's wife Subhanbibi (P. W. 36) closed the front as well as the back doors of their house but the crowd began to break them open. Vazir who was in the house went upstairs in order to avoid capture. Some members of the crowd rushed towards the back of Vazir's house while some of them managed to get on to the upper portion of Vazir's house and others scaled the roof of his house. Vazir managed to get into Mohmad's house next door through a window on the first floor. This however did not save him from the crowd; some members whereof got inside Mohmad's house and catching Vazir in the upper portion of Mohmad's house killed him and threw his body down on the ground below. At or about this time some 14 or 15 other members of the crowd rushed into the courtyard between the houses of Rehman which lay in be-

tween Vazir's house and Hussain Gulab and Mohmad Mustafa's houses and brutally injured Rasul Amir who was there. Someone in the crowd shouted that Balu and Kalu, members of the Malek community, were running away. Kalu was given a chase up the road, captured and killed. Thereafter the crowd returned to the above-mentioned courtyard and finding that Rasul was not dead they dragged him out of the house of Mohmad Mustafa where he had taken shelter and inflicted further injuries on him. As a result of this he had succumbed. Thereafter the dead bodies of Vazir and Rasul were taken away by some members of the crowd and left on the edge of the road about 125 feet away from Vazir's house. It appears that there were four armed police constables posted in the village for the purpose of maintaining law and order in view of the prevailing unsettled conditions. They came to the place where the quarrel was taking place and found the crowd attacking Vazir's house. One of them wanted permission to fire his rifle but this was rejected by the Head Constable. This constable went in a truck to the police station at Mangrol where he gave a report about the quarrel between the Maleks and Bhoras going in the village. The police Sub-Inspector who was away from the station at that time came to the village round about 10 p. m., in the night and recorded the complaint of Gulab Amir at about 11 p. m.

3. No less than 43 persons were charged with having formed an unlawful assembly and taking part in the incident. At the trial all the accused pleaded not guilty but four of them, accused 1, 3, 12 and 13 pleaded the defence of alibi. The appellants before us are original accused 2, 5, 7, 12 and 13.

4. The prosecution examined as many as 19 witnesses. The Sessions Judge rejected the evidence of a number of them as unreliable but applying the test of there being consistent evidence of at least four reliable witnesses as against thirteen of the accused persons as members of an unlawful assembly and responsible for the killings, he found them guilty of the offences punishable under Sections 147, 148 and 302 read with Section 149, I. P. C. He acquitted the

others by the application of the test mentioned above.

5. All these thirteen accused went up in appeal to the High Court while the State preferred an appeal against the acquittal of thirty persons. The High Court rejected the State's appeal and allowed the appeal of eight out of the thirteen appellants before it. According to the High Court there was no dispute:

"that there was a crowd of Bhoras assembled near the well and that the persons forming this crowd did not go to the house of Vazir, Rasul and Kalu. The dispute that was pressed in the trial Court and which is also pressed before us centres round the reliability of the witnesses examined and the identification of a particular accused by those witnesses".

6. There can be no doubt whatsoever that a large number of persons must have taken part in killing the three Maleks. The evidence of Dr. Pandya shows that there were no less than 45 injuries on different parts of the body of Vazir. These consisted of wounds and contusions by means of sharp-edged instruments and sticks. The wounds, according to the doctor, could have been caused by weapons like spears and dharias. One injury, viz., injury No. 28, was individually sufficient to cause the death. On the body of Kalu 44 injuries were found caused by spears, dharias and sticks. On the body of Rasul as many as 40 injuries were found 37 of which were wounds.

7. The High Court relied mainly upon the evidence of six witnesses and although some doubt was cast about the reliability of two out of the above number it upheld the conviction of the five appellants before us. It will suffice for our purpose to examine the evidence of the other four witnesses to see whether notwithstanding the acquittal by the High Court giving the benefit of doubt to some, the testimony of these persons can be accepted for maintaining the conviction of the appellants.

8. The first witness to be considered in this connection is Subhan Bibi (P. W. 36), widow of Vazir. Before the Sessions Court she stated that when she saw the crowd at the well shouting to kill Vazir, Rehman

and Kalu, she could identify at least 26 persons including one absconding accused Ayub Zheri. She named all the 25 persons and identified them before the Court. Her evidence was that a number of persons had entered the house from the back and she even gave their names and identified them. She said that she had seen accused 1, 2 and 16 actually killing Vazir on the upper portion of Mohmad's house. According to her, accused 7, 8 and Ayub Zheri carried the dead body on to the road and left it there. The High Court examined some alleged infirmities in her evidence. This mainly related to the number of persons she had mentioned to others as having taken part in the crime. Reliance was placed on the fact that she had mentioned to the police about having seen 39 persons whereas in the Sessions Court she identified only 26. She however denied that she had given more than 26 names to the police. According to her father-in-law she had given the names of only 8 or 10 persons and no more. It was also pointed out that she had not said to the police that she saw the dead body of her husband being thrown on the ground from the upper storey of Mohmad's house. The High Court examined her testimony in great detail and agreeing with the Sessions Judge on this point accepted her evidence that it was reliable to the extent that she had given the names of eight persons, seven of them being appellants to the High Court who had entered her house on that afternoon and pursued her husband with the object of killing him. The High Court found that she had improved upon her story to the police before the Sessions Court but even then her evidence to the extent that accused 1, 2, 12 and 13 were amongst the persons who had entered her house from the back was acceptable. The High Court also accepted her testimony that accused 7, 8 and Abub Zheri had lifted the dead body of Vazir and left it on the road. According to the High Court the testimony of this witness showed that accused 2, 5, 7, 12 and 13 were members of an unlawful assembly.

9. The High Court did not accept the evidence of the prosecution witness, Yakub and we are leaving him out of account. The third witness relied on by the High Court was Yusuf, a young boy of 12 years. His

version was that he had gone to the locality of Vazir's house at about 4 p. m. on the fateful day to see about the cattle in the shed belonging to his father and finding no cattle there he had gone to Vazir's house when he saw the crowd coming from the well of which he named no less than 27 persons. He also said that Subhan-bibi had closed the door when he was inside the house. According to him five persons had entered Vazir's house from the front. The High Court rejected the defence comment that he was a chance witness and held that it was not unnatural for him to have gone there and been present on the spot. The five persons named by him as having entered Vazir's house were accused 1, 5, 8, 12 and 13. According to the High Court no contradiction had been shown as regards this part of his evidence and it found no reason to disbelieve him on this point.

10. The High Court rejected the evidence of Nathu Kala but accepted the evidence of Deva Namla (P. W. 10). This witness was not a member of either community. His house was immediately adjacent to Vazir's. According to this witness, at the time when the mob came to the house of Vazir he was in his own house and had seen the crowd approaching Vazir's house and breaking open the doors. He also said that certain persons had climbed on to the roof of Vazir's house and shouted that Vazir should be killed. He had heard two gun shots and taking fright had gone inside the house and closed the doors. He did not come out even when the police came there at about 10 p.m. The next morning he went to his fields and stayed away from his house for 3 or 4 days. His statement was recorded by the police on 13th November 1967. He named certain persons as having been in the crowd and identified among those accused 1, 2, 5, 7, 12 and 13. The High Court held that he was a natural witness and the mere fact that he had gone away from the village and not made any statement to the police before November 13, was not enough to reject his evidence. Although he named one Ibrahim Suleman as a person seen among the crowd near Vazir's house, he could not properly identify that person among the accused before the Sessions Court. The High Court accepted his evidence as to the identifi-

cation of eight accused including accused 1, 2, 5, 7, 12 and 13.

11. Leaving out of account the other witnesses whose testimony was accepted in part and rejected as to the rest by the High Court, we come to the prosecution witness, Halimabibi. Her version was as follows. She was working in the field of Vazir in the village Togapur. At about 4.30 p. m. on the 9th November she was going home following a foot track near the cart track along which Kalu was running when he was killed. According to this witness she saw from a distance of about 50 or 100 feet that Kalu was running along Togapur road and was chased by about 10 to 20 Bhoras. She identified 15 persons out of them including Ayub Zheri. According to her a gun was fired at Kalu's direction whereupon Kalu stopped and he was immediately pounced upon by the crowd and put to death. She went to the spot where Kalu was lying and after waiting for some time she went home. It was urged that she was a chance witness and that she had met Subhanbibi, widow of Vazir the same evening. The High Court took the view that these points did not detract from her credibility and there was no reason for her to concoct the whole untrue story if she had not seen the incident of Kalu being murdered. Excepting that she had gone in the identification of accused No. 33 there was nothing to reject her evidence as to the substantive identification of accused 1, 2, 3, 4, 5, 7, 8, 12 among others.

12. The High Court found the evidence of six of the prosecution witnesses acceptable namely, Subhanbibi, widow of Vazir, Yusuf Gulab Malek, Dava Namla, Saberabibi, wife of Hussain Gulab and Halimabibi. The cumulative effect of the testimony of these witnesses was that accused 1 and 8 were two of the assailants of the Maleks on 9th November. The High Court however took the view that there was reasonable doubt about the presence of accused 1 and 8 at Naroli at the time when the incident took place. For this the High Court relied mainly on the evidence of a Magistrate of Kathor to the effect that these two persons were present in his Court at least till 2.30 or 3 p. m. on the day of the incident and Kathor being at a distance of 17 or 18 miles

from the village where the occurrence had taken place they could not have been present at Nani Naroli between 4 and 4.30 p. m. We have looked into the evidence of the Magistrate and speaking for ourselves we are not disposed to place much reliance thereon but inasmuch as the High Court has acted on that in giving the benefit of doubt to accused 1 and 8 we propose to say nothing more on the subject.

13. We find that the evidence of at least four witnesses, Subhanbibi, Deva Namla, Yusuf Gulab Malek and Halimabibi discussed above are acceptable. Subhanbibi is the widow of one of the deceased. She was present in the house: she tried to save her husband; she saw a number of accused trying to break the doors open and she saw her husband being injured and his dead body being thrown on the ground and being carried away from there. Deva Namla was not an interested witness at all. Yusuf Gulab Malek was a boy of 12 who could not have withstood cross-examination effectively unless he was speaking the truth. As regards Halimabibi the only interest if at all which she had in the deceased was that she had been working in the field of Vazir. But she gave a very consistent story of the chasing and killing of Kalu by some of the accused and she named and identified a number of them and was not shaken in cross-examination.

14. If the evidence of these four persons was accepted by the High Court—and we see no reason to the contrary—it must be held that the appellants were members of an unlawful assembly who were directly responsible for committing the crime of murder of three persons. We see no reason to take a view different from that of the High Court as regards their guilt and we accordingly dismiss the appeal.

Appeal dismissed.

AIR 1971 SUPREME COURT 996
(V 58 C 200)

(From: Kerala)*

G. K. MITTER, K. S. HEGDE
AND P. JAGANMOHAN REDDY, JJ.

The State Bank of Travancore,
Appellant v. Arvindan Kunju Panicker
and others, Respondents.

Civil Appeal No. 378 of 1967, D/-
19-3-1971.

(A) Evidence Act (1872), Section
114 — A Hindu family will be pre-
sumed to be joint unless the contrary
is established — S. A. No. 431 of 1961
(Kerala H. C.), D/- 17-1-1966, Affirm-
ed. (Para 7)

Where there is no reason to dis-
believe evidence adduced by plaintiffs
to show that the Tharwad is undivid-
ed and that the original first plaintiff
was the Karanavan of the Tharwad and
this evidence was un rebutted it will
be presumed that the Tharwad is un-
divided and that the original first
plaintiff was Karanavan of the Thar-
wad. (Para 7)

(B) Limitation Act (1963), Arti-
cle 65 — A permissive possession can-
not be converted into an adverse pos-
session unless it is proved that the
person in possession asserted an
adverse title to the property to the
knowledge of the true owners for a
period of twelve years or more —
S. A. No. 431 of 1961, D/- 17-1-1966
(Ker), Affirmed. (Para 9)

Where the suit property of
Tharwad was all along in the posses-
sion of tenants, the possession of a
person who has only a lien over the
property for the amount advanced by
him, will be symbolical and will
only be permissive possession. Also,
subsequent purchaser of that person's
right can have no better title than
what that person had. So in absence
of evidence to show that that person
or his successor in interest asserted
any hostile title to the suit property
to the knowledge of the true owners
at any time before the suit, their pos-
session cannot be said to be adverse
possession. (Para 9)

Mr. P. C. Bhartari, Advocate, for
Appellant; Mr. R. Gopalakrishnan,
Advocate, for Respondents Nos. 1 to
3.

*(S. A. No. 431 of 1961, D/- 17-1-1966
— Ker.)

CO/CO/B444/71/MLD/P.

The Judgment of the Court was
delivered by

HEGDE, J.: — This appeal by
special leave is directed against the
decision of a single Judge of the
Kerala High Court in a second appeal.
Therein the learned Judge allowed the
appeal of the plaintiffs, reversed the
judgment and decree of the first appel-
late Court and restored that of the
trial Court.

2. In order to decide the points
arising for decision in this appeal, it
is necessary to set out in brief the
facts of the case. This litigation has
a long history. The property con-
cerned in the suit is 99 cents in extent
but it contains some buildings. It is
situate in a municipal town of
Kottayam taluk. It appears that the
property has now become very valua-
ble. This property admittedly at one
time belonged to an Ezhava Marumak-
kathayam Tharwad. Three junior
members of that Tharwad sold that
property to a third party in 1063 M. E.
(Mallayalam Era). Three other junior
members of that Tharwad sued for the
recovery of that property in 1074 M. E.
after setting aside the alienation which
according to the plaintiffs therein was
not valid and binding on the Tharwad.
That suit was decreed and the plain-
tiffs therein were allowed to recover
possession of that property on their
paying the alienee a sum of Rs. 454/-.
The decree-holders were unable to
pay that sum. They applied to the
Court to permit one Krishnan
Krishnan, a relation of theirs to depo-
sit the amount in question into
Court and take delivery of the pro-
perty. The Court allowed that appli-
cation. Thereafter the said Krishnan
Krishnan deposited Rs. 454/- into
Court through the plaintiffs' lawyer
and took delivery of the property in
1082 M. E. through Court. Kunjappi
Velu, a creditor of Krishnan Krishnan
filed a suit against him in 1089 M. E.,
obtained a decree and thereafter put
up the property in question for sale
and purchased the same in Court
auction. He took delivery of that pro-
perty through Court in 1102 M. E.
The said Kunjappi Velu sold the pro-
perty to one Punnen Thomas very
soon after he took delivery of the pro-
perty. This purchase by Punnen
Thomas was for and on behalf of one
Kochu Thommen Kuruville. Punnen
Thomas executed a release deed in
favour of Kuruville in 1121 M. E. On

8-5-1128 Kuruvilla mortgaged the suit property for Rs. 37,000/- in favour of Travancore Forward Bank Ltd., Kottayam. As Kuruvilla did not discharge that debt, the bank obtained a mortgage decree against him. The Travancore Forward Bank Ltd. was amalgamated with the State Bank of Travancore (the appellant herein). Thereafter the State Bank of Travancore was impleaded as an additional plaintiff in that suit. On 12-8-1121 M. E., four members of the Ezhava Marumakkathayam Tharwad referred to earlier instituted the suit from which this appeal arises seeking possession of the suit property. The first plaintiff (since deceased) claimed to be the Karanavan of the Tharwad. Their case is that Krishnan Krishnan who deposited Rs. 454/- into Court and took delivery of the suit property was only an agent of the Tharwad. He had no right in that property. He was entitled to keep possession of the property until the amount deposited by him into Court was repaid to him. It was further alleged in the plaint that there was an agreement between Krishnan Krishnan and the plaintiffs in the suit wherein the deposit was made that Krishnan Krishnan should redeliver the property to the Tharwad on receiving the amount in question. The plaintiffs in the present case offered to pay to Krishnan Krishnan's representative the sum of Rs. 454/-.

3. The agreement alleged to have been entered into between the plaintiffs in the first suit and Krishnan Krishnan has neither been accepted by the first appellate Court nor was it relied upon by the High Court. There is no reliable evidence in support of that agreement.

4. The trial Court came to the conclusion that Krishnan Krishnan in law can only be an agent of the plaintiffs in the first suit. He can only have a lien over the suit property and the subsequent purchasers of his right can have no better title than what Krishnan Krishnan had. That Court also repelled the contention of the contesting defendants that Krishnan Krishnan or those who acquired his rights had perfected their title to the suit property by adverse possession. It held that the possession of Krishnan Krishnan was permissive and the same could not be considered as being adverse to the real owners. It further held that the property in question

was always in the possession of the tenants and it was never in the possession of Krishnan Krishnan or those who purchased his rights. It also held that there is no evidence to show that either Krishnan Krishnan or the subsequent purchasers of the suit property ever to the knowledge of the true owners asserted hostile title to the property. The trial Court also did not accept the contention of the defendants that the plaintiffs have not succeeded in proving that the Tharwad which was the original owner of the suit property is joint or original first plaintiff was Karanavan of that Tharwad when the suit was instituted.

5. In appeal the learned appellate Judge came to the conclusion that the plaintiffs had not established that the Tharwad in question is undivided nor have they proved that the original first plaintiff was the Karanavan of the Tharwad when the suit was instituted. He further came to the conclusion that Krishnan Krishnan must be held to have acquired an absolute title to the suit property as the plaintiffs have not succeeded in proving the agreement pleaded by them. It upheld the contention of the defendants that Krishnan Krishnan and thereafter his successors in interest had acquired full title to the property by adverse possession.

6. In second appeal a learned single Judge of the High Court disagreed with each one of the conclusions reached by the first appellate Court and agreed with those reached by the trial Court. Dealing with the question whether the Tharwad in question is an undivided Tharwad, he pointed out that the evidence of the plaintiffs in that regard stands un rebutted. He also accepted the contention of the plaintiffs that the first plaintiff was the Karanavan of that Tharwad when the suit was instituted. He further held that on the basis of the material on record, the only conclusion possible is that Krishnan Krishnan took possession of the suit property as the agent of the plaintiffs in the first suit and as such his possession was permissive. He agreed with the trial Court that the actual possession of the property was always with the tenants and the possession of Krishnan Krishnan and that of his successors in interest has not been shown to be adverse to that of the true

owners. Each one of these findings were challenged before us.

7. We shall first take up the questions whether the plaintiff's Tharwad was divided or undivided and further whether the original first plaintiff was the Karanavan of the Tharwad when the suit was instituted. On these questions the evidence is completely one sided. The plaintiffs have adduced evidence to show that the Tharwad is undivided and that the original first plaintiff was the Karanavan of the Tharwad. There is no reason to disbelieve that evidence. That evidence was un rebutted. That apart, a Hindu family is presumed to be joint unless the contrary is established. There is no evidence on record to rebut that presumption. We agree with the learned Judge of the High Court that there was no basis for the first appellate Court for doubting the fact that the original first plaintiff was the Karanavan of the Tharwad at the relevant time.

8. Now coming to the question as to the nature of the possession of Krishnan Krishnan, the High Court has not relied on the agreement pleaded by the plaintiffs. There is no reliable evidence to support that agreement. But the evidence adduced in this case including unimpeachable documentary evidence clearly shows that assistance of Krishnan Krishnan (Krishnan Krishnan was the father of some of the then members of the Tharwad) was sought by the plaintiffs in that suit to tide over the difficulty in the matter of depositing the required amount into court. As mentioned earlier the amount in question was deposited into court through the plaintiffs' lawyer and Krishnan Krishnan took possession of the suit property in execution of the decree in favour of the plaintiffs in that suit. No sale deed or any other document was executed in favour of Krishnan Krishnan nor could the plaintiffs in that suit validly alienate that property as they were only junior members of the family. We agree with the High Court that as Krishnan Krishnan paid the amount that was payable by the Tharwad and took possession of the property, he could only have a lien over the property for the amount advanced by him. Neither Vellu nor Kuruvilla who purchased the rights of Krishnan Krishnan can in law have greater rights in that property than what Krishnan

Krishnan had. On purchasing the rights of Krishnan Krishnan they had merely stepped into his shoes.

9. Now coming to the question of adverse possession, there is conclusive evidence to show that the suit property was at all times in the possession of the tenants of the Tharwad referred to earlier. Krishnan Krishnan, Vellu and Kuruvilla at best could have only collected the rent. The evidence in this regard has been discussed in detail by the learned judge of the High Court. It is not necessary to deal with that evidence over again. We accept the conclusion of the learned judge that the suit property was all along in the possession of the tenants. Further as Krishnan Krishnan had only a lien over the property for the amount advanced by him his possession of the suit property which in this case is symbolical, must be held to be a permissive possession. The possession of Vellu and Kuruvilla for the same reason must be held to be permissive possession. A permissive possession cannot be converted into an adverse possession unless it is proved that the person in possession asserted an adverse title to the property to the knowledge of true owners for a period of twelve years or more. There is no evidence to show that either Krishnan Krishnan or Vellu or Kuruvilla asserted any hostile title to the suit property to the knowledge of the true owners at any time before the present suit.

10. In the result we agree with the conclusions reached by the learned Judge of the High Court and dismiss this appeal with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 998
(V 58 C 201)**

(From: Bombay)*

**S. M. SIKRI, C. J., J. M. SHELAT,
C. A. VAIDIALINGAM,
A. N. GROVER AND A. N. RAY, JJ.**
K. H. Phadnis, Appellant v. State
of Maharashtra, Respondent.

Civil Appeal No. 381 of 1967, D/-
19-3-1971.

**Constitution of India, Article 311
— Reversion of Government servant**

*(Appeal No. 111 of 1963, D/- 5-7-1966
— Bom.)

DO/DO/B442/71/BNP/M

from temporary officiating post to substantive post by way of punishments attracts Article 311 — Appeal No. 111 of 1963, D/- 5-7-1966 (Bom), Reversed. (Para 17)

Cases Referred: Chronological Paras (1971) 1971 Lab IC (Notes) 1 =

Civil Appeal No. 25 of 1967, D/-

3-12-1970 (SC), Appar Apar Singh

v. State of Punjab 13

(1962) AIR 1962 SC 1711 (V 49)

= (1963) 1 SCR 416, Sukhbans

Singh v. State of Punjab 12

(1958) AIR 1958 SC 36 (V 45)

= 1958 SCR 828, Parshotam

Lal Dhingra v. Union of India 9, 11

M/s. R. K. Garg, S. C. Agarwala and D. P. Singh, Advocates of M/s. Ramamurthi and Co., and M/s. V. J. Francis and R. K. Jain, Advocates, for Appellant; Mr. V. S. Desai, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

RAY, J.: — This is an appeal by special leave from the judgment dated 30 June, 1966 and 4 and 5 July, 1966 of the High Court at Bombay reversing the judgment of the learned Single Judge dated 29 October, 1963.

2. The only question in this appeal is whether the order of the Government of Bombay dated 8 May, 1962 "repatriating" the appellant from the temporary post of Controller of Food Grains Department, Bombay to his parent Department of Excise and Prohibition amounted to a reduction in rank in violation of the provisions contained in Article 311 of the Constitution.

3. The appellant joined service as Sub-Inspector of Excise in the Excise and Prohibition Department of the Government of Bombay in the year 1938. He was thereafter selected for transfer to the Bombay City Police Department. In 1942 he was sent on "deputation" to the Civil Supplies Department as an Inspector. He continued to work in that department up to the month of February, 1955. By February, 1955 he had by various promotions become Rationing Officer which was a gazetted post and he was then drawing a salary of Rs. 530/- p. m. in the grade of Rs. 350-20-550. In 1955 there was decontrol of foodgrains. The post was abolished. The appellant was reverted to the Excise Department. In course of time he was

promoted to the post of District Inspector in the Excise Department in the grade of salary of Rs. 220-10-300. In 1957, the Government of Bombay again introduced the system of distribution of foodgrains on the basis of household cards. The appellant in view of his record of service in the Civil Supplies Department was asked to go on "deputation" in the Agriculture and Forests Department as a Sub-Inspector under the Controller of Foodgrains Distribution, Bombay. In 1960, the appellant was appointed to a temporary post of Controller of Foodgrains Distribution, Bombay in the grade of Rs. 475-25-600-50-750. In 1961 the appellant was drawing a salary of Rs. 500/- p. m. as a Controller of Foodgrains Distribution.

4. The appellant married his daughter in the month of December, 1961. The appellant's daughter, a qualified doctor, was then working as a Resident Medical Officer in the Bombay Municipal Corporation. The appellant was asked by the Director of Civil Supplies in the months of January to March, 1962 partly in writing and partly orally first whether he had forced his peons to do menial work at the marriage of his daughter, secondly, if he had taken cash and gifts from Fair Price Shop-owners; and, thirdly, whether he had forced the staff to contribute in cash for the marriage of his daughter. The appellant denied these allegations. Thereafter, the Secretary to the Government of Maharashtra, Agriculture and Forests Department told the appellant in the month of April, 1962 that there were complaints against him and that "there could be no smoke without fire", and the appellant would be "repatriated" to the Prohibition and Excise Department. The Minister of Civil Supplies in the month of April, 1962 visited the appellant's office and said that there were complaints against him. The appellant requested a thorough enquiry in connection with such complaints. Subsequent to the visit of the Minister, an Inspector of Police of the Anti-corruption Branch took possession of several files of various fair price shop-keepers for scrutiny.

5. Thereafter, the Government of Bombay by a resolution dated 8 May, 1962 directed that the appellant who was "on deputation from the Excise and Prohibition Department should be repatriated to his parent

department with immediate effect". The appellant was asked to hand over charge and the appellant was posted by the Director of Excise and Prohibition in the Office of Officiating Inspector in his Department.

6. In the month of July, 1962 the appellant came to know that the Anti-corruption Branch of the Police submitted a report to the Government and the appellant was found to be exonerated from all charges. The appellant made a representation to the Government brining the said fact to the notice of the relevant authorities and requested for appointment to the post of Controller of Foodgrains. The Government did not send any reply to the appellant's representation.

7. The appellant contended that the resolution was in the nature of punishment by way of reduction in rank in violation of the provisions contained in Article 311 of the Constitution and made an application under Article 226 of the Constitution impeaching the order of reversion as an action of punishment taken on false reports without waiting for the investigation by the police to be complete.

8. The Learned Single Judge of the Bombay High Court held that the order of 8 May, 1962 was an act of punishment and reduction in rank. The Division Bench of the Bombay High Court reversed that judgment and held that the appellant had no legal right to the post in the Department of Agriculture and Forests and therefore his reversion was not a punishment.

9. This Court in *Parshotam Lal Dhingra v. Union of India*, 1958 SCR 828 = (AIR 1958 SC 36) laid down three propositions: First, Article 311 makes no distinction between permanent and temporary members of the services or between persons holding permanent or temporary posts and affords protection to both classes of servants; secondly, if a Government servant has no right to the particular rank his reduction from an officiating higher rank to his substantive lower rank will not by itself be a punishment; and, thirdly, the mere fact that the servant has no title to the post or the rank and the Government has by contract, express or implied or under the rules governing the conditions of his service, the right to reduce him to a

lower post does not mean that the order of reduction of a servant to a lower post or rank cannot in any circumstance be a punishment.

10. In determining whether the reduction is or is not by way of punishment it has to be found out if the order entails or provides for the forfeiture of his pay or allowances or the loss of his seniority in his substantive rank or the stoppage or postponement of his future chances of promotion, or that in truth and reality the Government has passed the order as and by way of penalty.

11. In applying these principles *Dhingra's case*, 1958 SCR 828 = (AIR 1958 SC 36) (supra) laid down two tests; first, whether the servant had right to the post or the rank, or, secondly, whether he has been visited with evil consequences of the kind mentioned in that decision.

12. This Court in *Sukhbans Singh v. State of Punjab*, (1963) 1 SCR 416 = (AIR 1962 SC 1711) in dealing with the question as to whether a probationer has any right to hold the post said that it would not be correct to say that a probationer has a right to the higher post in which he is officiating or a right to be confirmed, but a probationer could not be punished for misconduct without complying with the requirements of Article 311. The appellant in that case was recruited as Tehsildar in 1936. He was thereafter selected by the Punjab Public Service Commission and appointed as an Extra Assistant Commissioner on probation in 1945. On 20 May, 1952 he was reverted to his substantive post of Tehsildar. He asked for the grounds of reversion. He was denied the same. This Court held on the facts that the Government wanted to punish him for what it thought was misconduct and therefore reverted him. Thus, reversion by way of punishment without complying with the provisions of Article 311 cannot be sustained.

13. In the recent unreported decision in *Appar Apar Singh v. State of Punjab*, Civil Appeal No. 25 of 1967, D/- 3-12-1970 = (1971 Lab IC (Notes) 1 (SC)) the question for consideration was whether an order reverting the appellant in that case from a post in Class I service in which he was officiating to his substantive post in Class II amounted to reduction in rank. The appellant was employed in

the Punjab Education Service Class II. He was promoted to Class I on an officiating post as Principal of the Government College, Muktsar. He had trouble with the members of the staff. The appellant as Principal of the College in reading the annual report made certain aspersions against some members of the teaching staff. Thereafter, an enquiry was made pursuant to the demand of some of the parents of the students. Two Deputy Directors made an enquiry. At that enquiry the appellant was neither given copies of statements recorded nor was he allowed to cross-examine the witnesses. The State contended that it was a preliminary confidential enquiry into the affairs of the College and that the appellant had no right to continue in Class I appointment where he was only officiating. The High Court held that the order of reversion was not by way of punishment but only because the person reverted was not found suitable to hold the post and an enquiry was only to find out the state of affairs of the normal functioning of the College. This Court held that the enquiry by the Deputy Directors was to investigate allegations against the Principal and the Deputy Directors recommended exemplary punishment. Therefore, the order amounted to reduction in rank and as no enquiry regarding disciplinary proceedings was held, the order was in violation of the provisions of Article 311.

14. The most pre-eminent features which accentuate the order of reversion to be in the nature of punishment in the present case are these. The appellant was faced with certain charges of receiving money and gifts at the time of the marriage of his daughter. The appellant denied the allegations. The Secretary to the Government virtually threatened to repatriate the appellant to his parent department. The Minister visited the office of the appellant. The Police conducted an enquiry. The appellant himself had asked for an enquiry. At the time of the passing of the order of reversion the appellant not only protested but also asked the Government to wait for the completion of the investigation. The Government did not accede to that request. Subsequently, the investigation indicated that the appellant was totally free from blame or taint.

15. The entire service record of the appellant showed that the appellant was chosen to go on "deputation" twice once in 1942 and again in 1957. From 1942 to 1955 he was in the Food Department and he was promoted from time to time. Between 1942 and 1955 the appellant rose from the post of Permit Officer to that of Rationing Officer at the salary of Rs. 530/- p. m. In 1955 the post was abolished. The appellant was reverted to his parent department. In his parent department the appellant was also promoted to the post of Inspector and thereafter District Inspector in the grade of Rs. 220-10-300. In 1957, the appellant was again sent on "deputation" to the Food Department. The appellant was chosen for his experience. Again, he received a promotion and increment in salary.

16. It is true that the post which the appellant held was a temporary one, but the post continued for several years. The indications were that the post was practically of a quasi-permanent character. The appellant was reverted neither because the temporary post was abolished nor because he was found unsuitable to continue. The parent department of the appellant did not want him back.

17. The order of reversion simpliciter will not amount to a reduction in rank or a punishment. A Government servant holding a temporary post and having lien on his substantive post may be sent back to the substantive post in ordinary routine administration or because of exigencies of service. A person holding a temporary post may draw a salary higher than that of his substantive post and when he is reverted to his parent department the loss of salary cannot be said to have any penal consequence. Therefore, though the Government has right to revert a Government servant from the temporary post to a substantive post, the matter has to be viewed as one of substance and all relevant factors are to be considered in ascertaining whether the order is a genuine one of "accident of service" in which a person sent from the substantive post to a temporary post has to go back to the parent post without an aspersion against his character or integrity or whether the order amounts to a reduction in rank by way of punishment. Reversion by itself will not be a stigma. On the other hand,

if there is evidence that the order of reversion is not "a pure accident of service" but an order in the nature of punishment, Article 311 will be attracted.

18. In the present case, the facts and circumstances to which reference has already been made bring out in bold relief that the order of reversion was in the nature of punishment. The order was not in compliance with the provisions of the Constitution.

19. For these reasons, we are of opinion that the learned Single Judge was correct in his judgment. The appeal is allowed. The Bench decision of the Bombay High Court is set aside and the judgment of the learned Single Judge is restored. The appellant will be entitled to costs in this Court.

Appeal allowed.

AIR 1971 SUPREME COURT 1002 (V 58 C 202)

(From: Madras)*

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.

U. N. R. Rao, Appellant v. Smt. Indira Gandhi, Respondent.

1. The Attorney-General for India,
2. Union of India (By notice).

Civil Appeal No. 196 of 1971, D/- 17-3-1971.

Constitution of India, Art. 74 (1)—
The Council of Ministers does not
cease to hold office even after dis-
solution of the House of the People.
(X-Ref: Arts. 75 (2) and (3) and 53 (1)).
(Para 10)

Article 74 (1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. Any exercise of executive power without such aid and advice will be unconstitutional in view of Art. 53 (1).
(Paras 7, 10)

Provisions of Art. 75 (3) which envisage the doctrine of ministerial responsibility has to be harmoniously construed with the provisions of Article 74 (1) and Art. 75 (2). Thus construed, Art. 75 (3) applies only when

*(Writ Petn. No. 63 of 1971, D/- 21-1-1971 — Mad.)

DO/DO/B387/71/GKC/M

the House of the People does not stand dissolved or prorogued. It cannot, therefore, be said that on the dissolution of the House of the People the Prime Minister and other Ministers must resign or be dismissed by the President.
(Paras 7, 10)

Cases Referred: Chronological Paras

(1970) AIR 1970 SC 1102 (V 57)=

(1970) 2 SCJ 589, A. Sanjeevi

v. State of Madras

5

(1955) AIR 1955 SC 549 (V 42)=

(1955) 2 SCR 225, Ram Jawaya

Kapur v. State of Punjab

4

Appellant in person; Mr. Niren De, Attorney General for India, (M/s. R. H. Dhebar and Ram Panjwani, Advocates, and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co., with him), for Respondent; Mr. Niren De, Attorney General for India, (M/s. Ram Panjwani, R. H. Dhebar and S. P. Nayar, Advocates, with him), For the Attorney General for India and Union of India.

The following Judgment of the Court was delivered by

SIKRI, C. J.: This appeal by certificate is directed against the judgment of the High Court of Judicature at Madras dismissing Writ Petition No. 63 of 1971 filed by U. N. R. Rao, appellant before us. In this petition the appellant had prayed that a writ of quo warranto be issued to the respondent, Smt. Indira Gandhi, and it be declared that the respondent has no constitutional authority to hold the office of and to function as Prime Minister of India.

2. In brief, the appellant contends that under the Constitution as soon as the House of the People is dissolved under Art. 85 (2) of the Constitution the Council of Ministers, i.e., the Prime Minister and other Ministers, cease to hold office. According to him this follows plainly from the wording of Art. 75 (3), which provides that "the Council of Ministers shall be collectively responsible to the House of the People." How can the Council of Ministers be responsible to the House of the People when it has been dissolved under Art. 85 (2)? According to him no void in the carrying out of Government will be created because the President can exercise the Executive Power of the Union either directly or through officers subordinate to him in accordance with the Constitution

as provided in Art. 53 (1) of the Constitution.

3. In constitutional matters it is advisable to decide only those points which necessarily arise for determination on the facts of the case. It seems to us that a very narrow point arises on the facts of the present case. The House of the People was dissolved by the President on 27-12-1970. The respondent was the Prime Minister before the dissolution. Is there anything in the Constitution, and in particular in art. 75 (3), which renders her carrying on as Prime Minister contrary to the Constitution? It was said that we must interpret Article 75 (3) according to its own terms regardless of the conventions that prevail in the United Kingdom. If the words of an article are clear, notwithstanding any relevant convention, effect will no doubt be given to the words. But it must be remembered that we are interpreting a Constitution and not an Act of Parliament, a Constitution which establishes a Parliamentary system of Government with a Cabinet. In trying to understand one may well keep in mind the conventions prevalent at the time the Constitution was framed.

4. Speaking for the Court (Mukherjea, C. J.) observed in *Ram Jawara Kapur v. State of Punjab*, (1955) 2 SCR 225 at p. 238 = (AIR 1955 SC 549 at p. 556).

"The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set-up. Our Constitution, though federal in its structure, is modelled on the British Parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercisable by the legislature? Under article 53 (1) of our Constitution, the executive power of the Union is vested in the President but under article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them."

5. In *A. Sanjeevi Naidu v. State of Madras*, AIR 1970 SC 1102 at p. 1106 it was urged on behalf of the appellants in that case that "the Parliament has conferred power under Section 68-C of the Motor Vehicles Act (1939) to a designated authority. That power can be exercised only by that authority and by no one else. The authority concerned in the present case is the State Government. The Government could not have delegated its statutory functions to any one else. The Government means the Governor aided and advised by his Ministers. Therefore the required opinion should have been formed by the Minister to whom the business had been allocated by 'the Rules'. It was further urged that if the functions of the Government can be discharged by any one

else then the doctrine of ministerial responsibility which is the very essence of the cabinet form of Government disappears; such a situation is impermissible under our Constitution."

6. Speaking on behalf of the Court, Hegde J. repelled the contentions in the following words:

"We think that the above submissions advanced on behalf of the appellants are without force and are based on a misconception of the principles underlying our Constitution. Under our Constitution, the Governor is essentially a constitutional head, the administration of State is run by the Council of Ministers. But in the very nature of things, it is impossible for the Council of Ministers to deal with each and every matter that comes before the Government. In order to obviate that difficulty the Constitution has authorised the Governor under sub-article (3) of Article 166 to make rules for the more convenient transaction of business of the Government of the State and for the allocation amongst its Ministers, the business of the Government. All matters excepting those in which Governor is required to act in his discretion have to be allocated to one or the other of the Ministers on the advice of the Chief Minister. Apart from allocating business among the Ministers, the Governor can also make rules on the advice of his Council of Ministers for more convenient transaction of business. He can, not only allocate the various subjects amongst the Ministers but may go further and designate a particular official to discharge any particular function. But this again he can do only on the advice of the Council of Ministers.

The Cabinet is responsible to the legislature for every action taken in any of the ministries. That is the essence of joint responsibility."

7. Let us now look at the relevant articles of the Constitution in the context of which we must interpret Art. 75 (3) of the Constitution. Chapter I of Part V of the Constitution deals with the Executive. Article 52 provides that there shall be a President of India and art. 53 (1) vests the executive power of the Union in the President and provides that it shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. The

last five words are important inasmuch as they control the President's action under art. 53 (1). Any exercise of the executive power not in accordance with the Constitution will be liable to be set aside. There is no doubt that the President of India is a person who has to be elected in accordance with the relevant provisions of the Constitution but even so he is bound by the provisions of the Constitution. Art. 60 prescribes the oath or affirmation which the President has to take. It reads:

"I, A. B., do swear in the name of God/solemnly affirm that I will faithfully execute the office of President (or discharge the functions of the President) of India and will to the best of my ability preserve, protect and defend the Constitution and the law and that I will devote myself to the service and well-being of the people of India." Articles 74 and 75 deal with the council of Ministers. They read thus:

"74. (1) There shall be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions.

(2) The question whether any, and if so what, advice was tendered by Ministers to the President shall not be inquired into in any court.

75. (1) The Prime Minister shall be appointed by the President and the other Ministers shall be appointed by the President on the advice of the Prime Minister.

(2) The Ministers shall hold office during the pleasure of the President.

(3) The Council of Ministers shall be collectively responsible to the House of the People.

(4) Before a Minister enters upon his office, the President shall administer to him the oaths of office and of secrecy according to the forms set out for the purpose in the Third Schedule.

(5) A Minister who for any period of six consecutive months is not a member of either House of Parliament shall at the expiration of that period cease to be a Minister.

(6) The salaries and allowances of Ministers shall be such as Parliament may from time to time by law determine and, until Parliament so determines, shall be as specified in the Second Schedule."

8. It will be noticed that article 74 (1) is mandatory in form. We are unable to agree with the appellant

that in the context the word "shall" should be read as "may". Article 52 is mandatory. In other words 'there shall be a President of India.' So is art. 74 (1). The Constituent Assembly did not choose the Presidential system of Government. If we were to give effect to this contention of the appellant we would be changing the whole concept of the Executive. It would mean that the President need not have a Prime Minister and Ministers to aid and advise in the exercise of his functions. As there would be no Council of Ministers, nobody would be responsible to the House of the People. With the aid of advisers he would be able to rule the country at least till he is impeached under Article 61.

9. It seems to us that we must read the word "shall" as meaning "shall" and not "may". If Article 74 (1) is read in this manner the rest of the provisions dealing with the Executive must be read in harmony with it. Indeed they fall into place. Under Article 75 (1) the President appoints the Prime Minister and appoints the other Ministers on the advice of the Prime Minister, and under Article 75 (2) they hold office during the pleasure of the President. The President has not said that it is his pleasure that the respondent shall not hold office.

10. Now comes the crucial clause three of art. 75. The appellant urges that the House of People having been dissolved this clause cannot be complied with. According to him it follows from the provisions of this clause that it was contemplated that on the dissolution of the House of People the Prime Minister and the other ministers must resign or be dismissed by the President and the President must carry on the Government as best as he can with the aid of the Services. As we have shown above, Art. 74 (1) is mandatory and, therefore, the President cannot exercise the executive power without the aid and advice of the Council of Ministers. We must then harmonise the provisions of Art. 75 (3) with Art. 74 (1) and Art. 75 (2). Article 75 (3) brings into existence what is usually called "Responsible Government". In other words the Council of Ministers must enjoy the confidence of the House of People. While the House of People is not dissolved under Art. 85 (2) (b), Art. 75 (3) has full operation. But when it is dissolved the Council of Ministers can-

not naturally enjoy the confidence of the House of People. Nobody has said that the Council of Ministers does not enjoy the confidence of the House of People when it is prorogued. In the context, therefore, this clause must be read as meaning that Art. 75 (3) only applies when the House of People does not stand dissolved or prorogued. We are not concerned with the case where dissolution of the House of People takes place under Art. 83 (2) on the expiration of the period of five years prescribed therein, for Parliament has provided for that contingency in S. 14 of the Representation of the People Act, 1951.

11. On our interpretation other articles of the Constitution also have full play; e. g. Article 77 (3) which contemplates allocation of business among Ministers, and Article 78 which prescribes certain duties of Prime Minister.

12. We are grateful to the Learned Attorney General and the appellant for having supplied to us compilations containing extracts from various books on Constitutional Law and extracts from the debates in the Constituent Assembly. We need not burden this judgment with them. But on the whole we receive assurance from the learned authors and the speeches that the view we have taken is the right one, and is in accordance with conventions followed not only in the United Kingdom but in other countries following a similar system of responsible Government.

13. In the result the appeal fails and is dismissed, but there will be no order as to costs in this Court.

Appeal dismissed.

AIR 1971 SUPREME COURT 1005
(V 58 C 203)

(From: Patna)*

J. M. SHELAT, I. D. DUA AND
V. BHARGAVA, JJ.

Aditya Kumar Singh, Appellant v.
The Principal, Rajendra Medical
College, Ranchi and others, Respondents.

Civil Appeal No. 2298 of 1970, D/-
17-3-1971.

*(Civil Writ Jurisdiction Case No. 517
of 1970, D/- 24-7-1970 — Pat.)

DO/DO/B389/71/SSG/P

Constitution of India, Article 226 — Where a writ petition was filed by a student of Medical College against order of Principal striking off his name from college roll because he had not passed in Physics paper of B. Sc. Part I Examination and that petition impleading only Principal and State Government was allowed on ground of violation of principles of natural justice, in subsequent writ petition by same student against order of Registrar of University not allowing that student to appear in Ist M. B. B. S. Examination the University is not bound by decision in previous writ petition and principle of res judicata shall not apply.

(Paras 5, 6)

Cases Referred: Chronological Paras

(1969) Writ Petn. No. 219 of 1969, D/- 8-12-1969 = 1970 ELJR 836, Aditya Kumar Singh v. The Principal 2, 4, 5

(1964) AIR 1964 Pat 291 (V 51), Ajit Singh v. Ranchi University 2

(1962) AIR 1962 SC 1110 (V 49) = (1963) 2 SCJ 509, Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta 2

Mr. V. S. Desai, Senior Advocate, (M/s. B. P. Singh and D. N. Mishra, Advocates, with him), for Appellant; Mr. D. Goburdhun, Advocate, (for Nos. 1 and 2) and Dr. L. M. Singhvi, Senior Advocate, (Mr. U. P. Singh, Advocate, with him), (for Nos. 3 to 5), for Respondents.

The following Judgment of the Court was delivered by

DUA, J.: — This appeal has been presented to this Court pursuant to a certificate granted by the Patna High Court under Article 133 (1) (c) of the Constitution.

2. The appellant, Aditya Kumar Singh, passed the B. Sc., Part I examination of the Bhagalpur University from the I. N. B. College in 1964 with Chemistry, Botany and Zoology as principal subjects and Physics as an extra subject. In 1967 he passed the B. Sc., examination of the Magadh University with Honours in Zoology. Thereafter he applied for admission to the Rajendra Medical College, Ranchi. Along with his application he attached a marks sheet of the B. Sc. Part I examination of the Bhagalpur University, purporting to have been issued to him by that

University as also the marks sheet of B. Sc., (Hons) examination of the Magadh University. In March, 1968 he was admitted to the First Year of the M. B. B. S. Course of that College. On January 21, 1969 the appellant was served with a notice dated January 20, 1969 from the Principal of Rajendra Medical College, Ranchi calling upon him to show cause why his name should not be struck off the College rolls on the ground that the marks sheet of B. Sc., Part I examination submitted by him along with his application for admission to the College was not genuine and that he had gained admission to the College by fraudulent means. The reply to this notice was required to be submitted latest by January 27, 1969. The appellant sent his reply on February 1, 1969. This reply was not considered satisfactory and on February 4, 1969 the Principal of the College informed him accordingly, adding that from the record of marks received from the University of Bhagalpur it had been found that the appellant had not passed in Physics which he had offered as an extra subject in the B. Sc., Part I examination and as such he did not satisfy the minimum qualification laid down for admission to the College, with the result that he could not be allowed to continue his studies in the College. If the appellant had any further representation to make he was asked to do so by 11 a. m. on February 12, 1969. The Principal of the College passed an order on February 27, 1969 striking off the appellant's name from the College roll. On March 11, 1969 the appellant filed in the Patna High Court an application under Article 226 of the Constitution (W. P. 219 of 1969, D/- 8-12-1969 (Pat)) for a writ of certiorari praying for quashing the order of the Principal dated February 27, 1969 and for a writ of mandamus commanding the Principal not to enforce the said order and also not to interfere with the appellant's right to prosecute his studies in the Rajendra Medical College. The appellant impleaded in this writ petition the Principal of Rajendra Medical College as respondent No. 1 and the State of Bihar through Secretary, Department of Health as respondent No. 2. Neither respondent filed any counter-affidavit and respondent No. 1 was not even represented by a counsel. The facts stated in the writ petition were accord-

ingly taken by the High Court as correct. This writ petition was allowed by a Division Bench of the Patna High Court on December 8, 1969. The final conclusions of the Court were expressed by Wasiuddin J. in these words:

"On a consideration of all these facts, it is abundantly clear that there was a violation of the principle of natural justice and the petitioner had not been given full opportunity of placing his case and the petitioner must have also found himself bewildered by the receipt of the order dated the 27th February, 1969 when the second show cause notice showed that action was being taken only on account of the petitioner not satisfying the minimum qualification for admission into the Rajendra Medical College. There can be no doubt that action could have been taken against the petitioner if it had been found that the petitioner was responsible for the inflation and interpolation of the mark-sheet, but for this there should have been due and proper inquiry in which the petitioner should have been given full opportunity of being heard. But it appears that no such opportunity was given and there was thus a violation of the principle of natural justice. In this connection, I may also refer here to two decisions, one of which is of Supreme Court reported in the case of Board of High School and Intermediate Education, U. P. Allahabad v. Ghanshyam Das Gupta, (AIR 1962 SC 1110) where the petitioner of that case had been debarred from appearing at the examination and it was held that the authorities had violated the principle of natural justice. There is also a Division Bench decision of our High Court (AIR 1964 Pat 291) — Ajit Singh v. Ranchi University — in this connection which no doubt is also in respect of examination, but there also the same principle as laid down in the Supreme Court decision has been followed".

It appears that the Principal of the Rajendra Medical College had made routine enquiries from the Assistant Registrar of the Bhagalpur University about the marks obtained by the students admitted in the College who had passed the B. Sc., Part I examination from that University. On December 12, 1968 the Assistant Registrar of that University wrote to the Principal in reply to his letter of 3rd

December, 1968 stating inter alia that Shri Aditya Kumar Singh (the appellant) had secured 5 marks in Physics practical and not 15. This statement was stated to have been verified by the Assistant Registrar (Shri H. N. Rai) and Dr. K. P. Singh of Rajendra Medical College. It may be recalled that the appellant had been required in the Principal's letter of February 4, to make whatever further representation the appellant desired to make by February 12, 1969. Presumably after waiting till February 12, the Principal on February 13, 1969 requested the Assistant Registrar of Bhagalpur University to hold further investigation in the matter of marks obtained by the appellant. On February 22, 1969 the Assistant Registrar wrote back to the Principal the following letter:

"Dear Dr. Mitra,

With reference to your D. O. letter No. 958/RMC dated the 13th February, 1969 I am to inform you that necessary investigation into the matter has been made. It has been verified and found that Shri Aditya Kumar Singh Roll Bhag. No. 340 (a candidate for the Annual B. Sc., Part I examination, 1964) obtained only 5 (five) marks in Physics practical and not 15 (fifteen) as stated previously.

Yours sincerely,
Sd/ H. N. Rai
Assistant Registrar"

It appears that the first M. B. B. S. Examination was to begin on November 21, 1969. On October 9, 1969 the Principal forwarded the appellant's form for admission to that examination along with his fee. The Principal, however, did not append his signatures on the form. He stated his reasons for not doing so in the covering letter in which he wrote:

"It was apparent from the mark-sheet that he had passed in Physics also. Subsequent to this he passed B. Sc., Final Examination from Bihar University in the year 1966 with Chemistry, Botany and Zoology. Thereafter he passed B. Sc., Hons. examination in Zoology in the year 1967 from Magadh University. Since he had passed B. Sc., Hons. in Zoology after having passed B. Sc., I with Chemistry, Biology and Zoology and apparently Physics also he was given preference over B. Sc., I candidates and admitted straightway".

After briefly narrating the history resulting in the appellant's name being struck off, the letter continued:

"Advice was sought (through the Health Department) from the Standing counsel of Government (in the absence of the Advocate General) and I have been advised that he should not be debarred from my end from appearing at the examination. I am therefore sending his form and fees but I am unable to certify that he has passed in Physics at B. Sc. I level as is required to be done on the body of the admission form. This is because the very University from which he had appeared at the B. Sc. I Examination has declared that he had not passed in Physics. I am enclosing copies of documents mentioned herein-under for your perusal and consultation with legal advisors of the University if deemed necessary. I am further to state that he has fulfilled the rest of the conditions which are required to be certified by the Principal on the Admission form".

With this letter were also enclosed copies of the writ petition, the order of the High Court and the correspondence which had passed between the Principal and the Government on the subject. On receipt of this letter the Deputy Registrar, Ranchi University returned the form on October 28, 1969 stating that the appellant could not be permitted to appear at the first M. B. B. S. Examination. Apparently on learning of this position the appellant also wrote to the Principal complaining against his refusal to give to the appellant a "good conduct certificate". The Principal replied to the appellant on November 1, 1969 stating all the facts and denying that he had debarred the appellant from appearing in the first M. B. B. S. Examination. It was explained in this letter that he (the Principal) was unable to certify that the appellant had passed in Physics at B. Sc., Part I level and it was for this reason that he had not signed a certificate to that effect. The Principal repeated his inability to certify that the appellant had passed in Physics. A copy of this letter was forwarded to the Vice-Chancellor, Ranchi University, with reference to the letter dated October 28, 1969 from the Deputy Registrar.

3. On November 4, 1969 the appellant filed an application in the Patna High Court for taking contempt

proceedings against the Principal of Rajendra Medical College. On November 14, 1969 a Division Bench of the Patna High Court considered this application but found no justification for contempt proceedings against the Principal. It, however, directed the Principal to certify to the University that the appellant had passed B. Sc., Part I Examination in Physics as shown from the College record. It was added that since the matter of the appellant having passed the B. Sc., Part I Examination in Physics was under investigation it should also be noted that the certificate must be deemed to be provisional and in case it was established that the appellant had not passed the B. Sc., Part I examination in Physics then his admission to the First M. B. B. S. Examination of Ranchi University would be treated as cancelled. After this order the Principal on November 20, 1969 sent to the Vice-Chancellor, Ranchi University the appellant's form with his certificate as directed by the High Court along with a copy of that Court's order.

4. On November 22, 1969 the Registrar of the University under directions of the Vice-Chancellor wrote back to the Principal informing him that the High Court had not issued any directive to the University to allow the appellant to appear at the ensuing first M. B. B. S. Examination of 1969. The letter proceeded to state that the question whether the appellant had passed B. Sc., Part I Examination in Physics was still under investigation and in the opinion of the Vice-Chancellor the appellant was not eligible to appear at the first M. B. B. S. Examination of 1969. The appellant thus could not take the examination held on November 21, 1969. After the decision of the High Court on December 8, 1969 in the previous writ petition (No. 219 of 1969 (Pat)), the appellant applied to the Vice-Chancellor, Ranchi University on January 22, 1970 seeking permission to appear in the M. B. B. S. Examination scheduled to be held from March 2, 1970. A copy of the order of the High Court dated December 8, 1969 was also forwarded to the Vice-Chancellor. On February 14, 1970 the Registrar of the University informed the appellant that he had to qualify himself in accordance with the relevant regulations for being admitted to the first M. B. B. S. Exa-

mination. The appellant was accordingly advised to furnish proof that he had passed in Physics at the B. Sc., Part I Examination. On February 21, 1970 the appellant wrote to the Vice-Chancellor saying that as the M. B. B. S. Examination was scheduled to commence on March 2, 1970 the time at his disposal was too short to enable him to furnish proof of his having passed in Physics at the B. Sc., Part I Examination as required by the University. He also referred to the marks sheet said to have been furnished to him by the Bhagalpur University which he had already supplied and to the order of the High Court dated December 8, 1969. A request was made to permit him at least to sit at the examination provisionally and, if necessary, to withhold his result pending the completion of the enquiry by the University. In the meantime it appears that in view of the examination scheduled to be held from March 2, 1970 and apprehending that the appellant would claim to sit at this examination the Principal of the Rajendra Medical College applied to the Patna High Court on February 9, 1970 under Section 151, C. P. C. stating that the counsel appearing for the State in the High Court in Writ Petition No. 219 of 1969, D/- 8-12-1969 (Pat) had somehow failed to file a counter-affidavit explaining the full factual position. This was stated to be due to the fact that the correspondence between the Advocate-General of the State and the Principal had remained unnoticed by the counsel. In the background of this position the Principal sought directions from the High Court as to how he was required to implement the Court's order in the matter of attesting the appellant's application for permission to take the first M. B. B. S. Examination. On this application the High Court recorded the following order on February 11, 1970:

"Heard both sides. Let a provisional certificate be granted in terms of our order dated 14-11-69".

On February 25, 1970 the Registrar of the Ranchi University informed the appellant that he was not eligible to appear at the ensuing first M. B. B. S. Examination in 1969 (Special) scheduled to be held from March 2, 1970. On receipt of this letter the appellant, on February 26, 1970, presented a writ petition in the Patna High Court under

Article 226 of the Constitution which has given rise to the present appeal. The appellant obtained a rule against the respondents to show cause why:

(i) they be not directed to implement the directions of the High Court contained in the judgment in Civil Writ 219/69 forthwith;

(ii) a writ in the nature of a writ of mandamus be not issued commanding them to permit the petitioner to appear at the supplementary M. B. B. S. Examination of the Ranchi University commencing from March 2, 1970;

(iii) an appropriate writ or order be not issued quashing the order contained in the letter of the University dated February 14, 1970;

(iv) the respondents be not punished for contempt of the High Court. The five respondents impleaded in this writ petition were:

(1) Principal, Rajendra Medical College, Ranchi;

(2) State of Bihar;

(3) Deputy Registrar, Ranchi University;

(4) Vice-Chancellor, Ranchi University and

(5) University of Ranchi through its Registrar.

When the writ petition came up for preliminary hearing the counsel for the appellant did not press the prayer for taking contempt proceedings. After admitting the writ petition the court stayed the operation of the order contained in the letter of the University dated February 14, 1970 and also directed the respondent No. 1 (the Principal) to certify forthwith in the prescribed form that the appellant had passed B. Sc., Part I Examination with Physics. Shri Sarwar Ali, counsel for the Principal, undertook to inform his client so as to ensure compliance with this direction. Respondent No. 5 (the University of Ranchi) was also directed to permit the appellant to sit at the M. B. B. S. Part I Supplementary Examination. The appellant's result was not to be published till after the disposal of the writ petition. On July 24, 1970 the writ petition was dismissed by the High Court on the finding that the appellant had not passed B. Sc., Part I Examination in Physics and that the University authorities were not bound to admit the appellant to M. B. B. S. Part I Examination without his fulfilling the requirements contained in Regulation 5 of Chapter

XVIII of the Regulations of the University.

5. In this Court Shri V. S. Desai took us through the relevant facts and after giving the history of the case he strenuously contended that the High Court was in error in dismissing the appellant's writ petition. The learned counsel contended that the earlier decision of the High Court in writ petition No. 219 of 1969 D/- 8-12-1969 (Pat) was conclusive and binding on the parties and it was not open to the respondents to go behind that decision. This submission is unacceptable. To begin with in the earlier petition only the Principal of the Rajendra Medical College and the State of Bihar were impleaded as parties. It is unfortunate that in those proceedings the respondents did not file any counter-affidavit and the Principal of the College was not even represented by a counsel with the result that no arguments were addressed on his behalf. The fact, however, remains that nothing said in that decision can bind the University and now it is the University which is primarily objecting to the appellant's eligibility to take the First M. B. B. S. Examination on the ground that he has not complied with Regulation 5 of Chapter XVIII of the University Regulations. It was contended by Shri Desai that the Principal should have given the certificate as directed by the High Court in the previous decision and the counsel added that if that had been done the appellant would not have found it necessary to have resort to the present writ proceedings.

6. This submission ignores the fact that the Principal had actually complied with the order of the High Court in the earlier case. He, however, also in addition disclosed all the other relevant facts which he was, in our view, entitled to do. Besides, the question directly raised in the previous case was confined to the grievance relating to violation of the principle of natural justice as the appellant had not been given adequate opportunity of placing his case before the authorities. He was accordingly held entitled to an opportunity to show cause against the action sought to be taken against him so as to satisfy the requirements of the rule of natural justice. The appellant, as the facts noted earlier in this judgment show, was given notice to show that he had

actually passed in physics as claimed by him. The previous decision is thus of no assistance to the appellant in the present case.

7. The point of res judicata was also urged in the High Court and indeed it was in the forefront of the arguments addressed in that Court on behalf of the appellant. After noting the fact that in spite of the instructions from the Principal to the Health Department of the Bihar State Government to forward the Principal's version to the Advocate-General's office neither counter-affidavit was filed nor were any arguments addressed in the High Court on his behalf in the earlier case. The High Court in the present case observed that the decision in the earlier writ petition would nevertheless be binding on the Principal but it could not bind the Ranchi University. The law laid down in the earlier case was, however, held to constitute a binding precedent for the Court to follow in the present case. The previous decision was held to be confined only to the question of removal of the appellant's name from the roll of the College in violation of the principles of natural justice inasmuch as proper opportunity was not afforded to him to meet the charge that he was responsible for submitting the inflated marks sheet. After adverting to the facts of the case the High Court observed:

"We do not want to make any observation in this case in regard to the case of the respondents at some of the stages that really the figure '1' before the figure '5' in figure '15' was an interpolation in different ink. Because that matter was not finally investigated as the previous judgment shows, by following the principles of natural justice. But this much is clear now that the petitioner had not passed B. Sc., Part I Examination in Physics as he had got only twenty eight marks in Physics (five in Practical and twenty three in theoretical) and had submitted a mark sheet along with his admission application form which, to say the least, was not correct. Whoever may have been responsible for showing the inflated mark but surely the user of this mark sheet was the petitioner and to his advantage". When confronted with this position the learned counsel, after making a faint but unsuccessful attempt to persuade us to go into the facts and come to

our own conclusions, confined his submission to a very narrow point. He submitted that since the appellant has attended the College regularly and has also been permitted, though provisionally, to sit at the University Examination he should be given an opportunity of showing to the University authorities that he had in fact passed in Physics at the B. Sc., Part I Examination from Bhagalpur University. According to his submission the High Court should not have given a final decision on this point when the question of interpolation of figure '1' in the marks sheet had been left open.

8. The High Court has undoubtedly observed in the impugned order that the appellant had neither in the earlier writ petition nor in the present writ petition nor in any of his affidavits in reply stated that he had as a matter of fact passed in Physics at B. Sc., Part I Examination from Bhagalpur University. On the other hand the appellant throughout insisted on basing his claim on the marks sheet which he had attached with the admission form and which had been held not to be genuine. The High Court, while dealing with the question of equitable estoppel, again observed:

"It will bear repetition to say that the petitioner who had not undisputedly now passed B. Sc., Part I Examination with Physics but by making use of wrong mark sheet had led the Principal to admit him, is not entitled to invoke the principle of estoppel against the University".

The learned counsel for the appellant was not able to point out any material on the record from which it could be shown that the High Court is wrong in making these observations and that the appellant had at any stage asserted that as a matter of fact he had passed in Physics as contended. We are, therefore, unable to find any error in the impugned order.

9. In the High Court it was not the appellant's case that he should be allowed an opportunity to show that he had actually passed in Physics as is now prayed by his counsel. Indeed, all along he was being asked to furnish proof of his having so passed in Physics. Since no such plea was raised in the High Court we are unable to make any order in the terms suggested by Shri Desai. In case, however, he is in a position to

furnish proof of this fact he may approach the authorities concerned. It was the appellant himself who had without furnishing any such proof rushed to the Court with a misconceived prayer. The appeal must fail and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 1011 (V 58 C 204)

(From Patna: AIR 1966 Pat 364)

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

The State of Bihar and others, Appellants v. Shiva Bhikshuk Mishra, Respondent.

Civil Appeal No. 1353 of 1966, D/- 14-9-1970.

Constitution of India, Art. 311 — Test for applicability of — Impugned order need not necessarily refer to stigma attributable to conduct of Government servant — Circumstances attendant on impugned order are relevant.

For applicability of Art. 311 of the Constitution it is not necessary that there should be express words of stigma attributable to the conduct of Government servant in the impugned order. There is no rigid principle that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct. It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the

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misconduct is a mere motive or is the very foundation of the order. AIR 1968 SC 1089 & AIR 1964 SC 1680 Rel. on. AIR 1969 N.S.C. 21, Ref; AIR 1966 Pat 364, Affirmed. (Paras 4, 5)

Cases Referred: Chronological Paras
(1969) AIR 1969 N.S.C. 21 (V 56)

=Civil Appeal No. 882 of 1966,

D/- 7-4-1969, Union of India

v. R. S. Dhaba, I. T. Officer,

Hoshiarpur

3, 4

(1968) AIR 1968 SC 1089 (V 55)=

(1968) 3 SCR 234, State of Punjab v. Sukh Raj Bahadur

3

(1964) AIR 1964 SC 1680 (V 51)=

1964-3 SCR 55, S. R. Tewari v.

District Board, Agra

4

(1964) AIR 1964 SC 1854 (V 51)=

1964-5 SCR 190, Champaklal

Chimanlal Shah v. Union of

India

3

Dr. L. M. Singhvi, Sr. Advocate, (Mr. V. P. Singh, Advocate, with him), for Appellants; M/s. D. Goburdhun and R. Goburdhun, Advocates, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: This is an appeal by certificate from a judgment of the Patna High Court. The respondent was holding the substantive post of a Sergeant in the police force till July 31, 1946 in the State of Bihar. On August 1, 1946 he was promoted to officiate in the higher post of Subedar. On January 9, 1948 while he was still holding the substantive post of a Sergeant he was promoted to officiate temporarily as a Subedar-Major. It appears that on October 3, 1950 the Commandant of the Bihar Military Police, Muzaffarpur wrote to the Deputy Inspector General of Police, Armed Forces, mentioning an incident between the respondent and his orderly on the night of September 22, 1950. The incident involved a physical assault by the respondent on the orderly. The Commandant made an inquiry in the matter and expressed the opinion that the respondent had actually assaulted his orderly by taking the law into his own hand instead of bringing any complaint which existed against the orderly to the notice of the higher authorities for proper action. In the penultimate paragraph of his letter the Commandant wrote, "to drop the above incident without taking action, in order to prevent any re-occurrence of

the Subedar Major's gross misconduct, I suggest he be censured for his unsatisfactory behaviour where he failed to maintain the required discipline." The Deputy Inspector General wrote a note to the Inspector General as follows:

"Kindly see pp. 15-12 which relate to the notorious Subedar Major S. B. Missir of M.B.P. VI whose conduct is already under enquiry by a Board to be presided over by the I. G. himself.

In this particular case Subedar Major Missir appears to have tripped up very badly and I feel that transfer, as recommended by D.I.G.A.F. is no cure.

It is indeed strange that our Board accepted the Subedar Major for promotion to the rank of Sergeant Major although he has not yet undergone training of a Sergeant. In a similar case the then D.I.G.A.F. recommended that a temporary Sgt. must undergo the Sergeant's course before his case was considered for promotion. The Subedar Major is, perhaps, too old to learn and in any case cannot be posted as a Sergeant Major in view of the fact that he was never trained as a Sergeant and has never worked in a district. He was originally appointed in the R.P.P. by Mr. Creed's Board.

I recommend that the officiating Subedar Major should be reverted to his substantive rank of Sergeant and posted to Hazaribagh. The question whether he should be retained in service will be decided after the Board of enquiry concludes its labour. I am purposely suggesting his posting to Hazaribagh because he will be far away from the witnesses and would not be able to tamper with the evidence recorded of each witness. Even the present charge against Subedar Major Missir is serious but the order of reversion would meet with the case, as it is obvious that he is not likely to make either a suitable Subedar Major or Sergeant Major."

The Inspector-General made an order on November 2, 1950, "as proposed". In the first week of November 1950 the respondent was asked to attend a Board of enquiry for answering charges of misconduct. On November 14, 1950 the respondent was reverted to his substantive post of Sergeant. On April 7, 1953 an order was made by the Deputy-Inspector-General dismissing the respondent from service.

2. In February 1954 the respondent filed a suit for a declaration that his demotion from the rank of a Subedar Major to that of Sergeant and dismissal from service were wrongful, illegal and inoperative and that he had all along remained a Subedar-Major. He further claimed a decree for a sum of Rs. 3118/- on account of arrears of pay as detailed in Sch. I attached to the plaint with future interest. The trial Court dismissed the suit on the view that the order of reversion did not contain any stigma on the competence and character of the respondent and that it had not been made by way of punishment. The High Court on appeal reversed the decision of the trial court on the finding that the "reversion was not in the usual course or for administrative reasons but it was after a finding on an inquiry about some complaint against the plaintiff and by way of punishment to him". The order of dismissal was set aside on the short ground that if the respondent continued to remain in the post of Subedar-Major even in an officiating capacity on the date with effect from which the order of dismissal was passed the provisions of Art. 311 (1) had not been complied with. The Deputy Inspector General who had passed the order of dismissal was subordinate to the authority by which he had been appointed to officiate in the post of Subedar Major, that authority being the Inspector General of Police. The dismissal order was, therefore, invalid and not binding on the respondent. He was granted the declaration asked for by him together with a decree for Rs. 3118/- with future interest at the rate of 6% per annum.

3. The sole point which falls for determination is whether the reversion of the respondent from the post of officiating Subedar Major was made in circumstances which would attract the applicability of Article 311 (2) of the Constitution. Mitter J., delivering the judgment of this court in *State of Punjab v. Sukh Raj Bahadur*, (1968) 3 SCR 234 = (AIR 1968 SC 1089) stated the following propositions on a consideration of the numerous decisions on the point:

"1. The services of a temporary servant or a probationer can be terminated under the rules of his employ-

ment and such termination without anything more would not attract the operation of Art. 311 of the Constitution.

2. The circumstances preceding or attendant on the order of termination have to be examined in each case, the motive behind it being immaterial.

3. If the order visits the public servant with any evil consequences or casts an aspersion against his character or integrity, it must be considered to be one by way of punishment, no matter whether he was a mere probationer or a temporary servant.

4. An order of termination of service in unexceptionable form preceded by an enquiry launched by the superior authorities only to ascertain whether the public servant should be retained in service does not attract the operation of Art. 311 of the Constitution.

5. If there be a full-scale departmental enquiry envisaged by Art. 311 i.e. an Enquiry Officer is appointed, a charge sheet submitted, explanation called for and considered, any order of termination of service made thereafter will attract the operation of the said article".

The argument sought to be raised on behalf of the appellant is that the order of reversion of the respondent to his substantive post casts no aspersion against his character or integrity. Even if the motive behind the making of the order was the report of the Deputy Inspector General dated November 1, 1950 consequent on the communication received from the Commandant dated October 3, 1950 arising out of the incident involving an assault by the respondent on his orderly it would not be a case of reversion by way of punishment. A great deal of stress is laid on the fact that no departmental enquiry as envisaged by Art. 311 was made into the above-mentioned incident before reversion was ordered. Our attention has been invited to this court's decision in the *Union of India v. R. S. Dhaba*, Income Tax Officer, Hoshiarpur Civil Appeal No. 882 of 1966, D/- 7-4-1969 = (AIR 1969 N.S.C. 21) in which Mr. Pillai the then Commissioner of Income tax had said that the officer concerned should be reverted because of the large number of complaints which the

department had received against his integrity and the bad reports received by him from his superiors. The successor of Mr. Pillai Mr. S. R. Mehta made an order on May 22, 1964 to the effect that Dhaba officiating Income-tax Officer class II had been found unsuitable, after trial, to hold that post; his reversion was ordered as Officiating Inspector, Income tax. It was held by this court that the order of reversion had not been made by way of punishment and the decision of the High Court to the contrary was set aside. A large measure of support is sought to be derived from this decision because of the previous opinion of the Commissioner of Income tax which was highly prejudicial to Dhaba and the argument raised there was that the reversion of Dhaba was the direct result of the note of Mr. Pillai. This is what was observed by this court in that case:

"The test for attracting Art. 311 (2) of the Constitution in such a case is whether the misconduct or negligence is a mere motive for the order of reversion or termination of service or whether it is the very foundation of the order of termination of service of the temporary employee (see the decision of this court in *Champaklal Chimanlal Shah v. The Union of India* (1964) 5 S.C.R. 190 = (AIR 1964 SC 1854). In the present case, however, the order of reversion does not contain any express words of stigma attributed to the conduct of the respondent and, therefore, it cannot be held that the order of reversion was made by way of punishment and the provisions of Art. 311 of the Constitution are consequently attracted".

4. We are unable to accede to the contention of the appellant that the ratio of the above decision is that so long as there are no express words of stigma attributed to the conduct of a Government Officer in the impugned order it cannot be held to have been made by way of punishment. The test as previously laid and which was relied on was whether the misconduct or negligence was a mere motive for the order of reversion or whether it was the very foundation of that order. In Dhaba's case Civil Appeal No. 882 of 1966, D/- 7-4-1969 = (AIR 1969 NSC 21), it was not found that the order of reversion was based

on misconduct or negligence of the officer. So far as we are aware no such rigid principle has ever been laid down by this Court that one has only to look to the order and if it does not contain any imputation of misconduct or words attaching a stigma to the character or reputation of a Government Officer it must be held to have been made in the ordinary course of administrative routine and the Court is debarred from looking at all the attendant circumstances to discover whether the order had been made by way of punishment. The form of the order is not conclusive of its true nature and it might merely be a cloak or camouflage for an order founded on misconduct (see *S. R. Tewari v. District Board Agra* 1964-3 SCR 55 = (AIR 1964 SC 1680)). It may be that an order which is innocuous on the face and does not contain any imputation of misconduct is a circumstance or a piece of evidence for finding whether it was made by way of punishment or administrative routine. But the entirety of circumstances preceding or attendant on the impugned order must be examined and the overriding test will always be whether the misconduct is a mere motive or is the very foundation of the order.

5. In the present case the High Court found that the order of reversion was made owing to the note of the Deputy Inspector-General of Police following the report of the Commandant. The order of reversion was directly and proximately founded on what the Commandant and the Deputy Inspector General said relating to the respondent's conduct generally and in particular with reference to the incident of assault by him on his orderly. We find no reason to disagree with the view of the High Court. It is not disputed that if the order of reversion was void the subsequent order of dismissal which was passed by the Deputy Inspector General of Police would be violative of Art. 311 (1) of the Constitution.

6. The appeal fails and it is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 1015
(V 58 C 205)

(From: AIR 1967 Andh Pra 99)

J. C. SHAH, C. J., K. S. HEGDE
AND A. N. GROVER, JJ.

Commissioner of Income Tax, Andhra Pradesh, Hyderabad, Appellant v. M/s. Jayalakshmi Rice and Oil Mills Contractor Co., Respondent.

Civil Appeal No. 545 of 1967, D/- 15-1-1971.

Income Tax Act (1922), Sec. 23-A — For purposes of Rule 2 (b), a firm will not be treated as registered before the end of the previous year, where although an application for its registration under Section 58, Partnership Act was made before the end of such previous year it was actually registered in accordance with Sec. 59 of that Act only after the end of such year — (X-Ref. Partnership Act (1932), Sections 58 and 59) — **AIR 1935 All 898 and AIR 1936 All 3 and AIR 1964 Ker 251, Rel. on; AIR 1967 Andhra Pra 99, Reversed.** (Para 5)

Cases Referred: Chronological Paras (1964) AIR 1964 Ker 251 (V 51)

= (1964) 51 ITR 711, Kerala

Road Lines Corporation v. Commissioner of Income-tax Kerala 4

(1936) AIR 1936 All 3 (V 53)

= ILR (1936) 58 All 495, Danma

Parshotamdas v. Baburam Chhotelal 4

(1935) AIR 1935 All 898 (V 22)

= 1935 All WR 1051, Ram Prasad

v. Kamta Prasad 4

Mr. S. C. Manchanda, Sr. Advocate, (M/s. B. D. Sharma and R. N. Sachthey, Advocates, with him), for Appellant; Mr. K. Rajendra Chaudhuri, Advocate, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal from a judgment of the Andhra Pradesh High Court arising out of a reference made under Section 66 (I) of the Income-tax Act, 1922, hereinafter called the 'Act' of the question whether on the facts and in the circumstances of the case the application under Section 26-A of the Act was filed out of time.

2. The facts are not in dispute. The assessee firm was constituted under a deed of partnership dated October 6, 1955. It was to come into existence with effect from November

5, 1954. The assessee filed an application under Section 26-A of the Act for registration of the firm for the assessment year 1956-57. The 'previous year' of the firm was shown as the year ending October 26, 1955. This application was received by the Income-tax Officer on October 14, 1955. On October 20, 1955 the assessee filed before the Registrar of Firms a statement under Section 58 of the Indian Partnership Act, 1932. On November 2, 1955 the Registrar of Firms filed the statement of the assessee and made entries in the register of firms. On March 23, 1961 the Income tax Officer passed an order refusing to register the firm under Section 26-A, inter alia for the reason that the application had not been made in time. The appeal taken to Appellate Assistant Commissioner by the assessee failed. The Income tax Appellate Tribunal also upheld the order of the Income-tax Officer and the Appellate Assistant Commissioner. On that a reference was sought and the High Court answered the question referred in favour of the assessee on the ground that the application had been filed in time.

3. Section 26-A of the Act provides that an application may be made to the Income tax Officer on behalf of any firm constituted under an instrument of partnership specifying the individual shares of the partners for registration for the purposes of the Act. The application has to be made by such person or persons and at such time and has to contain such particulars etc., as may be prescribed. Rules 2 to 6 (b) of the Rules made under Section 59 of the Act deal with registration of firms. We are concerned with the following material portion of Rule 2.

"Such application shall be.....made....."

(a) Where the firm is not registered under the Indian Partnership Act, 1932 (IX of 1932) or where the deed of Partnership is not registered under the Indian Registration Act, 1908 (XVI of 1908), and the application for registration is being made for the first time under the Act,

(i) Within a period of six months of the constitution of the firm or before the end of the 'previous year' of the firm whichever is earlier, if the firm was constituted in that previous year,

(ii) before the end of the previous year in any other case;

(b) Where the firm is registered under the Indian Partnership Act, 1932, (IX of 1932) or where the deed of partnership is registered under the Indian Registration Act, (XVI of 1908) before the end of the previous year of the firm....."

Now it is common ground that the application for registration was not made within the period prescribed by Rule 2 (a). What has been urged throughout on behalf of the assessee is that the application to the Income tax Officer was governed by Rule 2 (b) and was in time as the firm should be deemed to have been registered not on the date on which it was actually registered by the Registrar of Firms but with effect from the date on which the application for registration was presented to the Registrar. In other words the firm should be considered to have been registered on October 20, 1955 on which date the statement under Section 58 of the Partnership Act was filed by the assessee before the Registrar of Firms.

4. The real question which has to be determined is whether the registration of a firm under the Partnership Act takes place with effect from the date on which the application for registration is made in accordance with Section 58 of that Act. Section 58 (1) provides that the registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated a statement in the prescribed form and accompanied by the prescribed fee stating Under Section 59 when the Registrar is satisfied that the provisions of Section 58 have been duly complied with he shall record an entry of the statement in a register called the "register of firms" and shall file the statement. In *Ram Prasad v. Kamta Prasad*, AIR 1935 All 898 it was laid down that the registration of a firm under the Partnership Act takes place only when the necessary entry is made in the register of firms. Even under Section 69 of the Partnership Act which deals with the effect of non-registration it has been consistently held that the registration of a firm subsequent to the filing of the suit did not cure the defect; See *Danmal Parshotamdas v. Baburam*

Chhotelal, ILR (1936) 58 All 495 = (AIR 1936 All 3). Thus under the Partnership law it can be taken to have been settled by decisions of High Courts from a long time that the registration of a firm takes place only when the necessary entry is made in the register of firms under Section 59 of the Partnership Act by the Registrar. It is true that sub-section (1) of Section 58 employs language which without anything more may lend support to the view that the registration of a firm may be effected merely by sending an application which would mean that as soon as an application is sent and if entry is made under Section 59 pursuant to it the registration would be effective from the date when the application was presented. But Section 58 (1) is not to be read in isolation and has to be considered along with the scheme of the other provisions of the Act, namely, Section 59 and Section 69. The latter section may not have a direct bearing on the point under our consideration but it throws light on what was contemplated by the legislature with regard to the point of time when the firm could be regarded as registered. The Kerala High Court has in *Kerala Road Lines Corporation v. Commr. of Income-tax, Kerala*, (1964) 51 ITR 711 = (AIR 1964 Kerala 251) clearly expressed the view that reading Sections 58 and 59 of the Indian Partnership Act together a firm cannot be said to be registered when the statement prescribed by Section 58 and the required fee are sent to the Registrar and that the registration of the firm is effected only when the entry of the statement is recorded in the register of firms and the statement is filed by the Registrar as provided in Sec. 59. In that case also an identically similar question arose in respect of registration of a firm under Section 26-A of the Income tax Act.

5. The High Court in the judgment under appeal referred to the statement extracted from the report of the Special Committee which had been appointed by the Government of India to examine the provisions of the Bill before it came to be passed by the Central Legislature as the Partnership Act and reference was made in particular to the statement relating to Sec. 58 corresponding to Section 59 of the Partnership Act to the effect that the Registrar was a mere recording officer

and that he had no discretion but to record the entry in the register of firms. We are unable to see how that statement can be taken into consideration for the purpose of interpreting the relevant provisions of the Partnership Act. We also cannot concur with the other reasoning of the High Court for coming to the conclusion that the partnership should be deemed to have been registered on the date when the application was presented and that the requirement of Rule 2 (b) would be satisfied if it became registered under the Partnership Act even after the application was filed.

6. For the reasons given above the appeal is allowed and the judgment of the High Court is set aside. The answer to the question referred must be given in the affirmative and against the assessee. The appellant shall be entitled to costs in this Court.
Appeal allowed.

AIR 1971 SUPREME COURT 1017
(V 58 C 206)

(From Mysore: (1965) 4 Law Rep 366)

S. M. SIKRI,

P. JAGANMOHAN REDDY AND

I. D. DUA, JJ.

Ramakrishna Hari Hegde and another, Appellants v. The Market Committee, Sirsi and others, Respondents.

Civil Appeal No. 1072 of 1966 D/- 15-1-1971.

Bombay Agricultural Produce Markets Act (22 of 1939), Section 4-A — Notification of Mysore Government No. DPC 203 CMD 64 (i), D/- 5-1-1965 declaring certain area as Principal Market Yard in supersession of earlier notification D/- 31-8-1954 is violative of fundamental right to carry on business of dealers who have to shift their business from the old notified principal market yard within a short period of ten days — (X-Ref: — Constitution of India, Article 19 (1) (g)).
(Para 12)

It is true that Government has power to declare the area specified in impugned Notification as the Principal Market Yard without necessarily declaring the old notified principal market yard as sub-market area. But reasonable time should have been given to the dealers for shifting their

business. The period of one and half year was agreed to be reasonable and consequently the notification was not struck down. (Para 13).

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 97 (V 49)

= (1962) 2 SCR 659, Mohammad

Hussain Gulam Mohammad

v. The State of Bombay 8

Mr. V. M. Tarkunde, Sr. Advocate (Mr. Naunit Lal, Advocate with him), for Appellants; Mr. R. B. Datar, Advocate, for Respondent No. 1; M/s. S. K. Dholakia and S. P. Nayar, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.: — This Appeal is by Special Leave against the Judgment of the Mysore High Court dismissing the Writ Petition filed by the Appellants and Respondent No. 3 against Respondents 1 and 2, the Market Committee, Sirsi and the State of Mysore respectively, by which they challenged the Notification of the Government of Mysore No. DPC 206 CMD 64 (i) dated 5th January 1965. The Town of Sirsi in the North Canara which was once part of the Bombay State is one of the leading markets for Areca, Cardamom and Pepper. The Appellants have been carrying on business in these 3 commodities on a large scale for many years in this town mainly in the localities comprising Channapattan Galli, Basti Galli and Naged Galli, while the Respondent 3 who is a dealer in the said commodities was carrying on business in Naged Galli. In the Channapattan Galli there are nearly 20 Commission Agents who own shops and godowns who also deal in these commodities. It was stated that the three Gallis constitute the main market where wholesale business in the aforesaid commodities is being carried on for more than a century.

2. The Bombay Legislature had passed the Bombay Agricultural Produce Markets Act, 1939 (Act XXII of 1939) and thereafter made rules under the Act known as Bombay Agricultural Produce Market Rules hereinafter referred to as the Act and Rules respectively. In 1951 under the provisions of Section 4 (1) of the Act the Government of Bombay declared the town of Sirsi and various surrounding villages, 59 in number, as a market area in respect of Areca,

Pepper and Cardimom and by Notification dated 24th April 1951 had also declared the 3 Gallis referred to above as the Market Yard under the Act. In 1954 the Act was amended by the addition of Section 4-A to which a reference will be made presently. After the amendment of the said Act, on 31-8-1954 the Government of Bombay Notified the three Gallis of Channapattan, Basti and Nadged which previously had been declared as a Market Yard, as the Principal Market Yard of the said Market area under Section 4-A (2) proviso. After this declaration it is said the Appellants invested large amounts in buildings which are worth ten lacs of Rupees and improved their trade. Similarly in the Nadged Galli the properties of Commission Agents are worth about Rs. 5 lacs and in the Basti Galli the business premises are worth about Rs. 2 lacs.

3. It is alleged that Shri Hegde Kadve is a Congressman and as the Chairman of the Market Committee and also as the Chairman of the Sirsi Totgars Co-operative Society and President of the Taluka Board had considerable personal influence over the Congress Ministry and consequently prevailed on the Government to grant to the Market Committee free of cost land measuring about 10 acres and 37 gunthas for a market at a distance of more than a mile from the present market, which was divided into plots, on which he managed to get shops, godowns and offices constructed with the money secured by the Society as a loan from the Government at a very low rate of interest. The Market Committee disposed of eleven sites to private parties and also allowed the Co-operative Society to construct premises for a Rice Mill, but notwithstanding these constructions the new site for the Market has no amenities. The impugned Notification had the effect of prohibiting persons from carrying on business in the said three main commodities at the old market Yard, and has thus destroyed the business of traders including that of the Appellants. The new site it was said was only so declared with a view to confer on the Co-operative Society a monopoly in trade as it would not be possible for traders to invest money and construct new buildings and godowns for carrying on trade at the new market site. The

Notification was thus challenged as being ultra vires of the provisions of the Act, illegal, arbitrary, capricious and discriminatory, violating Articles 14, 19 (1) (g) and 31 of the Constitution.

4. The Respondents denied the several allegations made against them. Respondent 1 stated that the Market Committee having felt as early as 1958 that the area of the three Gallis was insufficient to cope with the expanding business and made efforts to acquire a more convenient and specious area to house the market. In furtherance of this desire and with the object of providing better facilities to the Agriculturists, the Committee from time to time made representations to the Government, which ultimately granted in all 35 acres 29 gunthas of land. Thereafter steps were taken for the development of the said area by leasing out plots to Commission Agents and traders who were induced to build premises for the purpose of sale and purchase of the Agricultural produce in the Market Yard. The Committee thereafter resolved on 13-7-1964 to request the Government, to declare the new area as the Principal Market Yard while at the same time permitting the traders to continue their business in the existing place for a period of one or two years. It was also pointed out that the Market Committee of which the Appellant No. 1 was a Member have never objected to the shifting of the Market Yard since 1958 but on the contrary had applied for the grant of plots and was complaining that the Government was delaying the issue of the necessary Notification. Besides the Appellant there were 14 others, who had obtained leases of the plots and constructed buildings on these plots. The allegation that there are no roads or well was incorrect. The new site was only about half a mile from the 3 Gallis and was centrally situated within the Municipal limits of Sirsi as is evident from the fact that the Totgars Society itself was transacting 30% of the entire business of Sirsi Market Committee in the regulated commodities with an annual turn over of more than a crore of Rupees within that area. These allegations were considered by the High Court which held that it was open to the Government under Section 4 to alter the declaration regarding the Principal Market Yard. After set-

ting out the history of the legislation it was of the view that the impugned Notification was issued in the public interest, and not with any ulterior purpose and consequently rejected the Writ Petition.

5. The Short point in this Appeal is whether by reason of the impugned Notification the Appellants have been prevented from exercising their right to trade and whether it is discriminatory and affects in any manner their right to property.

6. The Act under which the Notification issued deals with the regulation of purchase and sale of agricultural produce in the State of Bombay including the area which has now become part of Mysore State as a consequence of the States Reorganisation Act, 1956. An examination of the provisions of the Act would show that there is no warrant for holding that there is anything which affects the freedom to carry on trade or business nor is there anything which can be said to be discriminatory. Section 2 of the Act in so far as relevant defines Market, Market Area, Principal Market Yard, Sub-Market Yard. Section 3 provides for the constitution of Markets and Market Committees and confers power on the Commissioner by Notification to declare his intention of regulating the purchase and sale of such agricultural produce and in such area as may be specified and inviting objections and suggestions within a month of the publication of the Notification. The Commissioner may after considering the objections and suggestions if any received by him during that period and after holding such enquiry as may be necessary declare the area under Section 4-A to be Market area for the purposes of the Act. Section 4 (2) provides that after the Market area is declared, no place in the said area shall subject to the provisions of Section 5-A be used for the purchase or sale of any agricultural produce specified in the Notification. Section 5 confers power on the State Government after the declaration of the Market area to establish a Market Committee for every Market area and under Section 5-AA it becomes the duty of the Market Committee to enforce the provisions of the Act and also to establish a Market therein on being required to do so by the State Government. In as much as there may be a time lag between the

declaration of a Market area and establishment of a Market; the proviso to Section 4 (2) lays down that pending the establishment of a Market in a Market area the Commissioner may grant a licence to any person to use any place in the said area for the purpose of purchase and sale of any such agricultural produce and it is the duty of the Market Committee under Section 5-AA to enforce the conditions of the licence granted under Section 4 (2). Section 26 confers power on the State Government to frame rules for the purpose of carrying out the provisions of the Act, and Section 27 confers power on the Market Committee to frame bye-laws with the previous sanction of the Director or any other officer specially empowered in this behalf by the State Government under Section 26. The State Government has power under Section 29 to add to, amend or cancel any of the items of agricultural produce specified in the Schedule to the Act.

7. The Act was amended in 1954 by the addition of Section 4-A which under sub-s. (1) makes it necessary for each Market area to have one Principal Market Yard and one or more Sub-Market Yards as may be necessary. Sub-s. (2) of the said Section empowers the Commissioner by Notification to declare any enclosure, building or locality in any market area to be a Principal Market Yard for the area and other enclosures, buildings or localities to be one or more Sub-market Yards for the area. The proviso requires that one of the enclosures, buildings or localities declared to be market yards before the commencement of the amendment of that section, shall be declared to be the Principal Market Yard for the Market area and others, if any, to be one or more Sub-Market Yards for the area, subject to such variation as may be necessary.

8. The effect of these provisions is that a Market area is first declared under Section 4 (1) after which a market yard may be constituted for the market area as Principal Market Yard and Sub-Market Yard or yards if any. The declaration of the Market area subject to Section 5-A has the effect of prohibiting the purchase or sale of agricultural produce in any place in that area except in the area declared as a Principal Market Yard or Sub-Market yard or yards, if any.

This Court had earlier in *Mohammad Hussain Gulam Mohammad v. The State of Bombay*, (1962) 2 SCR 659 = (AIR 1962 SC 97), held Sections 4, 4-A, 5, 5-A and 5-AA to be constitutional and that none of the said provisions imposed unreasonable restrictions on the right to carry on trade in the agricultural produce regulated under the Act as such were not violative of Article 19 (1) (g) of the Constitution.

9. It is, however, contended that the impugned Notification is violative of Articles 19 (1) (g), 14 and 31 of the Constitution.

10. The Notification as we have already stated was issued on 5-1-1965 under Section 4-A of the Act and is in the following terms:—

"In exercise of the powers conferred by sub-section (2) of Section 4-A of the Bombay Agricultural Produce Markets Act, 1939 (Bombay Act 22 of 1939) as in force in the Bombay area, and in supersession of Bombay Government Notification Development Department No. APM 4554, dated 31-8-1954, the Government of Mysore hereby declares the following locality in the market area of the Agricultural Produce Market Committee, Sirsi of Sirsi Taluka of North Kanara District, to be a Principal market yard for the area with effect from the 15th January, 1965, namely:—

Locality:

An area measuring about 35 acres and 29 gunthas and 4 acres of Sirsi Totagaras' Co-operative Sales Society Ltd., Sirsi in R. S. No. 116, 117, 59 and 60 of Sirsi Taluka

On the North by:— Sirsi — Yellapur Main Road and R. S. No. 116.

On the South by:— R. S. Nos. 55, 57, and portion of R. S. No. 299.

On the East by:— Portion of R. S. Nos. 299, 58, 129-A and 118.

On the West by:— R. S. Nos. 61, 64 and 68".

11. It may be mentioned that the earlier Notification of 31-8-1954 also made in exercise of the powers conferred by sub-section (2) of Section 4-A of the Act had declared as the Principal Market Yard all godowns, storage places and open places lying within the limits of the Sirsi Municipality and approved by the Agricultural Produce Market Committee, Sirsi for storage and for the purpose of sale of commodities under regulation including the area locally known as Channapattan Gali, Basti

Galli and Nadger Galli which had earlier been declared by Notification of the Government in the Development Department dated 24-4-1951 to be a Market Yard. The effect of the supersession of this Notification by the impugned Notification is that as from 15-1-1965 the area of the 3 Gallis ceased to be the Principal Market Yard, and as such no business could be transacted therein on and after that date.

12. This position could not be seriously controverted by the learned Advocate for the Respondents. In our view the prohibition implicit in the Notification was unreasonable and to that extent violated the fundamental rights of the Appellants and Respondent 3 to carry on their business because it could not have been postulated that they could immediately in 10 days shift their business to the Principal Market Yard declared by the impugned notification. The learned Advocate for the Market Committee however pointed out that it was never their intention to prohibit at once any business being conducted in the Market Yard in the Gallis, but they had in fact in their proposals to the Government suggested the business in the Gallis should be allowed to be continued for a year or two. Whatever their proposals may have been we have no doubt that the effect of the Notification as long as it is in force is to prohibit the Appellants and Respondent 3 from carrying on business in the Market Yard of the Gallis.

13. It is submitted by the learned Advocate for the Respondents that the Appellants and Respondent 3 had sufficient time till now to make arrangements to shift their business, as such they are not entitled to complain, but the contention on behalf of the Appellants is that they were entitled to challenge the Notification and as they had invested large amounts in buildings etc., in the 3 Gallis they are justified in asking this Court to direct Respondents to have these areas declared as a sub-Market area. While the Government has the power to issue a Notification in public interest and to declare the area specified in the impugned Notification as the Principal Market area, without necessarily declaring other areas simultaneously as sub-Market area, in our view sufficient time should have been given for the Appel-

lants, Respondent 3 and other persons doing business in the area of the 3 Gallis to shift their business. As long as the Notification prohibited them from doing business in those Gallis they had a right to challenge the validity of that Notification. No doubt the Government could have declared the 3 Gallis as sub-Market area but it is not for this Court to arrogate to itself the functions of the Government and direct them to do so merely because that would be one of the ways in which the impugned Notification can be rectified. The learned Advocate for the Market Committee, however, consistent with the stand taken by the Market Committee in its counter before the High Court that it had requested the Government to allow the business in the Gallis to be carried on for one or two years agrees to give one and a half years time for the Appellants and Respondents to enable them to shift during this period, to the Principal Market Yard declared under the impugned Notification and till then permit them to continue their business in the 3 Gallis. The period agreed to in our view is a reasonable period within which the Appellants and Respondent 3 can shift their business to the new Market Area and till then they should not be prohibited from doing business in the Market area of the 3 Gallis as heretofore. In view of this agreement except to give the above direction there is no need to strike down the Notification.

14. The Appeal is accordingly allowed to the extent indicated subject to the above directions. There will be no costs in this Appeal.

Order accordingly.

**AIR 1971 SUPREME COURT 1021
(V 53 C 207)**

(From: Bombay)*

**J. C. SHAH, K. S. HEGDE AND
A. N. GROVER, JJ.**

Century Spinning & Manufacturing Co. Ltd., and another (in both the appeals), Appellants v. The Ulhasnagar Municipal Council and another (in both the appeals), Respondents.

Civil Appeals Nos. 2130 and 2131 of 1969, D/- 27-2-1970.

*(Spl. Civil Appln. No. 41 of 1969 and S. C. A. No. 1774 of 1969, D/- 19-6-1969 — Bom.)

JN/KN/B171/70/KSB/M

(A) Constitution of India, Article 226 — Exercise of jurisdiction is in judicial discretion of High Court — Petitioner prima facie entitled to have his grievance tried — Dismissal of petition in limine without giving reasons is improper — Spl. Civ. Appln. No. 41 of 1969, dated 19-6-1969 (Bombay), Reversed.

The High Court may, in exercise of its judicial discretion decline to exercise its extraordinary jurisdiction under Article 226. If the petitioner makes a claim which is frivolous, vexatious, or prima facie unjust, or may not appropriately be tried in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits. (Para 28)

Where the allegations in the petition and the materials placed before the Court show that the petitioner is entitled to have his grievance against the imposition of octroi duty tried, the dismissal of the writ petition in limine without giving any reasons is improper. (Para 8)

(B) Evidence Act (1872), Section 115 — Representation of existing fact and representation as to promise to do something in future — Distinction — Other party acting on such representation — It may give rise to estoppel in former case but in latter it may result in contract or obligation ex contractu enforceable in equity — This equally applies to obligations of public bodies like municipality.

A representation of an existing fact must be distinguished from a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agree-

ment shall be in a certain form, no contract may result from the representation and acting therefor but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation. (Para 10)

Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position, to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise; when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation may be enforced against it in appropriate cases in equity. AIR 1968 SC 718, Rel. on; (1949) 1 KB 227 and (1950) 1 All ER 538, Ref. to. (Paras 11, 12)

(C) Constitution of India, Article 226 — Alternative remedy of civil suit open — Petitioner not to be relegated to remedy of suit merely because questions of fact are raised.

(Para 13)

Cases Referred: Chronological Paras

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| (1968) AIR 1968 SC 718 (V 55) | |
| = (1968) 2 SCR 366, Union of India v. Anglo Afghan Agencies | 11 |
| (1950) 2 KB 16 = (1950) 1 All ER 538, Falmouth Boat Construction Co. Ltd. v. Howell | 11 |
| (1948) 2 All ER 667 = (1949) 1 KB 227, Robertson v. Minister of Pensions | 11 |

Mr. C. K. Daphtary, Sr. Advocate, (M/s. Suresh A. Shroff and P. C. Bhartari, Advocates and Mr. O. C. Mathur, Advocate, of M/s. J. B. Dadachanji and Co. with him), for Appellants (In both appeals); Mr. H. R. Gokhale, Sr. Advocate, (M/s. N. H. Gursahani and N. N. Keswani, Advocates with him), for Respondent 1 (In both appeals); M/s. B. D. Sharma and S. P. Nayar, Advocates, for Respondent No. 2 (In both appeals).

The following Judgment of the Court was delivered by

SHAH, J.: — The High Court of Bombay dismissed in limine a petition filed by the Century Spinning and Manufacturing Co. Ltd — hereinafter

called 'the Company' — for the issue of a writ restraining the respondent Municipality from enforcing the provisions of the Maharashtra Municipalities Act 40 of 1965 relating to the levy, assessment, collection, recovery of octroi and in particular Section 105 and Sections 136 to 144 thereof, and from enforcing the Maharashtra Municipalities (Octroi) Rules, 1967, and from acting upon resolutions passed by the Municipal Council dated September 9, 1968 and September 13, 1968, and from levying, assessing, collecting, recovering or taking any other step under the Act, rules or the resolutions, and for an order restraining the Municipality of Ulhasnagar from levying, assessing, collecting any octroi on the goods imported by the Company within the limits of the Municipal Council for a period of seven years from the date of its first imposition. With special leave, the Company has appealed against the order rejecting the petition.

2. The Company was incorporated under the Indian Companies Act, 1913. It set up its factory in 1956, within the limits of village Shahad, Taluka Kalyan, on a site purchased from the State of Bombay, and within an area known as the 'Industrial Area'. No octroi duty was then payable in respect of goods imported by the Company into the Industrial Area for use in the manufacture of its products. On October 30, 1959, the Government of Bombay issued a notification announcing its intention to constitute a Municipality for certain villages, including the Industrial Area. The Company and other manufacturers who had set up their plants and factories objected to the proposed constitution of Municipal area. On September 20, 1960, the State of Maharashtra (successor to the State of Bombay) published a notification constituting with effect from April 1, 1960 the Municipality including the area in which the Industrial Area was included. Representations were then made by the Company and other manufacturers for excluding the Industrial Area from the Ulhasnagar Municipal District Area. On April 27, 1962 the Government of Maharashtra (the new State of Maharashtra having been constituted under the Bombay Reorganisation Act, 1960) proclaimed that the Industrial Area be excluded from the Municipal jurisdiction. The District

Municipality then made a representation to the Government of Maharashtra that the proclamation dated April 27, 1962, be withdrawn by the Government. The Municipality agreed to exempt the existing factories, viz., the Company and other manufacturers whose factories were then existing in the Industrial Area from payment of octroi for a period of seven years from the date of levy of octroi and for exempting new industrial units from payment of octroi for a similar period from the date of establishment. The Government of Maharashtra acceded to the request of the Municipality to retain the Industrial Area within the local limits of the Municipality.

3. On August 24, 1963, the District Municipality passed a resolution to implement the agreement. It was resolved that the Municipality "agrees to give a concession to the existing factories by exempting them from the payment of octroi for a period of 7 years from the date of levy of octroi tax and by exempting new factories from the payment of the octroi tax for a period of 7 years from the date of their establishment as recommended by the Government of Maharashtra".

4. On October 31, 1963, the Government of Maharashtra issued a notification withdrawing the proclamation dated April 27, 1962, and the Industrial Area became part of the Ulhasnagar Municipal District. Relying upon the assurance and undertaking given by the Municipality the Company claims that it had expanded its activities and commenced manufacturing new products by setting up additional plant which it would not have done "but for the concessions given, assurances and representations made and agreement arrived at on May 21, 1963".

5. On September 10, 1965, the Legislature of the State of Maharashtra enacted the Maharashtra Municipalities Act which repealed the Bombay District Municipal Act 3 of 1901. The notification declaring the area of the former District Municipality of Ulhasnagar into the Ulhasnagar Municipality became effective as from June 15, 1966. The Ulhasnagar Municipality took over, as successor to the Ulhasnagar District Municipality, the assets and the affairs of that body. On September 9, 1968 the Ulhasnagar

Municipality resolved "to levy minimum rates of octroi duty as shown in columns 4 and 6 on all items shown in Sch. I to the Rules", and by resolution dated September 13, 1968, the Municipality adopted with effect from January 1, 1969, the rates for the imposition of octroi duty on the goods imported for use, sale and consumption within the Municipal Council limits.

6. At a special meeting held on December 24, 1968, the Municipal Council considered the letters written by the Government of Maharashtra dated November 22, 1968 and December 10, 1968, drawing the attention of the Municipality to the circumstances in which the Industrial Area was included and retained in the local limits of the Ulhasnagar District Municipality and continued to remain within the local limits of the Municipality, and "advised the Municipality to pass a resolution confirming such exemption and honour the commitments of its predecessor". The Municipality ignored the advice and resolved that the Government of Maharashtra be informed that the Municipality would consider afresh on merits any representation of a tax-payer for exemption from payment of octroi, and if any such representation was made by the factories situate in the Industrial Area, the Council would consider the same and take such action as it would deem fit. Thereafter the Municipality sought to levy octroi duty and to recover from the Company octroi duty amounting to approximately Rs. 15 lakhs per annum.

7. The Company moved a petition before the High Court of Bombay under Article 226 of the Constitution for the writs set out earlier seeking to restrain the Ulhasnagar Municipality from enforcing the octroi Rules.

8. The High Court may, in exercise of its discretion, decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution. But the discretion is judicial: if the petition makes a claim which is frivolous, vexatious, or prima facie unjust, or may not appropriately be tried in a petition invoking extraordinary jurisdiction, the Court may decline to entertain the petition. But a party claiming to be aggrieved by the action of a public body or authority on the plea that the

action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits. Apparently the petition filed by the Company did not raise any complicated questions of fact for determination, and the claim could not be characterised as frivolous, vexatious or unjust. The High Court has given no reasons for dismissing the petition in limine, and on a consideration of the averments in the petition and the materials placed before the Court we are satisfied that the Company was entitled to have its grievance against the action of the Municipality, which was *prima facie* unjust, tried.

9. The Company pleaded that the Ulhasnagar Municipality had "entered into a solemn arrangement" not to levy octroi duty for a period of seven years from the date of its imposition. The evidence relating to the undertaking was contained in public records. The Government of Maharashtra advised the Municipality that it was acting in violation of the terms of that undertaking. By its resolution the Municipality declined to abide by the undertaking of its predecessor.

10. There is undoubtedly a clear distinction between a representation of an existing fact and a representation that something will be done in future. The former may, if it amounts to a representation as to some fact alleged at the time to be actually in existence, raise an estoppel, if another person alters his position relying upon that representation. A representation that something will be done in the future may result in a contract, if another person to whom it is addressed acts upon it. A representation that something will be done in future is not a representation that it is true when made. But between a representation of a fact which is untrue and a representation express or implied — to do something in future, there is no clear antithesis. A representation that something will be done in future may involve an existing intention to act in future in the manner represented. If the representation is acted upon by another person it may, unless the statute governing the person making the representation provides otherwise, result in an agreement enforceable at law; if the statute requires that the agreement shall be in a certain form, no contract may result from the representation

and acting therefor but the law is not powerless to raise in appropriate cases an equity against him to compel performance of the obligation arising out of his representation.

11. Public bodies are as much bound as private individuals to carry out representations of facts and promises made by them, relying on which other persons have altered their position to their prejudice. The obligation arising against an individual out of his representation amounting to a promise may be enforced *ex contractu* by a person who acts upon the promise: when the law requires that a contract enforceable at law against a public body shall be in certain form or be executed in the manner prescribed by statute, the obligation if the contract be not in that form may be enforced against it in appropriate cases in equity. In *Union of India v. M/s. Indo-Afghan Agencies Ltd.*, (1968) 2 SCR 366 = (AIR 1968 SC 718) this Court held that the Government is not exempt from the equity arising out of the acts done by citizens to their prejudice, relying upon the representations as to its future conduct made by the Government. This Court held that the following observations made by Denning, J., in *Robertson v. Minister of Pensions*, (1949) 1 KB 227 applied in India.

"The Crown cannot escape by saying that estoppels do not bind the Crown for that doctrine has long been exploded. Nor can the Crown escape by praying in aid the doctrine of executive necessity, that is, the doctrine that the Crown cannot bind itself so as to better its future executive action". We are in this case not concerned to deal with the question whether Denning, L. J., was right in extending the rule to a different class of cases as in *Falmouth Boat Construction Co. Ltd. v. Howell*, (1950) 1 All ER 538, where he observed at page 542:

"Whenever Government officers in their dealings with a subject take on themselves to assume authority in a matter with which the subject is concerned, he is entitled to rely on their having the authority which they assume. He does not know, and cannot be expected to know, the limits of their authority, and he ought not to suffer, if they exceed it". It may be sufficient to observe that in appeal from that judgment *Howell v.*

Falmouth Boat Construction Co. Ltd., (1950) 1 All ER 538 Lord Simonds observed after referring to the observations of Denning, L. J.:

"The illegality of an act is the same whether the action has been misled by an assumption of authority on the part of a government officer however high or low in the hierarchy. * * * * The question is whether the character of an act done in force of a statutory prohibition is affected by the fact that it had been induced by a misleading assumption of authority. In my opinion the answer is clearly: No".

12. If our nascent democracy is to thrive different standards of conduct for the people and the public bodies cannot ordinarily be permitted. A public body is in our judgment, not exempt from liability to carry out its obligation arising out of representations made by it relying upon which a citizen has altered his position to his prejudice.

13. Mr. Gokhale appearing on behalf of the Municipality urged that the petition filed by the Company apparently raised questions of fact which in the view of the High Court could not appropriately be tried in the exercise of the extraordinary jurisdiction under Article 226. But the High Court has not said so, and on a review of the averments made in the petition this argument cannot be sustained. Merely because a question of fact is raised, the High Court will not be justified in requiring the party to seek relief by the somewhat lengthy, dilatory and expensive process by a civil suit against a public body. The questions of fact raised by the petition in this case are elementary.

14. The order passed by the High Court is set aside and the case is remanded to the High Court with a direction that it be re-admitted to the file and be dealt with and disposed of according to law. The High Court will issue rule to the Municipality and the State and dispose of the petition. We recommend that the case may be taken up for early hearing.

15. We had during the pendency of the appeal in this Court made an order restraining the levy of octroi duty. We extend the operation of the order for a fortnight from this date to enable the Company to move the High Court for an appropriate interim order pending hearing and disposal of the

writ petition. There will be no order as to costs in this Court. Costs in the High Court will be costs in the cause.

16. Since we have granted special leave against the order dismissing the petition, we do not deem it necessary to consider whether the order rejecting the application for certificate was erroneous. Civil Appeal No. 2131 of 1969 is therefore dismissed.

Case remanded.

AIR 1971 SUPREME COURT 1025 (V 58 C 203)

(From: Punjab)*

G. K. MITTER AND A. N. RAY, JJ.

M/s. Exen Industries, Appellant v. The Chief Controller of Imports and Exports, New Delhi and Others, Respondents.

Civil Appeal No. 971 of 1967, D/- 22-1-1971.

Constitution of India, Article 226 — High Court can reject a petition in limine when it is satisfied that the authorities whose acts are impugned have acted properly or the petition raises complicated questions of fact for determination; but not when a prima facie case for investigation is made out. (Para 5)

Thus where a petition against an order refusing to grant licences under the Imports (Control) Order was rejected in limine though a prima facie case for investigation was made out; the order was set aside and the case was remanded. Civil Writ No. 25-D/1966, D/- 6-1-1966 (Punjab High Court, Circuit Bench at Delhi), Reversed. (Paras 4, 6)

Cases Referred: Chronological Paras

(1971) AIR 1971 SC 1021 (V 58),
Century Spinning & Manufacturing Co. Ltd. v. Ulhasnagar
Municipal Council 5

M/s. S. J. Sorabji and Janendra Lal, Advocates, and Mr. B. R. Agarwala, Advocate of M/s. Gagrati and Co., for Appellant; Dr. A. V. Seyid Muhammad, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Respondents.

*(Civil Writ No. 25-D of 1966, D/- 6-1-1966 — Punjab at Delhi.)

BO/BO/A504/71/YPB/C

The following Judgment of the Court was delivered by

MITTER, J.: — This is an appeal by certificate under Article 133 (1) (b) of the Constitution of India granted by the High Court of Judicature for the State of Punjab at Delhi against its order and judgment dated the 6th January, 1966 dismissing in limine the appellants' application for the issue of an appropriate writ directing the respondents to grant to the appellants 50 per cent of the balance of the six licences applied for by them on applications made between April 23, 1964 and October 28, 1964 of the total value of Rs. 56,483/- and for other reliefs.

2. The facts are as follows. The appellant firm which is engaged in the manufacture of fountain pens, ball pens etc., was constituted of three partners, namely, K. R. Vora, J. L. Mehta and A. M. Bhuta. After retirement of one of the partners, the firm consisted of only two persons H. T. Vora and G. J. Mehta in November 1958. The firm had always been getting import licences as actual users for the importation of raw materials from the Chief Controller of Exports and Imports and from the Iron and Steel Controller, respondents 1 and 2 herein, through the Plastic Directorate. In December 1963 G. J. Mehta also retired from the partnership and Mrs. Santokbai H. Vora was admitted as a partner in his place. On the same day the partners executed an agreement of dissolution of partnership which inter alia provided:—

1. That the partnership would stand dissolved so far as the retiring partner was concerned as from December 5, 1963.

2. The machinery, raw materials etc. lying in stock at the time of the dissolution of the partnership would be equally divided between the parties.

3. The continuing partner would be entitled to continue and carry on business in the name of the dissolved firm and would also be entitled to its good will and the continuing partner would have the sole right of import licences which were in hand and which would be received against the pending applications.

According to the petition presented before the High Court, the appellant communicated the said change to the respondents 1 and 2 and it appears that even after the dissolution of the firm several licences were received by

the continuing partner without any objection from the retiring partner. Between the dates mentioned above the appellant submitted six applications for the grant of import licences which were required for the purpose of carrying on the business of manufacture pursued by the firm. The appellant also purchased new machinery and equipment so as to enable it to increase its production capacity. This averment in the petition is said to be supported by a statement of comparative figures of manufacture as certified by chartered accountants of which a copy was annexed to the petition. There was some correspondence between the appellant and the Assistant Development Officer of the Government of India on the question of the appellant's claim to licences in view of the fact that Messrs Premier Products, a business started by the retiring partner had reported commencing manufacturing fountain pens etc., with the portion of the machinery allotted to him as a result of the dissolution of the firm and the partition of its assets. The appellants claimed to have satisfied the Assistant Development Officer with full and necessary particulars. In order to avoid delay in the matter of the investigation taken up by the Assistant Development Officer the appellants prayed for issue of at least 50% of ad hoc licences pending final decision of the matter by a letter dated 10th March, 1965. They received two ad hoc licences on April 9, 1965. But in spite of their best efforts and representations made to the Deputy Secretary, Ministry of Commerce of the Government of India as its Secretary the appellants were unable to secure 50 per cent of the balance of the actual users' licences to which they claimed to be entitled. Ultimately the Assistant Controller by letter dated November 18, 1955 informed the appellants that as licences of raw materials had been issued to Premier Products Bombay no further licences could be issued to them. This was repeated by the Under Secretary to the Government of India in his letter dated 3rd December 1965 wherein it was stated that as the machinery and equipment of the original firm had been equally divided, it had been decided that both the firms i. e., the old and the new ones, should be registered with D. G. T. D. and the raw

material allocations previously made to the undivided firm should be equally divided between the two firms.

3. It is against this decision that the appellants moved an application to the High Court for issue of a writ on the ground that the refusal had been against the policy, procedure and conditions governing the grant and issue of actual users' licences as published in the Gazette of India as a public notice and embodied in an official publication called the 'Import Trade Control Policy' popularly known as the Red Book and the Hand Book. In these two publications detailed provisions have been made for the division of the licences in the event of a change in the constitution of a firm's (firm?) pending applications, pending licences, future licences and future licence entitlements. According to the appellant the two books also lay down conditions for grant of licence to actual users and make separate provisions for division of licences in the case of pending applications for the grant of licences and pending licences in the case of change of constitution of the firm. The appellants claim that these publications however do not make any provisions for division of the licence entitlements for the future inasmuch as actual users are given licences for the licensing period only on the basis laid down by the Red Book and the Hand Book. Paragraph 73 of the Hand Book to which our attention was drawn, lays down the basis of licensing of actual users. They provide for taking into account various matters which are all set out in the petition. Paragraph 88 of the Hand Book provides for changes in the name, constitution or ownership of the actual users' business after the issue of the actual users' licence but before and after the importation of the goods. According to the petition this paragraph does not deal with the division of future licences to actual users inasmuch as the same has to depend on the basis laid down and contained in paragraph 73 of the Hand Book. The appellants claimed in their petition that the licensing authorities are bound to act judicially and reasonably while granting or refusing licences in exercise of the discretion vested in them by law and they could refuse the licence under the provisions of Clause 6 of the Imports (Control) Order, 1955 and

under paragraph 73 of the Hand Book, but the reason given for refusal to give the balance of import licences to them was not a valid one and the refusal was unfair and arbitrary based on extraneous considerations without proper application of the mind on the part of the respondents. It was in the above circumstances that the appellants approached the High Court for the issue of a writ and the said application was rejected in limine.

4. It was submitted before us that clearly the facts laid down in the petition called for some explanation by the respondents to justify their refusal as the ground which was put forward as the basis of the refusal cannot bear scrutiny. It appears to us that the grievance of the appellants is not unjustified. The petition supported as it was by numerous annexures which contain copies of representations made by the appellants to the various authorities and their replies, obviously established a prima facie case for investigation and the High Court should have, to say the least, called upon the respondents to show cause why a rule should not be issued.

5. Learned counsel appearing for the respondents did not suggest that a prima facie case for enquiry had not been made out. The grant of actual users' licences to manufacturers is of vital importance to them if they are to carry on their business and Courts ought not to uphold any refusal of such licences if they appear to be arbitrary or based on extraneous considerations. It may be that the respondents could have satisfied the High Court that there was sufficient cause for refusal apart from the grounds put forward by them in the letters of November 18, 1965 and December 3, 1965. However the High Court though competent to decline to exercise its extraordinary jurisdiction under Article 226 of the Constitution when it finds that the petition is frivolous or without substance should not throw it out in limine if a prima facie case for investigation is made out. The High Court can reject a petition in limine if it takes the view that the authorities whose acts were called in question had not acted improperly or if it felt that the petition raised complicated questions of fact for determination which could not be properly adjudicated upon in a proceeding

under Article 226 of the Constitution. We may, in this connection, refer to a recent judgment of this Court in *Century Spinning and Manufacturing Co. Ltd. v. Ulhasnagar Municipal Council*, (reported in AIR 1971 SC 1021) where it was stated that:

"..... a party claiming to be aggrieved by the action of a public body or authority on the plea that the action is unlawful, high-handed, arbitrary or unjust is entitled to a hearing of its petition on the merits The High Court has given no reasons for dismissing the petition in limine, and on a consideration of the averments in the petition and the materials placed before the Court we are satisfied that the Company was entitled to have its grievance against the action of the Municipality, which was *prima facie* unjust, tried".

6. Following the above dictum we allow the appeal, set aside the order of the High Court and remand the case to the High Court with a direction that the petition be re-admitted to the file and be dealt with and disposed of according to law. The High Court will issue a rule to the authorities concerned and the Union of India and dispose of the petition expeditiously. In the circumstances, we make no order as to costs of the hearing before this Court.

Appeal allowed; case remanded.

AIR 1971 SUPREME COURT 1028 (V 58 C 209)

(From: Calcutta)*

J. C. SHAH AND A. N. GROVER, JJ.

Smt. Rani and another, Appellants
v. Smt. Santa Bala Debnath and others,
Respondents.

Appeal No. 1943 of 1966, D/- 14-10-1970.

(A) **Hindu law — Joint family property — Alienation for legal necessity by limited owner — Suit to set it aside — Recital in sale-deed that full consideration is paid — Onus lies on plaintiff to prove that recital is false and vendor did not in fact receive consideration.** A. F. O. D. No. 173 of 1956, D/- 7-3-1962 (Cal), Reversed.

(Para 7)

*(A.F.O. D. No. 173 of 1956, D/- 7-3-1962 — Cal.)

KN/KN/E919/70/DVT/G

(B) **Hindu law — Joint family property — Alienation — Legal necessity — Proof — Recital in sale-deed of legal necessity — Evidentiary value.**

Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession

(Paras 10, 11)

A sale-deed executed by a widow, a limited owner, in respect of joint family property contained recital that sale was for legal necessity. Circumstances proved in suit to set aside sale also corroborated the fact of legal necessity. Eldest son of the widow also participated in execution of the sale-deed and it was not proved whether he was minor or major at that time.

Held, sale could not be set aside as legal necessity was amply proved. A. F. O. D. No. 173 of 1956, D/- 7-3-1962 (Cal), Reversed. (Paras 13, 14)

(C) **Hindu law — Joint family property — Alienation for legal necessity — Suit to set it aside — Plea of fraudulent representation and exercise of undue influence over vendor — Denial by vendee — No issue raised**

and no evidence led in trial — Held, Appellate Court could not decree suit in appeal on ground of false representation and undue influence. A.F.O.D. No. 173 of 1956, D/- 7-3-1962 (Cal), Reversed. (Civil P.C. (1908), S. 96).

(Para 6)

(D) Civil P.C. (1908), O. 22 R. 2— Suit against several defendants — Death of one against whom no relief is claimed — No reason given in plaint for impleading him as defendant — Failure to bring his legal representatives on record — Appeal does not abate. (Para 15)

Mr. S. V. Gupte, Sr. Advocate, (Mr. D. N. Mukherjee, Advocate, with him), for Appellants; Mr. Purshotam Chatterjee, Sr. Advocate, (M/s. P. K. Chatterjee and Rathin Das, Advocates, with him), for Respondent No. 2.

The following Judgment of the Court was delivered by

SHAH, J.: One Sashi Bhusan was possessed of a piece of land at Mcuza Behala District 24-Parganas admeasuring .98 acres. The land devolved on the death of Sashi Bhusan in 1920 upon his daughter Sarala. Under the Dayabhaga system of law, Sarala inherited the property of her father as a limited owner. Sarala married Kunja Behari. The latter died in 1937 leaving him surviving Sarala, two sons Tulsi and Gobinda, and four daughters Nalini, Kamala, Mangala and Radha. Two of the daughters were married during the lifetime of Kunja Behari. Kunja Behari left no estate except a residential house constructed on the land at Mauza Behala. Kunja Behari was ailing for about one year before his death in 1937. He was in an humble walk of life, and was apparently not profitably employed during his lifetime. At the time of his death the two sons Tulsi and Gobinda were minors.

2. On October 22, 1941, Sarala executed a deed, Ext. E, agreeing to sell a part of the land (.90 acres) for Rs. 1,100/- to Chapalabala wife of Sakha Nath Ghosh. It was recited in the agreement of sale that Sarala had agreed to sell .90 acres of land possessed by her "on account of financial need and to pay off certain debts". Sarala acknowledged receipt of Rupees 101/- as earnest money. It appears that Sarala was for some time thereafter disinclined to carry out the bar-

gain. However on March 13, 1942 she executed a deed, Ext. C, conveying the land agreed to be sold for a consideration of Rs. 1,500/- to Chapalabala and Banikana. It was recited in the deed:

"Now on account of financial needs and to meet certain debts and out of other legal necessity. I announced to sell .90 acre land at rent of Rs. 23/- per annum free from defects and encumbrances leaving a portion of homestead land measuring .08 acre." It was also recited in the deed that Rs. 101/- were paid on the date of the agreement of sale that Sarala had received Rs. 899/- before the date of sale, and Rs. 500/- were paid to her in the presence of the Sub-Registrar. An endorsement of payment of Rupees 500/- before the Sub-Registrar was made by that Officer. The thumb-mark of Sarala was attested by Abinash Chandra Chakravarty and the deed was attested by four persons including her son Gobinda.

3. On the date of the sale the rent in respect of the land was in arrears. It also appears that before the date of sale Mangala had been given in marriage and the youngest daughter Radha remained to be married. Sarala had also to provide for food and clothing for at least five persons. Sarala had only a residential house and the land in dispute and she had no source of income.

4. Sarala died on April, 12, 1950. On January 24, 1953 Tulsi and Gobinda sons of Sarala filed a suit in the Court of the Subordinate Judge, 24-Parganas, for a decree declaring that the sale deed dated March 13, 1942 executed by Sarala was not binding upon the plaintiffs, because it was executed without legal necessity. The suit was resisted by Chapalabala and Banikana (defendants 1 & 2) and by alienees of the land from them. The Trial Court held that the sale deed was supported by legal necessity. The learned Judge observed that Sarala was in "strained financial circumstances", and she executed the sale deed to meet expenses for maintaining herself and her family, and for payment of debts. She had to meet municipal taxes, rent for the land, and expenses for the marriage of her daughter Radha. The learned Judge observed that the plea that execution of the sale deed was obtained by fraud, misrepresentation and undue influence was not seriously

pressed "inasmuch as there was no evidence worth the name adduced" to support that case.

5. Against the decree dismissing the suit the plaintiffs appealed to the High Court. In the view of the High Court there was "no such serious and sufficient pressure on the estate" of Sarala as to compel her to sell her property, and the case of the plaintiffs that she was induced to do so "by persuasion and undue influence of Sakha Nath Ghosh husband of defendant 1 must be accepted. The High Court also observed that it was doubtful whether even full consideration for the sale was paid. The High Court held that the defendants' case of legal necessity was not proved and on that account the sale deed executed by Sarala was not binding upon the plaintiffs. But because one Dhiren Chandra an intermediate transferee was not made party to the suit and Dhiren Chandra had obtained afresh settlement the High Court was of the opinion that the decree of the Trial Court in respect of 10 cottahas out of the land sold by Sarala, could not be reversed. The High Court accordingly modified the decree passed by the Trial Court and allowed the appeal in part, and dismissed the plaintiffs' suit against defendants 4, 5, 6 & 16 in respect of 10 cottahas of land in the northern part of the land. The plaintiffs were given by the decree opportunity to amend the plaint by making a claim for actual possession which was not till then claimed in the plaint. Accordingly the suit was decreed in respect of the remaining defendants in respect of the portion of the land not covered by 10 cottahas in possession of defendants 4, 5, 6 & 16. With certificate granted by the High Court, the heirs of original defendants 2 and 3 having appealed to this Court.

6. In the plaint it was averred in paragraph 4 that Sarala was "illiterate and unpractical in worldly matters", that "she was a simple and pardanashin lady", that Sakha Nath Ghosh husband of Chapalabala was an "Officer" of one of the partner of the famous Roy family and was "shrewd and cunning", that Sarala called him "Dharamapita", and used to "depend upon him in many affairs" and used to be guided by his instructions, and on that account the said Sakha Nath and the husband of Banikana in collusion

with the scribe made fraudulent representation and exercised undue influence over Sarala and got the sale deed executed in their favour. This plea was denied by the contesting defendants. At the trial no issue was raised and no evidence was led in support of that plea. It was conceded that the plea of fraud and undue influence could not be supported. The Trial Court observed:

"Though it was also tried to be said that there was fraud, misrepresentation and undue influence exercised for the execution and registration of the Kobala (Sale deed) yet that branch of argument was not seriously pressed inasmuch as there was no evidence worth the name adduced to show that there was really any fraud practised for the execution and registration of the kobala in favour of defendants 1 and 2 (Chapalabala and Banikana) by Sarala Bala Dasi." The High Court without adverting to this state of the record observed that the case of the plaintiffs that Sarala was induced to sell the land because of persuasion and undue influence of Sakha Nath Ghosh must be accepted. The High Court also observed that it was doubtful whether full consideration for the sale was paid, and that since Sakha Nath Ghosh was "a rent collector under one of Roy Babus of Behala, in order to grab the valuable property belonging to Sarala he had induced Sarala to enter into a transaction of sale". These observations of the High Court are not supported by any evidence, and they seriously vitiate their appreciation of the evidence on record.

7. In the sale deed it was expressly recited that Rs. 101/- were paid at the time of the agreement of sale. That recital was supported by the recital in Ex. E in the agreement of sale. It was also recited in the sale deed, Ext. C, that Rs. 899/- were received before the date of the sale, and Rs. 500/- were received before the Sub-Registrar. Payment of Rs. 500/- is supported by the endorsement on the sale deed itself. It is true that apart from the recital about the payment of Rs. 899/- there is no other documentary evidence to prove that payment. The burden of proving that the consideration was not received by the vendor, however, lay upon the plaintiffs and no serious attempt was

made to discharge that burden. The plaintiffs set up the case that Rupees 500/- were taken back from Sarala after she left the Sub-Registrar's office. The High Court disbelieved this part of the case about repayment of the amount of Rupees 500/- by Sarala received by her before the Sub-Registrar. The High Court observed that about the payment of the balance of the consideration, namely Rupees 899/-, "there was no evidence at all on the side of the defendants that the same was paid". In our judgment, the High Court misconceived the nature of the onus which lay upon the plaintiffs to prove that the consideration which it was recited in the deed was received by Sarala was not in fact received by her and a false recital was made. The recitals in the deed are supported by the testimony of Sailendra Nath Nandi who said that the entire consideration was received by Sarala. We are unable to accept the view of the High Court that the sale deed was not supported by full consideration.

8. The agreement of sale and the sale deed, it may be remembered were attested by Gobinda son of Sarala. Before us it was contended that Gobinda was at the date of the agreement of sale, and at the date of the sale deed, a minor and his attestation was of no value. But on this part of the case there is no reliable evidence.

9. Jogindra Nath Mondal who wrote the two deeds was examined on behalf of the defendants. He deposed that Ext. E—the agreement of sale—was read over and the contents were explained to Sarala after it was written, and she understood the implications of the deed and also received Rs. 101/-. In his cross-examination he stated that he had written down the deed according to what was said to him by Sarala, Gobinda and by Sakha Nath Ghosh and thereafter Sarala executed the deed. There is no reason to disbelieve the testimony of this witness. Abinash Chandra Chakravarty who attested the sale deed—Ext. C—and the agreement of sale—Ext. E—could not be examined for he had died before the date of trial. Attestation by him of the two deeds has significance. Gobinda Chandra Debnath a witness examined on behalf of the plaintiffs stated that the family of the plaintiffs had confidence in Abinash Chandra Chakravarty as he was

"the friend and well-wisher of the family". There is no ground for believing that Abinash Chandra Chakravarty who was present at the time of the execution and had attested the two deeds misused the confidence reposed in him and was guilty of being a party to the bringing into existence a deed containing false recitals to defraud Sarala and her sons.

10. Legal necessity to support the sale must however be established by the alienees. Sarala owned the land in dispute as a limited owner. She was competent to dispose of the whole estate in the property for legal necessity or benefit to the estate. In adjudging whether the sale conveys the whole estate, the actual pressure on the estate, the danger to be averted, and the benefit to be conferred upon the estate in the particular insistence must be considered. Legal necessity does not mean actual compulsion: it means pressure upon the estate which in law may be regarded as serious and sufficient. The onus of proving legal necessity may be discharged by the alienee by proof of actual necessity or by proof that he made proper and bona fide enquiries about the existence of the necessity and that he did all that was reasonable to satisfy himself as to the existence of the necessity.

11. Recitals in a deed of legal necessity do not by themselves prove legal necessity. The recitals are, however, admissible in evidence, their value varying according to the circumstances in which the transaction was entered into. The recitals may be used to corroborate other evidence of the existence of legal necessity. The weight to be attached to the recitals varies according to the circumstances. Where the evidence which could be brought before the Court and is within the special knowledge of the person who seeks to set aside the sale is withheld, such evidence being normally not available to the alienee, the recitals go to his aid with greater force and the Court may be justified in appropriate cases in raising an inference against the party seeking to set aside the sale on the ground of absence of legal necessity wholly or partially, when he withholds evidence in his possession.

12. Kunja Behari husband of Sarala had died in 1937 after a pro-

fracted illness: there is no reliable evidence that he left any property except the residential house, built on a part of the land which Sarala had inherited from her father. Sarala had two sons who were then minors and two daughters who were yet to be married. There were five members in the family to be fed and clothed, and the marriage expenses of the two daughters had to be met. The case that Tulsi the eldest son obtained gainful employment shortly after his father's death and before the sale deed was executed was rightly disbelieved by the Trial Court. The story that Gobinda had taken to hawking vegetables has also been rightly disbelieved by the Trial Court. Sarala had to meet several obligations: she had to pay the annual rent accruing due in respect of the land in dispute and also to pay municipal taxes: she had to feed and clothe herself and her children and to perform the marriage of her daughter Radha. She had no other property and she had no income. The recitals in the deed about the existence of pressure upon the estate are, therefore, amply corroborated by the circumstances.

13. Mr. Purshottam Chatterjee appearing on behalf of the plaintiffs contended that there was evidence only of the debts amounting to Rupees 75/-, Rs. 25/- as rent for the land payable to the head-lessor and Rs. 50/- expenditure incurred for the marriage of the daughter Mangala. Counsel relied upon the recitals made in a plaint filed in a suit for recovery of rent by the landlord against Sarala after the sale deed in which the rent for the years 1941, 1942 and 1943 was claimed. Counsel also relied upon the evidence that in the community to which Sarala belonged, the marriage of a daughter only costs Rs. 50/-. That evidence, in our judgment, is wholly unreliable. In any event apart from the obligation to pay rent and to meet the expenses of marriage of her daughter Mangala various other obligations had to be met. The argument that Sarala belonged to a community in which the male members used to be employed as "household servants" and that Tulsi and Gobinda were so employed is also not supported by any reliable evidence. In our judgment, the High Court ignored the strong inference

which arose out of these circumstances and especially out of the participation by Gobinda in the execution of the agreement of sale and the sale deed.

14. In our view the case of the defendants 1 & 2 that the sale deed was supported by legal necessity of Sarala was amply made out and the Trial Court was right in holding that the sale deed was executed for legal necessity. From the attestation by Gobinda one of the sons of the agreement of sale and the sale deed and the recitals in those deeds, viewed in the light of the other evidence, we are of the opinion that the legal necessity set up by the defendants 1 & 2 is amply proved.

15. It was urged before us that because the 10th defendant died before the certificate was given by the High Court for appeal to this Court, and the heirs of the 10th defendant were not brought on the record, the appeal abates in its entirety. There is, however, no clear evidence whether the 10th defendant died before or after the judgment of the High Court. Again, the plaintiffs had in the suit only claimed a relief for declaration that the alienation in favour of defendants 1 & 2, i.e. Chapalabala and Bani-kana made on March 13, 1942, was without legal necessity and was not binding upon them, and for a declaration of their title to the disputed land. The alienees from defendants 1 & 2 were, it is true, impleaded as parties, but no relief was claimed against them. Nor was any averment made in the plaint about the reasons for and the circumstances in which they were so impleaded. Since the plaintiffs only claimed relief against defendants 1 & 2, and that relief cannot be granted to the plaintiffs, we think, the circumstances that the heirs of the 10th defendant are not impleaded in this appeal does not affect the right of the defendants to claim that the appeal must be dismissed.

16. The appeal is therefore allowed and the suit filed by the plaintiffs is dismissed with costs throughout.

Appeal allowed.

AIR 1971 SUPREME COURT 1033
(V 58 C 210)

(From: Punjab and Haryana)*

K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.

Jage Ram and others, Appellants
v. The State of Haryana and others,
Respondents.

Civil Appeal No. 2034 of 1969, D/-
2-3-1971.

(A) Land Acquisition Act (1894),
Section 3 (f) — Industrialisation of an
area is in public interest. (Para 8)

(B) Land Acquisition Act (1894),
Section 6 (3) — Unless it is shown
that there was colourable exercise of
power, the Court cannot go behind the
declaration of the Government and
find out in a particular case whether
the purpose for which the land was
needed was a public purpose or not —
AIR 1963 SC 151 and AIR 1967 SC
1081, Rel. on. (Para 8)

(C) Land Acquisition Act (1894),
Section 38 — Where the Government
had contributed money towards cost
of land sought to be acquired it is not
necessary to proceed with the acqui-
sition under Part VII of the Act —
AIR 1963 SC 151, Rel. on. (Para 9)

(D) Land Acquisition Act (1894),
Section 17 — Fact that State Govern-
ment or the party was lethargic at
an earlier stage is not very relevant
for deciding whether on the date of
notification there was urgency or not —
Conclusion of Government that
there was urgency though not con-
clusive is entitled to great weight.
(Para 10)

(E) Land Acquisition Act (1894),
Section 17 (2) (as amended in Punjab)
— Clause (c) cannot be interpreted,
by the application of the rule of ejus-
dem generis, as applying to cases
similar to those mentioned in Clauses
(a) and (b) — Case law Rel. on. —
(X-Ref: Interpretation of Statutes —
Rule of ejusdem generis).

There is no basis for holding that
the general words in Clause (c) follow
the particular and specific words in
Clauses (a) and (b) or the specific
words contained in Clauses (a) and (b)
constitute a category, class or genus.
(Para 18)

*(Civil Writ No. 850 of 1969, D/-
7-5-1969 — Punj. & Har.)

CO/CO/B235/71/MKS/P

Cases Referred: Chronological Paras

(1967) AIR 1967 SC 1081 (V 54)
= (1967) 1 SCR 373, Raja
Anand Brahma Shah v. State
of U. P. 8

(1963) AIR 1963 SC 151 (V 50)
= (1963) 2 SCR 774, Somavanti
v. State of Punjab 8, 9

(1960) AIR 1960 SC 1050 (V 47)
= 1960 Ker LT (SC) 31, K. K.
Kochini v. States of Madras
and Kerala 17

(1957) AIR 1957 SC 521 (V 44)
= (1957) SCR 721, Lilavati Bai
v. State of Bombay 16

(1955) AIR 1955 SC 310 (V 42)
= (1955) 2 SCR 867, The
State of Bombay v. Ali
Gulshan 16

Mr. K. L. Gossain, Sr. Advocate,
(Mr. N. N. Goswamy, Advocate, M/s.
S. K. Mehta and K. L. Mehta,
Advocates of M/s. K. L. Mehta
and Co. and Mr. K. R.
Nagaraja, Advocate, with him), for
Appellants; M/s. Harbans Singh and
R. N. Sachthey, Advocates, for Res-
pondents Nos. 1 and 2; Mr. S. V.
Gupte, Sr. Advocate, (Mr. S. K.
Gambhir, Advocate, with him), for
Respondent No. 18.

The following Judgment of the
Court was delivered by

HEGDE, J.: — This appeal by
certificate arises from the decision of
a Division Bench of the Punjab and
Haryana High Court in a writ petition
wherein the appellants challenged the
validity of proceedings under Sec-
tions 4, 6, 9 and 17 (2) (c) of the
Land Acquisition Act, 1894 as amend-
ed by the Punjab Legislature. For
convenience sake we shall refer to
that amended Act as 'the Act'. The
High Court dismissed the writ peti-
tion.

2. It appears that several con-
tentions were sought to be advanced
before the High Court but in this
Court only three contentions have
been pressed for our consideration
i. e., (1) the acquisition in question
being one for a company, proceedings
should have been taken under Sec-
tions 38 to 44-B of the Act, the same
having not been taken, the proceedings
taken are void; (2) there was no
urgency and hence recourse should
not have been had to Section 17 of
the Act and (3) Section 17 (2) (c) is
inapplicable to the facts of the case.

3. Now we may state the facts relevant for the purpose of deciding the questions in dispute.

4. On 14/17th March, 1969, Government of Haryana issued a notification under Section 4 of the Act notifying for acquisition the land concerned in this case. The notification further directed that action under Section 17 (2) (c) of the Act shall be taken on the ground of urgency and the provisions of Section 5-A shall not apply in regard to the said acquisition. The preamble to the said notification says that

"whereas it appears to the Governor of Haryana that land is likely to be required to be taken by Government, at public expenses, for a public purpose, namely for the setting up a factory for the manufacture of China-ware and Porcelain-ware including wall Glazed Tiles, etc., at village Kasser, Tehsil Jhajjar, District Rohtak, it is hereby notified that the land in the locality described in the specification below is likely to be required for the above purpose".

On March 18, 1969 the Government issued a notification under Section 6 of the Act acquiring the land for a public purpose. On March 28, 1969 notices under Section 9 of the Act were served on the appellants. On April 8, 1969, the appellants filed the writ petition giving rise to this appeal.

5. The allegations in the writ petition include the assertion that there was no urgency in the matter of acquiring the land in question and therefore there was no justification for having recourse to Section 17 and thus deprive the appellants of the benefit of Section 5-A of the Act. It was further alleged therein that the acquisition in question was made for the benefit of a company and hence proceedings should have been taken under Sections 38 to 44 (B) of the Act and that there was no public purpose involved in the case. It was further pleaded that the land acquired was not waste and arable land and that Section 2 (c) of the Act did not confer power on the Government to dispense with the proceedings under Section 5-A. In the counter-affidavit filed by the Deputy Director of Industries (Administration), Government of Haryana on behalf of the State of Haryana, the above allegations were all denied. Therein it is stated that at the instance of the State of Haryana,

Government of India had issued a letter of intent to a company for setting up a factory for the manufacture of Glazed Tiles etc., in village Kasser. That project was to be started with the collaboration of a foreign company known as Pilkington Tiles Ltd. The scheme for setting up the project had been finalised and approved by the concerned authorities. On November 26, 1968, the Government wrote to one of the promoters of the project, Shri H. L. Somany asking him to complete the "arrangements for the import of capital equipment and acquisition of land in Haryana State for setting up of the proposed factory". It was further stated in that communication that the Government was pleased to extend the time for completing the project upto April 30, 1969. Under those circumstances it had become necessary for the State of Haryana to take immediate steps to acquire the required land. It was under those circumstances the Government was constrained to have recourse to Section 17 of the Act. The Government denied the allegation that the facts of this case did not come within the scope of Section 17 (2) (c). It was also denied that the acquisition in question was not made for a public purpose.

6. We have earlier seen that in the notification issued under Section 4, it had been stated that the acquisition was made "at public expenses, for a public purpose" namely for the setting up a factory for the manufacture of China-ware and Porcelain-ware including wall Glazed Tiles etc.

7. In the writ petition it was not denied that the acquisition in question was made at "public expenses". All that was challenged in the writ petition was that the purpose for which the acquisition was made was not a public purpose.

8. There is no denying the fact that starting of a new industry is in public interest. It is stated in the affidavit filed on behalf of the State Government that the new State of Haryana was lacking in industries and consequently it had become difficult to tackle the problem of unemployment. There is also no denying the fact that the industrialization of an area is in public interest. That apart, the question whether the starting of an industry is in public interest or not is essentially a question that has to be decided by the Government. That

is a socio-economic question. This Court is not in a position to go into that question. So long as it is not established that the acquisition is sought to be made for some collateral purpose, the declaration of the Government that it is made for a public purpose is not open to challenge. Section 6 (3) says that the declaration of the Government that the acquisition made is for public purpose shall be conclusive evidence that the land is needed for a public purpose. Unless it is shown that there was a colourable exercise of power, it is not open to this Court to go behind that declaration and find out whether in a particular case the purpose for which the land was needed was a public purpose or not — see *Smt. Somavanti v. State of Punjab*, (1963) 2 SCR 774 = (AIR 1963 SC 151) and *Raja Anand Brahma Shah v. State of U. P.*, (1967) 1 SCR 373 = (AIR 1967 SC 1081). On the facts of this case there can be hardly any doubt that the purpose for which the land was acquired is a public purpose.

9. In view of the pleadings referred to earlier it is not open to the appellant to contend that the State Government had not contributed any amount towards the cost of acquisition. We were informed at the bar that the State Government had contributed a sum of Rs. 100/- towards the cost of the land which fact is also mentioned in the award of Land Acquisition Officer. That being so it was not necessary for the Government to proceed with the acquisition under Part VII of the Act — see *Somavanti's case*, (1963) 2 SCR 774 = (AIR 1963 SC 151) (supra).

10. Now coming to the question of urgency, it is clear from the facts set out earlier that there was urgency. The Government of India was pleased to extend time for the completion of the project, upto April 30, 1969. Therefore, urgent steps had to be taken for pushing through the project. The fact that the State Government or the party concerned was lethargic at an earlier stage is not very relevant for deciding the question whether on the date on which the notification was issued, there was urgency or not. The conclusion of the Government in a given case that there was urgency is entitled to weight, if not conclusive.

11. This takes us to the question of applicability of Section 17 (2) (c) to the facts of the case. The appellant had denied in the affidavit that the entire land acquired is either waste or arable land. That contention of his has not been examined by the High Court. Therefore, we have to proceed on the basis that the case does not come within the scope of Section 17 (1). The State has also not purported to act under Section 17 (1). It has purported to act under Section 17 (2) (c). Therefore, we have to see whether the State could have proceeded on the facts of this case under Section 17 (2) (c). Section 17 as amended by the Punjab Act 2 of 1954, Punjab Act 17 of 1956 and Punjab Act 47 of 1956 to the extent necessary for our present purpose reads thus:

"17 (1). In cases of urgency whenever, the appropriate Government so directs, the Collector, though no such award has been made, may, on the expiration of fifteen days from the publication of the notice mentioned in Section 9, sub-section (1) take possession of any waste or arable land needed for public purposes or for a Company. Such land shall thereupon vest absolutely in the Government free from all encumbrances.

Explanation.....

(2) In the following cases, that is to say:—

(a) Whenever owing to any sudden change in the channel of any navigable river or other unforeseen emergency, it becomes necessary for any Railway Administration to acquire the immediate possession of any land for the maintenance of their traffic or for the purpose of making thereon a river-side or ghat station or of providing convenient connection with or access to any such station;

(b) Whenever in the opinion of the Collector it becomes necessary to acquire the immediate possession of any land for the purpose of any library or educational institution or for the construction, extension or improvement of any building or other structure in any village for the common use of the inhabitants of such village, or any godown for any society registered under the Co-operative Societies Act, 1912 (Act II of 1912), or any dwelling-house for the poor, or the construction of labour colonies or houses for any other class of people under a Government-sponsored Hous-

ing Scheme or any irrigation tank, irrigation or drainage channel, or any well, or any public road;

(c) Whenever land is required for a public purpose which in the opinion of the appropriate Government is of urgent importance, the Collector may, immediately after the publication of the notice mentioned in sub-section (1) and with the previous sanction of the appropriate Government enter upon and take possession of such land, which shall thereupon vest absolutely in the Government free from all encumbrances.

Provided that the Collector shall not take possession of any building or part of a building under this sub-section without giving to the occupier thereof at least forty-eight hour's notice of his intention so to do

(3) In every case under either of the preceding sub-sections the Collector shall at the time of taking possession offer to the persons interested compensation for the standing crop and trees (if any) on such land and for any other damage sustained by them caused by sudden dispossession.....

(4) In the case of any land to which in the opinion of the appropriate Government, the provisions of sub-section (1) or sub-section (2) are applicable, the appropriate Government may direct that the provisions of Section 5-A shall not apply"

12. Herein we are only concerned with the scope of Section 17 (2) (c) as the vires of Section 17 (2) is not challenged. Section 17 (2) (c) if read by itself is plain. It seems to permit the appropriate Government to direct that the provisions of Section 5-A shall not apply whenever land is required for public purpose which in the opinion of the appropriate Government is of urgent importance. The conditions precedent for the application of Section 17 (2) (c) are (1) that the land must be required for a public purpose and (2) the appropriate Government must be of the opinion that the purpose in question is of urgent importance. But it was urged on behalf of the appellants that we should apply ejusdem generis rule in interpreting Section 17 (2) (c). The contention on behalf of the appellants was that though Section 17 (2) (c) read by itself covers a very large field, that provision should be given a narrower meaning

because of the provisions in Section 17 (2) (a) and (b). It was urged that as the general words contained in Section 17 (2) (c) follow the specific words of the same nature, in Section 17 (2) (a) and (b), those general words must be understood as applying to cases similar to those mentioned in Section 17 (2) (a) and (b).

13. The ejusdem generis rule is not a rule of law but is merely a rule of construction to aid the Courts to find out the true intention of the legislature. If a given provision is plain and unambiguous and the legislative intent is clear, there is no occasion to call into aid that rule. Ejusdem generis rule is explained in Halsbury Laws of England (3rd Edn.) Vol. 36 p. 397 paragraph 599 thus:

"As a rule, where in a statute there are general words following particular and specific words, the general words must be confined to things of the same kind as those specified, although this, as a rule of construction, must be applied with caution, and subject to the primary rule that statutes are to be construed in accordance with the intention of Parliament. For the ejusdem rule to apply, the specific words must constitute a category, class or genus; if they do constitute such a category, class or genus, then only things which belong to that category, class or genus fall within the general words....."

14. It is observed in Craies on Statute Law (6th Edn) p. 181 that:

"The ejusdem generis rule is one to be applied with caution and not pushed too far, as in the case of many decisions, which treat it as automatically applicable, and not as being, what it is, a mere presumption, in the absence of other indications of the intention of the legislature. The modern tendency of the law, it was said, is "to attenuate the application of the rule of ejusdem generis". To invoke the application of the ejusdem generis rule there must be a distinct genus or category. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects".

15. According to Sutherland Statutory Construction (3rd Edn) Vol. II, p. 395, for the application of the doctrine of ejusdem generis, the following conditions must exist.

(i) The statute contains an enumeration by specific words;

(ii) The members of the enumeration constitute a class;

(iii) The class is not exhausted by the enumeration;

(iv) A general term follows the enumeration and

(v) There is not clearly manifested an intent that the general term be given a broader meaning than the doctrine requires.

16. The scope of the *eiusdem generis* rule has been considered by this Court in several decisions. In *State of Bombay v. Ali Gulshan*, (1955) 2 SCR 867 = (AIR 1955 SC 310) it was observed:

"Apart from the fact that the rule must be confined within narrow limits, and general or comprehensive words should receive their full and natural meaning unless they are clearly restrictive in their intendment, it is requisite that there must be a distinct genus, which must comprise more than one species, before the rule can be applied".

In *Lilavati Bai v. The State of Bombay*, 1957 SCR 721 = (AIR 1957 SC 521), it was observed:

"The rule of *eiusdem generis* is intended to be applied where general words have been used following particular and specific words of the same nature on the established rule of construction that the legislature presumed to use the general words in a restricted sense; that is to say, as belonging to the same genus as the particular and specific words. Such a restricted meaning has to be given to words of general import only where the context of the whole scheme of legislation requires it. But where the context and the object and mischief of the enactment do not require such restricted meaning to be attached to words of general import, it becomes the duty of the Courts to give those words their plain and ordinary meaning".

17. The same view was reiterated by this Court in *K. K. Kochini v. States of Madras and Kerala*, AIR 1960 SC 1050.

18. Bearing in mind the principles set out earlier, we shall now consider whether the general import of the words in Section 17 (2) (c) should be cut down in view of Section 17 (2) (a) and (b). Under Clause (a) of Sec-

tion 17 (2), the acquisition is to be made by the Railway Administration when owing to any sudden change in the channel of any navigable river or other unforeseen emergency it becomes necessary for the administration to acquire the immediate possession of any land for the maintenance of the traffic or for the purpose of making thereon a river-side or ghat station or for providing convenient connection with or access to any such station. We would like to emphasize that under this provision, the acquisition can only be made by the Railway Administration and that when it considers that immediate possession of any land is necessary for the purposes mentioned therein. Under Clause (b) of sub-section (2) of Section 17, before an acquisition can be made, the Collector must form an opinion that it has become necessary to acquire the immediate possession of the land concerned for the purposes mentioned therein. Under Clause (c) of Section 17 (2), the acquisition can be made only when the appropriate Government forms the opinion that because of urgent importance, the concerned land has to be acquired for the purposes mentioned in that provision. Under Clause (a) the decision to acquire has to be made by the Railway Administration. Under Clause (b), the acquisition can be made only on the formation of the required opinion by the Collector. Under Clause (c) the acquisition can be made only when the requisite opinion is formed by the appropriate Government. Further under Clause (a) the acquisition has to be made to meet certain unforeseen emergency as a result of which the immediate possession of the land is necessary. Under Clause (b) the Collector must form an opinion that it has become necessary to acquire the immediate possession of land but under Clause (c) the requirement is that the appropriate Government must form the opinion that the acquisition is of urgent importance. Under Clauses (a), (b) and (c) of sub-section (2) of Section 17, the decision to acquire land has not to be made by the same authority but by different authorities. Further the conditions under which the acquisition has to be made differ from clause to clause. Therefore, there is no basis to say that the general words in Clause (c) follow the particular and specific words in

Clauses (b) and (c). Nor can it be said that the specific words contained in Clauses (a) and (b) constitute a category, class or genus. Hence, we are unable to accept the contention that in interpreting Clause (c) of Section 17 (2), we should apply the rule of ejusdem generis.

19. As none of the contentions taken by the appellants are acceptable, this appeal fails and is dismissed. But in the circumstances of the case we make no order as to costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1038
(V 58 C 211)**

(From Calcutta: AIR 1969 Cal 175)

**K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.**

Biswanath Banerjee, Appellant v.
State of West Bengal, Respondent.

Civil Appeals Nos. 1674 and 1675
of 1969, D/- 2-3-1971.

(A) Education — W. B. Board of Secondary Education Act (5 of 1963), Section 16 — An employee of Secondary Education Board under W. B. Secondary Education Act (37 of 1950) who was appointed as Secretary of Board by the Administrator appointed by State Government under W. B. Secondary Education (Temporary Provision) Act 22 of 1954 could be validly discharged from services and another person could be appointed in his place by Government under Section 16 of W. B. Board of Secondary Education Act of 1963 read with W. B. Board of Secondary Education (Appointment of Secretary) Rules (1963), Rule 8 — (X-Ref: Education — W. B. Board of Secondary Education) (Appointment of Secretary) Rules (1963), Rule 8) — AIR 1967 SC 459, Distinguished; AIR 1969 Cal 175, Affirmed. (Para 5)

(B) Constitution of India, Article 226 — Point that petitioners who were employees of Board of Secondary Education could not be discharged till some alternative employment is found for them cannot be permitted to be raised for first time at the argument stage in writ petition — (X-Ref: Education — W. B. Board of Secondary Education Act (5 of 1963), Section 46 (2) (c)). (Para 5)

CO/CO/B236/71/HGP/P

Cases Referred: Chronological Paras
(1969) 73 Cal WN 417, Bidyut Kumar Biswas v. West Bengal Board of Secondary Education 5
(1967) AIR 1967 SC 459 (V 54) = (1967) 1 SCR 499, State of Assam v. Kripanath Sarma 5
Mr. B. Sen, Sr. Advocate, (M/s. D. N. Mukherjee and Somendra Chandra Bose, Advocates, with him), for Appellant; M/s. K. R. Chaudhuri and K. Rajendra Chowdhary, Advocates, for Respondents Nos. 2, 3 and 6, Mr. Santosh Chatterjee, Advocate and Mr. G. S. Chatterjee, Advocate for Mr. Sukumar Basu, Advocate, for Respondent No. 1.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.: — These Appeals are by a Certificate under Article 132-C of the Constitution of India against the Judgment of the Calcutta High Court, which have by an order of this Court dated 25-8-1969 been consolidated for the purpose of hearing. The short question for determination in these Appeals is whether under the Provisions of the West Bengal Board of Secondary Education Act 5 of 1963 read with Rule 8 of the West Bengal Board of Secondary Education (Appointment of Secretary) Rules, the Appellant could be discharged from the service of the Board of Education. The Appellant was an office Superintendent of the Board constituted under the West Bengal Secondary Education Act 37 of 1950 (hereinafter called 'the 1950 Act'). He was promoted as Assistant Secretary on 12-7-1952, as Deputy Secretary on 18-6-56 and on the 1st/8th August 1962 he was appointed as Secretary on probation and confirmed on 1-8-63 by an order dated the 24th August '63. The Appellant continued in this office till 25th November '66 when his services were dispensed with, with immediate effect on payment of 3 months salary in lieu of notice. In his place the Government by its order of the same date appointed temporarily Respondent 6-D. Mazumdar, Director of Consumer Goods, West Bengal as Secretary for a period not exceeding 6 months from the date on which he takes charge of the office. As we have earlier mentioned the initial Act under which his appointment was made was the Act of 1950. Subsequently another Act known as the West Bengal Secondary Education

(Temporary Provision) Act, 22 of 1954 was passed by the Legislature, by which the Board created by the Act of 1950 was superseded and its powers were vested in an Administrator appointed by the State Government. It was the Administrator who had appointed the Petitioner on probation. On the 20th February '63 the West Bengal Board of Secondary Education Act 5 of 1963 (hereinafter called 'the 1963 Act') was passed which came into force on 1-1-1964. Before this Act came into force certain regulations were made on 12-12-63 under the Act of 1950, Rule 4 of which dealt with the conditions of service which were similar to those in Rule 4 of 1951 regulations made on 19-9-51. Under regulation 4 of 1951 the Board had power to dispense with the services of the Secretary or any officer by giving 3 months notice or on payment to him of 3 months salary in lieu of notice. Act 22 of 1954 it may be mentioned did not abolish the Board but only authorised the Administrator to carry on the duties and functions vested in the Board so that the Appellant when he was appointed on probation by the Administrator was an employee of the Board. The 1963 Act by Clause 1 of Section 46 repealed both the 1950 Act as well as the temporary provisions Act 22 of 1954 and by sub-clause (2) it provided that "all Officers and other persons in the employment of the Board of Secondary Education immediately before the commencement of this Act shall until provision is made continue in the service of the Board". It may here be mentioned that prior to the enforcement of the Act on 1-1-64 the Government had made and published rules under that Act known as the West Bengal Secondary Education (Appointment of Secretary) Rules 1963 Rule 8 whereof is in the following terms:

"The State Government shall have the power to dispense with the services of the Secretary on three months' notice or in lieu of such notice on payment of three months' salary and also to discharge or dismiss the Secretary from service without notice or compensation in the event of misconduct or of a breach of any of the duties attached to the post of Secretary".

2. It is in exercise of powers vested under this Rule that the Gov-

ernor dispensed with the services of the Appellant which is now challenged. The learned Advocate for the Appellant contends inter alia that:—

(i) the rule under which the Appellant's services have been dispensed with have no application to the case of a person who continues in service under Section 46 (2) (c) of the 1963 Act,

(ii) being an employee of the Board, his services could only be terminated by the Board and not by the State Government,

(iii) Section 46 (2) (c) envisages that till some other employment is found for all those persons who were in employment of the Board of Secondary Education before the commencement of the 1963 Act, they cannot be discharged.

3. For an appreciation of these contentions it is necessary to examine the relevant provisions of the 1963 Act.

4. Under Section 2 (a) the Board means the West Bengal Board of Secondary Education established under the 1963 Act. Section 3 empowers the State Government as soon as may be after the Act comes into force to establish the Board named the West Bengal Secondary Education Board. The Board shall be a body corporate with perpetual succession and a common seal. Section 4 deals with the composition of the Board which it may be stated is totally different to that which comprised the Board, under the 1950 Act. The appointment of persons in the service of the Board and their condition of service etc., are the subject matter of Section 16, the relevant provisions of which are as follows:—

(1) The Board shall have a Secretary who shall be appointed by the State Government.

(2) The Board may appoint such other officers and servants as it considers necessary for carrying out the purposes of this Act.

(3) The terms and conditions of appointment and the scales of pay and allowances, if any shall—

(a) as respect the Secretary be such as may be prescribed, and

(b) as respect the other officers and servants be such as may be determined by regulations.

(4) xx xx xx

5. Sub-section (1) of Section 45 empowers the State Government after

previous publication, to make rules for carrying out the purposes of this Act and sub-section (2) (f) provides that:

"In particular, and without prejudice to the generality of the foregoing power, such rules may provide for all or any of the following matters, namely—

(f) the terms and conditions of appointment; the scale of pay and the rules of discipline relating to the Secretary of the Board.

It is under the last mentioned provision, 45 (2) (f), that the rules were made, Rule 8 of which we have already extracted. It will thus be seen that the 1963 Act constituted an entirely new Board of Secondary Education and after repealing the old Acts it continued the services of the Officers and other persons in the employment of the Board of Education under the old Act until other provision is made. It may be stated that the power of appointment of a Secretary for the Board under Section 16 is not vested in the Board but in the Government as such there can be no validity in the contention of the learned Advocate for the Appellant that the Government has no power to appoint a Secretary in place of the Appellant who according to him still continues as Secretary under the Board. As we read the provisions, we are clear in our minds and it admits of no doubt that the Board has no power to appoint a Secretary, nor has the Appellant a right to the post as such. All that the Act provides is for the continuance of the Employees of the previous Board till other arrangements are made, namely till a Secretary is appointed by the Government. In our view the appointment of the new Secretary can be traceable to the powers vested in the Government under Section 16 irrespective of the power vested under the rules. The argument that Appellant being an employee of the Board his services could only be terminated by the Board and not by the State Government has no validity in that the old rules have been repealed and the new Board has no power to appoint a Secretary. It has been urged before us that a decision of this Court in *State of Assam v. Kripanath Sarma*, (1967) 1 SCR 499 = (AIR 1967 SC 459), lends support to the contention of the learned Advocate. That case was under the Assam Elementary Education Act, 1962

the relevant provisions of which are not in pari materia with the provisions of the Act which we are called upon to consider. The Respondents in that case were Elementary Education School Teachers appointed under the Assam Basic Education Act, 1954. That Act was repealed by the Assam Elementary Education Act, 1962 under which the Board was to be constituted and in the place of the School Boards functioning under the 1954 Act, the Deputy Inspectors of Schools were made Assistant Secretary of the said Board within their respective jurisdiction. Section 34 (2) provided that all the Elementary School Teachers appointed under the 1954 Act would be taken over by the State Board and who under Section 38 were further deemed to have been employed by the said Board. The statute therefore provided that they were the employees of the Board. Section 46 (2) (c) however merely continues them and does not deem them to be employees of the Board. What happened in that case was that the Board merely passed a resolution "that all teachers who are not Matriculates or who have not passed the Teachers test but who are working as Teachers in School shall be discharged with effect from 31-3-63". The Assistant Secretary without obtaining specific sanction from the Board issued orders for their discharge which he had no power to do. In those circumstances the power to terminate the services being in the Board, it was held that the order of termination by the Assistant Secretary was invalid. This case does not help the Appellant. Lastly the learned Advocate sought to press in aid a Judgment of a Bench of the Calcutta High Court in *Bidyut Kr. Biswas v. West Bengal Board of Secondary Education*, (1969) 73 Cal WN 417, in which the provisions of Section 46 (2) (c) of the 1963 Act were dealt with in support of his contention that the persons in the employment of Board of Secondary Education under the 1950 Act could only be discharged if an alternative employment is found for them inasmuch as the words 'until other provision is made' justifies that conclusion. This point has not been raised in the Writ Petition nor has it been urged either before the Single Bench or before the Division Bench of the High Court and is sought to be raised for the first time before this

Court. We cannot permit him to do so, and therefore express no views on this aspect of the case. In the result the Appeals are dismissed but in the circumstances without costs.

Appeals dismissed.

**AIR 1971 SUPREME COURT 1141
(V 58 C 212)**

(From: Madhya Pradesh)*

K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.

Krishna Beharilal (dead) by his legal representatives (in both the appeals), Appellants v. Gulabchand and others (in both the appeals). Respondents.

Civil Appeals Nos. 74 and 75 of 1967, D/- 16-3-1971.

(A) Deed — Construction — Ordinary rule of construction of a document is to give effect to the normal and natural meaning of the words employed in the document — AIR 1952 SC 145 and AIR 1933 PC 67, Rel. on. (Para 4)

The words "malik mustakil" are strong, clear and unambiguous. Where a compromise deed specifically says that the properties given to the widow were to be enjoyed by her as "Malik Mustakil" and these words are not qualified by other words and circumstances appearing in the document, the Courts must hold that the estate given is an absolute one. (Para 4)

(B) Evidence Act (1872), Sec. 115 — If a person having full knowledge of his rights as a possible reversioner enters into a compromise which settles his claim as well as the claim of the opponent at the relevant time, he cannot be permitted to go back on that arrangement when reversion actually opens — (X Ref. Hindu Law — Family arrangement — Estoppel) — AIR 1961 SC 797, Followed; L. P. A. Nos. 3 and 4 of 1964, D/- 3-5-1966 (Madh Pra), Reversed. (Para 6)

Thus where under a compromise the presumptive reversioners purported to give a portion of the suit properties absolutely to the widow in consideration of her giving up her claim in respect of the other properties they would be estopped from contending

*(L. P. A. Nos. 3 and 4 of 1964, D/- 3-5-1966 — Madh Pra.)

that they are entitled to succeed to the properties given to the widow.

(Para 6)

A Hindu widow cannot enlarge her estate by entering into a compromise with third parties to the prejudice of the ultimate reversioners. But the same will not be true if the compromise is entered into with persons who ultimately become the reversioners. (Para 6)

(C) Constitution of India, Article 136 — Where the issue raised in the suit is broad enough to cover the plea of estoppel and that plea has been argued and considered by the lower Courts without any objection from the plaintiffs, they cannot be permitted in an appeal by special leave, to contend that the defendant had not taken any specific plea of estoppel. (Para 7)

(D) Hindu Law — Family arrangement — To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family — AIR 1966 SC 323, Followed.

(Paras 8 and 9)

The word "family" in the context of a family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement. AIR 1966 SC 323, Followed. (Para 8)

Cases Referred: Chronological Paras (1966) AIR 1966 SC 323 (V 53)

= (1965) 3 SCR 841, Ram Charan Das v. Girja Nandini Devi 8

(1961) AIR 1961 SC 797 (V 48)

= (1961) 3 SCR 624, T. V. R.

Subbu Chetty's Family Charities v. M. Raghava Mudaliar 6

(1952) AIR 1952 SC 145 (V 39)

= 1952 SCR 478, Dhyani Singh

v. Jugal Kishore 4, 5, 6

(1933) AIR 1933 PC 67 (V 20)

= 60 Ind App 56, Bishunath Prasad Singh v. Chandika Prasad Kumari 4

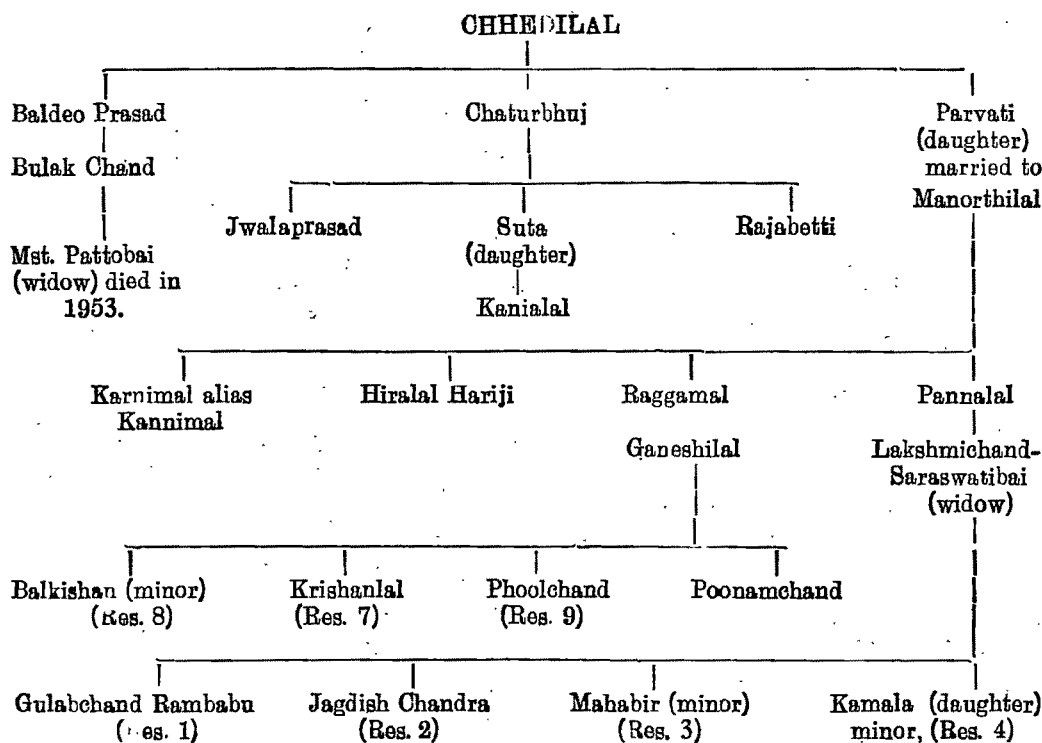
Mr. S. V. Gupte, Sr. Advocate (M/s. Rameshwar Nath and Ravinder Nath, Advocates of M/s. Rajinder Narain and Co. and Mr. Manik Chand Jain, Advocate, with him), for Appellants (In both appeals); Mr. S. T. Desai, Sr. Advocate, (M/s. Motilal Gupta, B. M. Agarwal and P. N. Tewari,

Advocates and M/s. J. B. Dadachanji, O. C. Mathur and Ravinder Narain, Advocates of M/s. J. B. Dadachanji and Co. with him), for Respondents (In both Appeals).

The following Judgment of the Court was delivered by

HEGDE, J.: — In these appeals by special leave identical questions of (Contd. on Col. 2)

fact and law arise for decision. It would be convenient to set out the material facts before formulating the questions arising for decision. In the State of Gwalior there was a firm known as Chhedilal Chaturbhuj. Chhedilal, the owner of the firm had two sons and one daughter. The genealogy of the family of Chhedilal is as follows:



2. After the death of Chhedilal, it appears the firm in question came into the possession of some of the children of Parvati. In 1926, Bulakichand, grandson of Chhedilal filed a suit against Jwalaprasad (his first cousin). Karnimal, Raggamal and Pannalal seeking possession of the firm. Therein he appears to have alleged that Jwalaprasad who had a half share in the suit properties had been colluding with the other defendants. Bulakichand died during the pendency of the suit. Thereafter his widow Pattobai was impleaded as his legal representative. During the pendency of the suit Jwalaprasad, Karnimal, Raggamal and Pannalal also died. Neither Jwalaprasad nor Karnimal left any successors. Raggamal was succeeded by his son Ganeshilal and Pannalal by his son Lakshmichand. They were duly impleaded in the suit. On June 7, 1941, the parties to the suit compromised their disputes.

It may be noted that to that compromise the minor sons of Lakshmichand as well as of Ganeshilal were also parties. Before compromising the suit the parties had obtained the leave of the court as the minor defendants had joined the compromise. Under the compromise, a portion of the suit properties was given to Pattobai and the remaining portion to the defendants in that suit. Pattobai alienated the properties given to her under three different sale deeds i. e. one on July 15, 1941 and the other two on July 24, 1941. The first sale deed was for a sum of Rs. 1,000/- and the other two for Rs. 9,000/- and Rs. 20,500/- respectively. The appellant is the alienee under all these sale deeds. In 1953, Lakshmichand and his sons and Ganeshilal and his sons instituted three suits seeking declarations that the alienations referred to above are not valid and binding against them, the presumptive reversioners to the estate

of Bulakichand. One of those suits is still pending trial. These appeals arise from the other two suits. During the pendency of those suits Pattobai died. Thereafter the suits were contested only by the appellant, the alienee (he will be hereinafter referred to as the defendant). The trial court dismissed the two suits holding that in view of the compromise in the earlier suit, the parties are estopped from challenging the validity of the sale deeds as under that compromise the estate given to Pattobai is an absolute one. In appeal the first appellate Court confirmed the judgment of the trial Court on the ground that as the plaintiffs had not amended the plaint seeking possession of the suit properties after the death of Pattobai, the suits were not maintainable. On further appeals being taken by the plaintiffs, the High Court set aside the first appellate Court's judgment. It came to the conclusion that the first appellate Court should have taken into consideration the change in the circumstances that had taken place pending the trial of the suits and moulded the relief according to law. It, accordingly remanded the cases to the first appellate Court for disposal of the same on merits. After remand the first appellate Court again affirmed the decision of the trial Court on two grounds viz. (1) that the plaintiffs were estopped from claiming any right in the suit properties as an absolute estate had been given to Pattobai in respect of those properties and (2) that under any circumstance the compromise in question should be considered as a family arrangement and as such is not liable to be reopened. This decision was affirmed by a single Judge of the High Court in second appeal. Thereafter the plaintiffs took up the matter in appeal to the Letters Patent Bench. The Letters Patent Bench reversed the judgment of the Courts below. It held that the compromise entered into in 1941 was an illegal compromise and as such the same cannot be used to non-suit the plaintiffs. It also disagreed with the conclusion of the learned single Judge that the compromise recorded amounted to a family settlement. These appeals are directed against that judgment.

3. The first question that falls for consideration is whether on a true construction of the compromise decree it can be held that Pattobai had been

given an absolute estate? According to the plaintiffs Pattobai having been impleaded to the suit as a legal representative of her husband, in law she could not take an absolute estate; she could only have a widow's estate and therefore in construing the compromise decree, we must bear in mind the principles of Hindu Law and if we do so, the only possible conclusion is that the intention of the parties was only to give her a life estate. On the other hand it is contended on behalf of the defendant that under law Pattobai was entitled to enjoy all the properties included in the plaint in the earlier suit during her lifetime but she agreed to give up her right in bulk of the properties in consideration of her getting an absolute estate in a small portion of the properties involved in that suit. It was further urged on his behalf that the compromise deed specifically says that the properties given to Pattobai are to be enjoyed by her as "Malik Mustikal" which means absolutely and hence there is no basis for the contention that she took a widow's estate.

4. The ordinary rule of construction of a document is to give effect to the normal and natural meaning of the words employed in the document. The compromise deed specifically says that the properties given to Pattobai were to be enjoyed by her as "Malik Mustakil". The meaning of the expression "Malik Mustakil" an urdu word, has come up for consideration before this Court in some cases. In *Dhyan Singh v. Jugal Kishore*, 1952 SCR 478 = (AIR 1952 SC 145) this Court ruled that the words "Malik Mustikal" were strong, clear and unambiguous and if those words are not qualified by other words and circumstances appearing in the same document, the Courts must hold that the estate given is an absolute one. A similar view was taken by the Judicial Committee in *Bishunath Prasad Singh v. Chandika Prasad Kumari*, 60 Ind App 56 = (AIR 1933 PC 67). The circumstances under which the compromise was entered into as well as the language used in the deed do not in any manner go to indicate that the estate given to Pattobai was anything other than an absolute estate.

5. The Letters Patent Bench of the High Court held that the compromise entered into was an illegal compromise. It came to that conclu-

sion on the basis that a Hindu widow cannot enlarge her own rights by entering into a compromise in a suit. But the High Court overlooked the fact that this was not a compromise entered into with third parties. It was a compromise entered into with the presumptive reversioners. Further at no stage the plaintiffs had pleaded that the compromise entered into in 1941 was an illegal compromise. The plaintiffs took no such plea in the plaint. There was no issue relating to the validity of the compromise. Hence the High Court was not justified in going into the validity of the compromise. Further even if the compromise was an invalid one, the parties to the compromise are estopped from challenging the impugned alienations: see Dhyani Singh's case, 1952 SCR 478 = (AIR 1952 SC 145) (supra).

6. This takes us to the question of estoppel. As seen earlier, the trial Court, the first appellate Court as well as the learned single Judge of the High Court have concurrently come to the conclusion that the plaintiffs are estopped from challenging the impugned alienations. But the Letters Patent Bench took a different view. Its conclusion, as mentioned earlier, proceeded on the basis that a Hindu widow cannot enlarge her own estate by entering into a compromise with others. It is well settled that a Hindu widow cannot enlarge her estate by entering into a compromise with third parties to the prejudice of the ultimate reversioners. But the same will not be true if the compromise is entered into with persons who ultimately become the reversioners. It was urged on behalf of the respondents that Pattobai was impleaded in the earlier suit only as a legal representative of her deceased husband; therefore, she could only represent his estate and not carve out an estate for herself. But this argument overlooks the fact that according to Pattobai she was entitled to enjoy the entire properties included in the earlier suit during her lifetime; but under the compromise a fraction of those properties were given to her absolutely; that being so the plaintiffs are estopped from backing out of that compromise. It was urged on behalf of the plaintiffs that the representation made by the defendants in the earlier suit is at best a representation as regards the true legal position and such a repre-

sentation cannot estop them; before there can be an estoppel, the representation must be about some fact, the opposite side must rely on that representation and must suffer some detriment by acting on the basis of that representation. It was urged on their behalf that in this case the only representation that the plaintiffs are said to have made is that pattobai had an absolute estate in a portion of the suit properties; this cannot be said to be a representation of a fact and therefore the same cannot form any basis for invoking the rule of estoppel. We are unable to accept this contention. From the facts set out earlier, it is clear that Bulakichand claimed the entire estate for himself after the death of Jwalaprasad. If the contention of Bulakichand is correct, as we must assume for the purpose of this case, then Pattobai would have been entitled to enjoy the entire properties during her lifetime. But she gave up her right in a substantial portion of those properties on the representation by the defendants that she can take a portion of the suit properties absolutely. This is a representation of a fact and not of law. The representation is that the defendants were willing to confer on Pattobai an absolute right in a portion of the suit properties if she gave up her right in the remaining properties. Pattobai relied on that representation and gave up her claim in respect of a substantial portion of the properties included in the earlier suit. Hence the plaintiffs particularly Lakshmichand and Ganeshilal who alone were the reversioners to the estate of Bulakichand on the date of the death of Pattobai, are estopped from contending that they are entitled to succeed to the properties given to Pattobai. The other plaintiffs have no independent right of their own in the properties with which we are concerned. In Dhyani Singh's case, 1952 SCR 478 = (AIR 1952 SC 145) (supra) this Court ruled that even if an award made is invalid, the persons who were parties to that award are estopped from challenging the validity of the award or from going behind the award in a subsequent litigation. In T. V. R. Subbu Chetty's Family Charities v. M. Raghava Mudaliar, (1961) 3 SCR 624 = (AIR 1961 SC 797), this Court ruled that if a person having full knowledge of his rights as a possible reversioner enters into a transaction

which settles his claim as well as the claim of the opponent at the relevant time, he cannot be permitted to go back on that arrangement when reversion actually opens. At the time of the compromise Lakshmichand and Ganeshilal were the nearest presumptive reversioners. They must be deemed to have known their rights under law. Under the compromise they purported to give a portion of the suit properties absolutely to Pattobai, evidently in consideration of her giving up her claim in respect of the other properties. They cannot be now permitted to resile from the compromise and claim a right inconsistent with the one embodied in the compromise. They cannot advance their case by impleading their sons as co-plaintiffs. Their sons can only claim through them.

7. For the first time in this Court it was urged that the plea of estoppel was not available to the defendant as no such plea had been taken in the pleadings. It is true that no specific plea of estoppel had been taken in the written statement filed by the defendant. But he had definitely stated in paragraph 14 of his written statement that the plaintiffs are bound by the compromise and have no right to deny the right of Pattobai over the whole of the properties sold to him. One of the issues raised in the suit (Issue No. 4) is:

"Are the plaintiffs Nos. 1 and 2 bound by the terms of compromise filed in Civil Original Suit No. 3 of S. Y. 1991 of the High Court? If so, what is its effect?"

This issue is broad enough to cover the plea of estoppel. The plea of estoppel had been urged and considered by all the Courts without any objection from the plaintiffs. They cannot be now permitted to contend that the defendant had not taken any specific plea of estoppel.

8. The next question that we have to consider is whether the compromise in question can be considered as a settlement of family disputes. It may be noted that Lakshmichand and Ganeshilal who along with Pattobai were the principal parties to the compromise were the grand-children of Parvati who was the aunt of Bulakichand. The parties to the earlier suit were near relations. The dispute between the parties was in respect of a certain property which was originally

owned by their common ancestor namely Chhedilal. To consider a settlement as a family arrangement, it is not necessary that the parties to the compromise should all belong to one family. As observed by this Court in *Ram Charan Das v. Girija Nandini Devi*, (1965) 3 SCR 841 at pp. 850 and 851 = (AIR 1966 SC 323 at pp. 328 and 329) the word "family" in the context of the family arrangement is not to be understood in a narrow sense of being a group of persons who are recognised in law as having a right of succession or having a claim to a share in the property in dispute. If the dispute which is settled is one between near relations then the settlement of such a dispute can be considered as a family arrangement — see *Ramcharan Das's case*, 1965-3 SCR 841 = (AIR 1966 SC 323) (supra).

9. The Courts lean strongly in favour of the family arrangements to bring about harmony in a family and do justice to its various members and avoid in anticipation future disputes which might ruin them all — see *Sahu Madho Das v. Pandit Mukand Ram and anr.*

10. For the reasons mentioned above we are of the opinion that in view of the compromise entered into between the parties in 1941, the suits from which these appeals arise are not maintainable. In that view, it is not necessary to go into the question whether the alienations were effected for valid necessity, a question that has not been gone into finally.

11. In the result these appeals are allowed and the suits from which these appeals arise dismissed with costs throughout.

Appeals allowed.

AIR 1971 SUPREME COURT 1045
(V 58 C 213)

(From: Patna)*

J. C. SHAH, K. S. HEGDE AND A. N. GROVER, JJ.

M/s. D. N. Roy and others, Appellants v. State of Bihar and others, Respondents.

Civil Appeal No. 1908 of 1968,
D/- 30-9-1970.

*(Misc. Judl. Case No. 1665 of 1964,
D/- 9-8-1966 — Pat.)

JN/JN/E808/70/RGC/B

Mines and Minerals (Regulation and Development) Act (1957), S. 30 — Central Government in exercise of its suo motu power cancelling mining lease granted to appellant by State Government — Appellant not informed at any stage that Central Government proposed to exercise its suo moto power and was not asked to show cause against exercise of such power— Failure of Central Government to do so held had vitiated the order — (C. R. Natural Justice). (Para 7)

Mr. M. C. Chagla, Senior Advocate (Miss Kailash Mehta and A. K. Nag, Advocates with him), for Appellants; Mr. Jagadish Swarup Solicitor-General of India, (Mr. R. C. Prasad Advocate with him), (for Nos. 1, 3 and 4) and Mr. V. A. Seyid Muhammad, Senior Advocate, (Mr. S. P. Nayar, Advocate with him), (for No. 2), for Respondents.

The Judgment of the Court was delivered by

HEGDE, J.:— On June 24, 1959, the Deputy Commissioner Santal Parganas caused a notice dated June 20, 1959 published in the Bihar Gazette in accordance with the provisions of Rule 67 of the Mineral Concession Rules, 1949, of the availability for regrant of mining rights in respect of fireclay over the whole of village Palasthali No. 39, situate in Thana Hala, Block Kasta, Sub-Division Jamtara in the District of Santal Parganas. He announced in that notice that the said area will be available for regrant with effect from August 1, 1959 and invited applications for grant of mining lease in respect of that area in accordance with the provisions of Mineral Concession Rules, 1949. The appellant, a partnership firm applied for that lease on June 24, 1959 itself. Thereafter other persons including the 5th respondent Nankhu Singh also applied for obtaining the lease in question. The State Government of Bihar granted the lease to the appellant on March 31, 1962. In pursuance of that grant a written agreement was entered into between the State Government and the appellant and the same was duly registered. The State Government rejected the applications of the other applicants. Even during the pendency of the applications before the State Government the 5th respondent moved the Central Government

under rule 54 of the Mineral Concession Rules, 1960 which had replaced the 1949 Rules. Therein he prayed that the grant of the lease in favour of the appellant, if it had been made, should be cancelled and that he should be granted the mineral lease in question. The Central Government served a copy of that petition on the appellant and called for its comments. At the same time it called for the comments of the State Government as well. After receiving the comments of the State Government, the same were passed on to the appellant as well as to the 5th respondent and their further comments were called for. After examining the representation made by the parties and the comments offered by the State Government, the Central Government dismissed the petition made by the 5th respondent on September 30, 1964. The Order of the Central Government reads thus:

"Government of India

Ministry of Steel & Mines,

(Department of Mines and Metals),
No. MV-1 (569)/61 New Delhi, the
30th Sept., 1964

From

Shri A. Nabar,
Under Secretary to the Government of India.

To

Shri Nankhu Singh,
P. O. Churulia, Distt. Burdwan
(West Bengal)

Subject: Application under rule 54 of the Mineral Concession Rules, 1960 in respect of Mining lease for fire-clay over 248 acres in Mouza Palasthali, P. S. Nala, Distt. Santal Parganas.

Sir,

I am directed to refer to your application dated 17-10-1961 on the above subject and to say that after careful consideration the Central Government hereby reject your revision application as being time-barred.

Yours faithfully,
Sd/- A. Nabar,

Under Secretary to the Government of India."

2. Thereafter the Central Government passed a further order on November 5, 1964 and that order reads thus:

"Registered A/D
Government of India
Ministry of Steel and Mines
(Department of Mines and Metals)
No. MV-1 (569)/61 New Delhi, the
5th November, 1964.

From

Shri H. S. Sahni,
Under Secretary to the Govern-
ment of India.

To

The Secretary to the Government
of Bihar,
Department of Mines and Geology,
Patna.

Subject: Revision application
under rule 54 of the Mineral Conces-
sion Rules, 1960 from Shri Nankoo
Singh relating to Mining lease for
Fire-clay over 248 acres in Santal Par-
gana District.

Sir,

In continuation of this Ministry's
letter of even number dated 30-9-1964
on the above subject, I am directed to
say that since no entry in the standard
register was made as required under
former rule 67 of the Mineral Conces-
sion Rules, 1949, the area could not
have been held to be available and the
four applications (referred to in para 2
of the State Government's letter no.
3181/M, dated 9-6-1962) would be
deemed to be premature and should
have been rejected on that ground
alone.

Even assuming that the notifica-
tion was valid, the first two applica-
tions were premature under rule 68
and on that ground should have been
rejected. Apart from this the appli-
cation of M/s. D. N. Roy and S. K.
Bannerjee was deemed to be rejected
on the expiry of 9 months from the
date of receipt of application i.e. 24-
3-1960. The party did not come up in
revision. The application, therefore,
ceased to exist and the order of the
State Government granting the lease
to this party on 31-3-1962 was without
jurisdiction. The grant and consequent
execution of the Mining lease are
therefore, void.

In view of the position explained
above the Central Government in exer-
cise of their revisionary power con-
ferred by Rule 55 of Mineral Conces-
sion Rules, 1960 and all other powers
enabling in this behalf hereby set aside
the order of the State Government
contained in their letter No.

A/MM/4031/62-1789M, dated 31-3-1962
(mentioned in State Government's
letter No. A/MM/4031/62-3181/M, dated
9-6-1962) granting Mining lease to M/s.
D. N. Roy and S. K. Bannerjee and
further direct them to throw open
the area again under Rule 58 (1) of
Mineral Concession Rules 1960 for re-
grant. The notification should clearly
indicate the date from which the area
could be available for re-grant and
the date by which the petitioners
should submit their applications for
mineral concession.

4. M/s. D. N. Roy and S. K.
Banerjee are being informed.

Yours faithfully,
Sd/- H. S. Sahni

Under Secretary to the Govern-
ment of India.

Copy forwarded to M/s. D. N. Roy
and S. K. Banerjee village and P. O.
Churulia, Distt. Burdwan (West
Bengal) with reference to their letter
dated 12-6-1963.

Sd/- H. S. Sahni

Under Secretary to the Gov-
ernment of India".

3. Aggrieved by this order the
appellant moved the Patna High Court
under Article 226 of the Constitution
to quash the order of the Central Gov-
ernment dated November 5, 1964
(which will hereinafter be referred to
as the 'impugned order'). The High
Court dismissed its petition. As
against the order of the High Court
the appellant has brought this appeal
after obtaining certificate of fitness
from the High Court.

4. It was urged before the
High Court that the Government hav-
ing passed the final order on Septem-
ber 30, 1964, it had no power to re-
view its own order and make any fur-
ther order. Admittedly there is no
provision under the Mines and
Minerals (Regulation and Develop-
ment) Act, 1957 or under the Mineral
Concession Rules, 1960 empowering
the Central Government to review its
order. The High Court did not hold
that the Central Government had any
power to review its own order either
under the Mines and Minerals (Regula-
tion and Development) Act, 1957 or
under the Mineral Concession Rules.
It upheld the Central Government's
order on two grounds namely that the
order dated September 30, 1964 is not
a complete order as it did not dispose

of the application made by the 5th respondent completely and secondly the Central Government had suo motu power to review the order of the State Government under Section 30 of the Mines and Minerals (Regulation and Development) Act, 1957. These conclusions of the High Court were assailed before us.

5. In his application under Rule 54 of the Mineral Concession Rules, 1960, the 5th respondent prayed for (i) setting aside the grant made in favour of the appellant and (ii) grant the area in question on lease to him. The High Court thought that these are two independent prayers. In its view the Central Government by its order dated September 30, 1964 had disposed of only the prayer of the 5th respondent to grant the area on lease to him but it had not disposed of his first prayer namely to cancel the grant in favour of the appellant. In our opinion this is an incorrect approach. The two reliefs asked for by the 5th respondent were interconnected reliefs. In the context in which they were made, they cannot be considered as independent prayers. No grant in his favour could have been made without first setting aside the grant made in favour of the appellant. Therefore the first relief asked for by the 5th respondent is a necessary condition precedent for a grant in his favour. Further by its order dated September 30, 1964, the Central Government dismissed the entire application of the 5th respondent on the ground that the same was time-barred. If his application in respect of one part of his prayer was time-barred, it was equally time-barred in respect of the other part.

6. The impugned order of the Central Government does not show that it was made in the exercise of its suo motu power. It is purported to have been made on the basis of the application made by the 5th respondent under Rule 54 of the Mineral Concession Rules, 1960. In paragraph 3 of that order it says "in view of the position explained above the Central Government in exercise of their revisionary power conferred by Rule 55 of Mineral Concession Rules, 1960 and all other powers enabling in this behalf hereby set aside the order of the State Government contained in

their letter No. A/MM/4031/62-1789M dated 31-3-1962".

7. It is true that the order in question also refers to "all other powers enabling in this behalf". But in its return to the writ petition the Central Government did not plead that the impugned order was passed in exercise of its suo motu powers. We agree that if the exercise of a power can be traced to an existing power even though that power was not purported to have been exercised, under certain circumstances, the exercise of the power can be upheld on the strength of an undisclosed but undoubted power. But in this case the difficulty is that at no stage the Central Government intimated to the appellant that it was exercising its suo motu power. At all stages it purported to act under Rules 54 and 55 of the Mineral Concession Rules, 1960. If the Central Government wanted to exercise its suo motu power it should have intimated that fact as well as the grounds on which it proposed to exercise that power to the appellant and given him an opportunity to show cause against the exercise of suo motu power as well as against the grounds on which it wanted to exercise its power. Quite clearly the Central Government had not given him that opportunity. The High Court thought that as the Central Government had not only intimated to the appellant the grounds mentioned in the application made by the 5th respondent but also the comments of the State Government, the appellant had adequate opportunity to put forward his case. This conclusion in our judgment is untenable. At no stage the appellant was informed that the Central Government proposed to exercise its suo motu power and asked him to show cause against the exercise of such a power. Failure of the Central Government to do so, in our opinion, vitiates the impugned order.

8. For the reasons mentioned above we allow this appeal as well as the writ petition and set aside the impugned order. Central Government shall pay the costs of the appellant in this Court as well as in the High Court.

Ordered accordingly.

AIR 1971 SUPREME COURT 1049
(V 58 C 214)

(From: Calcutta)*

J. C. SHAH AND A. N. GROVER, JJ.

Radha Nath Seal (dead) by his legal representatives, Appellants v. Haripada Jana and others, Respondents.

Civil Appeal No. 1657 of 1966, D/- 21-9-1970.

(A) Civil P. C. (1908), Section 100 — Second appeal — Question of fact — First appellate Court failing to consider material evidence in shape of documents and making good deal of assumptions of fact — High Court can interfere. (Para 4)

(B) Civil P. C. (1908), Section 100 — Second appeal — Findings of fact — Interference — Plaintiffs claiming to have purchased right, title and interest of original tenants — View of Courts below that plaintiff did not get any right, title or interest because of termination of tenancy of predecessors of plaintiff, by notice — On proved and admitted facts it is open to High Court to find what the nature of tenancy was. (Para 4)

Mr. S. V. Gupte, Sr. Advocate, (Mr. D. N. Mukherjee, Advocate with him), for Appellants; Mr. P. K. Chatterjee, Advocate, for Respondent No. 1.

Following Judgment of the Court was delivered by

GROVER, J.: — This is an appeal by special leave from a judgment of the Calcutta High Court. It arises out of a suit for declaration of title to property which was a tank known as Gangasagar in plot No. 4302 and for recovery of its possession together with mesne profits.

2. Kshirode Charan Duley and his brothers who were represented in the suit by defendants 4 to 6 were the original tenants of the property. The plaintiff claimed that he had purchased the right, title and interest of the original tenants, namely, the Duleys by a kubala for a consideration of Rs. 1800/- in the year 1955. It appears that the owner of the property served a notice on the successors of Duleys to quit the same and it was

*(A. F. A. D. No. 243 of 1961, D/- 3-3-1965 — Cal.)

alleged that they had surrendered possession to B. Sen defendant No. 3 who was trustee of Bipinbehari Sen Memorial Trust in April 1953. Thereafter B. Sen defendant No. 3 granted a settlement to the present appellant who was impleaded as defendant No. 1 in the suit. This happened in the year 1953. Certain criminal proceedings took place between the parties under Section 145 wherein it was held that defendant No. 1 was in actual possession of the property. This led to the filing of the suit by the plaintiff who claimed his right through Duleys who were the original tenants. The main defence of defendant No. 1 and defendant No. 2 his son was that the predecessors of the plaintiff had merely the jalkar right which had been validly terminated by a notice to quit with effect from the end of Chaitra 1359 B. S. The trial Court dismissed the suit and an appeal to the Subordinate Judge also failed. The High Court in second appeal decreed the suit.

3. The points which were agitated before the first appellate Court were: (1) what was the nature and purpose of the lease of the predecessors of the plaintiff. Had they merely jalkar right or right of tenancy in the suit property? (2) Did the plaintiff acquire any right title or interest by virtue of his purchase from the pro forma defendants? The first appellate Court held that the grant was merely of tank, fisheries and not that of raiyati with a right of occupancy. The question of relinquishment of possession by the Duleys after the expiry of the lease was also considered but the finding given was that it was defendant No. 3, namely, B. Sen who was in actual possession and not the plaintiff, of the property in dispute. It is difficult to find in the judgment of the first appellate Court any clear decision on the second point relating to the acquisition by the plaintiff of any right, title and interest by virtue of purchase of rights from Duleys. The High Court considered the evidence in detail and came to the conclusion that the tenancy which subsisted between B. Sen defendant No. 3 and the Duleys was governed by the Bengal Tenancy Act, 1885, hereinafter called the "Act". It became a permanent one after 12 years from the year 1322 B. S. It was, therefore, held that the plaintiff-

vendor was in possession of the disputed property as a raiyat with a right of occupancy. If that was so the tenancy could not have been terminated by means of the notice Ext. 3. The view of the Courts below that the plaintiff did not get any right, title or interest by virtue of Ext. 1 because of the termination of the tenancy by the notice Ext. 3 was found to be erroneous.

4. The learned counsel for the appellants has sought firstly, to assail the conclusion of the High Court with regard to the nature of the tenancy which subsisted between B. Sen and Duleys. It has been urged that under Section 100, Civil Procedure Code, it was not open to the High Court to interfere with questions of fact. The High Court has pointed out that certain material evidence in the shape of documents was not considered by the first appellate Court and a good deal of assumptions of fact were made. Apart from that on proved and admitted facts it was open to the High Court to find what the nature of the tenancy was.

5. It is clear from the judgment of the High Court that no attempt was made to argue that the relationship between the predecessors of the plaintiff and the landlord was governed by the provisions of any enactment which dealt with non-agricultural tenancies. Once the tenancy was governed by the Act and it became permanent under its provisions the only manner in which it could come to an end was the one provided by the Act. It has not been shown to us that the notice Ext. P. 3 which was served on the predecessors of the plaintiff was sufficient in law and complied with the provisions of the Act to bring to an end the permanent tenancy. The only argument that has been pressed on behalf of the appellants on this point is that after the notice had been served on the predecessors of the plaintiff they had surrendered their tenancy rights. This could be done under Section 86 of the Act. The provisions of Section 86 were never pressed before the High Court. They require examination of and investigation into several other matters which it is not possible to go into at this stage. Even the question of surrender was never sought to be put into issue in the trial Court.

6. We find no merit in this appeal which is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1050
(V 58 C 215)**

(From: Allahabad)*

**P. JAGANMOHAN REDDY AND
I. D. DUA, JJ.**

Matru alias Girish Chandra, Appellant v. The State of U. P., Respondent.

Criminal Appeal No. 165 of 1968,
D/- 3-3-1971.

**(A) Constitution of India, Art. 136
— In Criminal appeals Supreme Court reappreciates evidence only in exceptional cases. (Para 8)**

The Article merely confers discretionary power on the Court to scrutinise and go into the evidence in special circumstances in order to satisfy itself that substantial and grave injustice has not been done and does not confer a right of appeal on a party. (Para 8)

**(B) Evidence Act (1872), Section 9
— Identification tests do not constitute substantive evidence. (Para 13)**

Identification tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. (Para 13)

**(C) Penal Code (1860), Section 300
— Motive — Absconding by itself does not necessarily lead to a definite conclusion of guilty mind — (X. Ref. Evidence Act (1872), Section 8). (Para 13)**

The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Generally the Courts consider it as a very small item in the evidence for sustaining conviction. It cannot certainly be held as a determining link in completing the chain of circumstantial evidence consistent only with the hypothesis of the guilt of the accused. (Para 15)

*(Criminal Appeal No. 2305 of 1965,
D/- 8-2-1968 — All.)

CO/DO/B241/71/CWM/P

Cases Referred: Chronological Paras
(1956) AIR 1956 SC 51 (V 43)

= 1956 Cri LJ 147, Prabhu

Babaji Navle v. State of Bombay 7
(1952) AIR 1952 SC 343 (V 39)

= (1952) 3 SCR 1091, Hanumant.

v. State of Madhya Pradesh 7

Mr. A. S. R. Chari, Sr. Advocate,
(Mr. J. P. Goyal, Advocate and M/s.
Kshatriya and Chatterjee, Advocates,
with him), for Appellant; Mr. O. P.
Rana, Advocate, for Respondent.

The following Judgment of the
Court was delivered by

DUA, J.: — In this appeal by special leave the appellant Matru alias Girish Chandra challenges his conviction under Section 302 read with Section 34, I. P. C., and under Section 382, I. P. C. For the former offence he was sentenced to imprisonment for life and for the latter to rigorous imprisonment for four years. Both the sentences were directed to run concurrently.

2. The appellant, along with Mohar Singh and Saheb Singh were committed to the Court of Sessions for trial for offences under Sections 302/34, I. P. C. for the murder of Smt. Omwati, wife of Ram Chander (F. W. 1) and of their three year old son Sua Lal and under Section 382, I. P. C. for committing theft of cash, ornaments and other things from the house of the deceased. The offences were alleged to have been committed on May 29, 1964 between 10 and 11 a. m. in the township of Shamsabad.

3. The appellant and the deceased were admittedly next door neighbours in Mohalla Chaukhanda at the relevant time. Ram Chandra had two sons, the elder one Ramji being six years old. On the day of occurrence at about 9 a. m., Ram Chandra left his house for his shop about three furlongs away, leaving behind in the house his wife and two sons. About an hour later Omwati sent the elder son to the shop with some food for his father. A few minutes later Ram Chandra sent to his house some vegetables through his servant. After sometime his servant returned to the shop and informed Ram Chandra that his wife was lying in the house in pool of blood. After calling his nephew to look after the shop Ram Chandra immediately went to his house and found his wife lying dead in the courtyard near the well whereas his 3 year old son Sua Lal was lying

dead in a room close to the courtyard. The box inside the room also appeared to have been opened and its contents pilfered. Some gold and silver ornaments which his deceased wife was wearing that morning were found missing. Information of the occurrence was lodged at the police station Shamsabad at about 12.40 in the afternoon. But as he did not suspect anyone he merely stated the circumstances in which he came to know of the occurrence and found his wife and child dead in the house. It was stated in the report that Rs. 200/- in cash and three ornaments including a ring had been taken away by the miscreants. Matru, appellant, who was the next door neighbour came to Ram Chandra's house before the first information report was lodged and remained with him till the report was made to the police. The investigating officer found blood at both the places where the two dead bodies were lying. The blood-stained and unstained earth was collected and sealed. Next morning it appears Chhotey Lal (P. W. 2) and Nathu Lal (P. W. 10) went to see Ram Chandra between 6 and 7 a. m. Chhotey Lal informed him that he (Chhotey Lal) had seen Matru and two unknown persons entering Ram Chandra's house at about 10 or 10.30 a. m., on the previous day and Nathu Lal gave him the information that at about 11 a. m. on the day of the occurrence he had seen Matru and two other persons coming out of his house. These witnesses at that time did not attach any importance to the three persons entering and after some time coming out of Ram Chandra's house. However, later when they learnt about the double murder in Ram Chandra's house between 10 and 11 a. m. they thought that they should tell Ram Chandra what they had seen on the morning of May 29 at about the time of the occurrence.

4. It is said that about six months prior to the occurrence relations between Omwati and the wife of Matru, appellant, had become strained. One of Matru's daughters was married and the other was of marriageable age but both were living with their parents. Omwati suspected that some people used frequently to visit Matru's house without any cogent reason and also gave currency to this fact. Matru's wife naturally resented this. About six months prior to the occurrence an

incident is stated to have taken place which gave rise to a quarrel between the two women. Matru's wife threw a stone which struck Omwati on her head. Ram Chandra did not attach much importance to this incident considering it to be a matter of common occurrence amongst womenfolk. Later, however, Omwati seems to have told her husband that she had been threatened by Matru's wife with dire consequences. Ram Chandra advised his wife not to have anything to do with Matru's wife. After the occurrence, the appellant, it appears, remained in his house till the inquest was over but thereafter he seems to have disappeared. On receiving information about Matru and his two companions going into his house and coming out a short while later round about the time of the occurrence, Ram Chandra informed the investigating officer what he had been told by Chhotey Lal and Nathu Lal. The Sub-Inspector searched the appellant's house at about 9 a. m. on May 30, but he was not found there, nor was any incriminating thing found in the house. A search for the appellant was made but he could not be traced till three days later. On June 1, when the investigating officer learnt that Matru was likely to go to his village to see his children he was apprehended and on search of his person a spectacle case containing a pair of spectacles and a gold ring was recovered from the folds of his dhoti. Complicity of Mohar Singh became known to the police on Matru's interrogation. But Mohar Singh could not be arrested till September 13, 1964. When arrested, he offered to recover a shawl, one of the stolen properties, which he had sold to Darbarilal (P. W. 17) for Rs. 70. The shawl was accordingly recovered at Mohar Singh's instance from Darbarilal. Saheb Singh was also arrested on suspicion.

5. The Sessions Judge found the appellant guilty of murder and also of an offence under Section 382, I. P. C. Since there was no evidence of specific part played by the appellant the extreme penalty was not imposed on him. As observed earlier under Section 382, I. P. C. he was sentenced to four years rigorous imprisonment. Mohar Singh was acquitted of the offence under Section 302/34, I. P. C. as also of the offence under Section 382, I. P. C. He was, however, con-

victed for an offence under Section 411, I. P. C. and sentenced to rigorous imprisonment for two years. Saheb Singh was given benefit of doubt and acquitted. The only evidence against Saheb Singh was that of his identification by Nathu Lal (P. W. 10) which was not corroborated by any other evidence and identification alone in the circumstances was considered unsafe for convicting him.

6. Both the convicts appealed to the High Court. That Court came to the conclusion that Matru had a motive to commit the crime and that Chhotey Lal (P. W. 2) and Nathu Lal (P. W. 10) were reliable witnesses and that the investigation was neither tainted nor unfair to the accused. The statement of Ram Chandra (P. W. 1), husband of the deceased, and his conduct throughout also appeared to be quite straightforward. The ring which had been recovered from Matru's possession at the time of his arrest was held to be the one which the deceased was wearing when her husband left the house in the morning of the occurrence. This was considered to be a very incriminating circumstance. All these circumstances taken along with the fact that Matru had absconded were held to connect the appellant with the crime beyond reasonable doubt. Mohar Singh, from whose possession nothing had been recovered was given benefit of doubt and acquitted. The recovery of the shawl from Darbarilal in the absence of any writing was not considered to be incriminating enough to justify Mohar Singh's conviction because it did not exclude reasonable doubt about his innocence.

7. In this Court it was strongly argued on behalf of the appellant Matru that the circumstantial evidence does not establish his complicity in the offence charged. The police investigation was also assailed and it was submitted that identification of the articles alleged to have been stolen and later recovered was not of much value because the articles alleged to have been recovered were commonly available and had no distinguishing marks of identification. Objection was also raised to the admissibility of Ex. Ka-4, a letter written by the deceased to her father in which reference was made to injury received by her as a result of a brick thrown by Matru's wife. This ground was not included in the

original memorandum of appeal dated May 1, 1968 presented in this Court, but permission to raise this ground was sought by means of an application dated July 25, 1968 which was allowed by this Court while granting special leave. It was contended that this letter was inadmissible in evidence as it did not contain any statement relating to the cause of Omwati's death or to the circumstances of the transaction which resulted in her death. According to the argument this letter did not fall within the purview of any of the clauses of Section 32, Indian Evidence Act under which alone it could be held admissible in evidence. Shri Chari also submitted that the other two co-accused having been acquitted, Section 34, Indian Penal Code became inapplicable to the case of the appellant and his conviction under Section 302 read with Section 34, I. P. C. must be held to be contrary to law. For this submission he relied on *Prabhu Babaji Navle v. State of Bombay*, AIR 1956 SC 51. Finally counsel argued on the authority of *Hanumant v. State of M. P.*, (1952) 3 SCR 1091 = (AIR 1952 SC 343) that in case of circumstantial evidence the circumstances from which the conclusion of guilt is to be drawn should be fully established and all the established facts should be consistent only with the hypothesis of the guilt of the accused. In the present case the circumstantial evidence is not of conclusive nature and tendency, said Shri Chari.

8. Normally this Court does not go into the evidence and appraise it for itself in criminal appeals under Article 136 of the Constitution because this Article does not confer a right of appeal on a party. It merely clothes this Court with discretionary power to scrutinise and go into the evidence in special circumstances in order to satisfy itself that substantial and grave injustice has not been done. In the case before us we are persuaded to go into the evidence because of several exceptional features. It was a case of circumstantial evidence and the two accused who had been charged along with the appellant under Section 302 read with Section 34, I. P. C. were acquitted. The appellant, a neighbour of the deceased, remained with her husband at the place of occurrence till the report was made to the police on the day of the murder. Indeed, he accompanied Ram Chandra for lodging the report. The question

of admissibility and value of Ex. Ka-4 and the probative value of the identification proceedings of the articles alleged to have been stolen and recovered were also seriously canvassed at the Bar. And apart from the argument that the circumstantial evidence on the record does not exclude reasonable possibility of the appellant's innocence, the further question was raised that if these two pieces of evidence, namely, Ex. Ka-4 and the identification of the articles were to be ignored then there was absolutely no evidence on which a serious argument about the appellant's guilt could be founded.

9. Now, the deceased Omwati and her infant son were undoubtedly both murdered at about 10 or 11 on the morning of May 29, 1964. Ram Chandra Gupta, the husband of Omwati had no reason to suspect Matru, appellant, (his neighbour) of this crime. In the F. I. R. Ex. Ka-10 no one was named as a suspect and only the following articles of property were stated to be missing;

1. Gold chain weighing about 3 tolas, plain twisted design worth Rs. 375/-;
2. One pair of gold jhumki together with kundal weighing $1\frac{1}{2}$ tolas worth Rs. 150/-;

3. One gold ring longitudinal design weighing $\frac{1}{2}$ tola worth Rs. 75/-. This was stated to have been worn by the deceased; and

4. Currency notes worth Rs. 200/- stated to have been in the box.

It may here be pointed out that when P. W. 1 Ram Chandra came into the witness box he attempted to prove Ex. Ka-3, a supplementary list of missing articles which list, he said, had been handed over to the investigating officer soon after the preparation of the inquest report. The production of this list was objected to and though the trial Court relied on it, the High Court ruled it out as hit by Section 162, Criminal Procedure Code. The position, therefore, remains that the description of the ring in the F. I. R. is the only description we have on the record and also that there is no mention of the spectacle case and the spectacles in the F. I. R. Suspicion fell on the appellant only when Chhotey Lal, barbar (P. W. 2) and Nathu Lal (P. W. 10) saw Ram Chandra on the following morning (May 30, 1964) and informed him of what they had separately seen on the morning of the

29th at about the time of the alleged murder. What they conveyed to Ram Chandra has already been noticed by us. It was on the basis of this information that Ram Chandra is said to have informed the investigating officer about his suspicion against the appellant. The recovery of the articles, even if the evidence of these two witnesses is believed, would have a material bearing on the case because if the recovery proceedings of the articles said to have been recovered from the appellant's possession does not inspire confidence and it is not possible to hold beyond reasonable doubt that these were the very articles found missing from the house of the deceased, then it may be extremely difficult to sustain the appellant's conviction on the prosecution evidence. In this connection particular importance attaches to the ring stated to have been worn by the deceased because if that ring is not proved to be the same which is alleged to have been worn by the deceased Omwati at the time of her murder then no inference would seem to arise against the appellant.

10. The prosecution case against the appellant is mainly sought to be established by the evidence of P. W. 2 and P. W. 10 and by the evidence relating to the recovery from the appellant of the articles alleged to belong to the deceased supported by the evidence of motive on the part of the appellant for committing this crime and corroborated by the appellant's alleged conduct in trying to mislead Ram Chandra and the investigating Officer and finally by disappearing after the lodging of the F. I. R. The trial Court, as also the High Court, both relied on these four pieces of evidence for convicting the appellant.

11. To begin with it is noteworthy that Ram Chandra himself does not seem to have thought that the appellant was inimical towards the deceased and he did not suspect the appellant of complicity in the murder. According to his own testimony it was only after Chhotey Lal (P. W. 2) and Nathu Lal (P. W. 10) had informed him about what they had seen on the morning of May 29, that he recollected that about five or six months prior to the occurrence there was an altercation between Omwati and the appellant's wife. This would clearly indicate that the alleged altercation had not left any serious impact on the

mind of Ram Chandra and the appellant's admitted presence in the house of Ram Chandra till the lodging of the F. I. R. indicates that relations between Ram Chandra and the appellant were not openly hostile or unfriendly. The evidence of P. W. 2 shows that the appellant and two other persons came out of the appellant's house and entered the house of Ram Chandra on the morning of May 29, and the evidence of P. W. 10 shows that the appellant and two other persons came out of Ram Chandra's house and entered that of the appellant on the same morning a little later. This evidence having been believed by the two Courts below may be accepted. But so far as the question of time when these two witnesses saw the appellant and two other persons going into and coming out of Ram Chandra's house is concerned they seem to have given the time from their impression. Ram Chandra (P. W. 1) does not say that P. W. 2 and P. W. 10 had told him on the morning of May 30 that when they saw the appellant and his two companions on May 29, they had a Potli with them. It also seems somewhat unbelievable that the appellant with his companions should have entered the house of Ram Chandra with the purpose of committing murder and theft in broad day light particularly when P. W. 2, a barber who knew him and lives about one furlong away from his house had actually seen him. It is unlikely that the appellant should have failed to notice P. W. 2. It is in the evidence of P. W. 2 that the appellant and his companions came out of the appellant's house and entered that of Ram Chandra when the witness called out the name of Panditji meaning thereby Puttupal Pandit. Again, if the appellant and his two companions had committed the gruesome murder of Omwati and Sualal (Omwati aged 25 years had 4 incised wounds, 3 in the neck and one in the abdominal cavity and Sualal, 3 years old, had three incised wounds on his neck and one on his right wrist) within half an hour and had also stolen the articles including a ring, a gold kundal, jhumki and silver tori worn by the deceased on her person and also broken open a box and removed therefrom a shawl and Rs. 200/- within a short span of half an hour as alleged by the prosecution, then it is somewhat surprising that their movements and behaviour should

not have reflected any abnormality. At least Nathu Lal does not seem to have noticed any abnormal behaviour which would excite his suspicion. Now, the appellant and his companions were seen by P. W. 2 and P. W. 10, broadly speaking, between 10 and 11 in the morning. We would give these two witnesses a margin for their inaccuracy in regard to the time as deposed by them in the witness box. P. W. 2, it may be recalled, gives the time as between 10 and 10.30 a. m., when he saw the appellant and his companions and P. W. 10 gives the time between 10.30 and 11 a. m. when he saw them coming out of the house of P. W. 1. The F. I. R. was lodged at 12.40 p. m. which means that Ram Chandra (P. W. 1) must have arrived at his house a little earlier. The appellant, according to P. W. 1, had been with him when the F. I. Report was got written at his house and he went along with P. W. 1 for lodging the said report. The behaviour and conduct of the appellant, judged by normal standards, is not suggestive of his involvement in such heinous crime unless he was an experienced criminal (of which there is no suggestion) with extraordinary balance of mind and a disciplined control over his senses and faculties. In the absence of any direct evidence this consideration cannot be completely ruled out as irrelevant when weighing the circumstantial evidence in a case like the present.

12. This takes us to the recovery of the alleged stolen articles from the appellant and their identification. The main evidence of recovery consists of the statements of Head Constable Ahibaran Singh (P. W. 5) and of Nathu (P. W. 10) and the recovery memo Ex. Ka-1 dated June 1, 1964. P. W. 5 has deposed in his examination-in-chief that he did not know the appellant. According to him, an approver had informed him at about 7 p. m. on June 1, that the appellant would be coming to his house that evening to meet his children. At about 7.30 p. m., P. W. 5 along with Bankey, Nathu, Dilasa and two constables sat near Bankey's house waiting for the appellant. It was the approver who pointed out the appellant, whereupon, on being interrogated by the witness, the appellant tried to run away. He was, however, apprehended. In the course of this process the appellant received some in-

juries. Now, the person described as the approver has not been produced as a witness and indeed even his identity has not been disclosed. It is noteworthy that there is no mention of any approver anywhere else on the record. What is still more intriguing is that even though Nathu was not previously known to the witness, within half an hour of the information about the appellant's expected visit to his house P. W. 5 managed to collect Nathu and two other persons for arresting him. The statement made by P. W. 5 in this connection makes interesting reading. He said:

"I received information through an approver at about 7 p. m. that he shall come home to meet his children from the jungle of Imadpur by night. At this I sat near the house of Bankey by the side of the passage, along with Bankey, Nathu, Dilasa and two constables. Matru, accused present in Court came from the side of Imadpur at about 7.30 O'clock. The approver pointed him out. On being interrogated by me, he took to his heels. I caught him after surrounding and causing slight injuries to him. When I duly searched his person in presence of the witnesses, the case Ex. 3, was recovered from the right phent of the dhoti which he was wearing. On opening it, the spectacles, Ex. 2 and ring Ex. 1 were found in it. I prepared their memo, Ex. Ka-1 correctly at that spot immediately and obtained the signatures and thumb impressions of the witnesses over it. I sealed the articles there after sewing them in cloth Before the arrest of Matru, I and the witnesses had searched each other's persons". In cross-examination it was elicited from him:

"The approver had not told me that he was carrying articles also with him. I took the witnesses for help. I did not recognise him also. Imadpur might be about half a mile from the place where I arrested him. I did not make people sit on any other way. I sat on that very way. I took Nathu with me while he was coming out of a temple in Mauza Jatpura. I took Bankey from Bazar Kalan and Dilasa from Mauza Jatpura. I had not told the witnesses that there was possibility of articles being recovered from him. I did not know Nathu from before. I might have seen him. I did not know that his name was

Nathu. Matru was at a distance of about ten paces towards the South of me when I saw him for the first time. He was coming from the western side." Now, considering the fact that it was only at about 7 p. m. that the approver had informed P. W. 5 that the appellant was coming to his house and at 7.30 p. m. the arrest was actually made, it seems to be somewhat surprising that he should have within that short time collected Nathu, whom he did not know before, Bankey and Dilasa from various places and come to the spot in time for effecting the appellant's arrest and search. Bankey and Dilasa have also not been produced as witnesses. Nathu, who has appeared as P. W. 10, has stated in his examination-in-chief about the arrest and search of the appellant in the following words:

"On the fourth day of murder, i. e., after a gap of two days at about 7 p.m. the Head constable took me, Bankey and others with him. One person was keeping his face covered. He asked me to accompany him saying that he had to arrest a man. He had taken Dilasa as well. We sat in mohalla Tikuriya near the house of Bankey. We searched the persons of the constables and Head Constable. We searched the persons of us all. A little later, Matru accused, present in Court came from the western side. The person who was with us pointed out that he was Matru. Matru started running away. At this the Head constable and the constables caught hold of him. They gave him one or two danda blows while trying to catch him. When his person was searched, a case for keeping spectacles, containing a pair of spectacles and a gold ring, was recovered from the right phent of Matru accused. All these things were sewn in cloth and sealed on the spot. Memo was prepared there on the spot. It was read out. My thumb impression was also obtained. (Ex. Ka-1 read over) Yes. These very contents were read out (Shown Ex. 1-3 says) Now, I shall not be able to identify the articles as to whether they are the same or some other. It happened long ago".

13. P. W. 16, Jamuna Prasad, retired police constable is another witness who claims to have been present at the time when Matru was arrested. He was at that time posted as a constable at P. S. Shamsabad. In examination-in-chief he said nothing

about the appellant's arrest or the recovery of the articles from him. It was only in cross-examination that he deposed that he was with P. W. 5 at the time of the appellant's arrest and after arresting him the party returned to the police station at about 8 or 8.30 p. m. His version is:—

"Diwanji (presumably referring to P. W. 5) had a talk with one person in my presence. After that he asked me to go along with him. So I accompanied him. We met Bankey witness in Kalan Bazar. I cannot tell whether Bankey has not some shop or not or if he has got it, where is it? We met Nathu near the Naria. After arresting Matru, we returned to the Police Station at about 8 or 8.30 O'clock in the evening".

He has, however, given no details of the articles recovered nor about the appellant's search. The testimony of these witnesses is far from impressive and the story of recovery is difficult to accept on its face value. The memo of recovery is Ex. Ka-1. It purports to have been prepared at 7.30 p. m. on June 1, 1964. According to it on Matru's search, a spectacle case containing "a spectacle and a gold ring as per description given below corresponding to the case as offence No. 67 under Sections 302/380, I. P. C. was recovered from the right side of the phent of his dhoti". The description of the articles recovered, according to this memo, is:

1. One spectacle case of black colour, having dark blue colour inside;
2. One spectacle, having brown frame, white glasses, not circular, half frame;

3. One gold ring, longitudinal design, having green enamel with lengthwise, with red and blue flowery decision on the enamel. The ring is somewhat bent.

It is signed by Head Constable, Ahibaran Singh and attested by Bankey, Dilasa and Nathu. It does not mention the place where the search was effected though the memo is stated to have been prepared in a shop without giving any particulars of the shop. This memo does not materially add to the oral testimony of recovery. This is all the evidence of recovery of the articles. We do not find it safe on this evidence to hold that the articles mentioned in Ex. Ka-1 were recovered from the appellant's possession at the time of his arrest on

June 1, 1964 at 7.30 p. m. Neither P. W. 5, the investigating H. C. nor Nathu, (P. W. 10) can be considered to be witnesses on whom implicit reliance can be placed without proper corroboration from a more disinterested and dependable source. Having not been impressed by the evidence of recovery, the identification test of the articles can be of little help to the prosecution, though even on that point the prosecution evidence is equally uninspiring. Identification tests, it may be pointed out, do not constitute substantive evidence. Such tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on right lines. Now, although the articles are stated to have been recovered on June 1, the test identification was held by Shri Jwala Prasad Srivastava, Magistrate, on October 23, 1964. The reason for this delay as suggested is that similar articles had to be procured for mixing up with the articles recovered. But the manner in which this delayed identification has been held in this case is highly unsatisfactory. Jwala Prasad Srivastava, Magistrate, First Class, who had conducted the test identification appeared as P. W. 21. In his examination-in-chief he said:

"Even before the dates for identification proceedings were fixed but the identification could not be conducted because similar articles had not been received. The articles were opened and shown to the contractor once so that correct articles could be brought. On 13-7-1964 he made an application that the articles should be shown to him. The articles must have been shown to him within some days after that. The date must have been mentioned there but that order sheet is missing. Even then, I took a precaution that none except the contractor and the Court moharrir should see the articles. Just after showing the articles to the contractor, I got the same sealed in the Court room in my presence".

In cross-examination he said:

"The khol (case) Ex. 3 was old. Out of the khols which were mixed, one or two were perhaps new. That too was similar (dissimilar ?) but the dissimilarity was not so much, that I ought to have noted it (shown paper No. 49/147 of SC File) Yes, this note is mine.

"The case of the spectacle is old one whereas the mixed cases were new" (marked Ex. Kha 19). The counsel for the accused persons moved an application on the same day after the identification proceedings. I had read it. The allegations regarding the ring, were not correct. So I did not note them in my order. The order sheet of some particular dates regarding the identification proceedings, were preserved. The same has been found. The order sheet of two dates has been found. Out of them, one bears the signature of my predecessor. I recognise the same. (marked Ex. Kha-21). The other one does not bear the signature of any one. I do not remember exactly who presented the application Ex. Kha 11. Perhaps it was moved by the contractor's man. That man used to come frequently. (Marginal note on Ex. Ka-11 shown. That encircled in red pencil and marked X) I do not recognise the same. I cannot tell who made this entry and when. At present I cannot tell on which date the articles were shown. I did not find any such entry in the record which could tell on which date the articles were shown to the contractor. Only the word 'allowed' is written with the date 13-7-64.

..... Only one man of the contractor used to bring the articles before me. I do not remember his name. I can only recognise him by face. It is quite wrong that on 1-9-64 these articles were brought to the Court and were shown to the witnesses. I do not remember orally on which date these articles were taken out from the malkhana. It is wrong to say that all the articles which were to be mixed, were dissimilar. Only the cases of the spectacles were somewhat new".

The statement of this witness reveals the unsatisfactory manner of dealing with the test identification. We are unable to place any reliance on these proceedings.

14. This takes us to the question of motive. We have already noticed that the altercation between the deceased Omwati and the appellant's wife does not seem to have been taken seriously by either party. The proceedings under Section 107, Criminal P. C. to which a reference has been made were started by Ram Chandra against the appellant after the occur-

rence in question and, therefore they are not relevant on the question of motive for the present offence of murder. The appellant's counsel questioned the admissibility of Ex. Ka-4, the letter said to have been written by the deceased to her father, on the ground that it did not fall within the purview of Section 38, Indian Evidence Act. The objection appears *prima facie* on plain reading of the section to possess merit. But even if this letter were to be held admissible we are not satisfied that the motive which this letter suggests is of strong and impelling nature so as to induce the murder of Omwati and her infant child. The motive suggested by this letter, coupled with the testimony of P. W. 2 and P. W. 10, may at best give rise only to a suspicion against the appellant; but suspicion however strong cannot take the place of proof.

15. The appellant's conduct in absconding was also relied upon. Now mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime: such is the instinct of self-preservation. The act of absconding is no doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the Courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction. It can scarcely be held as a determining link in completing the chain of circumstantial evidence which must admit of no other reasonable hypothesis than that of the guilt of the accused. In the present case the appellant was with Ram Chandra till the F. I. R. was lodged. If thereafter he felt that he was being wrongly suspected and he tried to keep out of the way we do not think this circumstance can be considered to be necessarily evidence of a guilty mind attempting to evade justice. It is not inconsistent with his innocence.

16. One other circumstance which on the facts of this case also deserves notice is the non-recovery of the weapon of offence and the fact that no stains of blood were noticed by any one on the appellant's clothes

even though he was with Ram Chandra right upto the lodging of the F. I. R. and even accompanied him for that purpose. The Courts below seem to us to have failed to take into consideration all the relevant facts and circumstances of the case. As proof of the appellant's guilt depended solely on circumstantial evidence it was incumbent on the Courts below to properly consider and scrutinise all the material factors and circumstances for determining whether the chain of circumstantial evidence is so complete as to lead to the only conclusion of the appellant's guilt. In our view, the cumulative effect of the circumstantial evidence in this case falls far short of the test required for sustaining conviction. We are, therefore, constrained to allow this appeal set aside the appellant's conviction and acquit him.

Appeal allowed.

**AIR 1971 SUPREME COURT 1058
(V 58 C 216)**

(From: Patna)*

S. M. SIKRI AND I. D. DUA, JJ.

Raj Kishore Singh and others, Appellants v. The State of Bihar, Respondent.

Criminal Appeal No. 173 of 1967,
D/- 25-9-1970.

(A) Constitution of India, Art. 136 — Appreciation of evidence — Concurrent findings of fact — Evaluation of prosecution evidence — Judgment of trial court containing exhaustive discussion and its reasoning unexceptionable — High Court in appeal also agreeing with conclusions of Sessions Court after appraising testimony of eye-witnesses and considering attending circumstances and probabilities of case — Held, that the finding was binding and final and not open to reassessment. (Para 8)

(B) Evidence Act (1872), S. 9 — Identification parade — Delay in conducting — Prosecution not relying on test identification evidence — Question of accused having been prejudiced by late identification parade does not arise. (Para 10)

*(Cri. Appeals Nos. 457 and 481 of 1965, D/- 5-5-1967 — Pat.)

KN/KN/E566/70/MVJ/B

M/s. Nur-ud-din Ahmed, Indra Mohan Singh and U. P. Singh, Advocates, for Appellants. B. P. Jha, Advocate, for Respondent.

The following Judgment of the Court was delivered by

DUA, J.: This appeal by special leave by nine appellants is directed against the common judgment of the High Court of Judicature at Patna dismissing two criminal appeals (Nos. 457 and 481 of 1965) from the judgment of the first Additional Sessions Judge, Chapra: (1) convicting Rajkishore Singh, Bindheyachal Singh and Ram Bachan Bhar: (a) under Ss. 302/24, I. P. C., for the murder of Raj Bahadur Dubey and sentencing them to imprisonment for life; and (b) under Section 148, I. P. C. and sentencing them to rigorous imprisonment for two years; (2) convicting Dhup Narayan Singh, Bhikari Singh, Suresh Singh, Kirpal Singh, Behram Singh and Dudnath Singh (a) under Ss. 326/149, I. P. C. and sentencing them to rigorous imprisonment for six years; (b) under S. 323, I.P.C. and sentencing them to rigorous imprisonment for one year and (c) under S. 147, I. P. C. but imposing no sentence; (3) convicting Dhup Narayan Singh, Bhikari Singh, Suresh Singh, Rajkishore Singh, Bindheyachal Singh and Ram Bachan Bhar under S. 201, I.P.C. and sentencing them to rigorous imprisonment for two years with a fine of Rs. 100 each: in default of payment of fine they were to undergo rigorous imprisonment for six months. All the sentences were to run concurrently.

2. Before narrating the prosecution story the relationship of the appellants inter se may be broadly stated. Ramkishore Singh, Bindheyachal Singh, Dhup Narayan Singh and Suresh Singh, appellants 1, 2, 4 and 6 respectively are closely related to one another. Rajkishore Singh is son of Nagina Singh whereas Dhup Narayan Singh and Bindheyachal Singh are sons of Ram Das, brother of Nagina Singh. Suresh Singh is the son of Bindheyachal Singh. Bhika Singh is related to Nagina Singh and Ram Bachan Bhar is his ploughman. These six appellants belong to village Amapur also known as Adampur. The remaining three appellants belong to village Santhi. Kirpal Singh and Bali Ram Singh are brothers and Dudhnath Singh is their pattidar. We may now

turn to the broad features of the background of the prosecution story. Khata no. 100 in village Sandhi consists of a number of plots including plots nos. 2245 and 2246. The total area of this Khata consists of 7 bighas, 8 kathas and 3 dhuria. The landlords of this Khata were Bal Bahadur Prasad and others and the recorded tenants Jang Bahadur Rai and Bal Govind Rai. Its rent having fallen into arrears the entire holding was sold in execution and purchased by the landlords themselves sometime in September, 1932. Notwithstanding this sale in favour of the landlords the tenants continued in possession of plots nos. 2245 and 2246 where the present occurrence took place. The tenants also obtained Sada Hukumnama from the landlords sometime in August, 1934 and paid rent to them. When the Zamindari vested in the State Government the owners mentioned Bal Govind and Jang Bahadur as their tenants being entered in the jamabandi in 1963. Nagina Singh applied to the Land Revenue Department for correction of the jamabandi entries basing his claim on the allegation that Kaghunath Rai, Ramdhari Rai and others were zarpeshgidars of the Malkiat interest of Khata no. 100 and for arrears of rent the zarpeshgidars had obtained a decree and in its execution in September, 1922 had purchased the khata and secured its possession. Out of the Khata one bigha and 19 dhuria appertaining to plots nos. 2245 and 2246 were settled with Ram Das Singh, brother of Nagina Singh. This was claimed on the basis of a registered patta and it was on the footing of this document that Nagina Singh and the members of his family laid claim to the possession of the said two plots. These proceedings were still pending when the occurrence in question took place.

3. The prosecution version of the occurrence may now be briefly stated. The two plots nos. 2245 and 2246 which have been amalgamated belong to Banke Singh son of Jang Bahadur (P.W. 1) and Bal Govind Singh (P.W. 6) as their kasht (cultivation) and they claimed to have been in possession all along. Three days prior to the occurrence in question which took place on October 23, 1963 Banke Singh had ploughed and harrowed the land. On the date of oc-

currence at 6 a.m. Banke Singh and Bal Govind went to the field to sow jow and korse crops. As they were about to finish the sowing operations Rajkishore Singh came there and suggested that sowing should be done only after the settlement of the dispute. Bal Govind suggested that a panchayati should be called to decide this matter. Rajkishore thereupon went to call the panchas. Bal Govind also asked Banke Singh to call Radha Kishen from village Santhi and Raj Ballabh Dubey who was upmukhia (who lost his life in the occurrence) from village Basantpur. Kashi Dubey (P.W. 3) and Balram Dubey (P.W. 8) and one Kapil Dev Tiwari were with Raj Ballabh Dubey at that time. On being apprised of the controversy Raj Ballabh Dubey agreed to act as pancha. He took a blank piece of paper and a pencil with him and also persuaded the three persons mentioned above to accompany him. On arrival at the spot Bankey Singh found his uncle and Radha Kishan near the eastern side of the disputed field and Rajkishore Singh along with 40 or 50 persons variously armed towards the southwest corner of the field. An altercation appeared to be going on between the two parties. On Raj Ballabh Dubey's arrival Rajkishore Singh enquired from him as to why he had come there, to which Raj Ballabh Dubey replied that he had come to do panchayati. Rajkishore retorted that the field belonged to him and there was no question of a panchayati. This being refuted by Raj Ballabh Dubey there was exchange of hot words. Thereupon Rajkishore Singh and his partymen started throwing brickbats with the result that Bal Govind, Raj Ballabh Dubey and others began running towards north east. They were chased by the party of Rajkishore Singh. Raj Ballabh Dubey appears to have lagged behind. Rajkishore Singh gave him a bhalla blow in the stomach. This was followed by another bhalla blow by Bindheyachal Singh on the left side of his stomach. Raj Ballabh Dubey as a result fell down in the field of Ram Chandra Singh. Thereafter Ram Bachan Bhar gave a blow on his chest. In consequence of these blows Raj Ballabh Dubey died. Kapil Dev Tiwari protested but he too was assaulted by Dhup Narayan Singh and Bhikari with lathis felling him down. On protest being raised by Baliram against this

high-handedness he also received lathi blows. Kripal, Dudhnath, Baliram and Suresh thereafter struck him with lathis and felled him down. Thereafter Rajkishore Singh, Bindheyachal Singh, Bhikari and Dhup Narayan Singh tied Raj Ballabh Dubey in a green chadar belonging to him and carried him away tied on a lathi towards the river Sarjoo. They threw the dead body into the river. The dead body was, however, not recovered in spite of search with the result that no post-mortem examination could take place.

4. As against this the defence version, to which a passing reference has already been made, is that the entire khata no. 100 was purchased at an auction sale by Raghunath Singh, the zarpeshgidar who settled the plots in dispute in November, 1925 with Ram Das Singh under a registered patta. Ram Das Singh and Nagina Singh claimed to be in possession of the land in dispute by virtue of the said patta and used to pay rent as agreed. After the vesting of the zamindari when no demand of rent was made from them they made enquiries and learnt that in the jamabandi the entries had been made in favour of Bal Govind Singh. Thereupon they filed a petition for correction of those entries. Since they were in possession of the disputed land, three or four days prior to the occurrence in question it was ploughed on their behalf. On the day of the occurrence three men were sowing seeds and Dhup Narayan Singh was washing his face when at about 10 a.m. some persons came from the northern side and began to assault the ploughmen and beat the bullocks. Dhup Narayan Singh rushed towards them and saw Bal Govind Singh, Shemsher Singh, Bankey Singh and others. When he protested and raised alarm ten persons came there to support him and 30 or 40 persons appeared in support of the opposite party. There was uproar and use of lathis on both sides. Dhup Narayan Singh thereupon ran away. The accused denied having carried away the dead body of Raj Ballabh Dubey and thrown it into the river. In arguments, relying on the cross-examination of Bal Govind Singh (P.W. 6) it was urged that Bindheyachal Singh was unable to use bhalla with his right hand. But this was not the case of this accused at the trial and

P.W. 6 had merely learnt that Bindheyachal Singh's right hand had been damaged by electric shock. The witnesses for the defence deposed about the sale, the payment of rent and the possession of the disputed land by the accused. Evidence was also led showing injuries on the persons of Mahabir Basi and Ram Prakash Singh who were surprisingly enough not produced as witnesses to prove as to how they had received those injuries.

5. The trial court held that the two plots in question were in the actual possession of Nagina Singh's family. They had been ploughing them prior to the date of the occurrence and on that day three men sowed jow and korse. Raj Ballabh Dubey was called to act as a pancha and he came there with three companions. The party of the accused who were all armed collected there. After an altercation with Raj Ballabh Dubey the accused threw brickbats and after a chase assaulted Raj Ballaba Dubey, Kapil Dev and Bali Ram. This assault resulted in Raj Ballabh's death, whose dead body was carried away and thrown into the river Sarjoo. The alleged injury to Bindheyachal Singh's right hand was not considered to be sufficiently cogent to discredit the prosecution evidence implicating him. The appellants were convicted and sentenced, as already noticed.

6. The appellants challenged their conviction by means of two appeals presented in the High Court but that Court upheld their conviction and sentence. That court expressed its final conclusion in these words:

"The evidence is that the accused persons had thrown brickbats and not being satisfied with that, even after the prosecution party took to their heels, they chased them and thereafter assaulted them. Chase by armed people resulting in assault certainly shows that the chaser has the common object to assault the members of the prosecution party. Therefore, it must be held that all these nine accused persons who had taken part in chase and assault became members of an unlawful assembly the common object of which was to assault the prosecution party and thereby committed the offence of rioting. Since Rajkishore Singh, Bindhyachal Singh and Ram Bachan Bhar were armed with bhalas

they have rightly been found guilty of the charge under section 148, Indian Penal Code. The remaining six accused persons who were armed with lathis have also been rightly found guilty of the charge under section 147, Indian Penal Code.

From the manner in which Rajkishore, Bindhayachal and Rambachan Bhar surrounded Raj Ballabh and assaulted him with bhalas on vital parts of the body and thereby caused his death the irresistible conclusion is that they had common intention to kill him and as such they committed an offence under section 302/34, Indian Penal Code and so their conviction thereunder has to be upheld. Conviction of Dhupan, Suresh, Bhikari, Kirpal, Baliram Singh and Dudhnath under S. 326/149, Indian Penal Code is also fully justified. When they were members of an unlawful assembly with common object to assault prosecution party and the members of that assembly were armed with deadly weapons, such as bhala, the least knowledge that can be attributed to them is that there was likelihood of grievous hurt being caused to the members of the prosecution party.

The evidence of the eye-witnesses is that Rajkishore Singh, Bindhyachal Singh, Bhikhari Singh and Dhup Narayan tied the body of Rajballabh in a green chadar and carried it from the place of occurrence towards the river Sarjoo on a lathi. Evidence of P.Ws. 5, 9, and 12 who saw the body being carried in a bundle shows that Suresh and Rambachan Bhar were also involved in the disappearance of the body, at times they were also carrying it. All these six accused persons have rightly been convicted and sentenced under section 201, Indian Penal Code.

In face of the evidence of assault on Kapildeo and Balram Dubey already discussed above, conviction and sentence of accused Dhup Narain, Bhikhari Singh, Suresh Singh, Baliram Singh, Dudhnath Singh and Kripal Singh under section 323 of the Indian Penal Code are fully justified."

7. Before us the appellants' learned counsel strongly contended that on the concurrent findings of the Courts below that the possession of the disputed land was with Rajkishore Singh and his party and the fact that three ploughmen were injured during the course of the occurrence it must be

held that the appellants were the victims of unlawful aggression at the hands of their opponents and whatever injuries they may be found to have inflicted, were caused in exercise of the right of private defence. It was emphasised that the appellants being in possession there could not be any question of their agreeing to any panchayati and the story in this regard is a fabrication. Raj Ballabh Dubey, deceased, according to the argument, was a member of the party which came to take forcible possession of the land in possession of the appellants. He was a wrestler and a bully and, therefore, designedly brought by the opposite party to help them. There being no unlawful assembly formed by the appellants Section 149, I. P. C. was inapplicable and there being no common intention to murder or to commit an offence Section 34, I.P.C. was also not attracted. The cases against individual accused persons, the counsel argued, were not considered by the courts below and he added that even the presence of the three appellants, sentenced to imprisonment for life, is not satisfactorily established on the record. It was further complained that in spite of repeated requests by the accused persons no identification parade was held. The identification at the trial in court without a prior test identification parade in the circumstances would be of little value, said the counsel.

8. It is true that both the courts below have upheld the possession of the plots in dispute to be with the family of Nagina Singh. But this finding is clearly not conclusive on the question of the guilt or innocence of the accused. The courts below, it may be pointed out, have, believing the prosecution evidence, upheld the story about panchayati. In spite of elaborate arguments addressed by Mr. Nuruddin, the learned counsel for the appellants, we are unable to find any cogent ground for disagreeing with the evaluation of the prosecution evidence on this point by the courts below. The judgment of the learned Additional Sessions Judge contains a very exhaustive discussion on this point and the reasoning seems to us to be unexceptionable. The High Court on appeal, after appraising the testimony of the eyewitnesses and considering the attending circumstan-

ces and the probabilities of the case also agreed with those conclusions. The finding on this point on which both courts have agreed is binding on us and must be accepted as final, not open to reassessment.

9. The next question relates to the actual occurrence. That a conflict did take place at the time alleged by the prosecution at the place of the occurrence and that the deceased was present there is not disputed even by the accused persons. The difference between the two rival versions lies in the fact that each side claims to be the victim of aggression by the opposite party. The denial of panchayati by the accused having been repelled as unacceptable it seems to us to be more probable that the accused after having agreed to a panchayati desired as a second thought to go back on it and for this reason felt anxious to frustrate the offer of panchayati. On this point too the courts below have concurrently accepted the version of the prosecution witnesses which again seems to be in consonance with the probabilities and is also supported by the attending circumstances. May be that Raj Ballabh Dubey was a wrestler, though this fact is denied by Banky Singh (P.W. 1) according to whom Raj Ballabh Dubey used only to take physical exercises regularly, but that by itself does not mean that the acceptance of the prosecution version by the two courts below must be held to be so grievously erroneous as to require it to be reversed by us. Their appraisal of evidence being free from any serious infirmity has to be accepted. According to the trial court the prosecution party was not armed and the injuries on the persons of Mahabir and Ram Pravesh, who were not examined as witnesses, have not been shown to have been caused in the course of the present occurrence. The medical evidence in regard to their injuries, in the statement of Dwarka Prasad (D.W. 5) a private medical practitioner, did not impress the court. The plea of private defence was expressly ruled out. The High Court agreed with this view. That court added that if at all there was a right of private defence available to the accused in the beginning, it must be deemed to have ceased as soon as the prosecution party took to their heels and in that situation to chase the fleeing men and to assault them at

a considerable distance could not be justified on the plea of the right of private defence. The final outcome of the conflict on the facts found is also, in our view, proof positive of the aggression by the accused. We have, therefore, no option but to accept the concurrent conclusions of the two courts below on this point as well. The further question of the dead body of the deceased Raj Ballabh Dubey having been carried away by the party of the accused is similarly concluded by the concurrent findings of the two courts below and despite the persuasive manner of Mr. Nuruddin's arguments we have not been able to find any infirmity in these conclusions. A faint-hearted suggestion thrown by the appellant that Raj Ballabh Dubey's dead body having not been traced, his death cannot be considered to be conclusively established has on the evidence and the conclusions of the courts below merely to be stated to be rejected.

10. The next question which requires consideration is that of guilt of the individual accused persons. The trial court found Raj Kishore, Bindheyachal Singh and Ram Bachan guilty of the murder of Raj Ballabh Dubey and liable to be punished under Sections 302/34, I.P.C. The charge under Ss. 302/149, I.P.C. according to that court was not made out against all the members of the prosecution party though one under Ss. 326/149 was clearly established. The High Court also upheld the guilt of the three appellants Raj Kishore, Bindheyachal Singh and Ram Bachan Bhar under Sections 302/34, I. P. C. The evidence of Bankey Singh (P. W. 1), Kashi Dubey (P. W. 3), Bal Govind Singh (P. W. 6) and Balbhadra Singh (P. W. 10) was relied upon for this finding. This evidence, in our view, fully supports the conclusions of the two Courts below and no ground for interference in this appeal is made out. The appellant's learned counsel drew our attention to the dying declaration of Bal Ram Dubey (P. W. 8), Exhibit J, recorded by Shri R. K. Singh on the 24th October, 1963 in which he imputed his own injuries to lathi blows by Bindheyachal Singh. According to the counsel this at least throws a serious doubt on Bindheyachal Singh's complicity in the murderous assault on the deceased by

bhalla as deposed to by other witnesses. This submission, though attractive on first impression, is unacceptable on deeper thought on the facts and the conclusions of the courts below. The trial court did not rely on this dying declaration. The Magistrate who had recorded it was not examined as a witness and according to its contents Bal Ram Dubey was not fully conscious at that time. Now this witness is 75 years of age and had received six injuries as stated by P.W. 19, Dr. Sahai. One injury was grievous and it had resulted in fracture of humerous bone. He was medically examined at about 1 p.m. on the 24th October. The doctor of course does not seem to have recorded in his injury report that he was unconscious but that does not necessarily mean that later, at about 2.35 p.m. when his dying declaration was recorded, his condition could not have become worse. But this consideration apart, the High Court has found sufficient evidence even after excluding the testimony of Balram Dubey (P.W. 6) on which to sustain the finding that Rajkishore, Bindheyachal Singh and Ram Bachan Bhar had assaulted Raj Ballabh Dubey with bhallas with the intention of killing him. Incidentally it may be pointed out that Ram Narayan Dubey, brother of the deceased, had more than once filed written applications in the court of the Magistrate seized of the case, stating that Bal Ram Dubey and Kapil Dev Tiwari had been won over by the accused. Two such applications are dated 3rd February, 1964 (Ex. 14) and 20th June, 1964 (Ex. 14/1). These applications were filed in connection with the insistence of the accused to have them identified by Balram Dubey and Kapil Dev Tiwari. As Balram Dubey identified only Ram Bachan Bhar on 24th June his evidence was discarded. On considering all the circumstances we do not think that on the basis of Ex. J. alone it is possible to discard the evidence of the two eye-witnesses which has been accepted by both the Courts below. At this stage we may also appropriately dispose of the appellants' argument seriously pressed before us that in spite of repeated demands by the accused test identification parades were not held with expedition and this has prejudiced the appellants. The first application, to which our attention was drawn in this connection, was put up

before the Sub-Divisional Officer dealing with this case on 2nd January, 1964, in which it seems to have been prayed that the accused persons should not be produced in court on 3rd January, 1964 and also not till the test identification parade was finished. This application was, however, not pressed on behalf of the accused. On 3rd January, 1964 the accused were produced in custody and the court gave a direction to expedite the test identification parades. It appears that later the accused started pressing for immediate test identification parades. But in view of the fact that there was a counter-charge of some of the witnesses having been won over and the fact that the accused were apparently also known to the identifying witnesses test identification parade in this case can hardly be of any use. Kapil Dev Tiwari, the other identifying witness died a natural death before he could appear as a witness in the case. So the test identification by him which is not a substantive piece of evidence but can only be used as corroborative evidence could not be of much evidentiary value. What has just been stated clearly shows that the identification parades are of little value to the prosecution and there is no question of the accused having been prejudiced by the late identification parades. We are not relying on them at all. The appellants' suggestion some what casually made during the course of the arguments that Bindheyachal Singh was not capable of wielding bhala with his right hand, which argument was not accepted by the trial Court, appears to us to be without foundation.

11. This takes us to the other charges. Here again, the evidence of three witnesses P. Ws. 1, 3 and 6 has been accepted by both the Courts below and we are unable to find any cogent ground for disagreeing with them. The likelihood of the infliction of grievous hurt by the unlawful assembly, having a common object of assaulting the prosecution party, who were chased while running away, is amply established and has been so found by the Courts below. No legal infirmity or failure of justice has been made out. The general alternative submission that the appellants had only exceeded their right of private defence is equally unfounded because

on the facts on the record and on concurrent conclusions of the two Courts below there is no question of any right of private defence because the prosecution party has not at all been shown to be the aggressors. The question of exceeding this right can thus hardly arise. This appeal accordingly fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1064
(V 58 C 217)

(From: Gujarat)*

C. A. VAIDIALINGAM AND
A. N. RAY, JJ.

Bharvad Bhikha Valu and others,
Appellants v. The State of Gujarat,
Respondent.

Criminal Appeal No. 228 of 1968,
D/- 3-3-1971.

Evidence — Appreciation of —
Murder trial — Even if there is no
infirmities in the evidence of a young
boy it is desirable to seek corrobora-
tion of his evidence in view of his
tender age. (Para 17)

Mr. A. S. R. Chari, Sr. Advocate,
(Mr. N. N. Keswani, Advocate, with
him), for Appellants; Mr. S. K.
Dholakia, Advocate for, Respondent.

The following Judgment of the
Court was delivered by

RAY, J.: — This is an appeal by special leave from the judgment dated 5 April, 1968 of the High Court of Gujarat setting aside the order of acquittal passed by the Sessions Judge, Ahmedabad on 21 September, 1965 on a charge for an offence under Section 302 read with Section 34 of the Indian Penal Code and convicting the appellants and sentencing each of them to imprisonment for life.

2. The three appellants Bhika Valu, Dhuna Magha and Valu Vela were the accused in this case. They belonged to the Barwad community of Gundi village of Dholka Taluka, Ahmedabad Rural District. In this village there were two factions one of the Koli Patels and the other of Bharvads. Five or six years prior to the date of occurrence, namely 20 February, 1965, 5 or 6 Bharvads of

*(Criminal Appl. No. 12 of 1966, D/-
5-4-1968 — Guj.)

CO/CO/B243/71/CWM/P

Gundi village were murdered. Amongst those murdered were Vajakaran Vaha, Ranchhod Valu, Ganda Kama, Deva Kama and Vela Kama. The appellant Bhika Valu is the nephew of Vajakaran Vaha and is brother of Ranchhod Valu both of whom were among the murdered Bharwads. The appellant Dhuna Magha is an agnate of the three murdered Bharwads Ganda Kama, Deva Kama and Vela Kama. The appellant Valu Vela is the son of murdered Bharwad Vela Kama. In respect of the said offences of murders of those Bharwads, a charge-sheet was brought against 23 Koli Patels of the village and out of them, four persons were convicted and sentenced to various terms of imprisonment. Falji Teja, the deceased in the present appeal and Pitambar Bhura and Rupsing Raja, two prosecution witnesses in this case were among the 23 Koli Patels implicated in those offences of murders. Since the murder of Bharwads relations between Koli Patels and Bharwads were not friendly. The present offence was alleged to have been committed in consequence of the strained relations between the Koli Patels and the Bharwads.

3. The prosecution case was this. On 20 February, 1965 Falji Teja and his son Khengar went to the Bhurkhi Railway Station which was about two furlongs from the place of the occurrence. Falji and Khengar went to meet the train, which would arrive at about 3 p. m. to engage agricultural labourers if they could be obtained. Falji and Khengar met the train but could not find any agricultural labourer. Then they started on the return journey to Gundi Village. When they passed over a culvert near the Panchayat Office at Gundi accused No. 1 ran up from behind and gave a blow with an axe to Falji on the left leg from behind. Falji fell down. Accused Nos. 2 and 3 ran up to the spot. Accused No. 2 was armed with a spear and accused No. 3 with a Dharia. All the three accused started giving blows to Falji. As a result of the injuries Falji died on the spot. Three accused ran away. Falji Teja had a double barrelled gun with him and that gun fell from his hand when he was assaulted. Accused No. 1 carried away the gun which Falji Teja had carried with him.

4. Khengar who was a young boy of about 14 got frightened and

ran away. He informed his mother Bai Samu about the assault on his father and told her who the assailants were. At the time of the assault Pitambar Bhura a Koli Patel was proceeding from his house in Gundi to Bhurkhi Railway Station and he saw the entire incident from a place. Another prosecution witness Rupsing Raja also a Koli Patel was behind Pitambar Bhura and was on his way to the field. He also saw the incident of assault on Falji. After the assault Rupsing Raja went back to the village and informed Mera Mathur whose wife Bai Raju was working as an agricultural labourer with Falji. Thereafter Bai Samu went to the place of incident. Rupsing Raja and Mera Mathur also went to the spot by that time. At the place where the dead body of Falji Teja was lying, Pitambar Bhura and Rupsing Raja confirmed the information which Bai Samu had received from Khengar as to the three accused being the assailants of Falji.

5. One Kavabhai Mansing happened to go to a well near the scene of offence. Kavabhai Mansing saw Bai Samu and found her weeping. Kavabhai Mansing went up to Bai Samu and saw Falji lying dead with injuries. Rupsing Raja, Mera Mathur, Pitambar Bhura were also present when Kavabhai Mansing went up to the scene of offence. Bai Samu told Kavabhai Mansing about the incident and asked him to go and send a telegram to the Koth Police Station. Kavabhai Mansing went to the Bhurkhi railway station and contacted the Station Master and asked him to send information to Koth Police Station. The Station Master, Bhurkhi got in touch with the Koth Railway Station and recorded the message.

6. The Police Sub-Inspector from Koth Police Station proceeded to Gundi village. He held inquest on the dead body. He made a panchnama. When the three accused ran away accused No. 2 left behind him at the scene of the offence his spear. The blade of the Dharia which was used by accused No. 3 was broken and the broken portion of the blade was left behind at the scene of the offence. The Police Officer took charge of the spear and the broken portion of the blade of Dharia. The dead body was sent to Dhandhuka for post-mortem examination. The statements of Pitambar Bhura and Rupsing

Raja were recorded on 20/21 February, 1965 in the night and the following day the statements of other witnesses were recorded. The three accused presented themselves before the Police Inspector on 21 February, 1965. The Police Sub-Inspector discovered in the presence of Panchas a gun which accused No. 1 had concealed at the house of a tailor. The Police Inspector further discovered a Dharia which accused No. 3 had concealed at the hedge of the Vada land of one Bharvad Vama Vaja. The piece of blade of Dharia which was found at the scene of the offence matched the broken edge of the Dharia discovered. An axe was also discovered by accused No. 1 who led the police party and the panchas to the Vada land of Vama Vaja and from there took out an axe. The reports of the Chemical Analyser and Serologists indicated that there were stains of human blood on the gun and on the handle of the Dharia and the other portion of Dharia. There were blood stains on the axe but the blood had so integrated that the origin could not be determined.

7. After investigation a charge-sheet was submitted against the three accused. They were charged under Section 302 read with Section 34 of the Indian Penal Code and accused No. 1 was charged under Section 379 of the Indian Penal Code. All the accused denied having committed an offence.

8. The Sessions Judge examined the case under three broad heads. The first was evidence of motive. The second was evidence of eye-witnesses Pitambar Bhura and Khengar Falji and Rupsing Raja. The third was circumstantial evidence in the shape of discovery of blood stained articles, viz., stolen gun, farsi with stain of blood on them on information received from accused No. 1 and discovery of Dharia with stains of human blood on information received from accused No. 3. As to the prosecution witnesses the Sessions Judge found that since the incident of murder of some Bharvads six years prior to the date of occurrence Falji and others including witnesses Pitambar Bhura and Rupsing Raja who were also accused along with Falji in the trial of the Bharvad murder case belonged to the faction of Koli Patels who bore enmity against the Bharvads. The accused, in the

present case, were Bharvads and the witnesses and the deceased Falji were Koli Patels. The Sessions Judge therefore held that the prosecution witnesses were partisan and they belonged to a rival faction. Khengar being the son of Falji and a young boy of 14 was found by the Sessions Judge to be a witness whose evidence had to be very carefully scrutinised along with the evidence of Pitambar Bhura and Rupsing Raja. The Sessions Judge considering the evidence found that it could not be said with reasonable certainty that the witnesses were persons whose presence at that place would be natural in ordinary course of events. The consideration which weighed with the Sessions Judge was that if Khengar was present the accused would not have spared Khengar to remain an eye-witness. The Sessions Judge also on analysis of medical evidence found discrepancies between the medical evidence and the evidence of the witnesses to be a serious infirmity.

9. According to the Sessions Judge, the most serious infirmity in the prosecution case was that the First Information Report did not mention the name of accused No. 3 Valu Vela as one of the assailants. Kavabhai stated that Bai Samu wife of Falji had given the names of accused No. 1 and accused No. 2 and thereupon Kavabhai carried the information to the Station Master. The Sessions Judge concluded that the truthfulness of the evidence of these three eye-witnesses as a whole was not free from doubt and their evidence could not be accepted as sufficient for conviction in the absence of corroboration.

10. The Sessions Judge found that though the prosecution had established that there were strained relations between the accused and the deceased it could not be said that the incident of murder of Bharvads had not resulted in strained relations between Falji and any other Bharvad of the village but that possible motive for the murder could not be treated as corroboration of the evidence of the three eye-witnesses Pitambar, Khengar and Rupsing.

11. As to the discovery of blood stained articles, viz., stolen gun, farsi and Dharia and a piece of apparel called "Pachhedi" having a blood stain, the Sessions Judge held that con-

sidering that there were two factions it was highly desirable that persons other than Koli Patels were taken as Panchas and examined as witnesses. The evidence of Panch witness Chaturbhai was found by the Sessions Judge tainted because the prosecution did not examine the other two Panchas one of whom was a Muslim and the other a Sindhi.

12. The High Court set aside the order of acquittal and convicted the appellants. The High Court accepted the evidence of Khengar son of Falji, Bai Samu widow of Falji and relied on the evidence of Khengar by reason of corroboration of various pieces of circumstantial evidence.

13. The High Court did not consider it safe to rely on the testimony of Pitambar because of the previous enmity between him and the Bharvads and on the additional ground that Pitambar was trying to improve upon his earlier version regarding the names of the assailants that were disclosed by Bai Samu. The High Court also found it not prudent to rely upon the testimony of Rupsing because he belonged to the rival faction which bore animosity against the Bharvads and at the time of the incident Rupsing was at a distance of more than 100 feet and therefore Rupsing might not have identified the three assailants of Falji.

14. As to Khengar's evidence the High Court said that he had seen his own father being seriously assaulted by use of dangerous weapons and his failure to appeal to Rupsing and Pitambar to come to the help of his father was not unnatural for a boy of his age at that critical time. The High Court therefore rightly said that Khengar who was a young boy of about 14 years of age must have been very much frightened and his action of rushing towards the village to his own house raising shouts all the time was quite natural in view of his age and his relationship with the victim and the nature of the assault.

15. The High Court rightly rejected the criticisms of Khengar's evidence, namely, that he said that no passenger had got down at Bhurki Railway Station whereas Rupsing Raja said that he saw some passengers coming from the opposite direction and the conflict between the medical evidence and Khengar's evidence that

Falji had fallen down with his face downwards and the conflict between the medical evidence and Khengar's evidence as far as external injuries Nos. 1 and 2 were concerned. The doctor was not asked as to whether these two injuries Nos. 1 and 2 could not have been caused when Falji was lying with his face downward.

16. The other piece of evidence as to whether there was any passenger who had got down at Bhurki Railway Station was also found by the High Court not to be a ground for doubting Khengar's testimony because Rupsing was not asked any question as to whether the persons he met in the village coming from the opposite direction were passengers.

17. The High Court adopted the correct approach in finding that though there were no infirmities of Khengar's evidence as it stood but in view of the fact that he was a young boy it would be prudent to seek corroboration of Khengar's evidence.

18. The High Court correctly relied on the evidence of Bai Samu in corroboration of Khengar's testimony. Khengar told Bai Samu that his father was assaulted and on Bai Samu asking him who the assailants were Khengar told her that accused No. 2 Dhana Megha and accused No. 3 Valu Vela and accused No. 1 Bhikha Valu had assaulted his father. Bai Samu in cross-examination maintained that Khengar had given her the names of the three accused as the assailants of her husband. Kavabhai was near the well which is situated at a short distance to the north of Panchayat Office and on the date of occurrence he saw Bai Samu on the road near the culvert. Kavabhai saw Bai Samu weeping and went to her. Kavabhai saw Falji Teja lying dead on the ground with blood injuries. According to Kavabhai Bai Samu told him that Bhika Valu and Dhana Megha had killed her husband. Kavabhai went to the Station Master, Bhurki. The Station Master Chakravarti did not know Gujarati. Kavabhai spoke to him in Gujarati. The Station Master said that he understood from what Kavabhai told him that Bhikha Valu was murdered by Dhana Megha. The High Court rightly said the Station Master Chakravarti was not familiar with the Gujarati language and because of that there was misunderstanding of what Kavabhai said and wrong names were mentioned.

Bai Samu was in great distress and agony of her life. Therefore it would be reasonable to find that though under the circumstances Bai Samu might have given out the names of three individuals Kavabhai understood her to mention the names of accused No. 1 and accused No. 2.

19. The High Court referred to the three Panchnamas Exhibits 20, 21 and 23 as pieces of circumstantial evidence. Exhibit 20 is the deposition of the Panch witness Nanubhai who spoke of injuries on the different portions of the dead body, a piece of Dharia blade to be found lying at a short distance from the dead body and a cap and a piece of cloth used as a head gear found lying there. The spear was also found lying at some distance from the dead body. The Panchnama Exhibit 21 was recorded in connection with the scene of offence. Panch witness Nanubhai spoke of the piece of apparel Pachhedi of the nature of a short dhoti worn by accused No. 3 and taken charge by the police on 21 February, 1965. Accused No. 3 put on the pachhedi. It appeared to have a blood-stain and the police took charge of it under Panchnama Exhibit 23. Exhibit 21 also spoke of the piece of blade of Dharia found lying at a distance of one pace to the south of the dead body and the spear was found lying at a distance of about 7 paces to the west of the dead body. The Panchnama Ex. 23 mentioned that there was one blood spot on the right side on the "thigh portion" of that Pachhedi and accused No. 3 was allowed to change the pachhedi by wearing another pachhedi which he had with him and the spot of blood which was noticed on the pachhedi of accused No. 3 was encircled under the signature of Panch witnesses.

20. The High Court referred to the evidence of Dr. Lala who performed the post-mortem examination on the body of Falji Teja. Dr. Lala's evidence was that all the injuries could have been caused by sharp cutting instrument and the death of Falji Teja was due to shock and haemorrhage as a result of the fracture of the skull. Dr. Lala spoke of six injuries on Falji Teja. Injury No. 4 a cut on the back of left upper arm lower one third skin deep could have been caused by a spear. Injury No. 3 a semi-circular incised wound cutting through the bone and exposing the brain starting

from the right frontal area $1\frac{1}{2}$ " above lateral edge of right eyebrow and going backwards across the right parietal left occipetal and then forward over left temporal area and terminating at about 2" above left ear, could have been caused by a Dharia blow and it could not have been caused by an axe. Injuries Nos. 5 and 6 viz., an oblique incised wound on the back of left thigh and an incised wound on the back of middle half of the left leg could have been caused by an axe and not by a spear. Injury No. 1 an incised wound near the outer angle of left eye and injury No. 2 an oblique incised wound over left cheek in the area of left ear could have been caused by a Dharia and a farsi and not by a spear. That was the evidence of Dr. Lala.

21. The High Court dealt with the arguments advanced on the medical evidence that injuries Nos. 1 and 2 on the outer angle of left eye and over the left ear were so located that they could not have been caused when he was lying with his face downward. No questions were put to Dr. Lala about this aspect of the case and the High Court rightly said that it was not possible to accept the submission on behalf of the accused that those two external injuries could not have been caused when the deceased was lying with his face towards the ground.

22. The High Court correctly found corroboration from the injuries on the dead body and the three different weapons, viz., the axe, the spear and the Dharia and the wearing apparel pachhedi. The medical evidence was that the different injuries could have been inflicted by Dharia, axe and spear. External injury No. 4 could have been inflicted by a spear or by an axe. Khengar's evidence was there was a spear injury but he had not specified the part of the body where the spear had landed. Khengar might have noticed only the action of accused No. 2 in thrusting the spear but did not notice how and in what manner the spear landed on the person of Falji. Therefore, there could not have been discrepancy between Khengar's and the medical evidence. A spear was found lying at the scene. A broken blade of a Dharia was also lying near the dead body. The Police Sub-Inspector recorded inquest and took charge of that broken piece of Dharia blade. Stains of human blood were

found on the Dharia blade. The stains of blood on the spear had so integrated that its origin could not be determined. Therefore, looking at the place from which the spear was found and the circumstances under which the spear was taken charge of by the police, it is clear that the spear must have been stained with Falji's blood and must have been left behind by the person or persons who assaulted Falji.

23. The injuries on the dead body were consistent with the three different weapons and the three different types of weapons rendered it not unreasonable for the High Court to come to the conclusion that there were three assailants each of whom was having a different weapon and each of whom caused injuries to the deceased Falji. Khengar's testimony is corroborated by the testimony of Bai Samu that the three accused assaulted the deceased and caused injuries to the deceased by means of axe, spear and Dharia. The pachhedi which was taken charge from accused No. 3 immediately after he was arrested had stains of human blood. The High Court examined the pachhedi and found that there was only one cutting taken out from the pachhedi and that too was from the portion around which there was a circle in ink and the signature of panch witness Nanubhai was also there. No other cutting was taken out from the pachhedi. There was only one tear on the pachhedi. This cut mark was taken out from the portion encircled in ink when the Panchanama was made. The stain of human blood on the pachhedi worn by accused No. 3 was a strong reliable piece of evidence.

24. The discovery of a gun and an axe by accused No. 1 and a Dharia by accused No. 3 is of great importance for the purpose of corroboration. Panch witness Chaturbhai was a panch to three different panchanamas in connection with the discovery of different weapons. Hasan Alibhai, and Dayaram Kamaldas were co-panchas with him and accused No. 1 was in police custody at that time. Accused No. 1 said that he would show the place where he had kept the gun and accused No. 1 led the police and the panchas to a place on the station road to the tailor's house which was under construction. Accused No. 1 showed the gun which was lying at that house.

The gun was attached. Panchanama was made and the gun was taken charge of by the police. The gun was shown to be the gun belonging to Falji. The licence showed the number of the gun. The licence was given to Falji. The number and other description tallied. The number of the gun was noted in the panchanama.

25. Accused No. 3 led the police party and the panchas to a place near a small temple of a deity. Accused No. 3 took out a Dharia from the hedge of thorns. The Dharia was attached. A panchanama was made. The Dharia which was attached had its blade broken. There were blood like stains on it. Article 13 was the Dharia produced in Court. The blade which was found from the scene of offence near the dead body and the dharia which was attached matched. The High Court saw the two pieces matched completely at the broken edge and there was no doubt in coming to the correct conclusion that the broken piece of blade was broken from this particular dharia and the remaining portion which was recovered according to the prosecution from the hedge was the other matching part of it.

26. The third panchanama made on 22 February, 1965 stated that accused No. 1 said that he would find out the farsi in a hedge. Accused No. 1 also stated that he had kept the farsi in a hedge and then the panchanama was recorded at the Panchayat Office. Chaturbhai also said in evidence that the distance between the spot from where the dharia was taken out and the place from where farsi was taken out by accused No. 1 might be about 10 feet. The hedge from which the broken dharia and the axe were recovered was about a distance of 20 feet from the station road and the house of the tailor from which the gun of Falji Teja was recovered was on the station road. The High Court rightly said that the criticism on behalf of the accused that Chaturbhai was a Koli Patel and therefore had interest of the community was no ground to hold that Chaturbhai's evidence should not be accepted. Panch witness Nanubhai Virsing was also a Koli Patel and no allegation was made against Nanubhai. The High Court found that nothing was shown to hold that Chaturbhai was an interested witness or to be a professional panch or

amenable to the pressure of the police. Panch witness Hasanali was won over by the accused. That is why Hasanali who was cited as a witness was not examined along with Mera Mathur. Other witnesses were also dropped. Dayaram another panch witness was not examined. It was not obligatory to call Dayaram because it could not be said that Chaturbhai was an interested witness.

27. The High Court rightly said that there was no reason to disbelieve the three panchnamas and once that evidence was accepted it clearly followed that the prosecution established that a gun with stains of human blood on it and belonging to Falji Teja was recovered from a spot from where accused No. 1 had kept the gun and the broken blade of the Dharia with stains of human blood on it was recovered from the hedge of the Vada of Vama Vaja the place where accused No. 3 had kept it and the axe was found from another spot in the hedge of Vama Vaja. Discovery of the Dharia and the farsi and the gun corroborated the testimony of Khengar and the further fact that the names of the accused were disclosed by Bai Samu to Kava Mansing. Bai Samu had in her turn been told the names of the three accused as assailants by Khengar. This supports Khengar's version before the Court. Khengar's evidence received corroboration by the discovery of the gun, the axe and the spear.

28. The High Court rightly found that the prosecution case against the three accused had been established beyond reasonable doubt from the evidence of Khengar and from the corroboration which Khengar's evidence received.

29. For these reasons the appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1070 (V 58 C 218)

(From Andhra Pradesh: (1967) 2
Andh WR 444)

G. K. MITTER AND A. N. RAY, JJ.

Jupudi Kesava Rao (In all the Appeals), Appellant v. Pulavarthi Venkata Subbarao and others (In all the Appeals), Respondents.

Civil Appeals Nos. 2535 to 2537 of 1966, D/- 29-1-1971.

BO/BO/A544/71/SSG/C

(A) Stamp Duty — Stamp Act (1899), Section 2 (14) — Definition of "instrument" does not cover copy of document for purposes of Stamp Act.

(Para 13)

(B) Stamp Duty — Stamp Act (1899), Sections 35, 36 — In view of Sections 35 and 36 secondary evidence by way of oral evidence or copy of document insufficiently stamped is not admissible in a suit even though objection to its admissibility cannot be taken under Evidence Act (X-Ref: — Evidence Act (1872), Section 91) — AIR 1927 Rang 109 and AIR 1937 Mad 431, Overruled. (Paras 11 to 14, 23, 24)

Sections 35 and 36 are not concerned with copy of document. A party can only be allowed to rely on a document which is an instrument for purposes of these sections. Section 36 does not apply to secondary evidence adduced in proof of the contents of document unstamped or insufficiently stamped. (Paras 13, 14)

Cases Referred: Chronological Paras
(1962) AIR 1962 SC 110 (V 49)

= (1962) 1 SCR 827, State of Bihar v. Karam Chand Thapar Bros. Ltd. 17

(1947) AIR 1947 Mad 422 (V 34)
= (1947) 2 Mad LJ 116, Ponnuswami v. Kailasam 26

(1946) AIR 1946 Mad 298 (V 33)
= ILR (1946) Mad 672, Chidambaram v. Meyyappan 21

(1937) AIR 1937 Mad 431 (V 24)
= 45 Mad LW 515, Satyavati v. Pallaya 25

(1932) AIR 1932 Mad 693 (V 19)
= 63 Mad LJ 303, Alimane Sahiba v. Subbarayudu 26

(1927) AIR 1927 Rang 109 (V 14)
= ILR 4 Rang 363, Maung Po Htoo v. Ma Ma Gyi 22

(1907) ILR 30 Mad 386 = 17 Mad LJ 308, Thaji Beebi v. Thirumalappa Pillai 18, 19

(1900) ILR 23 Mad 49 = 26 Ind App 262 (PC), Raja of Bobbili v. Inuganti China Sitaramasami Garu 16, 21

Mr. A. K. Sen, Sr. Advocate, (M/s. A. V. Rangam and T. Raman, Advocates, with him), for Appellant (In all the Appeals); Mr. B. V. Subramanyam, Sr. Advocate, (Mr. B. Parthasarathy, Advocate, with him), for Respondents Nos. 1 and 2 (In all the Appeals).

The following Judgment of the Court was delivered by

MITTER, J.: — The main question in these three appeals is, whether

reception of secondary evidence of a written agreement to grant a lease is barred by the provisions of Sections 35 and 36 of the Indian Stamp Act.

2. The relevant facts are as follows. There is a rice mill in Bhimavaram, West Godavari District, which was formerly owned by the appellant along with respondents 3, 4 and 5. The mill was built on a site with an area of Ac. 1-75 by one K. N. Raju who had obtained a lease thereof from the guardian of respondents 1 and 2. It was executed on 21st December, 1941 and was to expire on 17th July, 1956. The appellant and respondents 3, 4 and 5 were successors-in-interest of the said lease-hold rights. Respondents 1 and 2 served notice of ejectment on the lessees to quit the site and deliver possession on the expiry of the said lease.

3. According to the lessees there were negotiations for a new lease. Respondents 1 and 2 demanded enhanced rent and an agreement was ultimately arrived at on January 6, 1957 between the appellant and respondent No. 5 for themselves and on behalf of respondents 3 and 4 on the one hand and respondents 1 and 2 on the other for grant of a new lease for a period of thirty years commencing on January 1, 1957. The rent was fixed at Rs. 540/- per annum payable every two months. There was an option given to the lessors to purchase the rice mill at a price to be fixed by the President of the Rice Mills' Association but in case the said option was not exercised, the lessees were entitled to remove the structures of the Mill. The lessees were to continue in possession and a deed of lease was to be executed and registered within a short time. The agreement was written on two stamp papers of Rs. 0-12-0 each and signed by the appellant and the 5th respondent on the one hand and respondent No. 1 on his own behalf and on behalf of respondent No. 2. The document was delivered to the respondent No. 1 after execution.

4. The appellant's further case is that thereafter he effected considerable improvements to the mill costing about Rs. 30,000/- and purchased the shares of respondents 3 and 4 in the said mill but respondent No. 5 who had originally joined the appellant in the suit for specific performance of the said agreement sold his

share in or about September, 1955 to respondent No. 6 herein.

5. On March 12, 1957 respondents 1 and 2 instituted a suit O. S. No. 31 of 1957 in the Court of the District Munsif of Bhimavaram against the appellant and respondents 3, 4 and 5 besides certain other persons who were in occupation of the site, for recovery of possession after removing the rice mill and structures standing thereon on the basis that on the expiry of the old lease they had become entitled to possession. Respondents 1 and 2 instituted another suit O. S. No. 100 of 1957 on 4th April 1957 in the same Court claiming damages from the appellant and respondent No. 5 for failure to deliver the site from 1st January, 1957 till date of delivery of possession. In paragraph 6 of the plaint in this suit they expressly stated that they would file a separate suit to recover the future mesne profits. The total claim in this suit was computed at Rs. 4,700 being the amount due for 94 days from 1st January 1957 to 4th April 1957 at the rate of Rs. 50 per day. On April 5, 1958 the appellant and respondent No. 5 instituted O. S. No. 92 of 1958 against respondents 1 to 4 praying for specific performance of the agreement to lease mentioned above with a direction that the respondents 1 and 2 should execute the lease deed. By their written statement filed in O. S. No. 92 of 1958 respondents 1 and 2 denied the execution of the agreement to lease while in the two suits for recovery of possession and damages for illegal occupation the appellant and respondent No. 5 pleaded the aforesaid agreement for lease in defence and submitted that they were entitled to remain in possession without any liability as to damages.

6. The three suits were tried together. As respondents 1 and 2 did not produce the original agreement which according to the appellant had remained with them, oral evidence was called by the appellant to prove the execution of the said document. In his judgment the learned Munsif held:

"The plaintiffs have no right to lead any oral evidence in respect of the suit agreement to lease dated 6-1-1957. However, in order to appreciate the case put forward by the plaintiffs in the absence of the agreement to lease oral evidence has been recorded

to determine whether the plaintiffs are entitled to specific performance as the full facts must be before the court".

Examining the evidence the learned Munsif recorded his finding that:

"The plaintiffs on whom the burden lies have not proved by evidence of P.Ws. 1 to 5 and 7 which is interested and developed that the agreement to lease dated 6-1-1957 is true and valid."

O.S. No. 92 of 1958 was therefore dismissed. O. S. No. 81 of 1957 was decreed against the appellant and others and they were directed to deliver vacant and peaceful possession after removing the constructions and the mill thereon on or before 9th July 1960. Suit No. 100 of 1957 was decreed against the appellant and respondent No. 5 for Rs. 117-2-10.

7. The Subordinate Judge, Narsapur who heard the appeals from the judgment and decrees of the learned Munsif set them aside. The suit for specific performance of the contract of agreement to lease was decreed and defendants 1 and 2 in that suit were directed to execute and register a lease deed from 1st January, 1957. He accepted the oral evidence tendered on behalf of the plaintiffs in that suit and recorded that the objection regarding the admissibility of the oral evidence was raised only at the time of the arguments on the ground that the agreement was written on a stamp paper of Rs. 1-8-0 when it should have been written on a paper with a stamp of Rs. 60/-. According to the learned Subordinate Judge the defendants had suppressed the agreement to lease whereby the plaintiffs were deprived of the opportunity of making good the deficiency of the stamp. The learned appellate Judge held further that the conditions mentioned in Section 27-A of the Specific Relief Act had been fulfilled. He also found that the parties were contemplating the execution of a deed of lease subsequent to the agreement and the mere fact that plaintiffs continued their possession after the expiry of the period of the previous lease did not take the case out of the purview of Section 27-A of the Specific Relief Act.

8. The High Court in Second Appeal went elaborately into the question of the admissibility of the oral evidence regarding the agreement to lease and held that "although the ob-

jection was raised by defendants 1 and 2 in the trial Court at the time of the final arguments and not before the oral evidence was received in regard to the admissibility of oral evidence, even then since Section 36 is not attracted to such an objection, the oral evidence cannot be acted upon. It is inadmissible in evidence and it cannot be received for any purpose."

The appellant before us challenges this finding of the High Court.

9. Learned counsel for the appellant Mr. Sen argued that the admissibility of secondary evidence, be it oral or in writing, must be primarily decided in terms of the Indian Evidence Act. Inasmuch as the original document which was insufficiently stamped was suppressed by the defendants in the suit for specific performance, secondary evidence of the contents of the document could be led in terms of Section 65 (a) of the Evidence Act. The Evidence Act imposed no bar to the reception of oral evidence by way of secondary evidence to prove the terms of the agreement to lease which was in writing and duly executed. According to counsel the Stamp Act did not create a bar with respect to the reception of secondary evidence to prove a document which was unstamped or insufficiently stamped in any case where the party seeking to rely upon the execution of the document and the terms thereof offered to pay the penalty in terms of Section 35 of the Stamp Act. According to Mr. Sen Section 35 raised a bar only in cases which were expressly excluded by proviso (a) to Section 35 and in others where the party seeking to rely on the document was not agreeable to pay the deficiency in the stamp together with the penalty in terms of the said proviso. Mr. Sen further argued that the whole object of S. 35 of the Stamp Act was that the Government revenue due by way of stamp should be protected. But even then Section 36 carved out an exception thereto and allowed the reception of an insufficiently stamped instrument in evidence when it had been admitted without objection at the initial stage. It was not reasonable, according to counsel to limit the operation of Section 36 only to cases where the original instrument was admitted in evidence without objection and logically oral evidence to prove the contents of a document which was insufficient-

ly stamped should be subject to the same but no further infirmity and once such oral evidence was recorded without objection of the party against whom it was tendered, particularly where such party was responsible for the suppression or non-production of the document, it should be acted upon by Courts of law. If the party tendering oral evidence was agreeable to make up the deficiency in the stamp and pay the penalty in terms of Section 35.

10. We find ourselves unable to accept the submissions made on behalf of the appellant. The Indian Evidence Act which was enacted in 1872 consolidates, defines and amends the law of evidence. By various Chapters it deals with matters as to how facts are to be proved and which facts need not be proved. Section 59 of the Act lays down that all facts except the contents of documents may be proved by oral evidence. Documentary evidence is dealt with in Chapter V and Section 61 provides that the contents of the document may be proved either by primary evidence or secondary evidence. Under Section 62 primary evidence means the document itself produced for inspection of the Court. Section 63 shows the different kinds of secondary evidence admissible with regard to documents. It includes several kinds of copies as specified in sub-cl. (1) to (3) of the section, counterparts of documents as against the parties who did not execute them in terms of Clause (4) and oral accounts of the contents of a document given by some person who has himself seen it in terms of Clause (5). Under Section 64 documents must be proved by primary evidence except in cases mentioned thereafter. Section 65 allows secondary evidence to be given of the existence, condition or contents of a document in circumstances specified in Clauses (a) to (g) thereof. Under Section 91 when the relevant portion of a contract or of a grant or of any other disposition of property has been reduced to the form of a document, no evidence shall be given in proof of the terms except the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions herebefore contained.

11. As the first Court of appeal recorded the finding that it was the

1971 S. C./68 VI G—6

defendants who were responsible for suppression of the original agreement to lease, a finding which was accepted by the High Court, it must be held that no objection to the reception of secondary evidence by way of oral evidence can be raised under the provisions of the Indian Evidence Act.

12. The Indian Evidence Act however does not purport to deal with the admissibility of documents in evidence which require to be stamped under the provisions of the Indian Stamp Act. The Stamp Act which is now in force is an Act of 1899 but it had a fore-runner in a statute of 1879. Chapter IV of the Stamp Act deals with instruments not duly stamped. Section 33 (1) of this Act provides that:

"Every person having by law or consent of parties authority to receive evidence, and every person in charge of a public office, except an officer of police, before whom any instrument, chargeable, in his opinion, with duty, is produced or comes in the performance of his functions, shall, if it appears to him that such instrument is not duly stamped, impound the same". The relevant portion of Section 35 is as below:—

"No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped:

Provided that—

(a) any such instrument not being an instrument chargeable with a duty not exceeding ten paise only, or a bill of exchange or promissory note, shall, subject to all just exceptions, be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument, insufficiently stamped, of the amount required to make up such duty, together with a penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion;

xx xx xx."

Section 36 lays down that:

"Where an instrument has been admitted in evidence, such admission shall not, except as provided in Sec-

tion 61, be called in question at any stage of the same suit or proceeding on the ground that the instrument has not been duly stamped".

13. The first limb of Section 35 clearly shuts out from evidence any instrument chargeable with duty unless it is duly stamped. The second limb of it which relates to acting upon the instrument will obviously shut out any secondary evidence of such instrument, for allowing such evidence to be let in when the original admittedly chargeable with duty was not stamped or insufficiently stamped, would be tantamount to the document being acted upon by the person having by law or authority to receive evidence. Proviso (a) is only applicable when the original instrument is actually before the Court of law and the deficiency in stamp with penalty is paid by the party seeking to rely upon the document. Clearly secondary evidence either by way of oral evidence of the contents of the unstamped document or the copy of it covered by Section 63 of the Indian Evidence Act would not fulfil the requirements of the proviso which enjoins upon the authority to receive nothing in evidence except the instrument itself. Section 35 is not concerned with any copy of an instrument and a party can only be allowed to rely on a document which is an instrument for the purpose of Section 35. 'Instrument' is defined in Section 2 (14) as including every document by which any right or liability is, or purports to be created, transferred, limited, extended, extinguished or recorded. There is no scope for inclusion of a copy of a document as an instrument for the purpose of the Stamp Act.

14. If Section 35 only deals with original instruments and not copies Section 36 cannot be so interpreted as to allow secondary evidence of an instrument to have its benefit. The words "an instrument" in Section 36 must have the same meaning as that in Section 35. The legislature only relented from the strict provisions of Section 35 in cases where the original instrument was admitted in evidence without objection at the initial stage of a suit or proceeding. In other words, although the objection is based on the insufficiency of the stamp affixed to the document, a party who has a right to object to the reception of it must do so when the

document is first tendered. Once the time for raising objection to the admission of the documentary evidence is passed, no objection based on the same ground can be raised at a later stage. But this in no way extends the applicability of Sec. 36 to secondary evidence adduced or sought to be adduced in proof of the contents of a document which is unstamped or insufficiently stamped.

15. The above is our view on the question of admissibility of secondary evidence of a document which is unstamped or insufficiently stamped, as if the matter were *res integra*. It may be noted however that the course of decisions in India in the Indian High Courts, barring one or two exceptions, have consistently taken the same view.

16. One of the earliest decisions is the judgment of the Judicial Committee of the Privy Council in *Raja of Bobbili v. Inuganti China Sitaramaswami Garu*, (1900) ILR 23 Mad 49. In this case a suit was brought by the Raja of Bobbili to obtain the proprietary possession of an estate once belonging to the family. The original defendant was the widow of a son of the sister of the plaintiff's paternal grandfather, a former Raja of Bobbili, by whom the estate, the subject of dispute was granted by a deed of April 5, 1848 to a cousin who had then married the then Raja's sister. The donee died in 1872, and his widow thereupon restored the estate to the Raja on the footing that the grant had been only for her husband's life. The Raja then granted the estate to another cousin who died in the same year. This was the husband of the original defendant. It was necessary for the Raja to show that the grant of 1848 was absolute and unconditional. The deed of grant was however not forthcoming having been lost. The question was whether the draft, or a copy, of the instrument tendered as secondary evidence of its contents when the original instrument was shown to have been insufficiently stamped, could be subjected to the penalty prescribed by Section 34 of the Indian Stamp Act, 1879 as a preliminary to its being admissible in evidence. The respondent denied that such a deed was ever executed and averred that the gift consisted in transferring the estate to the donee's name in the register, upon

the footing that the estate was to revert to the donor, in the event of the donee leaving no heir male of his body. At the trial the plaintiff offered in evidence what purported to be an unauthenticated copy and the defendant objected to the admission of the same on the ground that it was the copy of a document which was insufficiently stamped. The District Judge refused to receive the document or allow it to be proved and dismissed the suit. The appeal to the High Court of Madras was also unsuccessful, the learned Judges of the High Court holding that:

"the copy should not be admitted on payment of a penalty, for the provision of the Stamp Act regarding penalty (Section 39 of Act 1 of 1879) prescribes that such payment shall be endorsed on the document and presupposes that the document is forthcoming".

Before the Judicial Committee Counsel for the appellant admitted that he was not in a position to dispute that the original deed of gift dated 1848 had not been sufficiently stamped in terms of the Madras Regulation XIII of 1816 and that he would be unable to maintain his claim for the estate unless he was permitted to prove the copy of the deed and use it as secondary evidence either on due payment of a penalty in Court, or upon its endorsement by the Collector. He based his right to that remedy on the provisions of the Stamp Act of 1879. The Judicial Committee held on the construction of the said Act that the judgment appealed from was correct observing:

"These clauses throughout deal with, and exclusively refer to the admission as evidence of original documents which, at the time of their execution, were not stamped at all, or were insufficiently stamped. It is only upon production of the original writ, that the Collector has the power given him, or the duty imposed upon him, of assessing and charging the penalty, a duty which he must, in that case, perform by writing an indorsement upon the writ submitted to him, which then, and not till then, becomes probative in law".

Reference was made to Section 33 of the Act of 1879 which is in pari materia with Section 33 of the Act of 1899. Section 34 of the Act of 1879 was on the same lines as the present

Section 35. The Board further held that the effect of granting the remedy which the appellant maintained he was entitled to would be to add to the Act of 1879, a provision which it did not contain, and which the Legislature of India, if the matter had been brought under their notice, might possibly have declined to enact.

17. More than sixty years after the above decision this Court observed that the law laid down there was well settled and that a copy of an instrument could not be validated: *State of Bihar v. Karam Chand Thapar & Bros. Ltd.*, (1962) 1 SCR 827 = (AIR 1962 SC 110). It is not necessary to examine the facts of that case except to note that the contention put forward was whether an instrument i. e., an award received in Court which had been prepared in triplicate, the other two having been sent to the parties, was an original instrument which could be used by the payment of stamp duty under Section 35 of the Stamp Act and validated. This Court held that although the document sent to the Court was marked as a certified copy, it was in reality an original instrument for the purpose of the Stamp Act.

18. The above judgment shows that if the document tendered in Court was not an original instrument but a copy the decision would have been otherwise. However we may point out that the passage which occurs at page 835 of the report (reproduced hereinafter in part) as being quoted from the decision of the Judicial Committee is not to be found in their Lordships' judgment. The latter portion of the passage occurs in the judgment of the Madras High Court in *Thaji Beebi v. Tirumalappa Pillai*, (1907) ILR 30 Mad 386 at p. 387, but this does not in any way detract from the weight of the opinion expressed by a Bench of five judges of this Court.

19. In *Thaji Beebi's case*, (1907) ILR 30 Mad 386 (supra) the plaintiff sued upon a "cadjan" mortgage which was said to be in possession of the first defendant whose ancestors were alleged to have created the mortgage in favour of the plaintiff's ancestors. The first defendant denied the existence of any such deed. The plaintiff examined two witnesses to prove the mortgage one of whom stated that he had attest-

ed the document which was unstamped. Plaintiffs led oral evidence to prove the mortgage and also put in a petition by the first defendant's ancestor in which the mortgage was admitted. No objection was taken by the defendants to the reception of the secondary evidence. The trial court found the mortgage proved but dismissed the suit on the defendants' plea that the plaintiffs' ancestors had sold away the lands. On appeal the District Judge upheld the decision on the ground that the trial court ought not to have received secondary evidence of the mortgage. The High Court dismissed the Second Appeal on the same ground. The question as to whether it was open to the plaintiff to rely on the oral evidence of the alleged execution of the instrument and the alleged passing of possession of the property under that instrument in order to show that that possession operated to create by prescription only the title of a mortgage in the defendants was answered in the negative by observing:

"To hold otherwise would be to give some effect to the unstamped instrument inasmuch as it would necessarily connect the possession with the contents of the document relating thereto; and that would be contrary to the express provision of Section 35 of the Stamp Act which lays down that an instrument chargeable with duty shall not only not be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, but also that it shall not be "acted upon" by any such person unless duly stamped."

20. The decisions of different High Courts make it quite clear that the cause of the non-production of the original instrument is immaterial i. e. whether it was lost or whether it was destroyed or even if it was the allegation of the party seeking to prove its contents by alleging that the document was suppressed by his opponent.

21. In *Chidambaram v. Mayyappan*, AIR 1946 Mad 298 the plaintiffs produced an unstamped document as the basis of their claim. Before the trial commenced a mob invaded the court and set fire to it with the result that records of many cases including the record of the above case were destroyed. When the trial commenced the plaintiff sought to put in a copy of

the document and it was objected to on the ground that the copy could not be stamped even on payment of penalty. The Subordinate Judge without admitting the document but leaving the question of its admissibility open until he had heard the arguments of counsel, marked it as an exhibit. In rejecting the plaintiffs' appeal the learned Judges of the Madras High Court referred to the decision of the Privy Council in *Raja of Bobbili's case*, (1900) ILR 23 Mad 49 (supra) and observed that the destruction by the mob's action put the plaintiffs in no better position.

22. Numerous decisions on the point had been referred to by the learned Judge hearing the Second Appeal in the High Court but we do not think it necessary to take note of them in any detail. Mr. Sen relied strongly on certain observations in a judgment of the Rangoon High Court in *Maung Po Htoo v. Ma Ma Gyi*, ILR 4 Rang 363 = (AIR 1927 Rang 109). This arose out of a suit for administration of the estate of one Daw Thet San and for a declaration that a deed of gift executed by him was void. The District Court found that the deed of gift was void as being a testamentary disposition and granted a declaration to that effect. In appeal to the High Court the decision that the deed of gift was void was not contested and the only question for decision was whether the adoptions mentioned therein were proved. The appellants wished to use a certain part of the deed as evidence to prove that the plaintiff and one Tun Sein were not adopted while the respondents claimed that it could not be admitted in evidence for any purpose. The deed itself was not produced which admittedly had been in possession of Po Htoo who put in a certified copy alleging that he had lost the original. On a consideration of the entire evidence the District Judge found that the original deed of gift was insufficiently stamped. This decision was not questioned before the High Court but the appellant claimed that it could not be admissible in evidence and was not to be considered for any purpose. Referring to the decision of the Judicial Committee and the passage which we have quoted already the Judges of the Rangoon High Court remarked that their Lordships' observation (quoted by us earlier) that:

"Those clauses throughout deal with, and exclusively refer to, the admission as evidence of original documents, which, at the time of their execution, were not stamped at all, or were insufficiently stamped" did not intend to go as far as their words suggested. According to the Rangoon Judges:

"..... Section 35 of the present Act, read with the provisions of the Evidence Act, excludes both the original instrument itself and secondary evidence of its contents. Similarly, under Section 36, when either the original instrument itself or secondary evidence of its contents has in fact been admitted, that admission may not be called in question in the same suit, on the ground that the instrument was not duly stamped". In this view, they held that the terms of the deed of gift could be considered.

23. With all respect to the learned Judges it appears to us that both the premises of the last sentence of the above quotation and the conclusion based on the same are incorrect. Neither under the decision of the Judicial Committee nor the express words of Section 34 of the Stamp Act of 1879 mentioned in that judgment (present Section 36) allow the leading of secondary evidence of the contents of an insufficiently stamped document.

24. As we have expressed our view already Section 35 imposed a bar on the reception of any but the original instrument and forbade the reception of secondary evidence. Section 36 only lifted that bar in the case of an original unstamped or insufficiently stamped document to which no exception as to admissibility was taken at the first stage. It did not create any exemption in the case of secondary evidence which a copy would undoubtedly be. In the case before the Judicial Committee the copy was one other than the final draft of the original document which had been lost through no fault on the part of the person intending to prove it and yet it was held that the Stamp Act ruled out its admissibility in evidence.

25. For the same reason we must hold that the dictum in *Satyavati v. Pallayya*, AIR 1937 Mad 431 at p. 432 that:

"Section 36 will also apply when secondary evidence of an instrument

not duly stamped had been wrongly admitted". is not good law.

26. Learned counsel for the appellant also relied on the decision in *Ponnuswami v. Kailasam*, AIR 1947 Mad 422. In this case a suit was filed for recovery of two loans which were evidenced as two documents described as hand letters which were admittedly unstamped. Before the trial stamp duty and penalty was levied by the Court on the footing that they were bonds. The defendant admitted the execution of the two documents but pleaded that in substitution of his liability under them he had executed a promissory note and had made payments towards the same leaving a balance of Rs. 40/- only payable on the loan. Neither party let in any evidence. The defendant raised the only contention that the suit was not sustainable on the two documents because they are inadmissible in evidence for any purpose. The learned Judge in revision took the view that it was not necessary for him to decide as to the exact nature of the two documents to determine whether they were admissible in evidence but he went on to add:

"Assuming that these two documents should not have been legally admitted in evidence, nevertheless it is contended for the petitioner that as the defendant had admitted the execution of the documents and had only pleaded a substitution of liability by the execution of another promissory note and a partial discharge towards it there was no necessity for the plaintiff to adduce proof of his claim by seeking to get the two documents admitted in evidence. In other words the plaintiff will be entitled to a decree on the failure of the defendant to make out the plea set up by him in defence".

We do not think this judgment helps the appellant. If a suit is based on a document which is admittedly unstamped the insufficiency of the stamp is cured by the payment of penalty. The learned Judge never meant to lay down, as is contended for by Mr. Sen, that the defect of insufficiency of stamp is cured by the admission of execution of the document. The learned Judge of the Madras High Court relied on an earlier decision of that Court in *Alimane Sahiba v. Subbarayudu*, AIR 1932 Mad 963 wherein

a suit had been filed on a promissory note which bore a stamp paper but the same was not cancelled. The defendant admitted the execution of the promissory note sued on but pleaded discharge. Subsequently at the stage of the argument the defendant raised a legal objection to the maintainability of the suit on the ground that the stamp affixed to the promissory note had not been cancelled as required by Section 12 of the Stamp Act and contended that the promissory note should accordingly be treated as unstamped for any purpose. In Alimane Sahiba's case, AIR 1932 Mad 693 (supra) the learned Judge stated in clear terms that:

"Under the provisions of Section 12 (of the Stamp Act) therefore it must be taken that this promissory note was not duly stamped and accordingly if any question arose as to its admissibility in evidence the same may have to be held to be inadmissible". The learned Judge however took the view that as facts admitted need not be proved the circumstance that the promissory note was not admissible in evidence is immaterial for the purpose of this case. No doubt the learned Judge added (see at p. 696):

"How when once this document has been admitted in evidence and marked as an exhibit then having regard to the provisions of Section 36, Stamp Act, its admissibility could not be re-opened on the ground of the document not having been duly stamped. That position being clear under the provisions of Section 36, Stamp Act, the whole discussion would thus seem to be entirely unnecessary and for no purpose, so far as the facts of this case are concerned".

It was wholly unnecessary, as was pointed out by the learned judge himself, to consider the question of admissibility under Section 36 of the Act. His decision really rested on the conclusion that a fact which is admitted did not require proof.

27. The case is not an authority for the proposition that secondary evidence of a document is to be treated on the same footing as an unstamped or insufficiently stamped original document.

28. In the result the appeal is dismissed with costs.

29. The respondents moved an application C. M. P. No. 87 of 1971

under Order 47, Rule 5 of the Rules of this Court for a direction that a relief for future mesne profits from the date of the suit be added to the decree. On the facts of this case we cannot allow the application. The respondents in their own plaint had stated that they would file a suit for future mesne profits and it was because of this that the Courts below did not grant any such relief.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1078
(V 58 C 219)**

(From: Gujarat)*

J. C. SHAH AND A. N. GROVER, JJ.

The Nagar Panchayat, Una, Appellant v. The Una Taluka Sahakari Kharid Vechan Sangh Ltd., Respondent.

Civil Appeal No. 1059 of 1970, D/- 17-9-1970.

Panchayats — Gujarat Panchayat Act 1961 (6 of 1962), Section 307 (c) and (k) — Saurashtra Terminal Tax and Octroi Ordinance (1949), Section 4 — Power of Municipality to collect Octroi under Rules framed under S. 4 — Replacement of Municipality by Nagar Panchayat by Act of 1961 — Ordinance continued to be applicable to Nagar Panchayat by virtue of Section 307 (k), Nagar Panchayat held was entitled to collect octroi — Special Civil Application No. 387 of 1968, D/- 18-2-1970 (Guj), Reversed.

When Section 307 (k) of the Act saved the operation of all laws and rules, etc., other than the Municipal law the intention of the legislature was precise and definite and it is futile to suggest that the Ordinance was not covered by this saving clause. The object underlying Clause (c) of Section 307 was to vest in the Nagar Panchayat the entire Municipal fund including the arrears of taxes and fees as also the powers and rights relating thereto which previously vested in the Municipality. The octroi which was being collected under the Ordinance clearly fell within the ambit of Clause (c). The power and the right, therefore, had passed to the Nagar Panchayat and it was fully entitled to

*(Special Civil Application No. 387 of 1968, D/- 18-2-1970 — Guj.)

KN/KN/E328/70/GKC/T

exercise it. Even if in the rules framed under the Ordinance certain expression created a difficulty that could not defeat the right and the power conferred on the Nagar Panchayat by the Act of realising and collecting the octroi which was being done under the Ordinance as saved by Clause (k) of Section 307. Special Civil Application No. 337 of 1968, D/-18-2-1970 (Guj), Reversed.

(Paras 6 and 7)

Mr. D. V. Patel, Sr. Advocate, (Mr. Vineet Kumar Advocate, with him), for Appellant; Mr. I. N. Shroff, Advocate, for Respondent.

The following Judgment of the Court was delivered by

GROVER, J:— This appeal by certificate arises out of a writ petition filed by the respondent which is a Society registered under the Bombay Co-operative Societies Act, 1925 challenging the collection of octroi by the appellant which is the Una Nagar Panchayat.

2. The appellant is a local body constituted under the Gujarat Panchayat Act 1961, hereinafter called the Act, which came into force with effect from April 1, 1963. Prior to its enactment the Bombay Municipal Act 1901, as applied to Saurashtra, was in force in that region of the present State of Gujarat. Under its provisions the Una Municipality was constituted. It was collecting octroi on commodities which were imported into the Municipal limits of Una under the Saurashtra Terminal Tax and Octroi Ordinance, 1949. Under Sec 3 of that Ordinance the Government could impose the tax mentioned thereunder in the cities and towns specified or included later in Schedule I. One of these taxes was a terminal tax on goods imported into or exported from the terminal tax limits. Octroi as defined by Section 2 (2) included a terminal tax. Section 4 gave the power to the Government to make rules by notification for the purpose of carrying out the purposes of the Ordinance. Rules were framed under Section 4 in the Gujarati language. It was provided therein that the collection of Octroi and terminal tax would be done through the Sudhrai of the area entered in the schedule to the ordinance. It is apparent that under the Ordinance it was the State Gov-

ernment which imposed the octroi or the terminal tax in the cities and towns specified in the Schedule and the Sudhrai was only an agency for collection thereof.

3. By a notification dated December 12, 1949 issued under the Ordinance the Government of the erstwhile State of Saurashtra included the town of Una in the Schedule to the Ordinance. Thus octroi and terminal tax became leviable in that town on certain commodities imported there. Section 9 of the Ordinance must also be noticed. According to it the Government was to maintain a separate fund in respect of all monies received by it on account of any of the taxes specified in Section 3 for every city or town or local area specified in Schedule I and such fund after deducting therefrom the expenditure incurred in connection with the levy and collection of such tax was to be applied for the benefit of the inhabitants of the city or town or local area for which it was maintained. The purpose of levying the octroi duty or terminal tax under the Ordinance clearly was to add to the revenue of the local body for the benefit of the people residing within the jurisdiction of that particular local body.

4. So long as Una Municipality remained a municipality as constituted under the Act of 1901, there was no difficulty in the matter of collection of the octroi. After the Act came into force the Nagar Panchayat replaced the Municipality in Una. It continued to collect the octroi till 1967 when the respondent, for the first time, raised an objection that it was not entitled to do so. As the Nagar Panchayat persisted in making the collection a petition under Article 226 of the Constitution was filed in the Gujarat High Court. It has been held by the High Court that since in the Rules promulgated under the Ordinance in Gujarati the collecting agency has been described as Sudhrai which means a municipality the Nagar Panchayat was not competent to collect the octroi under the Ordinance as it did not fall within the meaning or definition of the term "Municipality".

5. In our judgment the High Court was in error in coming to the conclusion that the Nagar Panchayat was not entitled to carry on the work

of collection of octroi under the Ordinance even though the ordinance which imposed liability to pay remained in force. Under Section 307 of the Act where any local area was declared to be a gram or nagar under Section 9 and if that area was co-extensive with the limits of a Municipal district or Municipal borough the municipality functioning in such local area was to cease to exist and in its place an Interim Gram Panchayat was to be constituted. According to Cl. (c) of that section the unexpended balance of the Municipal fund that property including arrears of rates, taxes and fees belonging to the Municipality and all rights and powers which rested in the municipality were to vest in the Interim Gram or Nagar Panchayat fund until a new panchayat was constituted in accordance with the provisions of Section 308 (1). Clause (g) provided that all officers and servants in the employ of the Municipality were to become officers and servants of the Interim Panchayat under the Act. Clause (k) was in the following terms:—

"Any law (other than the Municipal law) or any rule, by-law, notification or order issued under such law, which was applicable to and in force in the local area immediately before it was declared as a gram or nagar under Section 9, shall continue to apply to and to be in force in the local area until it is superseded". Section 308 dealt with the term of office of an Interim Panchayat and the steps to be taken to hold election for a new Gram or Nagar Panchayat. The appellant in the present case is indisputably the duly constituted Nagar Panchayat.

6. Section 307 of the Act leaves no room for doubt that wherever a Nagar Panchayat was constituted in place of the Municipality the Municipality disappeared and all its funds including the right to realise taxes etc., vested in the Nagar Panchayat. In other words it was the Nagar Panchayat which was to function as the local body in the area previously constituted as a Municipality. Clause (k) of Section 307 clearly saved all laws or rules which were applicable to the local area which formed a municipality and they were to continue to apply and to remain in force in the area for which the Nagar Panchayat

came to be constituted. By no stretch of reasoning could it be said that the Ordinance did not become applicable to the cities and towns specified in Schedule I which came to be constituted as Grams or Nagars under the Act. It is true that no fresh rules were promulgated under the Ordinance adapting the new terminology but even about the word Sudhrai it is a moot point whether it means only a municipality as constituted under the Act of 1901.

7. An argument was raised before the High Court that the Gujarati expression "Sudhrai" meant any local-self governing authority. The High Court observed that this expression as used in the Octroi rules could not have a wider connotation than the expression "municipality" in Section 9 of the Ordinance. When Section 307 (k) of the Act saved the operation of all laws and rules, etc., other than the municipal law the intention of the legislature was precise and definite and it is futile to suggest that the Ordinance was not covered by this saving Clause. The object underlying Clause (c) of Section 307 was to vest in the Nagar Panchayat the entire Municipal fund including the arrears of taxes and fees as also the powers and rights relating thereto which previously vested in the Municipality. The octroi which was being collected under the Ordinance clearly fell within the ambit of Clause (c). The power and the right, therefore, had passed to the Nagar Panchayat and it was fully entitled to exercise it. Even if in the rules framed under the Ordinance certain expression created a difficulty that could not defeat the right and the power conferred on the Nagar Panchayat by the Act of realising and collecting the octroi which was being done under the Ordinance as saved by Clause (k) of Sec. 307.

8. If on account of the absence of proper adaptation in the rules made under the Ordinance any difficulty is being experienced in the collection of octroi it is always open to the State Government to make those clarifications and adaptations and indeed it would be expedient and desirable to do so. So long as the new rules are not framed under the Ordinance or adaptations are not made thereunder the Nagar Panchayat can certainly make the collection through the offi-

cers who discharge the same duties as were being performed by their counterparts mentioned in the rules. This is what seems to have been done up till 1967 without any objection by any one.

9. In the result the appeal succeeds and it is allowed with costs in this Court as also the High Court. Appeal allowed.

**AIR 1971 SUPREME COURT 1031
(V 58 C 220)**

(From: Gujarat)

**J. C. SHAH AND
V. BHARGAVA, JJ.**

Bai Chanchal and others, Appellants v. Syed Jalaluddin and others, Respondents.

Civil Appeal No. 1460 of 1969, D/- 11-9-1970.

(A) Houses and Rents — Bombay Rent Restriction Act (16 of 1939), Sections 4 (2) (b) and 11 — Lease of lands to construct houses and to let out or to use it in any manner — Lease is not for purpose of business or trade — Provisions of Act do not apply. (Para 5)

(B) Transfer of Property Act (1882), Sections 116 and 105 — Decree for eviction of lessees from leased lands on basis of consent — Judgment-debtors though liable to immediate eviction allowed to continue in possession for period of five years from date of decree in view of granting consent — Mesne profits at higher rate required to be paid by judgment-debtors — Clause in decree that in case of default of mesne profits they could be immediately called upon to deliver possession — Held, that the terms of the consent decree neither constituted a new tenancy nor a licence — AIR 1952 Bom 252, Distinguished. (Para 6)

(C) Civil P. C. (1908), Order 23, Rule 3 and Order 12, Rule 6 — There can be more than one decree passed at different stages in same suit — Suit by lessor for eviction of number of lessees — Decree passed on compromise with some of defendants at one stage — Decree at later stage determining rights of remaining defendants — Held, that the two decrees

were separate and independent and neither was a nullity. (Para 8)

(D) Houses and Rents — Bombay Rent Restriction Act (16 of 1939), Section 4 (2) (b) — Words "business" or "trade" — Interpretation — Word "business" as interpreted in income-tax law, or in terms of a covenant or the Companies Act cannot be used in interpreting the words in Section 4 (2) (b). (Para 5)

Cases Referred: Chronological Paras (1952) AIR 1952 Bom 252 (V 39)

= 52 Bom LR 143, Gurupadappa Shivlingappa Itgi v. Syed Akbar Sayad Budan Kadri 7

The following Judgment of the Court was delivered by

BHARGAVA, J.: — The predecessors-in-interest of plaintiff-respondents 1 to 3 gave, in 1895, land, bearing Serial Nos. 503 and 506 of Asarva within the limits of Ahmedabad Municipal Corporation, on lease for a period of 49 years at an annual rent of Rs. 199/-, to three persons, Sha Ramchandra Ambaram, Pardesi Sukhlal Anandram and Mehta Bogha Mugatram. These original lessees, during the currency of the lease, made transfers of their rights and also granted sub-leases. A number of Chawls and some other buildings were constructed on the land and some of them were let out on rent. In 1945, the lessors, after serving notice on the occupants to give vacant possession, filed a suit for recovery of possession. The suit was decreed on 8th July, 1946 on the basis of a consent decree as against some of the occupants including the four defendant-appellants. In the agreement, on the basis of which the decree was passed, it was agreed that the defendant-appellants will continue in possession of the property for a period of five years and will hand over possession after the expiry of this period of five years. For this period, they undertook to pay mesne profits every month at various rates on the lands in their possession. Between them, the four appellants were required to pay @ Rs. 227-10-0 per mensem making up an annual amount of mesne profits of Rs. 2731-8-0. Similar terms were included in the consent decree against other defendants who joined the compromise on the basis of which the decree was passed on 8th July, 1946. The remaining defendants in the suit entered into a later com-

promise and, as a result, another consent decree was passed on 28th January, 1949 against those defendants. Under this decree, these remaining defendants were also entitled to continue in possession for a period of five years from the date of the decree, but were required to pay mesne profits for this period. All the defendants governed by the two decrees dated 8th July, 1946 and 28th January, 1949, had to pay between them mesne profits monthly which worked out to an amount of Rs. 7,314-8-0 per annum. Before the expiry of the period of five years prescribed by either of the two decrees, the Custodian of Evacuee Property, in 1950, took possession of all the properties, as one of the decree-holders had become an evacuee. After the property was released by the Custodian of Evacuee Property, an application was filed by the decree-holders on 26th March, 1953 for execution of the consent decree dated 8th July, 1946 and, in that execution, possession was sought against the appellants of the property which was in their possession. Subsequently, a number of suits were filed for recovery of mesne profits also. The Execution Court directed eviction of the appellants after overruling the various objections raised by them in the execution proceedings. The decision of the Execution Court on the objections taken by the appellants was challenged in appeal before the District Judge, in second appeal before a single Judge of the High Court of Gujarat, and by a Letters Patent appeal before a Division Bench. All the Courts rejected the objections raised by the appellants and upheld the order of the Execution Court directing delivery of possession. It is against the judgment of the Division Bench in Letters Patent appeal in this execution that the appellants have come up to this Court in this appeal by special leave.

2. It is unnecessary for us to mention all the various objections that were taken at various stages by the appellants in the Execution Court, in the Court of the District Judge, or before the single Judge or the Division Bench in the High Court. Only three of the points raised have been urged before us and, therefore, we are called upon to deal with these three points only.

3. The first point raised is that the decree which was passed on 8th July, 1946 was a nullity, because it was passed in contravention of Section 11 (1) of the Bombay Rent Restriction Act No. XVI of 1939 (hereinafter referred to as "the Act"). This objection has been overruled by the High Court on the ground that the provisions of the Act were not attracted by the lease in question on the expiry of which the suit for ejectment was decreed under the consent decree dated 8th July, 1946. Counsel appearing for the appellants urged that the terms of the decree passed as well as the terms contained in the lease-deed of 1895 show that the Act was applicable because the land, to which the suit for ejectment related, was covered by the definition of "premises" to which the Act applies. The expression "premises" is defined in Section 4 (2) of the Act as meaning—

(a) any building or part of a building let separately for any purpose whatever, including any land let therewith, or

(b) any land let separately for the purpose of being used principally for business or trade.

Admittedly, the lease of 1895 was not in respect of any building or part of a building let separately for any purpose whatever. Reliance was placed on Section 4 (2) (b) of the Act on the contention that the land had been let for the purpose of being used principally for business or trade. Having gone through the documents relied upon by counsel for the appellants, we are unable to accept this submission. In the plaint of the suit, as well as in the decree dated 8th July, 1946, there is no mention of the purpose for which the land was let out by the lease of 1895. Reliance was, however, placed on one of the pleadings in the plaint which had been reproduced in the decree in which the plaintiff-respondents recited one of the terms of the lease in the following words:—

"On the expiry of the period of 49 years, the land shall be handed over without raising any dispute or objection or causing any obstruction, after removing whatever structures that might have been erected thereon and after making it as clear as it is." The argument was that this pleading indicates that the land was let out for making structures and those struc-

tures could only be utilised by being let out on rent. This purpose would constitute business or trade. We are unable to see any justification for such an inference. The mere fact that there was a mention that structures that might have been erected will be removed can in no way lead to a reasonable conclusion that the principal purpose of the lease was the use of the land for business or trade.

4. Reference, in this connection, was also made to the terms of the lease of 1895; but we are unable to hold that it establishes the case of the appellants that the lease was taken principally for the purpose of using the land for business or trade. All that the lease mentions is that it is for constructing houses and, at a later stage, there is a mention that "in the said fields, the lessees could construct houses in any manner or use it in any manner". The other parts of the lease, on which reliance has been placed are as follows:—

"1. On the land of those fields we can build houses in any manner and we will receive income thereof and you will not raise any dispute or obstruction in respect thereof. We can spend any amount on the construction of those houses which we will not demand from you for whatever reason nor we will have the right to deduct from rent payable to you.

2. If any houses are constructed thereon, we will remove the superstructures. If we do not remove the structures then you will be the owners of the said structures. If you take them, then we and our heirs and representatives will not object".

We are unable to find even in these quotations from the lease any mention that the land is going to be used principally for the purpose of business or trade. The lease does mention that it was being taken for constructing houses. There was no mention at all, however, of the manner in which the constructed houses were to be utilised. Further, there is a clear option given to the lessees that they could use the land in any manner if they did not construct any houses. These are terms on the basis of which it cannot be said that the land was being let out for business purposes.

5. The submission of counsel for the appellants was that, if the purpose was to construct houses and let them out on rent, that would constitute the use of the land for the purpose of business inasmuch as the lessees would be earning income from letting out those houses. We are unable to accept this submission, because we do not think that the word "business" or "trade" used in the definition of "premises" in Section 4 (2) (b) of the Act comprehends within it a lease which is merely for constructing houses. Learned counsel cited before us a number of decisions of Indian and English Courts, including decisions of the Privy Council and this Court, in which the scope of the word "business" was interpreted. That interpretation was given in connection with the word "business" as used either in income-tax law or in the terms of a covenant or the Companies Act, etc. We do not consider that it will be at all profitable to refer to them when interpreting the word "business" or "trade" as used in Section 4 (2) (b) of the Act, because none of those interpretations will cover a case similar to the one before us, where the lease was merely a permissive one giving a right to the lessees to construct houses and let them out or to use the land in any manner. When the purpose of the lease was expressed in this way, it is impossible to hold that the principal use, to which the land was to be put by the lessees, was business or trade. As a consequence of this interpretation, it has to be held that the Act was not applicable to the lease of 1895 and, therefore, no question arises of the decree of 8th July, 1946 being invalid on the ground of contravening Section 11 (1) of the Act.

6. The second point urged by learned counsel was that, by the consent decree itself, a new tenancy was created which was to continue for five years and, in the meantime, the Bombay Rents Hotel and Lodging House Rates Control Act, 1947 came into force and the appellants were protected from ejection under the provisions of that Act. The consent decree does not state that a new tenancy is being created. The argument was that the terms of that consent decree should be interpreted as indicating an intention to create a new tenancy. We are unable to find any

such terms. On the face of it, all that the consent decree envisaged was that, though the judgment-debtors were liable to immediate eviction, the decree-holders agreed to let them continue in possession for a period of five years. Since this concession was being granted as a special case, the decree-holders insisted that mesne profits should be paid at a much higher rate so much so that between all the defendants, governed by the two decrees of 8th July, 1946 and 28th January, 1949, the amount payable as mesne profits became Rs. 7,314-8-0 per annum which had no relation with the original rent of Rs. 199/- per annum for the entire land fixed by the lease of 1895. In fact, the decree-holders sought further protection by requiring the judgment-debtors to pay the mesne profits in monthly instalments, and the instalments were so fixed that the mesne profits due for five years were to be paid within a period of three years. There was the further clause that, in case of default of payment of the mesne profits, the defaulting judgment-debtors could be immediately called upon to deliver possession. These terms can, in no way, be interpreted as creating a new tenancy constituting the decree-holders as landlords and the judgment-debtors as their tenants. The terms of the consent decree neither constituted a tenancy nor a licence. All that the decree-holders did was to allow the judgment-debtors to continue in possession for five years on payment of mesne profits as a concession for entering into a compromise. The argument advanced must, therefore, be rejected.

7. Reference was made by learned counsel for the appellants, in support of his argument, to a decision of the Bombay High Court in *Gurupadappa Shivlingappa Itgi v. Sayad Akbar Sayad Budan Kadri*, 52 Bom LR 143=(AIR 1952 Bom 252) but that case, in our opinion, has no application. In that case, in the consent decree itself, the first clause was that the defendant admits that he is a monthly tenant of the plaintiff and is to continue in possession till January, 31, 1948. This clause specifically and clearly, in the language used, made it manifest that the defendant was a monthly tenant and was to continue in that capacity in possession. It was

in these circumstances that it was held that a new tenancy had been created from the date of the consent decree. In the case before us, the terms of the consent decree are in no way comparable with the terms used in the consent decree in that case. The language used in the consent decree in the present case contains no indication of any intention to create a tenancy, so that the Bombay Rent Control Act, 1947 could never apply to the case of the appellants.

8. The third point raised by learned counsel was that, since there was one single suit based on the lease of 1895 for ejectment of persons in possession, there could be only one single decree in that suit and the Court was incompetent to pass two separate decrees on 8th July, 1946 and 28th January, 1949. Counsel, in this connection, relied on the provisions of Rules 1 and 12 of Order XX of the Code of Civil Procedure which relate to the pronouncement of judgment and the Court passing a decree in a suit. These rules have really no relevance. On the other hand, Rule 3 of Order XXIII, C. P. C., clearly envisages a decree being passed in respect of part of the subject-matter of the suit on a compromise, and Rule 6 of Order XII, C. P. C., permits the passing of a judgment at any stage without waiting for determination of other questions. Thus, it is clear that, in the same suit, there can be more than one decree passed at different stages. In the present case, the first decree of 8th July, 1946 was based on a compromise between the plaintiffs and some of the defendants, while the second decree dated 28th January, 1949 decided the rights of the remaining defendants. The two decrees were separate and independent and neither of them could be treated as a nullity.

9. In these circumstances, the Execution Court was right in rejecting all the objections raised by the appellants and in directing delivery of possession. The appeal fails and is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 1035

(V 58 C 221)

(From: Punjab)*

S. M. SIKRI, C. J. AND G. K.**MITTER, K. S. HEGDE, A. N.****GROVER AND P. JAGANMOHAN****REDDY, JJ.**

Hari Shankar Khanna (dead) by his legal representatives, Appellants v. The Union of India and another, Respondents.

Civil Appeal No. 1785 of 1969, D/- 3-3-1971.

(A) Constitution of India, Article 311 — Article 311 does not apply to order of dismissal passed before coming into force of the Constitution.

(Para 4)

(B) Constitution of India, Article 133 — A point regarding dismissal from service by authority subordinate to the appointing authority, when not pressed before High Court could not be allowed to be raised before Supreme Court.

(Para 5)

(C) Civil Services — Civil Services Regulations (1920), Article 229 — On remaining absent after the end of leave officer ceases to have lien on any employment and his discharge from service is valid and legal.

(Para 5)

Assuming that he had sent in time the application for extension of leave, he being a temporary and not a permanent employee and having died no declaration could be made that he still continued to be in service. (Para 6)

M/s. N. N. Keswani and K. K. Bhatia, Advocates, for Appellants; Dr. V. A. Seyid Muhammad, Sr. Advocate, (Mr. S. P. Nayar, Advocate with him), for Respondents.

The following Judgment of the Court was delivered by

GROVER, J.: — This appeal by certificate from a judgment of the Punjab High Court (Circuit Bench), Delhi arises out of a suit filed by Harishankar Khanna, who is now dead, for a declaration that his discharge from service by the officer Commanding Engineering Stores Depot (O. C. E. S. D.) Karachi dated July 15, 1946 was illegal, without jurisdiction and ineffective and that it should be declared that he was con-

tinuing in service. The suit was decreed by the trial Court principally on the ground that he had not been dismissed by the proper authority and that the provisions of Section 240 of the Government of India Act, 1935, had been contravened. The appeal of the respondent to the Additional District Judge failed. The High Court, however, reversed the decision of the Courts below and dismissed the suit.

2. The case of the appellant as laid in the plaint was that he had joined the Central Provisions Office (C. P. O.) as a Clerk in December, 1941 and in March, 1945 he was absorbed in the office of the Engineer-in-chief, Army Headquarter as an Upper Division Clerk. In December, 1945 he was transferred to the office of the Officer Commanding Engineering Stores Depot, Karachi. In March, 1946 he was granted 15 days leave with permission to go to Delhi. During that period he fell ill and was obliged to take sick leave under medical advice. While he was ailing and confined to bed the O. C. E. S. D. Karachi summarily, illegally and against rules discharged him by means of a letter dated July 24, 1946 although his application for leave was supported by proper medical certificate. He made representations but was only given one month's pay in lieu of notice in the year, 1951. The main point raised in the plaint was that the order of discharge had been made by an authority that was different from the appointing authority. In the written statement it was admitted that Khanna had been granted 16 days leave from March 1946 to April 9, 1946. He subsequently applied for extension of leave from April 10, 1946 to June 25, 1946. He was due back for duty on June 26, 1946 but on expiry of that leave also he neither reported back for duty nor submitted any application for further extension of leave. He was consequently discharged from service with effect from July 15, 1946 in accordance with Article 229, Civil Service Regulations. It was claimed that under that regulation by which the civilians working in the Defence Establishment were governed no notice of discharge was necessary.

3. The main issue which required determination was whether the order of discharge or dismissal of Khanna was wrong, invalid and ultra vires. It was found that Section 240

*(Second Appeal No. 43-D of 1955, D/- 23-5-1961, Punj. at Delhi.)

(1) of the Government of India Act had not been complied with inasmuch as Khanna had been discharged from service by an authority subordinate to that by which he had been appointed and that he had also not been afforded a reasonable opportunity of showing cause against his discharge or removal in terms of Section 240 (3). The suit was held to be within time and a decree was granted by the trial Court that the discharge of Khanna from service was void and inoperative and that he continued to be in service of the Union of India. In the appeal of the respondent the Additional District Judge felt that it was very likely that Khanna had sent an application for extension of leave for the period beyond June 25, 1946 and his application somehow got mislaid in the office of the Engineer-in-Chief. As he had not been given any opportunity to show cause against his proposed dismissal the view of the trial Judge was upheld and the decree was confirmed.

4. When the matter was taken in appeal to the High Court it was heard along with other appeals including the companion appeal (C. A. 1719/67) of Lekh Raj Khurana the judgment in which has been delivered today. On the question of the applicability of Article 311 of the Constitution the High Court expressed the same view which has already been mentioned in the aforesaid judgment. It is, however, difficult to understand how Art. 311 could be applied to an order which was made prior to the coming into force of the Constitution. But in the judgment of the High Court it is stated that the suit of Khanna was based on breach of the rules (presumably Civil Service Regulations) and not on Section 240 of the Government of India Act. It had been contended on his behalf that according to the rules a notice ought to have been issued to him to show cause against the proposed order of discharge. The High Court, however, held that the breach of any rule was not justiciable. In Lakh Raj Khurana's case we have overruled that view and it is not possible to dispose of the matter on the ground that the breach of the rules was not justiciable.

5. No rule appears to have been specifically relied upon before the trial Court or the District Court. Our attention has been invited to the

Civil Service Regulations. In Chaudri's Compilation of these Regulations, Vol. 1, it is stated in Article 1 as follows:—

(a) "These Regulations are intended to define the conditions under which salaries and leave and pension and other allowances, are earned by service in the Civil Departments and in what manner they are calculated. They do not deal otherwise than indirectly and incidentally with matters relating to recruitment, promotion, official duties, discipline or the like". In Article 1 (b) it has been stated that the Regulations have been framed so as to embody all orders in force affecting the acting allowance, the leave allowance, the leave, the pension and the travelling allowance of officers, the conditions of whose service in respect of these matters are not defined by the Army and Marine Regulations. According to the respondent the case of Khanna fell under Article 229 of the Civil Services Regulations. This Article is as follows:—

An Officer who remains absent after the end of his leave is entitled to no allowance for the period of such absence, and ceases to have a lien on any appointment—

(i) if his leave was furlough without medical certificate, — immediately, and

(ii) if it was furlough on medical certificate or vacation or privilege leave, — after a week. In the case of officers to whom exception (ii) under Article 251 applies the week commences from the fifteen days mentioned therein".

It is pointed out that as the Officer concerned ceased to have a lien on any appointment in the circumstances of the case his discharge was almost automatic even though an order had to be made to that effect. If the case of the respondent is established that Khanna remained absent after the end of the leave then in view of Article 229 the order of discharge would be perfectly valid and legal. Now so far as the applicability of Section 240 of the Government of India Act is concerned that point was apparently not pressed before the High Court and it cannot be allowed to be raised now. No rule has been shown by which Khanna was governed which contained the same requirements as are to be found in sub-sections (2) and (3) of the above section regarding the auth-

ority which was competent to pass the order of discharge or the giving of a reasonable opportunity to show cause against the action proposed to be taken. The order of discharge had been made in view of Article 229 of the Civil Service Regulations and no such requirements exist therein.

6. As regards Article 229 of the Regulations even if it be assumed in favour of Khanna that he had sent his application in time for extension of leave supported by proper medical certificate, as is the evidence, he having died no declaration can now be made that he still continued to be in service. It is common ground that he was not a permanent employee and was holding a temporary post. All that he could, therefore, get was one month's pay in lieu of notice under Article 352 of the Regulations. It is not disputed that the same had in fact been paid to him in 1951.

7. The appeal thus fails and it is dismissed but in view of the entire circumstances the parties are left to bear their own costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1087
(V 58 C 222)**

(From: Bombay)*

**C. A. VAIDIALINGAM AND
A. N. RAY, JJ.**

Percy Rustomji Basta, Appellant
v. The State of Maharashtra, Respondent.

Criminal Appeal No. 267 of 1968,
D/- 16-3-1971.

(A) Evidence Act (1872), Section 24 — Section 24 is not a bar to admissibility in evidence of statement made by a person to Customs Officer on summons issued under Section 108 of Customs Act (X-Ref: Customs Act (1962), Section 108) — AIR 1970 SC 940, Followed. (Para 23)

Custom Officer making inquiry under Section 107 or Section 108 of Customs Act is not a police officer and person against whom inquiry is made is not an accused person. Statement made by such person in that inquiry is not a statement made by a person accused of any offence.

(Paras 17, 18)

*(Criminal Appeal No. 244 of 1967, D/- 26-9-1968 — Bom.)

DO/DO/B381/71/SSG/M

(B) Customs Act (1962), Section 108 (4) — Inquiry made by Customs Officer under Section 108 is deemed to be a judicial proceeding within meaning of Sections 193 and 228 of Penal Code (X-Ref: Penal Code (1860), Sections 193, 228). (Para 21)

If a person is summoned under Section 108 of Customs Act he is bound to appear and state the truth when giving evidence. If he does not answer he would render himself liable to be prosecuted under Section 228, I. P. C. If, on the other hand, he answers and gives false evidence he would be liable to be prosecuted under Section 193, I. P. C. for giving false evidence in judicial inquiry. (Para 21)

(C) Evidence Act (1872), S. 24 — Every threat, inducement or promise even though emanating from person in authority is not hit by Section 24.

(Para 22)

Where in inquiry in connection with smuggling of goods Customs Officer told person summoned under Section 108 of Customs Act that law required such person to tell truth and explained consequences of Section 193, I. P. C., such explanation by Customs Officer did not constitute threat under Section 24. That person had no basis for supposing that by making the statement he would gain any advantage or avoid any evil with reference to the proceedings in respect of which an inquiry was being conducted by the Customs Officers.

(Paras 21, 22, 23)

Cases Referred: Chronological Paras
(1970) AIR 1970 SC 940 (V 57)

= (1969) 2 SCR 461, Romesh

Chandra Mehta v. State of

West Bengal 12, 18

(1970) AIR 1970 SC 1065 (V 57)

= (1969) 2 SCR 613, Illias v.

Collector of Customs, Madras 15

Mr. A. S. R. Chari, Sr. Advocate, (Mr. R. Nagaratnam, Advocate, and M/s. Janendra Lal and B. R. Agarwal, Advocates of M/s. Gagrati and Co., with him), for Appellant; M/s. H. R. Khanna and B. D. Sharma, Advocates, for the Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: — This appeal by the first accused, on certificate, is directed against the judgment of the Bombay High Court dated September 26, 1968, in Criminal Appeal No. 244 of 1967 confirming his conviction and sentence passed against him by the

Presidency, Magistrate Mazgaon, Bombay for offences under S. 120-B, Indian Penal Code read with Section 135 of the Customs Act, 1962 (Act 52 of 1962) (hereinafter to be referred as the Act) and also under Section 135 of the Customs Act in respect of the articles claimed to have been recovered from his possession.

2. The short point that arises for consideration in this appeal is whether Section 24 of the Evidence Act is a bar to the admissibility in evidence of the statement Ex. T given by the appellant to the Customs Officers on a summons issued to him under Section 108 of the Act.

3. The appellant along with six others was charged under the sections mentioned above and after being found guilty was sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 2,000/- for the charges under Section 120-B Indian Penal Code read with Section 135 of the Act. He was also sentenced to undergo one year's rigorous imprisonment and to pay a fine of Rs. 2,000/- for the charge under Section 135 of the Act. The sentences were directed to run concurrently. In default of payment of fine, he was also sentenced to undergo further rigorous imprisonment for the period mentioned in the judgment of the Presidency Magistrate.

4. The case against the appellant was that he and several other persons entered into a conspiracy during the period from June, 1963 to the end of December, 1963 to smuggle wrist watches and other luxury goods such as nylon textiles, toilet requisites, playing cards, cigarette lighters, saffron, etc., from Dubai to India through Mechanised sailing vessel and land the said imported and smuggled goods surreptitiously at any coast near Bombay and then to bring the smuggled goods to Bombay by Motor Vehicles. It was further alleged that in pursuance to the said conspiracy such articles were actually smuggled in the month of December, 1963. The various parts played by the appellant along with the other accused had been given in the evidence of the prosecution witnesses. P. W. 19, Inspector in the Rummaging Division Town Intelligence in the Bombay Customs, on receipt of information in or about December 21, 1963 about the smuggling of the

goods conducted searches in various places and seized several smuggled articles.

5. During the pendency of the trial, the third and the fifth accused died and the second accused who was present for some later (sic) absconded necessitating separation of his trial. Some other accused could not be traced at all. Therefore, the trial proceeded against the appellant and accused Nos. 4, 6 and 7. It is not necessary to refer to the pleas of accused Nos. 4, 6 and 7 as they have been acquitted of all the charges by the Presidency Magistrate. The appellant had filed a lengthy written statement on October 24, 1966 denying the charges levelled against him. He had stated that he was not in any manner concerned with any conspiracy. He also denied that any articles had been recovered by the Customs Officers from the houses mentioned by them and stated that in any event he had nothing to do with any of those articles. He pleaded that his brother Cama was inimical towards him and that the latter in connivance with the Customs authorities had foisted this criminal case against him making false allegations. The appellant alleged that he had left Bombay for Ajmer to pay his respects to the Darga on December 21, 1963 and returned to Bombay on January 2, 1964, when he was apprehended by the Customs authorities and kept in detention, in the first instance, till January 7, 1964. During this period of detention he was continuously harassed and interrogated by P. Ws. 5 and 19 and forced to put his signature on January 7, 1964 to a statement already got written and prepared by P. W. 5. He was threatened that if he did not put his signature on the said statement, his mother and another brother will be prosecuted. He further alleged that it was represented to him that the statement to which he was being asked to put his signature was intended only to be used against the second accused and no part of it was meant to be used against him. It may be stated at this stage that the statement recorded from the appellant by P. Ws. 5 and 19, on January 7, 1964 is Ex. T. The statement refers to various matters concerning his relationship with the other accused as well as his connection with several

articles which had been seized and which were the subject of the charges.

6. We do not think it necessary to refer to Ex. T. in any great detail nor to the various seizures of articles made by the Customs authorities. It is enough to state that the conviction of the appellant has been substantially based on the confessional statement Ex. T. after finding independent corroboration furnished by other evidence on record in respect of the statements contained in Ex. T.

7. Objections were taken to the admissibility in evidence of Ex. T. on the ground that it is hit by Article 20 (3) and Sections 24 and 25 of the Evidence Act. All these objections were overruled both by the Presidency Magistrate as well as the High Court. The findings of the Presidency Magistrate and accepted by the High Court are that Ex. T. is a voluntary statement and it was a true disclosure made by the appellant. The allegation of the appellant that he was forced to put his signature to Ex. T. which had already been prepared by P. Ws. 5 and 19 and that he was induced to put his signature on the representation that it will be used only against the second accused and not against the appellant, was rejected. The further findings are that Ex. T. was a voluntary statement made by the appellant and that his plea that he was kept under illegal detention from January 2, 1964 to January 7, 1964 was false. It has also been found that Ex. T. is not hit either by Article 20 (3) or by Sections 24 and 25 of the Evidence Act.

8. The only contention that has been raised before us by Mr. A. S. R. Chari, learned counsel for the appellant is, that in view of Section 24 of the Evidence Act, Ex. T. the statement of the appellant recorded by the Customs authorities under the Act, is not admissible in evidence at the trial for the offences in respect of which the appellant was charged and tried. His further contention is that as the conviction has been based substantially on the statements contained in Ex. T. the conviction is illegal. The other contentions based on Article 20 (3) and Section 25 of the Evidence Act which were taken before the High Court have not been taken before us. In fact those contentions are no longer available to the appellant

in view of the decisions of this Court. According to Mr. Chari when the statement Ex. T. was recorded by the Customs officials, the appellant was in the position of an accused. It is in evidence that P. W. 5, who recorded the statement warned the appellant that he was bound to state the truth as the officer was conducting a judicial proceeding to which the provisions of Sections 193 and 228, Indian Penal Code apply. This, according to the learned counsel, amounts to a threat and as the statement Ex. T. has been procured on the basis of such a threat, it is inadmissible in evidence.

9. On the other hand, Mr. H. R. Khanna, learned counsel for the State has referred us to the findings recorded by the Presidency Magistrate and accepted by the High Court regarding voluntary nature of Ex. T. The counsel also pointed out that the fact that P. W. 5, who recorded the statement Ex. T. from the appellant, informed him that he was bound to speak the truth as it was a judicial proceeding to which Section 193, I. P. C. applies, does not amount to any threat in law so as to attract Section 24 of the Evidence Act.

9-A. We will now refer to the circumstances under which Ex. T. was recorded as found by both the Courts. Consequent on information received by the Customs authorities, several raids were conducted from December 21, 1963. The appellant went to the Customs House at about 8 A. M. on January 7, 1964. By about 8.30 A. M. summons under Section 108 of the Act was served on him. From 11.30 A. M. onwards to about 8.30 P. M. the process of recording of the statement Ex. T. from the appellant continued excepting for a short break of about 2½ hours for lunch, tea and other requirements. The appellant was arrested immediately after his statement Ex. T. was completed. The seizure of the entire contraband goods was completed by about December 25, 1963. Though the attention of the appellant was drawn to sub-section (4) of Section 108 of the Act, he was not informed or warned that his statement was likely to be used in the event of any prosecution against him for the said offence. Undoubtedly Ex. T. contained various incriminating facts regarding the complicity of the appellant with the offences alleged against him. The Inspector of Customs, P. W. 5, who

recorded the statement Ex. T. and P. W. 19, have both admitted that they questioned the appellant till the statement Ex. T was finally completed at 8.30 P. M. on January 7, 1964. Both of them have also asserted that they had not given any threat or offered any inducement to the appellant before the statement Ex. T was made. P. W. 5 has deposed that he drew the attention of the appellant to the last paragraph of the summons issued under Section 108 of the Act. In fact in Ex. T the appellant states that he had received summons No. 3 of 1964 dated January 7, 1964 issued to him under Section 108 of the Act. He has further stated that he had read the summons and that he had further understood that giving false evidence is an offence punishable under Section 193 of the Indian Penal Code. P. W. 5 has further deposed that he had explained to the appellant the provisions of Section 193, I. P. C. and that the statement was being recorded as if he was in Court and that the appellant was bound to speak the truth and that if he made a false statement he would be prosecuted. Based upon these answers of P. W. 5, Mr. Chari, urged that it is clear that P. W. 5 has administered a threat to the appellant and it was in consequence of such a threat that the appellant gave the statement Ex. T and thereby has placed himself in a grave jeopardy of action being taken against him under the Act.

10. Before we refer to Section 24 of the Evidence Act, it is desirable to advert to the relevant provisions of the Customs Act. Sections 107 and 108 are as follows:

"Section 107. Power to examine persons—

Any officer of customs empowered in this behalf by general or special order of the Collector of Customs may, during the course of any enquiry in connection with the smuggling of any goods,—

(a) require any person to produce or deliver any document or thing relevant to the enquiry;

(b) examine any person acquainted with the facts and circumstances of the case.

Section 108. Power to summon persons to give evidence and produce documents—

(1) Any gazetted officer of customs shall have power to summon any

person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry which such officer is making in connection with the smuggling of any goods.

(2) A summons to produce document or other things may be for the production of certain specified documents or things or for the production of all documents or things of a certain description in the possession or under the control of the person summoned.

(3) All persons so summoned shall be bound to attend either in person or by an authorised agent, as such officer may direct; and all persons so summoned shall be bound to state the truth upon any subject respecting which they are examined or make statements and produce such documents and other things as may be required:

Provided that the exemption under Section 132 of the Code of Civil Procedure, 1908, shall be applicable to any requisition for attendance under this section.

(4) Every such inquiry as aforesaid shall be deemed to be a judicial proceeding within the meaning of Section 193 and Section 228 of the Indian Penal Code".

11. Section 122 of the Act deals with confiscation of goods and levy of penalty. Section 124 deals with the procedure to be adopted before ordering the confiscation of any goods or imposing any penalty on any person. Section 135 deals with prosecution before a criminal Court in the circumstances mentioned in Clauses (a) and (b) and that prosecution is without prejudice to any action taken under the Act.

12. This Court had to consider in *Romesh Chandra Mehta v. State of West Bengal*, (1969) 2 SCR 461 = (AIR 1970 SC 940) whether an officer of customs under the Sea Customs Act, 1878 was a police officer and whether the statements made to him were hit by Art. 20 (3) of the Constitution and inadmissible in evidence under Section 25 of the Evidence Act. A further question also arose whether an officer of customs acting under the Act is in any event a police officer within the meaning of Section 25 of the Evidence Act and hence the confessional statements made to him were

inadmissible in evidence. After a consideration of the scheme of the Sea Customs Act, 1878, this Court held that a Customs Officer does not exercise, when enquiring into a suspected infringement of the Sea Customs Act, powers of investigation which a police officer may in investigating the commission of an offence and that he is invested with the power to enquire into infringements of the Act primarily for the purpose of adjudicating about forfeiture and penalty. Further it was held that the said officer has no power to investigate an offence triable by a Magistrate and that he can only make a complaint in writing before a competent Magistrate and hence Section 25 of the Evidence Act has no application. It was further held that the steps taken by the Customs Officer are for the purpose of holding an enquiry under the Sea Customs Act and for adjudging confiscation of goods dutiable or prohibited and imposing penalties and that the Customs Officer does not at that stage accuse the person suspected of infringing the provisions of the Sea Customs Act with the commission of any offence. Finally, it was held that a person examined under Section 171-A of the Sea Customs Act does not stand in the character of an accused person inasmuch as there is no formal accusation made against him by any person at the time and hence any statement made by such a person to a Customs Officer is not hit by Article 20 (3) of the Constitution.

13. The scheme of the Act was also considered in the said decision and some points of difference between the Act and the Sea Customs Act, 1878 were noted. But notwithstanding the slight difference in the powers exercised by a Customs Officer under the Act, it was held that the Customs Officer under the Act is not a police officer within the meaning of Section 25 of the Evidence Act. It was emphasised that the proceedings taken by him are for the purpose of holding an enquiry into suspected cases of smuggling and that the Customs Officer is for all purposes an officer of the Revenue. It was laid down that as the Customs Officer under the Act is not a police officer, the Statement made before him by a person, who is arrested or against whom an enquiry is made, are not covered by Section 25 of the Evidence Act. It was

further laid down that until a complaint is filed before a Magistrate, the person against whom an enquiry is commenced under the Customs Act does not stand in the character of a person accused of an offence under Section 135. The discussion on this aspect is wound up by this Court as follows:

"..... The Customs Officer even under the Act of 1962 continues to remain a revenue officer primarily concerned with the detection of smuggling and enforcement and levy of proper duties and prevention of entry into India of dutiable goods without payment of duty and of goods of which the entry is prohibited. He does not on that account become either a police officer, nor does the information conveyed by him, when the person guilty of an infraction of the law is arrested, amount to making of an accusation of an offence against the person so guilty of infraction. Even under the Act of 1962 a formal accusation can only be deemed to be made when a complaint is made before a Magistrate competent to try the person guilty of the infraction under Secs. 132, 133, 134 and 135 of the Act. Any statement made under Sections 107 and 108 of the Customs Act by a person against whom an enquiry is made by a Customs Officer is not a statement made by a person accused of an offence".

14. From this decision it follows that a Customs Officer conducting an inquiry under Section 107 or 108 of the Act is not a police officer and the person against whom the inquiry is made is not an accused and the statement made by such a person in that inquiry "is not a statement made by a person accused of an offence."

15. The same position has been reiterated in the later case of *Ilias v. Collector of Customs, Madras*, (1969) 2 SCR 613 = (AIR 1970 SC 1065).

16. Now coming to Section 24 of the Evidence Act, it runs as follows: "Section 24: Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding:

A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or

promise having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him".

17. To attract the provisions of this section, the following facts have to be established:

(a) that the confession has been made by an accused person to a person in authority;

(b) that it must appear to the Court that the confession has been obtained by reason of any inducement, threat or promise proceeding from a person in authority;

(c) that the inducement, threat or promise must have reference to the charge against the accused person; and

(d) the inducement, threat or promise, must, in the opinion of the Court, be such that the accused in making the confession believed or supposed that by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him.

18. We have already pointed out that when the appellant appeared before the Customs Officers on the morning of January 7, 1964, he was served with a summons under Section 108 of the Act and that it was after the receipt of the summons, the appellant gave the statement Ex. T. From the decision in, (1969) 2 SCR 461 = (AIR 1970 SC 940), it is clear that when an inquiry is being conducted under Section 108 of the Act, and a statement is given by a person against whom the inquiry is being held it "is not a statement made by a person accused of an offence and the person who gives the statement does not stand in the character of an accused person". Therefore the first essential fact to be established, to attract Section 24, referred to above is lacking in this case, as the appellant was not an 'accused person'.

19. We have already stated that it has been found by both the Courts that the statement Ex. T is a voluntary statement made by the appellant. Mr. Chari attempted to bring the statement Ex. T under Section 24 of the Evidence Act because of P. W.

5 having informed the appellant that the statement was being recorded as if he was a Court and that the appellant was bound to speak the truth and that if any false statement is made, he would be prosecuted. P. W. 5 has also stated that he explained Section 193, I. P. C. to the appellant. According to the learned counsel this conduct of P. W. 5 clearly amounts to a threat being administered to the appellant.

20. It is not in dispute that P. W. 5 who recorded the confession, is a person in authority within the meaning of Section 24 of the Evidence Act. But the question is whether, when P. W. 5 drew the attention of the appellant to the fact that the inquiry is a judicial proceeding to which Section 193, I. P. C. applies and that the appellant must speak the truth, it can be considered to be a threat ".... proceeding from a person in authority" under the section.

21. We are not inclined to accept the contention of Mr. Chari that in the circumstances mentioned above any threat has proceeded from a person in authority to the appellant, in consequence of which the statement Ex. T was given. Section 108 of the Act gives power to a Customs Officer of a gazetted rank to summon any person to give evidence in any inquiry in connection with the smuggling of any goods. The inquiry made under this section is by virtue of sub-section (4) deemed to be a judicial proceeding within the meaning of Sections 193 and 228 of the Indian Penal Code. A person summoned under Section 108 of the Act is bound to appear and state the truth when giving the evidence. If he does not answer he would render himself liable to be prosecuted under Section 228, I. P. C. If, on the other hand, he answers and gives false evidence, he would be liable to be prosecuted under S. 193, I. P. C. for giving false evidence in a judicial proceeding. In short, a person summoned under Section 108 of the Act is told by the statute itself that under threat of criminal prosecution he is bound to speak what he knows and state it truthfully. But it must be noted that a compulsion to speak the truth, even though it may amount to a threat, emanates in this case not from the officer who recorded the statement, but from the provisions of the statute itself. What is necessary to constitute a threat under Section

24 of the Evidence Act is that it must emanate from the person in authority. In the case before us there was no such threat emanating from P. W. 5, who recorded the statement or P. W. 19, who was guiding the proceedings. On the contrary the officers recording the statement were only doing their duty in bringing to the notice of the appellant the provisions of the statute. Even if P. W. 5 had not drawn the attention of the appellant to the fact that the inquiry conducted by him is deemed to be a judicial proceeding, to which Section 193, I. P. C. applies, the appellant was bound to speak the truth when summoned under Section 108 of the Act with the added risk of being prosecuted, if he gave false evidence.

22. Further, it is to be seen that it is not every threat, inducement or promise even emanating from the person in authority that is hit by Section 24 of the Evidence Act. In order to attract the bar, it has to be such an inducement, threat or promise, which should lead the accused to suppose that "by making it he would gain any advantage or avoid any evil of temporal nature in reference to the proceedings against him". In the case before us what is it that the appellant has been told? He has been told that the law requires him to tell the truth and if he does not tell the truth, he may be prosecuted under Section 193, I. P. C. for giving false evidence. This, we have held, does not constitute a threat under Sec. 24 of the Evidence Act. The plea of the appellant was that he was compelled to make the statement under the threat that otherwise his mother and another brother will be prosecuted. He has further stated that he was induced to make the statement on the belief that it will be used only against the second accused and not against him. These pleas of the appellant have been disbelieved by both the trial Court and the High Court. Therefore, it follows that even assuming that there was an inducement or threat, the appellant had no basis for supposing that by making the statement he would gain any advantage or avoid any evil with reference to the proceedings in respect of which an inquiry was being conducted by the Customs Officers. Therefore, even on this ground also Section 24 of the Evidence Act has no application.

23. For all the above reasons we hold that by the mere fact that the Customs Officer P. W. 5, who recorded the statement Ex. T, explained the provisions of Section 193, I. P. C. and informed the appellant that he was bound to tell the truth and that he is liable to be prosecuted if he made a false statement, there was no threat given to the appellant. We accordingly hold that Section 24 of the Evidence Act has no application and the statement Ex. T was properly admitted in evidence in the trial of the appellant. Both the Courts have found that there is also independent evidence to corroborate the truth of the statements in Ex. T. The question of admissibility of Ex. T in evidence, having been decided against the appellant, no other point has been argued before us.

24. In the result, the appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1093
(V 58 C 223)

(From Calcutta: (1967) 71 Cal WN 926)

J. C. SHAH, C. J., S. M. SIKRI,
V. BHARGAVA, K. S. HEGDE,
A. N. GROVER AND I. D. DUA, JJ.

Union of India, Appellant v. Jyoti Prakash Mitter, Respondent.

Civil Appeal No. 52 of 1968, D/- 21-1-1971.

(A) Constitution of India, Article 132 (1) — A single Judge of a High Court can grant a certificate under Article 132 (1) in very exceptional cases where direct appeal to Supreme Court is necessary and in view of grave importance of case an early decision is required in public interest. (Para 17)

Where a single Judge of the High Court had granted a certificate under Article 132 (1) at the instance of the Union of India who had not availed of its ordinary remedy by way of appeal under the Letters Patent and the respondent could not on the date of the impugned order of the President under Article 217 (3) be reinstated because he was on his own case more than 62 years of age, it was held that the certificate should not have been asked for or granted. The Supreme Court however did not think fit to vacate

BO/BO/A481/71/KSB/C

the certificate already granted.

(Para 17)

(B) Constitution of India, Article 217 (3) — Where the President acting on the advice of Chief Justice of India expressly recorded that he accepted that advice and that the age of the concerned Judge should be determined according to a certain date of birth the decision is not open to challenge as not being his own decision — (1967) 71 CWN 926, Reversed.

(Para 19)

(C) Constitution of India, Article 217 (3) — The mere fact that the President was assisted by machinery of Home Affairs Ministry in serving notices and receiving communications addressed to him cannot lead to inference that he was guided by that Ministry in arriving at his decision particularly when no rules were framed regarding inquiries under Art. 217 (3) — (1967) 71 CWN 926, Reversed.

(Para 21)

Even in the matter of serving notice and asking for representation from a Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India.

(Para 31)

Any irregularity in procedure viz., sending the papers through the Home Minister and the Prime Minister who countersigned them as if it was an executive matter does not affect the validity of order of the President on ground that he was guided by the Home Minister or the Prime Minister.

(Para 22)

(D) Constitution of India, Article 217 (3) — The sending of case papers and entire evidence to the Chief Justice and obtaining his advice fully comply with requirements of Article — Personal discussion with the Chief Justice is not at all a condition precedent to a valid decision.

(Para 23)

(E) Constitution of India, Article 217 (3) — The President while determining age of a High Court Judge discharges judicial and not executive function — Though rules of natural justice have to be followed,

personal hearing to concerned Judge is not obligatory.

(Paras 24, 25)

Normally, an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Article 217 (3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers.

(Para 31)

Article 217 (3) does not guarantee a right of personal hearing. Nor is a personal hearing a necessary incident of rules of natural justice. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President while making an enquiry is not a Court and the giving of personal hearing is entirely discretionary.

(Paras 24, 25)

(F) Constitution of India, Article 217 (3) — Order of President even though made final can be set aside by Court in appropriate cases though Court will not sit in appeal over order and will not substitute its own opinion for that of President by weighing the evidence before President.

(Para 31)

The Court can interfere with the order of the President where it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence.

(Para 31)

Cases Referred: Chronological Paras

(1965) AIR 1965 SC 961 (V 52)
= (1965) 2 SCR 53, Jyoti Prakash
Mitter v. Hon'ble Mr. Justice
Himansu Kumar Bose, Chief
Justice, High Court, Calcutta
(1964) AIR 1964 SC 1636 (V 51)
= (1964) 1 SCA 347, Hon'ble
Mr. Justice Himansu Kumar

Bose, Chief Justice, High Court,
Calcutta v. Jyoti Prakash Mitter 4
(1962) 1962 AC 322, B. Surinder
Singh Kanda v. Government of
the Federation of Malaya 28 30

Mr. Jagadish Swarup, Solicitor
General of India, (M/s. Ram Panjwani
and S. P. Nayar, Advocates, with him),
for Appellant; Respondent in person.

The following Judgment of the
Court was delivered by

SHAH, C. J.: — Jyoti Prakash Mitter—hereinafter called 'the respondent'—was a candidate for the matriculation certificate examination of the Bihar University, held in April, 1918. In the Bihar Government Gazette declaring him successful the age of the respondent was shown to be 16 years 3 months in April 1918. The respondent offered himself as a candidate for admission to the Indian Civil Service at an examination held in 1923 by the United Kingdom Civil Service Commission. On that occasion he declared that his date of birth was December 27, 1901. The respondent joined the High Court Bar at Calcutta in May 1931. On February 11, 1949 the respondent was appointed as Additional Judge and on December 26, 1949 he was recommended for appointment as a permanent Judge. He then declared that he was 45 years of age.

2. In 1956 the Government of India collected information relating to the educational and other qualifications of the Judges of the High Courts and their respective dates of birth. The declaration made by the respondent that his date of birth was December 27, 1904 was accepted. The Government of India having received information that the true date of birth of the respondent was December 27, 1901 commenced an enquiry. On April 17, 1959 the Chief Justice of the High Court of Calcutta asked the respondent to make a formal statement relating to his date of birth. On May 27, 1959 the respondent wrote to the Chief Justice of the High Court, Calcutta that his age entered in the matriculation certificate was incorrect, and that he was shown to be three years older than he actually was, because a true declaration of his age would have prevented him from appearing for the matriculation examination in 1918. The respondent also tendered an affidavit of one Panchakari Banerjee that the question of his age was discussed with

Sir Arthur Trevor Harries who was in 1949 the Chief Justice of the High Court of Calcutta.

3. A suggestion made by the Chief Minister of West Bengal that the respondent may agree to abide by the decision of the Chief Justice of India on the question of his true date of birth was not accepted by him. The respondent also did not furnish any material in support of his case that he was born in December, 1904. By order dated May 15, 1961 the President of India on the recommendation of the Minister of Home Affairs directed that the age of the respondent be determined on the basis of the date of birth declared in the matriculation certificate.

4. The respondent then moved a petition in the High Court of Punjab at Delhi for a declaration that he was entitled to hold office till December 27, 1964 and for a writ of mandamus restraining the Union of India from giving effect to the order of the President. The petition was dismissed. The respondent then filed a petition on January 2, 1962 in the High Court of Calcutta impleading the Chief Justice of the High Court of Calcutta as a party respondent praying for an order directing the Chief Justice to treat him as continuing in office till December 27, 1964 and "to assign judicial work" to him. He urged that the decision of the Government of India in pursuance of which the Chief Justice of the High Court had acted was "illegal, arbitrary and unconstitutional" and that the Chief Justice had no jurisdiction to act upon that decision. That petition was dismissed in limine. But a Special Bench of the High Court in appeal filed by the respondent directed that rule nisi be issued. This Court dismissed an appeal against the order of the High Court: Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta v. Jyoti Prakash Mitter, AIR 1964 SC 1636. A Special Bench of five Judges of the Calcutta High Court then heard the petition. The petition filed by the respondent was ordered to be dismissed and the rule was discharged. This Court in appeal against the order of the High Court: Jyoti Prakash Mitter v. Hon'ble Mr. Justice Himansu Kumar Bose, Chief Justice, High Court, Calcutta, (1965) 2 SCR 53 = (AIR 1965 SC 961) gave certain directions.

To appreciate the reasons for making those directions it is necessary to take into account certain developments.

5. When the appeal was pending in this Court, Article 217 of the Constitution was amended by the Constitution (Fifteenth Amendment) Act, 1963 and Clause (3) was added thereto to the following effect with retrospective effect:

"If any question arises as to the age of a Judge of a High Court, the question shall be decided by the President after consultation with the Chief Justice of India and the decision of the President shall be final".

Clause (1) of Article 217 was also amended by the Constitution (Fifteenth Amendment) Act, 1963, with effect from October 5, 1963 and the age of superannuation of Judges of the High Court was fixed at sixty-two years.

6. This Court held that Clause (3) of Article 217 having retrospective operation, validity of the order passed by the President must be adjudged in the light of Clause (3) of Article 217 and since the Ministry of Home Affairs had placed the file before the President in accordance with the rules of business, the procedure could not be assimilated to the requirements of Article 217 (3). The Court observed:

"The question concerning the age of the appellant (respondent herein) on which a decision was reached by the President on May 15, 1961, affects the appellant in a very serious manner; and so, we think considerations of natural justice and fair-play require that before this question is determined by the President, the appellant should be given a chance to adduce his evidence. That is why we think that, on the whole, it would not be possible to accept the Attorney-General's contention that the order passed by the President on May 15, 1961, can be treated as a decision within the meaning of Article 217 (3). We ought to make it clear that in dealing with the grievance of the appellant that his evidence was not before the President at the relevant time, we are not prepared to hold that his failure or refusal to produce evidence at that stage should be judged in the light of the retrospective operation of Article 217 (3); such a consideration would be totally inconsistent with the concept of fair-play and natural justice which ought to govern

the enquiry contemplated by Article 217 (3)"; and that:

"The appellant has contended before us that if we hold that the impugned decision of the President does not amount to a decision under Article 217 (3); he is entitled to have a formal decision of the President in terms of the said provision. The Attorney-General has conceded that this contention of the appellant is well founded. He, therefore, stated to us on behalf of the Union of India that in case our decision on the main point is rendered against the Union of India, the Union of India will place the matter before the President within a fortnight after the pronouncement of our judgment inviting him to decide the question about the appellant's age under Article 217 (3). Both parties have agreed before us that in case the decision of the President is in favour of the appellant, the appellant will be entitled to claim that he has continued to be a Judge notwithstanding the order passed by the Chief Justice of the Calcutta High Court and will continue to be a Judge until he attains the age of superannuation".

7. Thereafter the President of India directed the Secretary, Ministry of Home Affairs, to call upon the respondent to "make such representation as he may wish to make in the matter and produce such evidence as he may desire to produce in support of his claim that his correct age should be determined on the basis of his date of birth being taken as December 27, 1904", and after consulting the Chief Justice of India by order dated September 29, 1965, determined the date of birth of the respondent as December 27, 1901.

8. The legality of the procedure followed by the President in making the order is challenged by the respondent. It is, therefore, necessary to set out in some detail the various steps taken before passing that order. On November 17, 1964 the Secretary of the Ministry of Home Affairs drew up a note tracing the history of the litigation upto the decision of this Court, and invited the President to determine the age of the respondent under Article 217 (3). The note of the Secretary was submitted to the President through the Minister of Home Affairs and the Prime Minister. On November 21, 1964 the President

signed an order calling upon the respondent to make such representation as he may wish to make in the matter and to produce such evidence as he may desire. The respondent submitted his representation on December 7, 1964 and annexed therewith photostat copies of two documents, an almanac and a horoscope on which he relied and certain affidavits. By his forwarding letter the respondent prayed for an oral hearing before the President to enable him "to adduce his evidence and to produce in original the documents in the Annexures and to make submissions in support of his case". The respondent repeated his request for oral hearing by a letter addressed to the Secretary to the President on the same day. On December 9, 1964 the Secretary to the Ministry of Home Affairs wrote to the respondent asking him to send the original documents copies of which were annexures to his representation to enable him (Secretary) to place them before the President. On the same date, the Secretary to the Ministry of Home Affairs also supplied to the respondent a copy of his note dated November 17, 1964, seeking the determination of the President, and copy of the President's directive dated November 21, 1964. After receiving the copies the respondent by letter dated December 10, 1964 submitted an additional representation. On the same date the respondent submitted to the Secretary, Ministry of Home Affairs, documents in original relied upon by him in his representation. On December 14, 1964 the respondent addressed a letter to the Secretary to the President, forwarding a copy of his additional representation, with a request that representation together with the original documents, which he had handed over to the Ministry of Home Affairs, be called for from that Ministry and be placed before the President. On December 21, 1964 the Secretary, Ministry of Home Affairs sent a reply to the letter directing the respondent to send all the evidence that he desired to rely upon and informing him that no oral evidence of witnesses will be received, the respondent being free to submit affidavits of witnesses. Referring to his request for personal hearing it was stated in the letter that the President will decide after considering the evidence produced by the respondent whether any per-

sonal hearing would be necessary, and that "should he decide that you should be heard in person, you will be informed in due course". On December 31, 1964 the originals of the horoscope and the almanac submitted by the respondent were sent to the Director of the Central Forensic Institute, Calcutta by the Ministry of Home Affairs with the request that the horoscope and the entry in ink in the margin of the almanac be examined "with a view to determine its genuineness with particular reference to the age of the paper on which the horoscope had been prepared; the age of the ink used; and the age of the writing "with a similar report as to the genuineness of the entry in ink in the almanac. On January 4, 1965 the respondent submitted four additional affidavits including his own affidavit affirming that the writing on the margin of the almanac against the date 12 Paus, 1311 B. S., was that of his maternal uncle, Jadunath Bose, who had died when he the respondent was a student of Oxford. By his letter dated February 3, 1965 addressed to the Secretary, Ministry of Home Affairs, the respondent protested against the reference of the documents to the expert, contending that the documents were obtained from him on the representation that they "were required to be placed before the President." The respondent demanded that he be supplied a copy of the order of the President by which such reference to the expert had been made and also copies of the correspondence between the Home Ministry and the forensic expert. He also requested that the originals of the documents be returned to him so that he might have them examined by an independent expert, who would, after his examination, give evidence as to his opinion, by affidavit or otherwise. In reply to that letter, the Secretary, Ministry of Home Affairs wrote that the procedure to be followed and the opportunities to be given to the respondent depended entirely upon the discretion of the President and the question of returning the documents produced by the respondent before determination of the matter, pending before the President, did not arise at that stage. The respondent was also informed that the question whether he should have an opportunity of filing expert evidence will be considered in due course. He was also informed that

the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf.

9. There was some correspondence between the Director of the Central Forensic Institute, Calcutta and the Ministry of Home Affairs. The Commandant of the Institute opined that it was "extremely difficult to solve dating problems in a completely satisfactory manner". He initially sought instructions whether he was at liberty to deface or mutilate the documents, because the "test required could not be made without extracting parts of the documents, but later wrote that the mutilation of documents by the chemical test was not desirable and moreover that by such application it would not be possible to give an absolute date to the document. Thereafter the Director reported on a "limited examination" that could be carried out that it was not possible to give any opinion relating to the age of the ink writing on the almanac", but in his view the horoscope could not have been written earlier than 1909, because the paper on which it was written contained bamboo pulp which was not brought into the use by the Titaghur Mills in the manufacture of paper before 1912. The Director said nothing about the age of the ink in which the horoscope had been written.

10. After consultations between the Ministry of Home Affairs and the Ministry of Law, the Home Ministry sent certain old writings of the year 1904, 1949, 1950 and 1959, and requested the Director to determine the age of the writing of the disputed horoscope and marginal note in the almanac by comparison. The Director on April 17, 1965 wrote that it "was impossible to give any definite opinion by such comparisons particularly when the comparison writings were not made with the same ink on similar paper and not stored under the same conditions as the documents under examination", and that it "will not be possible for a document expert, however reputed he might be, anywhere in the world, to give any definite opinion on the probable date of the horoscope and the ink writing in the margin of the almanac".

11. After receiving the second report from the Director, the Ministry of Law raised the question about the opportunity to be given to the respondent before the President in the enquiry for determining the age of the respondent under Article 217 (3). It was then decided to refer the question to the Chief Justice of India for his advice. On July 24, 1965 the Chief Justice of India advised the President about the procedure to be adopted in the determination of the age of the respondent. Thereafter pursuant to a suggestion made by the Law Minister, the Ministry of Home Affairs wrote to the respondent on July 31, 1965 requiring him to state the date or year of the horoscope. The respondent by his letter dated August 4, 1965, stated that it was not possible for him to give definitely the date or year of the horoscope but he asserted that it was at least in existence in the year 1921 when it was consulted on the occasion of his marriage. On February 23, 1965 the respondent addressed a telegram to the President requesting that an early decision of the question of his age may be reached. On March 15, 1965 he addressed another telegram to the President requesting leave to produce other documentary evidence which he claimed may be available in East Pakistan, but sometime thereafter he informed the Secretary, Ministry of Home Affairs, that owing to lack of co-operation on the part of the people in East Pakistan it was not possible to get the evidence which was mentioned in his letter to the President and that he must content himself with the evidence he had already produced and which in his view was "overwhelming". He further stated:

"You can, therefore, take it that I have no further evidence to produce on the subject of my age, unless I am driven to call an expert or experts as indicated by me in my letter to you, dated 3rd February, 1965".

On August 13, 1965, copies of the reports of the Director of the Forensic Science Laboratory were forwarded by the Home Secretary to the respondent with a forwarding letter by which the respondent was informed that if he had any comments to make on the opinion expressed by the Director they may be submitted and that if the respondent desired he may also adduce evidence in rebuttal in the form of ex-

per opinion supported by proper affidavit, and that the comments, evidence and affidavits, if any, may be sent within one month of the letter. On receipt of the letter of the Home Secretary the respondent sent a telegram addressed to the Home Secretary on September 1, 1965, praying that the President may call for all papers and documents, if not already sent for and grant him an audience, "if at all necessary". The respondent also wrote a letter on that day submitting that the evidence tendered by him was "conclusive" and there was no question of adducing any further evidence or any evidence in rebuttal. He also submitted that the entry in the Bihar and Orissa Gazette (declaring him successful at the matriculation examination) was erroneous and concluded the letter that all relevant documents be placed before the President, and that the President "may be graciously pleased to grant "him" an audience for the purpose of deciding the question of his age".

12. The file of the respondent's case was then submitted to the President. On September 16, 1965 the President referred the matter to the Chief Justice of India asking him for his advice. On September 28, 1965 the Chief Justice recommended that the age of the respondent be decided on the basis that the respondent was born on December 27, 1901. The Chief Justice set out in detail all the evidence including the reports of Dr. Iyengar, Director of the Central Forensic Science Laboratory, Calcutta bearing on the dispute as to the true date of birth of the respondent. The Chief Justice of India thereafter observed:

"..... the question which the President has to decide is whether the date of Mr. Mitter's birth mentioned on the occasions when he appeared for the Matriculation Examination as well as for the Indian Civil Service Examination, is incorrect; and that would naturally turn upon whether it is shown that the entry in ink on the margin of the almanac showing that Mr. Mitter was born on 27-12-1904, was contemporaneously made and is correct as alleged by him. The horoscope on which Mr. Mitter relies, refers to the date and time of his birth; but that does not help Mr. Mitter very much, because it is obviously based upon information

given to Jyotish-Sastri Shri Jogesh Chandra Deba Sarma on the basis of the entry in the almanac. I have carefully considered the reports made by Dr. Iyengar, the comments on them made by Mr. Mitter, the affidavits on which Mr. Mitter relies, and the almanac and the horoscope on which he bases his case. I have also taken into account all the other relevant facts relating to the past history of this dispute, the conduct of Mr. Mitter, the grounds on which he challenged the earlier orders passed in this matter, and I have come to the conclusion that it is not shown satisfactorily that the entry in the ink on the margin of the almanac was made contemporaneously and is correct as alleged by Mr. Mitter. I am, therefore, unable to accept his case that the date of his birth which was shown at the time when he appeared for the Matriculation Examination as well as for the I. C. S. Examination "was exaggerated".

I would, therefore, advise the President to hold that Mr. Mitter has failed to show that he was born on 27-12-1904 and not on 27-12-1901; and that the question about his age should be decided on the basis that he was born on 27-12-1901".

The file containing the advice was then returned to the President. It appears however that after the file was received in the President's Secretariat, it was sent to the Secretary, Ministry of Home Affairs for putting it up before the Home Minister before submitting it to the President. The Home Secretary on September 29, 1965 put up the matter before the Home Minister with the following endorsement:

"A summary of the case will be found at slip 'Z'. The Chief Justice of India has offered his advice in his minute after going into the relevant material. H. M. (Home Minister) may recommend to the President that the age of Sri J. P. Mitter may be determined in accordance with the advice of the Chief Justice of India". The Home Minister and the Prime Minister countersigned that endorsement. The file was then placed before the President on the same day i.e., September 29, 1965. The President recorded his decision that he accepted "the advice tendered by the Chief Justice of India and "decided" that the age of Sri Jyoti Prakash Mitter should

be determined on the basis that he was born on the twenty-seventh December nineteen hundred and one".

13. The Secretary, Ministry of Home Affairs communicated the decision of the President to the respondent. On October 15, 1965 the respondent addressed a letter to the President praying that the decision which had been made without affording him an audience should be reopened and that he should be granted an audience in the presence of the Chief Justice of India and a representative of the Home Ministry. The Home Secretary informed the respondent that the President's decision was final and could not be reopened. He also pointed out that though the respondent was offered the opportunity of commenting on the opinion of the Government expert, he — the respondent — had by his letter of September 1, 1965 declined that offer.

14. On August 3, 1966 the respondent moved the petition out of which this appeal arises claiming a writ in the nature of mandamus commanding the Union of India (i) to act and proceed in accordance with law, (ii) to rescind, recall and withdraw the purported decision of the President conveyed to him by the Secretary to the Government of India in his letter dated October 13, 1965 and (iii) to forbear from giving effect or further effect to the purported decision of the President.

15. The petition was heard by D. D. Basu, J. After an elaborate discussion of the history of the dispute and decisions of the Courts in India and abroad, under diverse heads, the learned Judge concluded:

that ".....the impugned order of the President, the purport of which was communicated to the petitioner (respondent) by the letter of the Home Secretary, dated 13-10-65 is not a 'decision' of the President in term of Article 217 (3), because—

A. Whether the function is quasi-judicial or administrative he acted as recommended by the Home Minister and the Prime Minister, who are extraneous to the function under Article 217 (3);

B. The function being quasi-judicial
(i) the President was not given sufficient time and opportunity to exercise his independent judgment on the question before him;

(ii) the petitioner was not given a personal hearing before the President, as called for by the circumstances of the case.

C. The jurisdiction of this Court to interfere on the above grounds is not barred by the finality clause under Article 217 (3)."

He directed the Union of India not to give effect to the order of the President as communicated by the letter of the Home Secretary dated October 13, 1965. The learned Judge observed that the Union of India may, if so advised, place the matter before the President again, within two months from the date of the judgment, inviting him to decide the age of the respondent in accordance with Article 217 (3).

16. On behalf of the Union of India a prayer for a certificate under Article 132 (1) of the Constitution was made. Observing that the case involved a substantial question of law as to the interpretation of Article 217 (3) of the Constitution, D. D. Basu, J. granted the certificate prayed for under Article 132 (1) of the Constitution. This appeal is filed pursuant to that certificate.

17. Under Article 132 (1) of the Constitution an appeal lies to the Supreme Court from any judgment, decree or final order of a High Court, whether in a civil, criminal or other proceedings, if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution. A single Judge of the High Court may in appropriate cases certify that the case involves a substantial question of law as to the interpretation of the Constitution. But such a certificate is intended to be given in very exceptional cases where a direct appeal is necessary and in view of the grave importance of the case an early decision of the case must in the larger interest of the public or similar reasons be reached. This case was not one in which a certificate should have been asked for or granted. Against the decision of the Learned Judge, an appeal lay to a Division Bench of the High Court under the Letters Patent, and no reason was suggested for not moving the High Court. The order of the President was made in 1961. The respondent could not on the date of the order be reinstated because he

was even on his case more than 62 years of age. Since, however, a certificate was asked for on behalf of the Union of India and has been given, we have not thought it necessary to vacate the certificate and to ask the Union to have resort to the normal remedy of an appeal to the High Court.

18. Article 217 (3) incorporated by the Fifteenth Amendment Act in the Constitution was given retrospective effect from January 26, 1950. On that account all questions arising as to the age of a Judge of the High Court had to be decided by the President after consultation with the Chief Justice of India. A dispute relating to the age of the respondent who was a Judge of a High Court in India was raised and the President of India after consultation with the Chief Justice of India decided that question. Normally judicial power must be exercised by the authority in whom that power is vested. But under Article 217 (3) power to decide the question as to the age of a Judge of the High Court has to be exercised after consultation with the Chief Justice of India.

19. There is no substance in the contention of the respondent, who argued his case personally that the decision was in truth rendered by the Chief Justice of India and not by the President. The President has expressly recorded that he accepted the advice tendered by the Chief Justice of India and that he decided that the age of the respondent be determined on the basis that the respondent was born on the twenty-seventh December nineteen hundred and one. The President acted on the advice of the Chief Justice; he did not surrender his judgment to the Chief Justice. The order of the President is not open to challenge on the ground that he did not reach his own conclusion.

20. It was then urged that in rendering his decision there was no consultation between the President and the Chief Justice as required by the Constitution; that the President was guided by the Minister of Home Affairs and by the Prime Minister; that the President did not apply his mind to the evidence in the case; that it was obligatory upon the President to grant to the respondent an oral hearing and since he did not do so the order was liable to be declared

invalid; that in any case the respondent had requested on several occasions that an opportunity be given to him of an oral hearing before deciding the case and that the case was otherwise one in which an oral hearing should have been given; that the executive was closely associated with the President in making the order, since the notice to the respondent was issued through the Ministry of Home Affairs, and the papers were sent by the Chief Justice of India to the President but were diverted by the Secretary to the President to the Ministry of Home Affairs and after they were received with the advice of the Chief Justice of India they were considered by the Minister of Home Affairs and the Prime Minister and it was only after they assented to the advice of the Chief Justice of India that the papers were submitted to the President; and that the part played "by the Chief Justice of India was contrary to all principles of natural justice".

21. We do not propose to deal with those contentions in the sequence in which they were urged before us for many of those contentions overlap. It is true that the notice requiring the respondent to show cause was issued pursuant to the papers being submitted to the President and the notice was in fact sent by the Secretary to the Ministry of Home Affairs. But we do not think that because the President was assisted by the machinery of the Ministry of Home Affairs in serving notices, and receiving communications addressed by him it can be inferred that he was guided by that Ministry. Apparently no rules have been framed regarding the enquiry to be made by the President of India under Article 217 (3). This was the first case which arose in which the question of age of a Judge of the High Court had to be decided. The President has no secretarial facilities for serving notices and for taking other steps in regard to enquiries to be made under Article 217 (3).

22. After the Chief Justice of India sent the file of papers with his advice to the President, the papers were not immediately submitted to the President but were sent to the Ministry of Home Affairs. The Secretary recorded a note requesting the Minister of Home Affairs to recommend to the President that the age of the respondent may be determined

in accordance with the advice of the Chief Justice of India. The Minister for Home Affairs and then the Prime Minister placed their initials below the note. There is nothing in the order that the Minister for Home Affairs acted upon the request made by the Secretary; he merely countersigned the papers and sent them to the Prime Minister who also countersigned the note. The argument that the Home Minister and the Prime Minister signified their assent and thereafter the President acted as if he was exercising the executive authority on the advice of his Ministers has no force. There is no reason to think that the Minister for Home Affairs or the Prime Minister acted in pursuance of the request made by the Secretary. There is again nothing in the order of the President which may suggest that he was swayed by anything which the Secretary to the Ministry of Home Affairs had noted or by the signatures of the Minister for Home Affairs or the Prime Minister. The terms of the order of the President are clear: they show that the President was acting on the advice of the Chief Justice of India and that he decided the age of the respondent on that basis. Any irregularity in the procedure followed by the Secretary to the President and the Secretary, Ministry of Home Affairs, in sending the papers through the Minister of Home Affairs and the Prime Minister as if the matter dealt with was executive in character, does not, in our judgment, affect the validity of the order made by the President or vitiate it on the ground that he was guided by the Minister for Home Affairs or by the Prime Minister.

23. The argument that there was no consultation between the Chief Justice of India and the President is also without substance. Consultation contemplated by the Constitution is not a dialogue. Under Article 217 (3) the President is required to consult the Chief Justice of India before determining the question as to the age of a Judge of the High Court. The President must before deciding the age of a Judge under Article 217 (3) obtain the advice of the Chief Justice of India. For obtaining that advice the President undoubtedly must make available all the evidence in his possession to the Chief Justice of India. The Chief Justice has to

submit his advice to the President on that evidence. It is not a condition of the validity of the decision by the President that the President and the Chief Justice should meet and discuss across a table the pros and cons of the proposed action, or the value to be attached to any piece of evidence laid before the President and made available to the Chief Justice. The procedure followed in the present case of sending to the Chief Justice of India the file of papers relating to the evidence against the respondent and in his favour, and of obtaining his advice fully complied with the constitutional requirements as to consultation with the Chief Justice of India when he rendered his advice to the President.

24. The President had given ample opportunities at diverse stages to the respondent to make his representations. All evidence placed before the President when he considered the question as to the age of the respondent was disclosed to him and he — respondent — was given an opportunity to make his representation thereon. There is nothing in Clause (3) of Article 217 which requires that the Judge whose age is in dispute, should be given a personal hearing by the President. The President may in appropriate cases in the exercise of his discretion give to the Judge concerned an oral hearing, but he is not bound to do so. An order made by the President which is declared final by Clause (3) of Article 217 is not invalid merely because no oral hearing was given by the President to the Judge concerned. An opportunity to make representation to the Judge, after apprising him of the evidence which was likely to be used against him and consideration of the representation and the evidence comply with the requirements of Article 217 (3). The respondent it is true, did make requests that the President should give him an oral hearing. The respondent claims that his request was granted and he remained under an impression that he would be given an oral hearing, and the order made without granting him an opportunity of an oral representation was contrary to the rules of natural justice. By his representation dated December 7, 1964, the respondent had requested that he be given an oral hearing before the President and an opportunity to adduce his evidence and to produce in original the

documents, viz., an almanac and a horoscope, and to make submissions in support of his case. He repeated that request in the letter addressed to the Secretary to the President also on the same day. In reply thereto by letter dated December 21, 1964, the Secretary to the Ministry of Home Affairs informed the respondent that no oral evidence of witnesses would be received but the respondent was free to submit the affidavits of witnesses as he relied upon. Regarding his request for the personal hearing the respondent was informed that the President will decide after considering the evidence whether any personal hearing was necessary. He was also informed that should the President decide that the respondent should be heard in person, he will be informed in due course. Again in reply to the letter written by the respondent on January 4, 1965, the Secretary to the Ministry of Home Affairs informed the respondent that the procedure to be followed and the opportunities to be given to the respondent were entirely to depend upon the direction of the President and the respondent will be given an opportunity to put forward his case about the evidentiary value of the documents produced by him and any decision thereon would be arrived at by the President after affording him reasonable opportunities in that behalf. By his letter dated April 28, 1965, to the Secretary, Ministry of Home Affairs, the respondent stated that he had no further evidence to produce on the subject of his age, beside the evidence he had already produced. By his telegram dated September 1, 1965, the respondent requested the President to send for the papers and documents, if not already sent for, and to grant him an audience "if at all necessary." But in his letter addressed to the Secretary of the Ministry of Home Affairs on the same day he stated that all the papers may be placed before the President and the President may be "pleased to grant an audience for the purpose of deciding the question of his age."

25. Article 217 (3) does not guarantee a right of personal hearing. In a proceeding of a judicial nature, the basic rules of natural justice must be followed. The respondent was on that account entitled to make a representation. But it is not necessarily an incident of the rules of natural

justice that personal hearing must be given to a party likely to be affected by the order. Except in proceedings in Courts, a mere denial of opportunity of making an oral representation will not, without more, vitiate the proceeding. A party likely to be affected by a decision is entitled to know the evidence against him, and to have an opportunity of making a representation. He however cannot claim that an order made without affording him an opportunity of a personal hearing is invalid. The President is performing a judicial function when he determines a dispute as to the age of a Judge, but he is not constituted by the Constitution a Court. Whether in a given case the President should give a personal hearing is for him to decide. The question is left to the discretion of the President to decide whether an oral hearing should be given to the Judge concerned. The record amply supports the view that the President did not deem it necessary to give an oral hearing. There were no complicated questions to be decided by the President. On the one hand there was the evidence of the matriculation certificate and the representation made by the respondent before the Board of Commissioners in the United Kingdom when the respondent submitted himself for being admitted to the Indian Civil Service Examination. On the other hand there was the evidence of the assertion made by the respondent that he was born on December 27, 1904, which was sought to be supported by the almanac with an entry in the margin, a horoscope, an affidavit of Panchkari Banerjee, Secretary to the then Chief Justice Sir Arthur Trevor Harries, in which it was stated that the question about the age of the respondent was discussed with the Chief Justice. The truth of the statements made by the respondent had to be judged in the light of his conduct, that he gave no evidence of the date of his birth when he was appointed permanent Judge of the High Court, nor when in 1960, opportunity was given to him to furnish any material in support of his contention regarding his age. If upon this evidence the President was of the view that the disputed question may be decided without giving an opportunity of personal hearing, this Court cannot set aside the order on the ground that the order

was made without following the rules of natural justice.

26. It was urged that the President left India in the afternoon of September 23, 1965 on a tour of East European countries and that he had not sufficient time to consider the advice tendered by the Chief Justice of India and of going through all the evidence which was placed before him and of giving any judicial consideration to the matter before him. Having regard to the "strict-time-table" which was required to be observed, it was urged that he — President treated the matter as formal, and guided by the advice of the Home Minister and the Prime Minister he mechanically accepted the advice of the Chief Justice of India and surrendered his own judgment to the judgment of the Chief Justice of India. But on this part of the case there is no reliable evidence. No such ground was raised in the High Court. In this Court in the affidavit in reply filed by the respondent on February 24, 1967 in answer to the additional affidavit of the Union of India, the respondent stated two new grounds (1) that the Chief Justice of India had privately advised the Ministry of Home Affairs as to the conduct of the enquiry or reference under Article 217 (3) of the Constitution and he was on that account disentitled to tender advice to, or to be consulted by, the President under Article 217 (3), and that the "part played by the Chief Justice of India relative to the reference was against all principles of natural justice and fair play and vitiated his own purported advice to the President as well as the purported decision of the President rendering the purported decision a nullity"; and (2) that "the President of India left New Delhi shortly after noon on September 24, 1965, on a tour of East European countries and Ethiopia and that shortly before his departure a relative to the said reference was placed before him for his signature in token of his purported decision as to 'the respondent's age with the recommendation of the Prime Minister and the Home Minister to determine the age of the respondent in accordance with the advice of the Chief Justice of India'. He annexed thereto a copy of the daily edition of the Statesman dated September 30, 1965, evidencing the departure of the President as aforesaid and his purported decision as

to the question of the age of the respondent before his departure for Europe. But no attempt was made to have the matter investigated in the High Court as to when the papers were submitted to the President and what consideration he gave to the advice, whether he made only a mechanical approach believing that he was bound to accept the advice of his Ministers. These are matters which cannot be canvassed for the first time in this Court.

27. On the plea that the Chief Justice of India had improperly advised the Minister of Home Affairs as to the conduct of enquiry and the reference, and on that account he had disentitled himself to tender any advice to the President also no allegation was made in the petition and no argument was raised in the High Court. There is no evidence that beside tendering advice to the President in matters of procedure and the final decision, the Chief Justice of India had given any advice to the Ministry of Home Affairs privately or otherwise. The argument that the Chief Justice of India in tendering the advice was influenced by extraneous considerations is not founded upon any materials placed before this Court and must be rejected.

28. The respondent invited our attention to a judgment of the Judicial Committee in *B. Surinder Singh Kanda v. Government of the Federation of Malaya*, 1962 AC 322. In that case the Commissioner of Police, Malaya passed an order dismissing one Kanda, an Inspector of Police, on the ground that at an inquiry before an adjudicating officer Kanda was found guilty of failing to disclose evidence at a criminal trial. Kanda contended that after the coming into force of the Constitution of Malaya that power was only in the Police Service Commission, to which the Commissioner was a subordinate authority and that failure to supply him a copy of the report of the board of inquiry, which contained matters highly prejudicial to him and which had been sent to and read by the adjudicating officer before he set to inquire into the charge, amounted to a failure to afford the appellant Kanda "a reasonable opportunity of being heard", in answer to the charge within the meaning of Article 135 (2) of the Constitution of Malaya and to

a denial of natural justice. Lord Denning who delivered the judgment of the Judicial Committee considered the question whether the hearing by the adjudicating officer was vitiated because that officer was furnished with the report without Inspector Kanda being given any opportunity of correcting or contradicting it. Before the High Court of Malaya the question posed was whether there was a real likelihood of bias, that is "an operative prejudice, whether conscious or unconscious" on the part of the adjudicating officer. The Court of Appeal held that there was no likelihood of bias. In the opinion of Lord Denning however the proper approach to the case was different. "The rule against bias is one thing. The right to be heard is another. Those two rules are the essential characteristics of what is often called natural justice. They are the twin pillars supporting it x x x But they are separate concepts and are governed by separate considerations. In the present case Inspector Kanda complained of a breach of the second. He said that his constitutional right had been infringed. He had been dismissed without being given a reasonable opportunity of being heard.

If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. x x x x. It follows, of course, that the Judge or whoever has to adjudicate must not hear evidence or receive representations from one side behind the back of the other. The Court will not inquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The Court will not go into the likelihood of prejudice. The risk of it is enough. No one who has lost a case will believe he has been fairly treated if the other side has had access to the Judge without his knowing".

29-30. Relying upon the observation the respondent contended that a likelihood of prejudice is sufficient to vitiate the proceedings. But in this case we do not think that there was any likelihood of bias or of prejudice.

All evidence which the President had to consider had been placed before him at diverse stages. When the notice to show cause was issued, the President had *prima facie* material before him. Thereafter certain other evidence was collected and that was also placed before the President. It is not suggested that any evidence against the respondent was not disclosed to him. The principal argument raised by the respondent was that the President himself did not determine the question relating to the age of the respondent because he surrendered his judgment to the Chief Justice of India or that he was persuaded to reach his conclusion only because the Home Minister and the Prime Minister had countersigned the notation made by the Secretary of the Ministry of Home Affairs. We do not think that the President had heard any evidence or received any representation from one side behind the back of the other. If he had done so the question whether any representation was made which worked to the prejudice of the respondent would arise. The Court will not then consider the question whether the representation had in fact worked to his prejudice. A reasonable possibility may be sufficient. In the present case no evidence was placed before the President or considered by him which was not disclosed to the respondent. The principle in *B. Surinder Singh Kanda's case*, (1962) AC 322 has therefore no application.

31. It is necessary to observe that the President in whose name all executive functions of the Union are performed is by Article 217 (3) invested with judicial power of great significance which has bearing on the independence of the Judges of the higher Courts. The President is by Article 74 of the Constitution the constitutional head who acts on the advice of the Council of Ministers in the exercise of his functions. Having regard to the very grave consequences resulting from even the initiation of an enquiry relating to the age of a Judge, our Constitution makers have thought it necessary to invest the power in the President. In the exercise of this power if democratic institutions are to take root in our country, even the slightest suspicion or appearance of misuse of that power should

be avoided. Otherwise independence of the judiciary is likely to be gravely imperilled. We recommend that even in the matter of serving notice and asking for representation from a Judge of the High Court where a question as to his age is raised, the President's Secretariat should ordinarily be the channel, that the President should have consultation with the Chief Justice of India as required by the Constitution and that there must be no interposition of any other body or authority, in the consultation between the President and the Chief Justice of India. Again we are of the view that normally an opportunity for an oral hearing should be given to the Judge whose age is in question, and the question should be decided by the President on consideration of such materials as may be placed by the Judge concerned and the evidence against him after the same is disclosed to him. The President acting under Article 217 (3) performs a judicial function of grave importance under the scheme of our Constitution. He cannot act on the advice of his Ministers. Notwithstanding the declared finality of the order of the President the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral considerations or the rules of natural justice were not observed, or that the President's judgment was coloured by the advice or representation made by the executive or it was founded on no evidence. But this Court will not sit in appeal over the judgment of the President, nor will the Courts determine the weight which should be attached to the evidence. Appreciation of evidence is entirely left to the President and it is not for the Courts to hold that on the evidence placed before the President on which the conclusion is founded, if they were called upon to decide the case they would have reached some other conclusion.

32. The appeal is allowed. Having regard however to the circumstances of the case, we direct that there will be no order as to costs.

Appeal allowed.

AIR 1971 SUPREME COURT 1106
(V 58 C 224)

(From: Patna)*

S. M. SIKRI, C. J., J. M. SHELAT,
C. A. VAIDIALINGAM,

A. N. GROVER AND A. N. RAY, JJ.

Makeshwar Nath Srivastava, Appellant v. The State of Bihar and others, Respondents.

Civil Appeal No. 23 of 1967, D/- 2-3-1971.

(A) Civil Services — Bihar and Orissa Police Manual (1930), Rule 861 (b) — Appeal to Government against order of Inspector General of Police — In appeal by delinquent servant against order of his reversion, Government cannot pass an order of dismissal — It can only uphold or set aside order of reversion — (X-Ref: Police Act (1861), Section 3).

(Paras 9 and 11)

In the absence of any provision of law or any rule conferring on the Government as an appellate authority the power to pass an order of dismissal in exercise of its revisional power under Rule 853 or power of general superintendence under Section 3 of Police Act, the general principle must prevail namely that an appellate authority in an appeal by an aggrieved party may either dismiss his appeal or allow it either wholly or partly and uphold or set aside or modify the order challenged in such appeal. It cannot certainly impose on such an appellant a higher penalty and condemn him to a position worse than the one he would be in if he had not hazarded to file an appeal.

(Para 11)

(B) Civil Services — Bihar and Orissa Police Manual (1930), Rule 853 — Conferment of revisional power on appellate authority — Revisional power is meant to be used when appeal cannot for some reasons be filed and the authority thinks that order is so unjust or unreasonable that it should act under its revisional power.

(Para 10)

Cases Referred: Chronological Paras (1962) AIR 1962 Pat 276 (V 49)

= ILR 41 Pat 851, Makeshwar

Nath v. State of Bihar

9

M/s. S. N. Prasad and R. B. Datar, Advocates, for Appellant; Mr. B. P.

*(M. J. C. No. 824 of 1963, D/- 9-10-1963 — Pat.)

CO/CO/B232/71/CWM/P

Jha, Advocate, for Respondents Nos. 1 and 2.

The following Judgment of the Court was delivered by

SHELAT, J.: — This appeal, by special leave, is against the judgment of the High Court of Patna dismissing in limine the writ petition filed by the appellant challenging the order of his dismissal from service passed by the Government of Bihar.

2. The appellant was first appointed as a stenographer, Sub-Inspector of Police in 1940 in the Police Service of the State. After the requisite training in the Police training College at Hazaribagh, he was posted as a Sub-Inspector in 1950 in Champaran District. In 1954, he was promoted to officiate as an Inspector of Police. In June 1955, he worked in Saharsa District as an Officiating Inspector of Police.

3. In July 1955, he received a notice to show cause why disciplinary proceedings should not be taken against him in a matter relating to certain cloth recovered at Katihar Police Station in a Police Case under Sections 379 and 414 of the Penal Code. The appellant submitted his reply denying any misappropriation by him. On September 26, 1955, he was served with a charge-sheet alleging misappropriation and connivance by him of misappropriation by two constables named therein. This was followed by an enquiry held by the Deputy Superintendent of Railway Police at Samastipur. The appellant alleged that the enquiry was held partially behind his back and was, therefore, bad. In April, 1956, the Deputy Superintendent of Police submitted his findings to the Superintendent of Railway Police, Samastipur holding that the charges against the appellant had been established. These findings were then submitted to the Inspector General of Police with a recommendation that the appellant should be awarded exemplary punishment. In September 1957, the Inspector-General served a second show cause notice on the appellant to show cause why he should not be dismissed. The appellant submitted his reply and also appeared in person.

4. By his order dated September 30, 1958, the Inspector-General exonerated the appellant from the said charges. But on the basis of cer-

tain adverse remarks in the confidential character roll of the appellant, he passed an order reverting the appellant to his substantive rank of Sub-Inspector of Police for a period of one year. This order clearly was one of penalty. Admittedly, there was no charge against the appellant founded on the said adverse remarks. The adverse remarks on the basis of which the order of reversion was passed were, as the said order itself pointed out, never notified to the appellant. Nor was any opportunity to explain those remarks ever afforded to the appellant before the order of reversion was passed.

5. Aggrieved by the said order the appellant filed an appeal before the Government. On November 7, 1959, the Government set aside the order of reversion passed by the Inspector-General. That was the relief prayed for by the appellant in his said appeal. The order was set aside on the ground that no opportunity had been given to the appellant to explain the said adverse remarks, and that therefore, it was legally unsustainable. But the Government passed instead an order of dismissal disagreeing with the findings of the Inspector-General and agreeing with the findings given by the enquiry officer, by whom the appellant had been found guilty.

6. On a further appeal to the Governor having been dismissed by the Government, the appellant filed a writ petition in the High Court. On January 18, 1962, the High Court allowed the writ petition setting aside the Government's order of dismissal, but directed that the appellant's appeal should go back to the Government for disposal according to law. The Government thereupon served a notice on the appellant to show cause why he should not be dismissed from service. That notice was issued on the strength of Rr. 851 (b) and 853-A of the Bihar and Orissa Police Manual, 1930. The appellant thereupon gave his reply and requested for a personal hearing. The request for personal hearing was rejected. About a year after the High Court's order quashing the Government's order of dismissal, the Government issued an order dated March 5, 1963 reinstating the appellant, but at the same time suspending him from service. On June 15, 1963, the Government passed the order dis-

missing the appellant from service. Hence, the appellant filed once more the present petition which the High Court dismissed in limine.

7. The question is whether it was competent for the Government, in an appeal filed by the appellant against the said order of reversion passed by the Inspector-General of Police, to set aside the findings of that officer by which he exonerated the appellant from the said charges against him, which findings were not appealed against by the department, and then pass an order of dismissal accepting the findings of the enquiry officer.

8. The appellant was governed by the Police Act, 5 of 1861. Section 2 of the Act deals with the constitution of the police force and provides that the entire police establishment under a State Government shall, for the purposes of the Act, be deemed to be one police force, and shall be constituted in such manner as shall from time to time be ordered by the State Government. Section 3 provides that "The superintendence of the police throughout a general police district shall vest in and, shall be exercised by the State Government to which such district is subordinate". Under Section 4, the administration of the police throughout a general police district is vested in the Inspector-General of Police, and in such Deputy Inspectors-General of Police and Assistant Inspectors-General as the State Government shall deem fit. Section 7 runs as follows:

"Subject to the provisions of Article 311 of the Constitution, and to such rules as the State Government may from time to time make under this Act, the Inspector-General, Deputy Inspectors-General, Assistant Inspectors-General and District Superintendents of Police may at any time dismiss, suspend or reduce any police officer of the subordinate ranks whom they shall think remiss or negligent in the discharge of his duty, or unfit for the same, or may award any one or more of the following punishments to any police officer of the subordinate ranks who shall discharge his duty in a careless or negligent manner, or who by any act of his own shall render himself unfit for the discharge thereof, namely",

The section then sets out the punishments which the said officers can im-

pose, namely, fine, confinement to quarters, deprivation of good-conduct pay and removal from any office of distinction or special emolument.

9. It is clear that the Act itself confers on the Inspector-General power to impose in suitable cases the penalty of dismissal, suspension and reduction, subject, of course, to the provisions of Article 311 and the rules made under the Act. The power of superintendence conferred on the State Government by Section 3 must, therefore, be read in the light of the provisions of Section 7 under which the legislature has conferred specific powers to the officers mentioned therein. Therefore, the State Government cannot interfere, under the purported exercise of the general power of superintendence under Section 3, with an order passed by any one of the officers mentioned in Section 7 in exercise of the power conferred on them by that section, unless there is some provision which authorises or envisages such interference. Under Section 46 (2), the State Government has been given the power to make rules from time to time by notification in the official gazette consistent with the Act, inter alia:

"(a) to regulate the procedure to be followed by Magistrates and police-officers in the discharge of any duty imposed upon them by or under this Act;

* * * *

and

(c) generally, for giving effect to the provisions of this Act".

It would seem that in pursuance of the rule making power under Section 46 (2) rules have been made which are to be found in the Bihar and Orissa Police Manual, 1930. The Manual has not been produced before us. But we find Rule 851 set out by the High Court in its judgment in the first writ petition filed by the appellant, reported in *Makeshwar Nath v. State of Bihar*, AIR 1962 Pat 276. The rule so set out reads as follows:

"General rules as to appeals:

(a)

(b) Against an order of dismissal removal, reduction, withholding of promotion or periodical increment there shall be one appeal in each case as follows;

Against an order passed by a Superintendent, to the Deputy Inspector-General;

Against an original order passed by a Deputy Inspector-General, to the Inspector-General;

Against an original order passed by the Inspector-General, to the Local Government.

(c) The order of the appellate authority on any such appeal shall be final."

Under this rule an appeal would lie before the Government against the order of the Inspector-General re-verting the appellant to his substantive post of Sub-Inspector for one year. Such an appeal was in fact filed by the appellant. But no appeal was filed by the department against the order of the Inspector-General exonerating the appellant of the charges of misappropriation and connivance of misappropriation by the two constables. Under Rule 851 (b), therefore, the only question before the Government was whether the order of reversion should be sustained or not. There was no other matter by way of an appeal before the Government by the department or by any one else being aggrieved against the order of the Inspector-General by which he held that the charges against the appellant had not been established. That being so, the Government could pass in exercise of its appellate power under Rule 851 (b) such an order as it thought fit in the appeal filed by the appellant, i. e., either upholding the order of reversion or setting it aside. In the absence of any other appeal, the Government could not sit in judgment over the findings of the Inspector-General given by him under the power conferred upon him by Section 7 of the Act. An appeal before the Government having been provided for under Rule 851 (b), presumably both by the delinquent police officer, as also by the department, if aggrieved by an order passed by the Inspector-General, there would also be no question of the Government exercising its general power of superintendence under Section 3 of the Act. The exercise of such a power is ordinarily possible when there is no provision for an appeal unless there are other provisions providing for it. The order of dismissal passed by the Government in the appeal filed by the appellant, therefore, was not sustainable.

10. We are, however, informed by counsel that the Government of

Bihar has framed two Rules, Rule 853 and Rule 853-A. Rule 853, a copy of which has been furnished to us, provides:

"Memorials and Revision: — No petition or memorial which is a representation against an order passed in a disciplinary case shall be submitted to any authority other than the authority which under the rule for the time being in force is empowered to entertain the appeal".

No memorial or revision was filed either by the appellant or any one else before the Government, which was the appellate authority which could entertain such a memorial or revision. Assuming that under Rule 853 the Government could suo motu revise the order of the Inspector-General, an appeal having been filed before it, it could not so act. The fact that the power of revision is conferred on the authority possessed of appellate power indicates that the power of revision is intended to be used when an appeal could not for some reason be filed and the appellate authority felt that the order was so unjust or unreasonable that it should act under its revisional power. That was not the case of the Government before us. Nor did the Government say so in the impugned order. Therefore, there was no occasion for the Government to revise the order passed by the Inspector-General exonerating the appellant of the charges preferred against him.

11. In its order, dated January 31, 1963, the Government, no doubt, has referred to Rules 851 (b) and 853-A as being the rules under which it purported to act for the purpose of making the impugned order of dismissal. Rule 851 (b), as already pointed out, however, confers no such power. As regards Rule 853-A, it is neither set out in the impugned order, nor in the statement of case of the respondent-State. We called for its production, or even its copy, but counsel for the State expressed his inability to produce the same. Further, counsel for the appellant told us that even if Rule 853-A had been framed, it cannot operate because so far it has not been published in the official gazette as required by Section 46 (2). Counsel for the State was not in a position to throw any light whether the said rule

has been framed or not and if framed whether it was notified in the Gazette. In these circumstances, he could not rely upon that rule to sustain the order of dismissal passed by the Government. We have, therefore, to go upon Rule 851 (b), which clearly does not empower the Government to pass an order such as the one impugned by the appellant on the ground of its revisional power or any such similar power under Section 3 of the Act. In the absence of any other provision of law or any rule conferring on the State Government the power to pass an order of dismissal in exercise of its revisional power or power of general superintendence, the general principle must prevail, namely, that an appellate authority in an appeal by an aggrieved party may either dismiss his appeal or allow it either wholly or partly and uphold or set aside or modify the order challenged in such appeal. It cannot surely impose on such appellant a higher penalty and condemn him to a position worse than the one he would be in if he had not hazarded to file an appeal. Since under Rule 851 (b) an appeal to the Government has been provided for and the Government had under that rule the appellate authority to dispose of appeals filed before it against the original order passed by the Inspector-General, it could not resort to any general power of superintendence except in cases where there is a provision conferring such a power in addition to its appellate authority and in the manner envisaged by such a provision.

12. In our view, the High Court was not right in dismissing the appellant's writ petition. The appeal has, therefore, to be allowed and the order of the State Government quashed as being without jurisdiction. The consequence is as if the appellant was never dismissed and continued to remain in the police force to which he was attached. The respondent-State will pay to the appellant the costs both of this appeal and also of the writ petition filed by him in the High Court.

Appeal allowed.

**AIR 1971 SUPREME COURT 1110
(V 58 C 225)**

(From Assam: ILR (1967) 19 Assam 502)

**K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.**

H. Lyngdoh and others, Appellants v. Cromlyn Lyngdoh, Judge, Respondent.

Civil Appeal No. 1929 of 1967, D/- 2-3-1971.

Constitution of India, Article 311 — Where a person in Assam Judicial Service is appointed temporarily as Judge of United Khasi-Jaintia Hills District Council Court without the sanction of the Governor and is continued in service as such even after the expiry of the age of his superannuation, without the sanction of the Government, the termination of the services of such a person without the sanction of the Governor is not illegal — (X-Ref: Civil Services — Assam Fundamental Rules, Rule 56).

(Para 4)

Mr. M. C. Chagla, Sr. Advocate, (Mr. D. N. Mukherjee, Advocate, with him), for Appellants; Mr. Sarjoo Prasad, Sr. Advocate, (M/s. R. B. Datar and S. N. Prasad, Advocates, with him), for Respondent.

The following Judgment of the Court was delivered by

P. JAGANMOHAN REDDY, J.: — The short question in this Appeal which is against the Judgment of the High Court of Assam and Nagaland by special leave is whether the Respondent's services as Judge District Council Court of the Autonomous District of United Khasi-Jaintia Hills could be terminated by the District Council. The facts relevant for the appeal are that on the 26th January, 1950 the Autonomous District of United Khasi-Jaintia Hills by virtue of the provisions of clause (2) of Article 244 and the Sixth Schedule to the Constitution of India was constituted and the Governor of Assam was empowered to administer the said Autonomous District, pursuant thereto the Assam Autonomous Districts (Constitution of District Councils) Rules, 1951 were enforced as from the 15th October, 1951. On the 27th June 1952 a District Council and an Executive Committee was constituted for the said autonomous District. The District

Council was empowered to constitute Courts and appoint suitable persons as Presiding Officers. On 7th June, 1954 United Khasi-Jaintia Hills Autonomous District (Administration of Justice) Rules 1953 were framed by the District Council with the approval of the Governor, Rule 9 of which reads as follows:—

"Constitution of District Council Court — (1) There shall be one District Council Court for the United Khasi-Jaintia Hills Autonomous District which shall be called the United Khasi Jaintia Hills, District Council Court. The Court shall consist of one or more Judicial Officers to be designated as Judge or Judges appointed by the Executive Committee with the approval of the Governor

Provided that the Chief Executive Member or Member of the Executive Committee or any other members of the District Council shall not be entitled to hold office as Judicial Officer of the District Council Court".

2. It is admitted that no rules were made by the District Council under Rule 15 of the Constitution of District Councils Rules which empowered it to regulate conditions of service of Officers and staff appointed to the services and posts in connection with the affairs of the District Council. In the absence of these rules it is also admitted that the Assam Fundamental Rules subsidiary Rules and instructions were applicable to the Officers and staff of the District Council.

3. The Respondent who was an Additional District Judge in the senior grade of the Assam Judicial service was appointed with effect from 7-1-1954 temporarily as a Judge of the District Council without the approval of the Governor. The Governor however appointed him also as an Additional District Judge Lower Assam District for the purpose of disposal of Civil and Criminal matters under the respective Codes. On 16-2-1957 the Respondent attained the age of superannuation which was on his completion of 55 years. It would however appear that notwithstanding his having reached the age of superannuation the District Council continued him in service and by its order dated 22-4-1965 placed him in the Regular scale of Rs. 1200-60(EB)-60-1500 with

effect from 1-4-1965. Thereafter on 30-7-1966 the Executive Committee of the District Council served notice upon him that his services along with the services of others mentioned in the order were terminated from 31st August, 1966. It is this impugned order that was challenged in a Writ Petition which the Respondents filed in the High Court. The High Court came to the conclusion that unless the contrary is shown that the Respondent was appointed by the District Council with the approval of the Governor while the termination was by the Council without the approval of the Governor, though we observe that even with respect to this nothing contrary was shown that the Governor had not given his approval.

4. In our view a perusal of the order of appointment would show that it was issued by the Chief Executive Member District Council and it specifically states that the appointment is temporary. Immediately after the Respondent had reached the age of superannuation the High Court wrote to the Chief Executive Member on 5-3-57 enquiring whether the Respondent has been given an extension. In reply it was informed on 25-3-57 that he was appointed on the 10th February 1954 as Judge of the District Council Courts on a temporary basis; "and he will as such continue to perform his duties till further orders made by the Council". The initial temporary appointment as will be seen from the order of 10th February 1954 was on the scale of pay of Rs. 750-30-960-1000 but later he was placed in a regular scale of pay of Rs. 1200 to Rs. 1500 as already adverted to. It is this order that is being urged as having given the Respondent a permanent post, because as the learned Advocate submits, a permanent employee is one who is appointed to a permanent post which is defined under Assam Fundamental Rule 9 (22) as a post "carrying a definite scale of pay sanctioned without limit of time". As we have already noticed the Respondent's appointment was temporary and was continuing as such. Merely placing him in a scale of pay which is different to the one in which he was temporarily appointed does not make him a permanent employee. To become permanent he must be confirmed, but that question can never

arise because under those very Fundamental Rules which it is not denied apply to him in the absence of any rules made by the District Council, the date of his compulsory retirement according to Fundamental Rule 56 is the date on which he attains the age of 55 years, and if he is retained after this date it can only be done with the sanction of the Government which admittedly in his case has not been given. Even if the validity of his appointment by the District Council without the sanction of the Governor which was a necessary condition for valid appointment is overlooked he cannot complain that his termination by the very Council is without the Governor's sanction. We can find no justification for his continuance nor was any rule or regulation fundamental otherwise shown to us to continue him in service without the sanction and under some valid rule. The argument that the Governor had invested the Respondents with powers for the scheduled Districts and lower Assam is equally, unhelpful because this was also admittedly done in 1954 long prior to his attaining the age of superannuation when without a valid extension of the service he could not continue in service after that date. Viewed from any angle the Respondent's plea is untenable, as such the Appeal is allowed and the Writ Petition dismissed, but in the circumstances without costs.

5. Before we part with the case we were distressed to note certain personal remarks made by the learned Chief Justice against one of the Hon'ble Judges of that Court. To us these remarks do not appear to be either proper or just. By making these remarks the learned Chief Justice has let down his office as well as his Court. In the objective discharge of judicial functions there is little justification nay, none-at-all to assume any attitude other than of judicial restraint or to use a language while referring to one's colleagues other than that which has been hitherto adopted by long usage.

Order accordingly.

AIR 1971 SUPREME COURT 1112
(V 58 C 226)

(From: Bombay)*

C. A. VAIDIALINGAM AND
A. N. RAY, JJ.

Gaya Prasad Ramlal, Appellant v.
State of Maharashtra, Respondent.

Criminal Appeal No. 204 of 1968,
D/- 1-3-1971.

Penal Code (1860), Section 34 —
Where the premeditated attack on the
deceased with knives commenced at
the instance of the accused, the accus-
ed must be deemed to share the
common intention of the attackers to
murder though he was not holding any
weapon — (X-Ref.: — Section 302) —
AIR 1955 SC 216, Approved.

(Paras 8, 12)

Cases Referred: Chronological Paras
(1955) AIR 1955 SC 216 (V 42)
= (1955) 1 SCR 1083, Pandurang,
Tukia and Bhillia v. The State
of Hyderabad 8

Mr. V. S. Desai, Sr. Advocate,
(Mr. Vineet Kumar, Advocate, with
him), for Appellant; Mr. K. L. Hathi,
Advocate, and Mr. P. C. Kapoor, Advo-
cate, for Mr. S. P. Nayar, Advocate,
for Respondent.

The following Judgment of the
Court was delivered by

RAY, J.: — This is an appeal by
special leave from the judgment dated
16 February, 1968 of the High Court
of Bombay convicting the appel-
lant under Section 302 read with Sec-
tion 34 of the Indian Penal Code. The
Sessions Judge tried the appellant
under Sections 143, 147, 148, 302 and
306 read with Section 149 of the
Indian Penal Code. The High Court
convicted accused Nos. 1, 2 and 5
under Section 302 read with Section 34
of the Indian Penal Code and sentenc-
ed each of them to imprisonment
for life. The High Court convicted ac-
cused Nos. 2, 3 and 6 under Section
326 read with Section 34 of the Indian
Penal Code and sentenced each of
them to rigorous imprisonment for
three years. The sentence of accused
No. 2 was to run concurrently.

2. Accused No. 1 Habib Ahmed,
accused No. 2 Maksood Ahmed and ac-
cused No. 6 Mohmood Ahmed are
brothers. Accused No. 3 Darogasingh

*(Cri. Appl. No. 841 of 1966, D/-
16-2-1968 — Bom.)

CO/CO/B230/71/SNV/P

and accused No. 4 Chandra Shekhar are also brothers and their third brother was known in the locality as Phelwan. Phelwan was absconding since the date of the offence. Gaya Prasad alias Chakkiwala, accused No. 5 was the owner of a flour mill and was referred to by all the witnesses as Chakkiwala. Accused No. 5 is the only appellant.

3. Accused No. 1 lived in a house Masjid Chawl at Khar in Greater Bombay. Rashidkhan the deceased in the present appeal along with a few other persons of the locality passed a resolution that accused No. 1 should not be permitted to live in a part of the Masjid. This led to hostility between accused No. 1 and Rashidkhan. About two months before date of the incident 16 August, 1965 accused No. 2, the brother of accused No. 1, borrowed a silver bracelet from Hanisuddin Saifulla. The bracelet belonged to Hanisuddin's wife Wahidan. Accused No. 2 borrowed the bracelet on the pretext that he wanted to make a similar bracelet for his wife. On 15 August, 1965, accused No. 2 called on Hanisuddin. He asked for the return of the bracelet. Accused No. 2 refused to return it and instead brandished a knife. Hanisuddin went to the police station and lodged a complaint.

4. On 16 August, 1965 accused No. 2 again went to Hanisuddin's hut at about 9 p. m. Hanisuddin reminded accused No. 2 of the bracelet. Accused No. 2 started abusing him. Wahidan was frightened and escaped by a rear door. She went to the police station and reported the matter. Hanisuddin came out and saw accused No. 1, Rashidkhan and Phelwan on the road. Hanisuddin told Phelwan that accused No. 2 was threatening him with a knife. Phelwan said that it was not likely because accused No. 2 had not been seen in the locality for two years. Rashidkhan told Phelwan that he had seen accused No. 2 in the locality that very day. Phelwan asked Rashidkhan to point out where accused No. 2 was. Phelwan, Rashidkhan and accused No. 1 went into a lane and thereafter to the room of accused No. 1. Accused No. 2 could not be found in the house of accused No. 1. Thereupon Phelwan, Rashidkhan and accused No. 1 went round the colony and entered a lane to the

west of Rashid Chawl. In front of Rashid Chawl was another Chawl called Mulla Panwala Chawl. The incident happened in a narrow open space between the two Chawls.

5. Accused No. 1 returned to the open place with a knife in his hand. He was followed by the appellant accused No. 5 and finding that Rashid was standing in the open space between the two Chawls accused No. 5 gave a shout 'maro, maro'. Accused No. 1 then gave two blows with a knife on the buttocks of Rashid. Rashid turned and caught hold of accused No. 1. Phelwan caught hold of Rashid and threw him on the ground. Accused No. 1 sat on Rashid and gave two knife blows on Rashid's face. Phelwan also assaulted Rashid with a knife. Phelwan kept on saying that it was a matter of no concern if he was sentenced to a term of twenty years. Mehmoodkhan who saw the assault on Rashid, tried to go to his help. Sunder Anna another absconding accused engaged Mehmoodkhan in a struggle. While the struggle was going on accused No. 2 attacked Rashid with a knife. Accused Nos. 3 and 6 came on the scene and were armed with stripped stick and iron pipe respectively. They assaulted Mehmoodkhan repeatedly. So did accused No. 4 who was armed with a stick with a knob on. Accused No. 3 pulled out a pipe from the roof of Rashid's house and gave a blow on the face of Rashid with that pipe and Phelwan gave a final blow on his back.

6. Hanisuddin, who had seen the entire incident went to the police station and on his way saw a police jeep coming from the opposite direction. Hanisuddin told the police Sub-Inspector that accused Nos. 1, 2, Phelwan and Sunder Anna the two absconders had killed Rashid.

7. Four eye-witnesses Mehmoodkhan, Hamidkhan, Nazeemkhan, Bashirkhan, Hanisuddin, Saifulla and Abdul Sattar Badesaheb were examined by the prosecution. Mehmoodkhan, Hamidkhan was the principal eye-witness with regard to the attack with the pipe which resulted in the death of Rashid. The evidence of the eye-witness was that the appellant accused No. 5 shouted 'maro, maro' and immediately thereupon accused No. 1

caused two knife injuries to Rashidkhan on the buttocks. Phelwan then caught hold of Rashidkhan and threw him on the ground. Accused No. 1 sat on the chest of Rashidkhan and gave him two knife injuries on the face. Phelwan and accused No. 2 stabbed Rashidkhan. Mehmoodkhan tried to go to the rescue of Rashidkhan. Sunder Anna grappled with Mehmoodkhan. Accused Nos. 3, 4 and 6 started beating Mehmoodkhan. Accused No. 3 gave a blow with a pipe to Rashid on the face and Phelwan gave a fatal blow on the back.

8. Counsel on behalf of the appellant contended that the evidence that the appellant shouted 'maro, maro' was not free from doubt. It was also emphasised that assuming that the appellant was present, he did not carry any weapon and arms and he had no motive and on the facts it could not be said that between accused No. 1 and accused No. 5 there was any prior meeting for a pre-conceived plan and therefore there was no common intention. Counsel for the appellant relied on the decision of this Court in Pandurang, Tukia and Bhillia v. The State of Hyderabad, (1955) 1 SCR 1083 = (AIR 1955 SC 216) in support of the proposition that care should be taken not to confuse same or similar intention with common intention and the common intention required a pre-arranged plan and therefore there must be a prior meeting of minds. That statement of law is indisputable. The evidence found by the High Court is that Rashidkhan and Mehmoodkhan were assaulted at a place which was a narrow open space surrounded by huts on all sides in the colony except for the two small openings in the east and the west. The attack on Rashidkhan was not unpremeditated. The suddenness is accentuated by the shout given by the appellant. The ghastly attack in the narrow space could not by combination of circumstances be preceded by any commotion.

9. As to the appellant there is the consistent testimony of each of the eye-witnesses that the incident commenced with the appellant shouting 'maro, maro'. There is evidence to show that accused No. 1 was armed with a knife and the lead which accused No. 5, the appellant gave establishes that accused No. 1 should com-

mence the attack on Rashidkhan with a knife. The result is that accused No. 5, the appellant, shared in intention of accused Nos. 1 and 2 to commit the murder of Rashidkhan.

10. Accused Nos. 3 and 6 did not take any part in the assault on Rashidkhan and they in fact had gone to the scene of offence after the assault on Rashidkhan had commenced.

11. Accused No. 5 gave an alibi that he was treated as an out-door patient from 14 August, 1965 at Dr. K. C. Shah's Hospital. The trial Court rejected the evidence of Dr. Shah and found that the doctor's record was unworthy of credence.

12. The appellant, it is true, was not armed with any weapon. The witnesses spoke of the shout given by accused No. 5, the appellant. At the time the police Sub-Inspector went to the place of occurrence the names of accused Nos. 1 and 2 and of the two absconding accused were mentioned. The High Court acquitted accused No. 4 on the ground that three out of the four eye-witnesses did not refer either to the presence or participation of accused No. 4 and therefore accused No. 4 was given the benefit of doubt. As to accused Nos. 3 and 6 the High Court held that they were members of an unlawful assembly, because there was evidence to show that these two accused came on the scene after the attack on Rashid had commenced and therefore it could not be said that they were members of an unlawful assembly with the common intention to commit the murder of Rashidkhan. As to accused Nos. 1, 2 and 5 the High Court found that they were members of an unlawful assembly with the common intention to commit the murder of Rashidkhan. The shout of accused No. 5, the appellant established beyond any doubt that he shared the common intention to commit the murder of Rashidkhan. The judgment of the High Court is correct.

13. There is no merit in this appeal. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1115

(V 58 C 227)

(From: Calcutta)*

**C. A. VAIDIALINGAM AND
A. N. RAY, JJ.**

The Assistant Registrar of Companies, West Bengal, Calcutta (In all the Appeals), Appellant v. Standard Paint Works (Pvt.) Ltd. and others, etc., Respondents.

Criminal Appeals Nos. 248 to 251 of 1968, D/- 1-3-1971.

(A) Criminal P. C. (1898), Section 417 (3) and (4) — An appeal filed under Section 417 (3) against an acquittal on a complaint by Assistant Registrar of Companies for non-compliance with provisions of the Companies Act, without obtaining special leave within time prescribed by Section 417 (4) is incompetent and barred by limitation — (X-Ref: — Limitation Act (1963), Article 114). (Para 11)

(B) Companies Act (1956), Section 624-B — An appeal against order of criminal Court passed in trial of offence under the Companies Act is governed by the Criminal P. C. and not by Section 624-B of the Act which only empowers the Central Government to present appeals through persons mentioned therein. (Para 10)

Dr. L. M. Singhvi, Sr. Advocate, (Mr. S. P. Nayar, Advocate, with him), for Appellant (In all the Appeals).

The following Judgment of the Court was delivered by

RAY, J.: — These appeals are by certificate from the judgment dated 13 August, 1968 of the High Court at Calcutta holding that the memorandum of appeals from an order of acquittal were barred by Article 114 of the Limitation Act, 1963.

2. The appeals were directed against orders of acquittal passed by the Presidency Magistrate, Calcutta on 4 April, 1968. The four petitions of appeal were presented in the High Court on 1 July, 1968 by the learned Advocate authorised by the Vakalatnama executed by the Assistant Registrar of Companies, West Bengal described as the appellant in all the petitions.

3. The Assistant Registrar of Companies, West Bengal filed peti-

*(Cri. Appls. Nos. 425 to 428 of 1968, D/- 13-8-1968 — Cal.)

CO/CO/B231/71/MVJ/P

tions of complaint before the Chief Presidency Magistrate, Calcutta alleging that the certain officers/directors of the Standard Paint Works (P) Ltd. of 44 Beadon Row, Calcutta mentioned therein were guilty of offence for non-compliance with provisions contained in the Companies Act, 1956 by reason of default in filing Annual Return of the Company together with the Annual Accounts and Balance sheet. Section 210 of the Companies Act requires annual accounts and balance sheet of the Company to be filed within the time mentioned in the section. If any person being a director of the company fails to take all reasonable steps to comply with the provisions of Section 210, he shall, in respect of each offence, be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both. The complainant in filing the petitions of complaint prayed for exemption of personal appearance under proviso to Section 247 of the Code of Criminal Procedure read with Section 621 (1-A) of the Companies Act.

4. The Presidency Magistrate passed the orders of acquittal in all the cases.

5. Section 417 of the Code of Criminal Procedure speaks of appeal in case of acquittal. Sub-section (3) of that section is as follows:—

"If such an order of acquittal is passed in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grants special leave to appeal from the order of acquittal, the complainant may present such an appeal to the High Court".

6. Section 417 (4) of the Code of Criminal Procedure states that no application under sub-section (3) for grant of special leave to appeal from an order of acquittal shall be entertained by the High Court after the expiry of 60 days from the date of the order of acquittal. No application was made to the High Court in compliance with Section 417 (3) of the Code of Criminal Procedure.

7. On behalf of the appellant it was contended both in the High Court and in this Court that the appeals were preferred under Section 624-B of the Companies Act, 1956. Section 624-B is as follows:—

"Notwithstanding anything contained in the Code of Criminal Procedure, 1898, the Central Government may, in any case arising out of this Act, direct any company prosecutor or authorise any other person either by name or by virtue of his office, to present an appeal from an order of acquittal passed by any Court other than a High Court and an appeal presented by such prosecutor or other person shall be deemed to have been validly presented to the appellate Court".

8. The contention on behalf of the appellant that the right of appeal is conferred by Section 624-B of the Companies Act is unacceptable. Section 624-B only speaks of the Central Government directing or authorising any person to present an appeal from the order of acquittal.

9. Section 417 (1) of the Code of Criminal Procedure enacts that in case of acquittal the State Government may direct the Public Prosecutor to present an appeal to the High Court. Section 624-B of the Companies Act empowers the Central Government to present appeals through persons mentioned in that section. Presentation of appeal by the Central Government is a similar provision to Section 417 (1) of the Code of Criminal Procedure.

10. Chapter XXXI of the Code of Criminal Procedure relates to appeals. Appeal is a creature of statute. The right to appeal is governed by the Code of Criminal Procedure. Section 404 of the Code of Criminal Procedure states that no appeal shall lie from any judgment or order of a Criminal Court except as provided for by the Code of Criminal Procedure or by any other law for the time being in force. Section 624-B of the Companies Act does not confer any right of appeal from any order passed by a Criminal Court in respect of any offence under the provisions of the Companies Act. The right to appeal to the High Court in the present cases of acquittal is governed by section 417 of the Code of Criminal Procedure.

11. Article 114 of the Limitation Act, 1963 requires appeal under subsection (3) of section 417 of the Code of Criminal Procedure to be filed within 30 days from the date of the grant of special leave. No application for the grant of special leave to appeal from an order of acquittal was made within 60 days from that order of

acquittal. The orders of acquittal were passed on 4 April, 1968. The petitions of appeal were presented on 1 July, 1968. The appeals were rightly not entertained by the High Court because first there was no application for grant of special leave under section 417 (3) of the Code of Criminal Procedure; secondly, the appeals were incompetent without grant of special leave, and thirdly these were barred by limitation. An appeal under Section 417 (3) against acquittal is competent only when there is special leave granted by the High Court. On obtaining special leave the appeal is thereafter filed within 30 days of the grant of leave to escape the mischief of the period of limitation under Article 114 of the Limitation Act, 1963.

12. A provision in the Companies Act which confers right of appeal is Section 483. It speaks of appeals from orders made and the decisions given in the matter of winding up of the companies by the Court and it enacts that such appeals shall lie to the same Court to which, in the same manner in which, and subject to the same conditions under which, appeals lie from any order or decision of the Court in cases within its ordinary jurisdiction. Section 624-B is not such a section which can be said to be conferring a right of appeal. Section 624-B only mentions as to the person through whom appeal is presented.

13. The appeals therefore fail and are dismissed.

Appeals dismissed.

AIR 1971 SUPREME COURT 1116
(V 58 C 228)

(From: Rajasthan)*

C. A. VAIDIALINGAM AND
A. N. RAY, JJ.

Bansi Lal, Appellant v. The State of Rajasthan, Respondent.

Criminal Appeal No. 254 of 1968,
D/- 18-3-1971.

Criminal P. C. (1898), Section 288
— Evidence given in committal Court by a witness who resiled from it in the trial Court can be treated as substantive under Section 288 and can be

*[Criminal Appeal No. 394 of 1964, D/- 7-8-1968 — Raj.]

DO/DO/B392/71/GKC/P

acted upon if it is corroborated by independent evidence. (Para 14)

M/s. Naunit Lal and S. K. Handi, Advocates, for Appellant; Mr. K. B. Mehra, Advocate, for Respondent.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: — This appeal by the accused, by special leave, is directed against the judgment and order of the Rajasthan High Court dated August 7, 1968 in D. B. Criminal Appeal No. 394 of 1964.

2. The appellant was tried in Sessions Case No. 4 of 1963 by the Addl. Sessions Judge, Ajmer for an offence under Section 302, I. P. C. for causing the death of his brother Bajrang Lal on July 15, 1962. The Sessions Judge acquitted the appellant by his judgment and order dated January 4, 1964. The State filed an appeal before the High Court against the decision of the Sessions Judge. The High Court has set aside the order of acquittal and in turn has convicted the appellant for the offence under Section 302, I. P. C. and has sentenced him to undergo imprisonment for life. The case of the prosecution was as follows:

3. The appellant and his three brothers Bhanwarlal, Uchhablal and Bajrang Lal owned jointly 14 bighas of land as joint family property. Bhanwarlal had died some 15 or 16 years before the occurrence. There was a dispute between the appellant and his two brothers Uchhablal and Bajranglal and the heirs of his deceased brother Bhanwarlal on the question of effecting partition of the land. About three or four years prior to the occurrence Uchhablal and his brother Bajranglal along with one Hiralal son of their brother Bhanwarlal had filed a suit against the appellant for partition of the land. About two or three days prior to the occurrence, deceased Bajranglal and Uchhablal had commenced putting up the Doli enclosing that portion of the land which, according to them, represented their shares. On the day of the occurrence i. e., July 15, 1962, at about 3 P. M. the deceased and Uchhablal as usual went to the field to complete the work of putting up the Doli. When they were at their work, the appellant came to the field at about 6 P. M. armed with a gun and after threatening them fired a shot against Bajranglal. The shot hit

Bajranglal on his chest and he fell down dead. When Uchhablal tried to snatch the gun from the appellant, the latter gave him some blows on his knee and back with the barrel of the gun. During this scuffle the genti which Uchhablal had in his hand hit the head of the accused. Uchhablal, on the same evening at about 6.45 P. M., gave a complaint Ex. P. 1 before the police. The accused was arrested the next day and the gun Ex. 13 was recovered from him.

4. P. W. 15, Dr. Umed Singh Rathore, who performed the post-mortem on the body of the deceased found the following external and internal injuries, described in the post-mortem certificate:

(a) External injuries:

(1) A punched circular wound of the size of $\frac{1}{2}$ "x $\frac{1}{2}$ "x5" depth with inverted ecchymosed edges placed on the chest left side between 3 and 4 ribs 2" from the midsternal line directed towards back.

(2) An oval oblique wound of the size of $\frac{1}{2}$ "x2/3" with everted and irregular edges on back left side 3" from the middle at the level of the 7th spine.

(b) Internal injuries:

(1) 8th rib fractured on left side back with irregular rough and crushed fractured ends. A few pieces of bones weeded in the wound.

(2) Pleura on left side torn with a circular wound.

(3) A circular wound hole in the left lung upper lobe anterior aspect with direction behind. Diameter of the hole 1".

5. P. W. 15 has given evidence to the effect that the cause of death was syncope due to injury to the left lung by a fire arm. The appellant was also examined by P. W. 15 on the same evening. The appellant had a lacerated wound with irregular and contused borders and bleeding on touching placed vertically on the back of the hand on the occipital region, right side 3 inches from the right mastoid. The size of the injury was stated to be $1\frac{1}{2}$ "x1/5"x1/3". Uchhablal was also examined on the same day by P. W. 15. He had two contusions, three abrasions and a linear scratch. One abrasion and one contusion was on the back and one abrasion was on the left scapular region and one abrasion was on the left knee.

6. The prosecution mainly relied on the evidence of Uchhablal, P. W. 1 and Narain P. W. 2 regarding the incident. The appellant when he was examined under Section 342 Code of Criminal Procedure pleaded that the land had been given by his father as his share as he had taken over the liability to discharge the entire debts of his father. He further stated that he had gone to the jungle with his gun for hunting and was returning home on the evening of the day in question. His land was on his way to his house from the jungle. When he came near the land he found his two brothers, the deceased and P. W. 1, constructing the Doli on his field. He questioned them as to why they were doing an illegal act, when the matter was before the Court. But his two brothers protested against his interference and P. W. 1 caught hold of him, with the gun. The deceased then gave a blow with the genti on his head. The deceased also caught hold of the barrel of the gun which was in his hand and tried to snatch it away. During this attempt made by the deceased, the appellant pulled the gun towards him and the gun went off and hit the deceased on his chest and the latter fell down and died on the spot. The appellant admitted that the police recovered the gun Ex. 13 from him and also the shirt and bandi. He also examined two witnesses to prove that there was no enmity between him and the deceased. Therefore, it will be noted that the plea of the accused was that he did not shoot the deceased, but, on the other hand Bajranglal died receiving a gun shot injury by the gun going off accidentally. As the presence of the appellant near the field at the time of the incident, as also the fact that Bajranglal died as a result of the injuries sustained by him by the gun shot, are admitted by the appellant, it is not necessary to refer to the various items of evidence led by the prosecution in this regard.

7. The learned Sessions Judge did not believe the evidence of P. W. 2 and it is also seen that even before the High Court the State did not place any reliance on his evidence and it was conceded that P. W. 2 had not actually seen the occurrence. Therefore, the main evidence relating to the actual occurrence was that of P. W. 1. He was examined on April 8, 1963. In his examination-in-chief he supported

the prosecution in full and also admitted that the facts mentioned in Ex. P. 1 were true. It may be stated at this stage that P. W. 1's evidence in examination-in-chief relating to the incident was in accordance with the facts mentioned in Ex. P. 1. On the same day he was cross-examined for some time. But when the cross-examination continued on the next day, that is, on April 9, 1963, he completely went back upon the evidence given in examination-in-chief. On the other hand, he gave a version to the effect that the appellant did not intentionally shoot Bajranglal and that the latter sustained the injury in consequence of the gun going off by accident. In fact he has also stated that when the accused protested against the Doli being constructed, Bajranglal began to beat the appellant with a genti and tried to snatch the gun from the appellant. It was when Bajranglal attempted to snatch the gun that it went off accidentally causing an injury to the deceased.

8. The learned Sessions Judge was of the opinion that as P. W. 1 in his cross-examination has totally supported the appellant and as there was no other independent evidence against the appellant, it was unsafe to act on the testimony of P. W. 1 and convict the appellant. The learned Sessions Judge was also of the view that the defence story cannot be ruled out as improbable in the circumstances. For these reasons, the learned Sessions Judge acquitted the appellant.

9. On appeal by the State, the High Court set aside the order of acquittal. The High Court in the main has acted on the facts contained in Ex. P. 1 evidence given by P. W. 1, before the committal Court Ex. P. 7, treating the same as substantive evidence under Section 288 of the Code of Criminal Procedure and the answers given in the chief examination by P. W. 1. The High Court is of the view that P. W. 1, has been won over by the appellant and the answers given in cross-examination with a view to support the appellant are false. In order to act on the answers given by P. W. 1 in his chief examination, it found corroboration in Ex. P. 1, Ex. P. 7 and Ex. P. 28, the report of the ballistic expert. As the report Ex. P. 28 was already before the Court, the High Court examined the ballistic expert as Court Witness No. 1, in

to clarify the position whether the gun could have gone off accidentally as pleaded by the appellant and supported by P. W. 1 in his answers given in cross-examination. C. W. 1 was examined in the presence of the appellant and the latter was given a full opportunity to cross-examine him. From the evidence of C. W. 1 read with his report Ex. P. 28, the High Court is of the view that the plea of the accused that the deceased sustained the injury by the gun going off accidentally is improbable. Even in respect of treating Ex. P. 7 as substantive evidence, the High Court examined P. W. 1 and also provided the appellant an opportunity to cross-examine the said witness again.

10. On a review of the entire evidence on record, the High Court came to the conclusion that the deceased was shot at by the appellant with an intention to kill him and the injury sustained by the appellant was at the hands of P. W. 1 after the shooting incident. The plea of the appellant that the gun went off accidentally, in consequence of which Bajranglal sustained an injury and died was rejected by the High Court. In the end the High Court convicted the appellant of the offence under Section 302 and sentenced him to undergo imprisonment for life.

11. Mr. Naunit Lal, learned counsel for the appellant, has raised in the main three contentions: (1) the High Court was not justified in treating Ex. P. 7 as substantive evidence and by doing so the High Court has really filled up the lacuna in the case of the prosecution; (2) the High Court has erred in basing the conviction on the sole testimony of P. W. 1, who had given conflicting versions in his examination-in-chief and cross-examination, especially when there was no independent evidence to corroborate his evidence given in chief-examination; and (3) the plea of the appellant regarding the circumstances under which Bajranglal sustained the injury ought to have been accepted.

12. Mr. K. B. Mehta, learned counsel for the State, on the other hand, supported the reasons given by the High Court in reversing the order of acquittal.

13. All the contentions of Mr. Naunit Lal can be dealt with together. In our opinion, the High Court was

justified in treating Ex. P. 7 as substantive evidence under Section 288, Criminal P. C. and in doing so there was no question of the Court trying to fill up any lacuna in the case of the prosecution, P. W. 1, in the complaint Ex. P. 1, given immediately after the incident, had categorically stated that on the day in question he and the deceased were putting up the Doli when the accused came armed with a gun and found fault with them and said "beware I am giving you the share of the land". So saying he fired the gun at Bajranglal from a distance of about 10 or 12 feet. Bajranglal on receiving the gun shot on his chest fell down dead. The witness ran to snatch the gun from the appellant when the latter gave him some blows with the barrel of the gun. The genti in the hand of the witness slipped at that time and fell on the head of the accused. From this it is clear that the deceased never grappled with the appellant and he was the victim of shooting by the appellant. The injury received on the head of the appellant was sustained by the genti of P. W. 1 falling on the head of the appellant and this happened after Bajranglal had been shot dead. The same version was spoken to by P. W. 1, before the committal Court, which had been marked as Ex. P. 7. P. W. 1 had admitted that Ex. P. 1 was given by him voluntarily and that he signed it after it was read over to him by the police and there was no compulsion exercised by the police at that stage. Regarding Ex. P. 7, in his chief examination he had stated that he had given such a statement before the committal Court, but in cross-examination he explained it by saying that he was compelled to give such a statement by the police. In the chief-examination before the Court, when he was examined on April 8, 1963, he gave the same version as that contained in Ex. P. 1 and Ex. P. 7, but when his cross-examination took place, on the next day, he began to give answers in favour of the appellant making it appear that the appellant was not aggressive and that in the scuffle that took place, between the deceased and the appellant, the gun went off accidentally. In fact he has also stated that when the appellant protested against the putting up of the Doli, the deceased hit the appellant on his head with the genti.

14. Ex. P. 7 was already in evidence before the Magistrate and normally that statement should have been treated even by that Court as substantive evidence under Section 288, Criminal P. C. In fact he has been examined and cross-examined about Ex. P. 7 even during the trial. Therefore, the High Court did not do anything to fill up any lacuna in the prosecution case. On the other hand, to complete the record and to enable it to act on Ex. P. 7 by treating it as substantive evidence, it passed orders to that effect and examined P. W. 1 and gave an opportunity to the appellant to cross-examine the said witness. Therefore, there is nothing illegal or irregular in the High Court taking action under Section 288, Criminal P. C. and treating Ex. P. 7 as substantive evidence.

15. The report of the ballistic expert Ex. 28 was already before the Court and the High Court was justified in examining the ballistic expert as Court witness No. 1. The object of examining him was to ascertain whether it was probable for the gun to have gone off accidentally as pleaded by the appellant. The ballistic expert was examined in the presence of the appellant and an opportunity was given to him to cross-examine the said witness. In fact if that evidence had in any manner supported the plea of the appellant, we dare say the High Court would have given due consideration regarding the plea raised by the appellant in that regard. On the other hand, the evidence of C. W. 1 was that the gun could not have gone off accidentally and he has given very good reasons for his opinion. It is also in evidence that there was no blackening and charring near the wound sustained by the deceased. From all these circumstances, C. W. 1 has stated that the gun should have been fired from a distance of more than 5 or 6 feet, which makes the plea of tussle between the appellant and the deceased, as highly improbable. In fact the evidence that the gun must have been fired more than four or five feet from the target is also supported by the statement of P. W. 1 in Ex. P. 1, Ex. P. 7 and in his chief examination that the appellant fired the gun at Bajranglal when he was about 10 feet away from him.

16. The injuries sustained by P. W. 1 and the nature of injury sus-

tained by the appellant also corroborate the original version given by P. W. 1 in Ex. P. 1. That he had turned hostile to the prosecution with an attempt to support his brother is evident from the fact that he completely resiled from the statement made in Ex. P. 1 and Ex. P. 7 and in his chief examination. It is no doubt true that the evidence of such a witness like P. W. 1 has to be treated with caution, but it is not as if that the High Court has merely acted on the answers given by him in his chief examination. On the other hand, the High Court has taken care to see whether there is other independent corroboration to enable the Court to act on the answers given by P. W. 1 in his chief examination. Such corroboration, the High Court found in Ex. P. 1, Ex. P. 7 and Ex. P. 28, as well as the evidence of the ballistic expert, C. W. 1. If these items of evidence are accepted, it is clear that the shooting by the appellant was intentional and that he had no right of private defence as the injury in his head had been sustained by him not at the hands of the deceased but at the hands of his other brother P. W. 1, after the said incident was over. It follows that the plea of the appellant regarding the deceased having sustained the injury by the gun going off accidentally, is absolutely false. We do not see any error in the approach made by the High Court in setting aside the order of acquittal.

17. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1120
(V 58 C 229)

(From Rajasthan: AIR 1969 Raj 115)
C. A. VAIDIALINGAM AND A. N.
RAY, JJ.

Lt. Col. S. K. Kashyap and another, Appellants v. State of Rajasthan, Respondent.

Criminal Appeal No. 241 of 1968,
D/- 2-3-1971.

(A) Army Act (1950), Section 126
— Where in prosecution of certain army officers along with certain civilians before Special Judge on charges of conspiracy and corruption the Officer Commanding suggested institu-

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tion of Court Martial proceedings after expiry of period of limitation as prescribed under Section 122, Special Judge was not unjustified in asking Officer Commanding to make reference to Central Government for determination as to Court before which proceedings would be started — (X-Ref.: Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952), Rule 8). (Paras 12, 13, 16, 21)

(B) Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952), Rule 9 — Where in prosecution of army officers along with civilians on charges of conspiracy and corruption the Officer Commanding informed Special Judge that Court Martial proceeding would not be instituted and military authorities never asked Criminal Court for delivery of army officers to them, the only conclusion could be that the Officer Commanding formed opinion that accused army officers should be tried by Criminal Court — Hence there was no conflict of jurisdiction of Criminal Court and Court Martial to try the case. (Paras 16, 18, 19, 21)

(C) Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules (1952), Rule 5 — Fact that Officer Commanding exercised discretion under Rule 5 by communicating Criminal Court that accused army officers should be tried by Court Martial does not debar him from cancelling the said communication if after consideration of facts and circumstances he finds that Court Martial proceedings should not be instituted. (Paras 22, 23)

(D) Criminal Law Amendment (Amending) Act (22 of 1966), S. 5 — Word "pending" means that matter is not concluded and Court having cognizance of it can make order on matter in issue — (X-Ref.: Words and Phrases — Pending). AIR 1957 SC 503, Applied. (Para 25)

(E) Criminal Law Amendment (Amending) Act (22 of 1966), S. 5 (1) (a) — In order that case be pending or 30-6-1966 within S. 5 (1) (a) charges against accused need not have been actually framed — Distinction between Cl. (a) and Clause (b) of Section 5 (1) pointed — (X-Ref.: Criminal P. C. (1898), Sections 251-A, 252, 253). (Para 26)

Provision that Magistrate may discharge accused where charge against accused appears to be ground-

less indicates that words "charged with" cannot mean framing of charge against accused. (Paras 27, 29)

Cases Referred: Chronological Paras

(1971) AIR 1971 SC 500 (V 58)	
= Cri. Appl. No. 34 of 1969,	
D/- 30-11-1970, Joginder Singh	
v. State of Himachal Pradesh	20
(1969) AIR 1969 SC 414 (V 56)	
= (1969) 2 SCR 177, Som Datt	
Datta v. Union of India	18
(1965) AIR 1965 SC 247 (V 52)	
= (1964) 5 SCR 931, Ram Sarup	
v. The Union of India	17
(1961) AIR 1961 SC 1762 (V 48)	
= (1962) 2 SCR 195, Barsay	
K. G. v. State of Bombay	20
(1957) AIR 1957 SC 503 (V 44)	
= 1957 SCR 678, Asgarali	
Nazarali Singaporewala v. State	
of Bombay	25

Mr. S. V. Gupte, Sr. Advocate, (Mr. D. P. Singh, Advocate of M/s. Ramamurthi and Co. and M/s. R. K. Jain and V. J. Francis, Advocates, with him), for Appellants; Mr. Debabrata Mukherjee, Sr. Advocate, (Mr. R. N. Sachthey, Advocate, with him), for Respondent.

The following Judgment of the Court was delivered by

RAY, J.: — This is an appeal by special leave against the order and judgment dated 9, September, 1968 of the High Court of Rajasthan.

2. The question for consideration is whether the Additional Special Judge, Rajasthan, Jaipur could proceed with the trial of Criminal Case No. 2/68/Spl. Cr. as directed by the order of the High Court. That case was initiated under a sanction accorded by the Central Government under Section 197 of the Code of Criminal Procedure and Section 6 (1) (a) of the Prevention of Corruption Act and the appellants along with four civilians were charged with offences punishable under Sections 120-B, 161, 165-A, 420, 409 and 467-A of the Indian Penal Code and Section 5 (2) of the Prevention of Corruption Act read with Sections 5 (1) (a) and 5 (1) (d) of the Prevention of Corruption Act.

3. The Special Police Establishment, Jaipur Branch on 27 January, 1966 put up before the Special Judge, Jaipur a charge-sheet against the four appellants and four civilians. One of the civilians turned approver. The four appellants thereafter made an application on 13 September, 1966

before the Special Judge that they were Commissioned Officers of the Indian Army and without complying with the provisions of Section 549 of the Code of Criminal Procedure and the Rules thereunder called the "Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules", the Special Judge could not proceed against the appellants in the criminal Court which under the Army Act is described as a civil Court as opposed to Court-martial under the Army Acts. The Special Judge rejected that application on 10 October, 1966 and ordered that the case would be put up for further proceedings on 16 January, 1967. A revision application was thereafter moved in the Rajasthan High Court. The High Court of Rajasthan by order and judgment dated 20 December, 1966 said that the Special Judge would proceed in accordance with the provisions of Rules 3 and 4 of the Rules framed under Section 549 of the Code of Criminal Procedure.

4. In compliance with the aforesaid order of the High Court, the Special Judge on 12 January, 1967 gave notice to the Commanding Officer, 123 Infantry Battalion (T. A.), Jaipur notifying under Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 that the appellants along with three civilians were charged with the offences as indicated above and charges would be "framed against the accused after the expiry of a period of seven days from the date of the service of the notice". On 16 January, 1967 the Officer Commanding wrote to the Special Judge for Rajasthan that in exercise of the powers conferred upon him by Rule 5 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 the Officer Commanding gave notice that the four Officers meaning thereby the appellants belonged to his Unit and that the appellants would be tried by Court Martial under the Army Act, 1950 for the offences alleged to have been committed by them as set out in the notice of the Special Judge and that the Court of the Special Judge was requested to stay the proceedings against the four appellants with immediate effect. The letter concluded by stating that the four appellants might be delivered immediately to Major R. N. Kesar who was carrying

the notice to be handed over to the Court by hand.

5. On 17 January, 1967 the State of Rajasthan made an application before the Special Judge that under Section 122 of the Army Act, 1950 a period of three years was provided after which no Court Martial proceedings could be commenced against the Army Officers and the period of limitation was to be computed from the date of such offence. The charges of conspiracy and corruption against the appellants were alleged to have been committed in the month of December, 1962 and the end of the year 1963 and as such, according to the State of Rajasthan, the limitation for the purpose of Court Martial expired with the close of the year, 1966. The State of Rajasthan submitted that the Special Judge took cognizance of the case on the basis of sanction granted by the Central Government and there were two orders one from the highest authority of the Government, namely, the President of India sanctioning the prosecution of the appellants by a competent criminal Court and the other by an Officer Commanding for holding a Court Martial and therefore the matter might be referred to the Central Government for clarification. The Special Judge on 17 January, 1967 held that along with the appellants three civilians were charged with the commission of offence and they could not be tried by Court Martial. The Special Judge requested the Commanding Officer to make a reference to the Central Government within seven days failing which the Special Judge would make a reference to the Central Government. The Special Judge did not deliver the four appellants to the Commanding Officer.

6. On 28 January, 1967 the Officer Commanding, 123 Infantry Battalion (T. A.), Jaipur wrote to the Special Judge that the notice under Rule 5 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 served by the Officer on the Special Judge by letter dated 16 January, 1967 might be treated as cancelled.

7. On 21 March, 1968 the appellants made an application before the Additional Special Judge, Jaipur that the Commanding Officer acted illegally and without jurisdiction in

cancelling the earlier notice dated 16 January, 1967 and the Commanding Officer should have made a reference to the Chief of the Army Staff. The appellants prayed that they might be handed over to the Commanding Officer in terms of the letter dated 17 January, 1967 issued by the Commanding Officer asking the Special Judge to deliver the appellants to the Army authorities. On 5 April, 1968 the Additional Special Judge held that the Officer Commanding revised his discretion and intimated by letter dated 28 January, 1967 that the earlier notice dated 16 January, 1967 issued under Rule 5 requiring delivery of the appellants to the Army authorities for trial by Court Martial was cancelled and therefore the Special Judge would try the case and not deliver the appellants to the army authorities.

8. The appellants thereafter made an application to the High Court of Rajasthan under Section 435 read with Section 561-A of the Code of Criminal Procedure for quashing the proceedings before the Additional Special Judge and for directing the Special Judge to hand over the appellants to be tried by Court Martial. The High Court by order dated 9-9-1969* dismissed the revision application and directed the Special Judge, Rajasthan to conduct the trial expeditiously, because sufficient time had elapsed since the submission of the charge-sheet by the Special Police Establishment Branch, Jaipur.

9. Counsel on behalf of the appellants contended that the order of the High Court was wrong for 3 reasons: First, that the Special Judge having issued a notice on 12 January, 1967 under Rule 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 to the Officer Commanding and having received a reply dated 16 January, 1967 from the Officer, the Special Judge had no jurisdiction to deal with an application of the State made on 17 January, 1967 and pass an order on 17 January, 1967 on the stay application that the Commanding Officer should make a reference to the Central Government. The second contention was that the Commanding Officer had no power to cancel the intimation dated 16 January, 1967 by the subsequent letter dated 28 January, 1967.

Thirdly, it was said that the sanction for prosecution accorded by the Central Government had no relevance to Section 549 of the Code of Criminal Procedure read with the Rules.

10. Counsel on behalf of the respondent on the other hand contended that the Officer Commanding by letter dated 28 January, 1967 cancelled the earlier notice dated 16 January, 1967 with the result that no Court Martial proceeding was to be commenced against the appellants. It was said on behalf of the respondent that the competent military authority had power and jurisdiction to cancel the letter dated 16 January, 1967. Secondly, it was said that the Special Judge had jurisdiction and authority to try and dispose of the case which was pending on 30 June, 1966 in the Criminal Court by virtue of the provisions contained in the Criminal Law Amendment (Amending) Act, 1966. The third contention was that the Special Judge was justified in making an order on 17 January, 1967 requesting the competent military authority to make a reference to the Central Government failing which the Special Judge would make a reference to the Central Government.

11. In order to appreciate the rival contentions reference has to be made to Sections 125 and 126 of the Army Act and Rules 3 to 9 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 made by the Central Government in exercise of the powers under Section 549 of the Code of Criminal Procedure.

12. Sections 125 and 126 of the Army Act are framed for the purpose of ensuring that there is no conflict between the criminal Court and the Court Martial. Section 125 confers discretion on the Officer Commanding of the army corps, division or brigade in which the accused is serving to decide before which Court the proceedings shall be instituted in respect of an offence alleged to be committed by the accused. If the decision will be for institution of proceedings before the Court Martial direction is given for detention of the accused in military custody. Section 126 provides that where a criminal Court having jurisdiction is of opinion that proceedings shall be instituted before it in respect of any alleged offence, the criminal Court, may require the Offi-

*Reported in AIR 1969 Raj 115.

cer Commanding mentioned in Section 125 of the Army Act either to deliver the offender to the Magistrate or to postpone proceedings pending a reference to the Central Government. Section 126 (2) of the Army Act provides that the Officer Commanding shall either deliver the offender to the Magistrate or shall refer the question to the Central Government whose order upon such reference shall be final. These two sections of the Army Act do not leave any room for doubt that if after commencement of Court Martial proceedings the ordinary criminal Court intends to proceed against an accused who is subject to the control of the Army Act, the criminal Court will have to adopt either of the two courses mentioned. The order of the Central Government shall be final in cases of reference by the criminal Court to the Government.

13. In the present case, there was in the beginning suggestion by the Officer Commanding of institution of Court Martial proceedings. When the Special Judge found on the application made by the State on 17 January, 1967 that Section 122 of the Army Act raised the bar of limitation with regard to initiation of Court Martial proceedings and further found that there were civilians charged along with the appellants, it was not unjustified in asking the Officer Commanding to make a reference to the Government in order to prevent any competition or conflict between the Criminal Courts and Court Martial. On 17 January, 1967 as matters stood, the Special Judge had the intimation from the Officer Commanding that Court Martial proceedings would be instituted. Therefore on a reading of Section 126 of the Army Act the Special Judge requested the Officer Commanding to refer the question to the Central Government for determination as to the Court before which proceedings would be started.

14. Section 549 of the Code of Criminal Procedure empowers the Central Government to make Rules as to the case in which persons subject to military, naval or air-force law be tried by a Court to which the Code of Criminal Procedure applies or by Court Martial. When any such person is brought before the Magistrate and charged with an offence for which he is liable to be tried either by a Court or by Court Martial, the

Magistrate shall have regard to such Rules and shall in appropriate cases deliver him together with the statement of the offence of which he is accused to the Commanding Officer for the purpose of being tried by Court Martial.

15. There are 9 Rules under Section 549 of the Code of Criminal Procedure. These Rules are called Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. Broadly stated, Rules 3 to 9 are as follows. Under Rule 3, (a) a Magistrate may proceed against a person subject to military, naval or air-force laws without being moved by a competent military, naval or air-force authority, or (b) by being moved by such authority. Under R. 4 if the Magistrate is of opinion that he will proceed against such a person without being moved by the competent military, naval or air-force authority, he shall give written notice to the Commanding Officer of the accused and until the expiry of a period of seven days shall not (a) convict or acquit the accused, or (b) hear him in defence or (c) frame in writing a charge, or (d) make an order committing the accused for trial by the High Court or by the Court of Sessions under Section 213 of the Code of Criminal Procedure. Under Rule 5 where within the period of seven days or at any time thereafter before the Magistrate has done any act or issued any order, the Commanding Officer gives notice to the Magistrate that the accused should be tried by Court Martial, the Magistrate shall stay the proceedings and if the accused is in his power or under his control the Magistrate shall deliver him to the relevant authority. Under Rule 6 where a Magistrate has been moved by the competent military, naval or air-force authority under Rule 3 (b) and the Commanding Officer subsequently gives notice to the Magistrate that the accused shall be tried by Court Martial, such Magistrate, if he has not before receiving such notice done any act or issued any order referred to in Rule 4, shall stay proceedings and, if the accused is in his power or under his control, shall deliver him to the relevant authority. Under Rule 7 where an accused person having been delivered by the Magistrate under Rule 5 or 6 is not tried by a Court-martial for the offence of which he is accused, or other effectual

proceedings are not taken against him the Magistrate shall report the circumstance to the State Government which may, in consultation with the Central Government take appropriate steps to ensure that the accused person is dealt with in accordance with law. Under Rule 8, where it comes to the notice of the Magistrate that a person subject to military, naval or air-force law has committed an offence, proceedings in respect of which are instituted before him and that the presence of such a person cannot be procured unless through military, naval or air-force authorities the Magistrate may by a written notice require the Commanding Officer of such person either to deliver such a person to a Magistrate to be named in the said notice for being proceeded against according to law, or to stay the proceedings against such person before the Court-martial if since instituted, and to make a reference to the Central Government for determination as to the Court before which the proceedings should be instituted. Under Rule 9 where a person subject to military, naval or air-force law has committed an offence which in the opinion of the competent military, naval or air-force authority, as the case may be, ought to be tried by a Magistrate in accordance with the civil law in force or where the Central Government has on a reference mentioned in Rule 8, decided that proceedings against such person should be instituted before a Magistrate the Commanding Officer of such person shall after giving a written notice to the Magistrate concerned, deliver such person under proper escort to that Magistrate.

16. These Rules enjoin comity of criminal Courts and Court Martial. Before proceeding against the person subject to military law, the Magistrate is required to give notice to the Commanding Officer. If within the period of seven days or before the Magistrate has done any act or issued any order the Commanding Officer gives notice that the accused should be tried by a Court-martial the criminal Court shall stay proceedings. If thereafter the Court-martial proceeding is not taken the Magistrate may report to the State Government which may in consultation with the Central Government take appropriate steps to ensure that the accused is dealt with in accordance with law. Where it comes

to the notice of the Magistrate that proceedings ought to be instituted before him he may by written notice require the Commanding Officer to deliver the accused to the Magistrate or require the Commanding Officer to stay the Court-Martial proceedings if instituted and to make a reference to the Central Government for determination as to the Court before which the proceedings shall be instituted. Rule 8 again supports the step taken by the Magistrate, in the present case, on 17 January, 1967 when he required the Commanding Officer to make a reference to the Central Government. Under Rule 9 if the relevant authority of the armed forces is of opinion that the Criminal Court ought to try the offender or if the Central Government on a reference to it is of similar opinion the offender is delivered to the Magistrate. Rule 9 is also attracted in the present case by reason of two features, viz., the Officer Commanding on 28 January, 1967 informed that no Court-Martial proceeding would be instituted, and, secondly, the military authorities never asked the criminal Court to deliver the appellants to the military authority. The facts and circumstances indicate that the competent military authority formed the opinion that the appellants should be tried by the Special Court.

17. This Court in the case of *Ram Sarup v. Union of India*, (1964) 5 SCR 931 = (AIR 1965 SC 247) considered the question whether S. 125 of the Army Act could be said to be discriminatory and violative of Article 14 of the Constitution. In that case *Ram Sarup* who was subject to the Army Act was tried by the General Court Martial found guilty and sentenced to death. He then filed a petition under Article 32 of the Constitution for a writ of habeas corpus and a writ of certiorari setting aside the order of the Court Martial and the order of the Central Government. It was contended there that Section 125 of the Army Act left to the unguided discretion of the Officer mentioned in that section to decide whether the accused should be tried by a Court-Martial or by a criminal Court. This Court repelled that contention and held "there is sufficient material in the Act which indicates policy which is to be a guide for exercising discretion and it is expected that the discretion is exercised in accordance

with it. The Magistrate could question it and the Government in case of difference of opinion between the views of the Magistrate and the Army authorities decide the matter finally". In *Ram Sarup's case*, (1964) 5 SCR 931 = (AIR 1965 SC 247) (supra) this Court further examined the meaning of Sections 125 and 126 of the Army Act and Section 549 of the Code of Criminal Procedure and Rules 3 to 9 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952 made under the Code of Criminal Procedure and laid down two propositions: First, if the Magistrate will find that the military authorities do not take effectual proceedings under the Army Act within a reasonable time the Magistrate can report the circumstance to the State Government which may in consultation with the Central Government take appropriate steps to ensure that the accused is dealt with in accordance with law. Secondly, whenever there will be difference of opinion between the criminal Court and the military authorities about the forum where an accused is to be tried for the particular offence committed by him, final choice about the forum of the trial of a person accused of a civil offence meaning thereby an offence triable by criminal Court rests with the Central Government.

18. This Court in the recent decision in *Som Datt Datta v. Union of India*, (1969) 2 SCR 177 = (AIR 1969 SC 414), considered the effect of Rule 3 of the Rules framed under Section 549 of the Code of Criminal Procedure. The petitioner in that case made an application under Article 32 for a writ of certiorari for quashing the proceedings before the Court-Martial whereby he was found guilty of charges under Sections 304 and 149 of the Indian Penal Code and sentenced to 6 years' rigorous imprisonment. The contention in that case was that having regard to the provisions of Section 125 of the Army Act and having further regard to the fact that the Army Officer had in the first instance decided to hand over the matter for investigation to the Civil Police and by reason of absence of notice under Rule 5 of the Rules under Section 549 of the Code of Criminal Procedure that the petitioner should be tried by Court Martial, the criminal Court alone had jurisdiction under Rule 3

to try the petitioner. This Court held that the action of the Officer under Section 125 of the Army Act constituting a Court-Martial indicated that decision was taken under Section 125 of the Army Act for institution of Court-Martial proceedings. Rule 3 was said to be applicable to a case where the Police had completed the investigation and the accused was brought before the Magistrate after submission of the charge-sheet. Rule 3 could not be invoked where the Police merely started investigation. In *Som Datt Datta's case*, (1969) 2 SCR 177 = (AIR 1969 SC 414) (supra) this Court said about Sections 125 and 126 of the Army Act. "These two sections of the Army Act provide a satisfactory machinery to resolve the conflict of jurisdiction having regard to the exigencies of the situation in any particular case". In the present case, the Special Judge gave notice to the Officer Commanding. The Officer Commanding had first said that Court-Martial proceedings would be instituted. The Officer Commanding thereafter cancelled that intimation. There is no further aspect of conflict between the Criminal Court or the Court-Martial in the present case.

19. The appellants contended that they should be delivered to the Army authorities. The Army authorities did not want delivery of the appellants to them for any Court-Martial proceedings. On the contrary, the Army authorities indicated in no uncertain terms that the Special Judge should proceed with the case. When Special Judge asked the Army authorities to make a reference to the Government the Army authorities instead of making a reference to the Government cancelled their first intimation about the institution of Court-Martial proceedings with the result that the Officer Commanding expressed the opinion that the appellants ought to be tried by a Magistrate in accordance with law of the land.

20. This Court in the recent unreported decision in *Joginder Singh v. State of Himachal Pradesh*, Cri. Appl. No. 34 of 1969, D/- 30-11-1970 = (Since reported in AIR 1971 SC 500) considered the question as to whether the trial and conviction by the Assistant Sessions Judge in respect of an offence under Section 376 of the Indian Penal Code violated provisions

of the Army Act read with Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. The contention in that case was that the criminal Court did not follow the provisions contained in Section 126 of the Army Act read with Rules 3 and 4 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1952. It was particularly emphasised in that case that it was for the competent officer to decide in the first instance that the appellant should be tried by Court Martial. This Court referred to the earlier decision of this Court in *Major K. G. Barsar v. State of Bombay*, (1962) 2 SCR 195 = (AIR 1961 SC 1762) for the proposition that there was no exclusion of jurisdiction of the ordinary criminal Courts in respect of offences which are also triable by Court Martial. Sections 125 and 126 of the Army Act leave no doubt in that matter. Rule 3 (a) of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules also indicates that the criminal Court can of its own motion start proceeding against an accused who is subject to the Army Act. The several provisions of the Army Act and the Rules also indicate that the criminal Court is not powerless when it is of opinion that the case should be tried in a criminal Court and in case of conflict between the criminal Court and the Court-Martial the order of the Central Government is final decision as to the forum of trial of the offence. In *Joginder Singh's case*, Cri. Appl. No. 34 of 1969, D/- 30-11-1970 = (Since reported in AIR 1971 SC 500) (supra) this Court examined the Rules and said that the absence of a notice under Rule 4 was not fatal in the facts and circumstances of the case because the competent military authority knowing the nature of the offence released the accused from military custody and handed him over to the civil authorities, and the action amounted to a decision by the military authorities that the accused in that case was to be tried by an ordinary criminal Court and not by Court-Martial.

21. The provisions of the Army Act, the Rules under Section 549 of the Code of Criminal Procedure and the decisions of this Court all support the conclusion that the Special Judge in the present case was justified in asking the Officer Commanding to

make a reference to the Central Government and that the Officer Commanding in the facts and circumstances of the case expressed the opinion that the appellants should be tried by criminal Courts because there would in fact be no Court-Martial proceedings.

22. The contention on behalf of the appellants that the Officer Commanding having once exercised the discretion under Rule 5 could not cancel the discretion is unacceptable. The Officer Commanding upon consideration of facts and circumstances and particularly in the context of the communication of the Special Judge on 17 January, 1968 intimated on 28 January, 1967 that the previous letter dated 16 January, 1967 was cancelled. There are no allegations of mala fide or abuse of power to challenge the propriety of the exercise of power and discretion.

23. The Officer Commanding did not lack authority or jurisdiction to communicate to the Special Judge that Court-Martial proceedings would not be instituted.

24. The Criminal Law Amending Act, 1966 being Act No. 22 of 1966 has an important bearing on the present appeal. Section 5 of Act 22 of 1966 is as follows:—

"(1) Notwithstanding anything contained in this Act or in the principal Act as amended by this Act,—

(a) cases pending immediately before the 30th day of June, 1966, before a Special Judge in which one or more persons subject to military, naval or air-force law is or are charged with and tried for an offence under the principal Act together with any other person or persons not so subject, and

(b) cases pending immediately before the said date before a Special Judge in which one or more persons subject to military, naval or air-force law is or are alone charged with and tried for an offence under the principal Act and charges have already been framed against such person or persons shall be tried and disposed of by the Special Judge.

(2) Where in any case pending immediately before the 30th day of June, 1966, before a Special Judge, one or more persons subject to military, naval

or air-force law is or are alone charged with and tried for an offence under the principal Act and charges have not been framed against such person or persons before the said date, or where, on appeal or on revision against any sentence passed by a Special Judge in any case in which one or more persons so subject was or were alone tried, the appellate Court has directed that such person or persons be retried and on such retrial charges have not been framed against such person or persons before the said date, then, in either case, the Special Judge shall follow the procedure laid down in Section 549 of the Code of Criminal Procedure, 1898, as if Special Judge were a Magistrate".

The question is whether the present appeal relates to a case pending immediately before 30 June, 1966 before a Special Judge within the meaning of Section 5 (1) (a). Sanction was accorded on 29 October, 1965 under Section 197 of the Code of Criminal Procedure. A charge-sheet was submitted before the Special Judge on 27 January, 1966. On 5 March, 1966 the case was adjourned to 4 July, 1966 at the request of the Public Prosecutor for enabling the Public Prosecutor to supply the copies of documents envisaged by Section 173 of the Code of Criminal Procedure. The case was numbered 4/66/Spl. Cr.

25. The word 'pending' came up for consideration before this Court in *Asgarali Nazarali Singaporewalla v. The State of Bombay*, 1957 SCR 678 = (AIR 1957 SC 503). Criminal Law Amendment Act, 1952 provided for the trial of all offences under Sections 161, 165 or 165-A of the Indian Penal Code or sub-sec. (2) of Section 5 of the Prevention of Corruption Act, 1947 exclusively by Special Judges, and directed the transfer of all such trial pending on the date of the coming into force of the Act to Special Judges. The Presidency Magistrate continued the trial and acquitted the appellant. Upon appeal by the State Government the High Court held that from the date of the commencement of the Act the Presidency Magistrate lost all jurisdiction to continue the trial and ordered retrial by the Special Judge. It was contended that on the date of the coming into force of the Criminal Law Amendment Act, 1952, viz., 28 July, 1952, the case was not pending because no Spe-

cial Judge was appointed until 26 September, 1952 and the trial also came to an end on 26 September, 1952. This Court did not accept that contention because the accused was not called upon his defence on 28 July, 1952 and the examination of the accused under Section 342 of the Code of Criminal Procedure took place after that date and the accused filed his written statement on 14 August, 1952 and the addresses by the prosecution as well as the defence continued right up to 26 September, 1952. The word 'pending' will ordinarily mean that the matter is not concluded and the Court which has cognizance of it can make an order on the matter in issue. The test is whether any proceedings can be taken in the cause before the Court or tribunal where it is said to be pending. The answer is that until the case is concluded it is pending. Judged by these tests it will appear that this present appeal relates to a case pending before 30 June, 1966.

26. The next question is as to what meaning should be given to the words "charged with and tried for an offence under the principal Act", occurring in Section 5 (1) (a). Counsel for the appellants contended that the words "charged with and tried for an offence" would mean that charges had been actually framed and trial commenced. There is a distinction between Clauses (a) and (b) of sub-section (1) of Section 5 of Act 22 of 1966. Clause (a) deals with persons who are subject to the military, naval or air-force law being charged with and tried for an offence together with a person or persons not so subject whereas Clause (b) deals only with persons who are subject to military, naval or air-force law. In the present case, the appellants are persons who were subject to military law and they were charged along with civilians. Therefore, Clause (a) is attracted. It is in connection with a case which concerns only persons subject to military, naval or air-force law that under Section 5 (1) (b) it is enacted that a case is not only to be pending before 30 June, 1966 before a Special Judge but that charges should also have been framed against such persons. The absence of framing of charges in Clause (a) and requirement of framing charges in Clause (b) repels the construction suggested by counsel for the appellants that charges should

have been framed in the present case in order to make it a case pending within the meaning of Section 5 (1) (a) of the 1966 Act. The words "charged with and tried for an offence" mean that there are accusations and allegations against the person. The words "charged with" are used in Section 5 (1) (a) in contradistinction to the words "charges have already been framed" in Section 5 (1) (b) of the Act. Therefore, the use of separate words in the two separate Clauses (a) and (b) is significant to indicate that the statute speaks of the words "charged with" in Clause (a) not in the sense of "charges have been framed" in Clause (b). The legislative intent is abundantly clear from the use of separate words.

27. Sections 251, 251-A, 252, 253 and 254 of the Code of Criminal Procedure throw some light as to the meaning to be given to the words "charged with and tried for an offence". In the trial of warrant cases instituted on a police report the Magistrate is to follow the procedure specified in Section 251-A and the present is one such. Section 251-A contemplates that the Magistrate on the commencement of the trial shall satisfy himself that the documents referred to in Section 173 have been furnished to the accused and if he finds that the accused has not been furnished with such documents or any of them he shall cause them to be so furnished. In the present case, it will appear that in the month of March, 1966 the Public Prosecutor made an application to the Special Judge for adjournment of the case till the month of July, 1966 to enable copies of papers to be given to the accused under Section 173 of the Code of Criminal Procedure. Under Section 251-A (2) if, upon consideration of all the documents referred to in Section 173 and making such examination, if any, of the accused as the Magistrate thinks necessary and after giving the prosecution and the accused an opportunity of being heard, the Magistrate considers the charge against the accused to be groundless, he shall discharge him. This provision that the Magistrate may discharge the accused where the charge against the accused appears to be groundless indicates that the words "charged with" cannot be said to mean framing of a charge. It is because the charge or the allegation or accusation against

the accused is groundless that he is discharged.

28. Again, in Section 252 it will appear that the Magistrate in any case instituted otherwise than on a police report shall proceed to hear the complainant and take evidence in support of the prosecution. Under Section 253, if, upon taking the evidence referred to in Section 252, and making such examination of the accused as the Magistrate thinks necessary, he finds that no case against the accused has been made out, the Magistrate shall discharge him. The provisions contained in Sections 252 and 253 are cases where the Magistrate deals with warrant case instituted not on a police report but upon a complaint.

29. These three Sections i.e., Sections 251-A, 252 and 253 indicate that an accused can be discharged by the Magistrate if the charge appears to be groundless. Charge is framed under Section 254 of the Code of Criminal Procedure when the Magistrate upon evidence and examination is of opinion that there is ground for presuming that the accused has committed an offence which the Magistrate is competent to try and which could be ordinarily punished by them that he shall frame in writing a charge against the accused. The charge under Section 255 of the Code of Criminal Procedure is read and explained to the accused and he shall be asked whether he is guilty or has any defence to make.

30. The Special Judge therefore has jurisdiction to try and dispose of the case. It is a case pending before 30 June, 1966 and under Act 22 of 1966 it is to be tried and disposed of by the Magistrate. The letter dated 28 January, 1966 is an additional reason to indicate that the appellants are not required to be delivered to the competent military authorities. It is also in evidence that no Court Martial proceeding is pending and the appellants are to be tried by the Special Judge. The judgment of the High Court is upheld.

31. The appeal therefore fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1130
(V 58 C 230)

(From Bombay: ILR (1969) Bom 484)
G. K. MITTER, K. S. HEGDE AND
P. JAGANMOHAN REDDY, JJ.

Hariyansh Lal Mehra, Appellant
v. The State of Maharashtra, Respondent.

Criminal Appeal No. 80 of 1967,
D/- 19-3-1971.

(A) Constitution of India, Art. 265 — Any customs duty or tax must be sanctioned by law — It cannot be levied on basis of administrative instructions — ILR (1969) Bom 484, Reversed.

(Para 6)

(B) Tariff Act (1934), Section 5 — Notification issued in 1950 declaring Goa to be a foreign territory for purposes of exports from that country to India had no legal effect after Goa became part of India — There was no liability to pay customs duty on transmission of goods by any person from Goa to Bombay after integration of Goa — ILR (1969) Bom 484, Reversed.

(Para 6)

(C) Prevention of Corruption Act (1947), Section 5 (1) (d) — Accused could not be convicted on charge of utilising his official position for sending articles from Goa to Bombay without paying any customs duty after 27-3-1962 because no such duty was leviable after integration of Goa on that date — ILR (1969) Bom 484, Reversed.

(Para 8)

Mr. A. S. R. Chari, Sr. Advocate, (M/s M. J. Mirchandani, K. K. Jain, H. K. Puri and R. Nagratnam Advocates, with him), for Appellant; M/s. P. K. Chatterjee, B. D. Sharma and S. P. Nayar, Advocates, for Respondent.

The following Judgment of the Court was delivered by

HEGDE, J.: — The appellant and one R. B. Mathur were tried before the learned Special Judge for Greater Bombay under various charges including a charge of conspiracy. Mathur was acquitted and the appeal against his acquittal was unsuccessful. The appellant was also acquitted of all charges excepting a charge under Section 5 (2) read with Section 5 (1) (d) of the Prevention of Corruption Act. For that offence he was sentenced to suffer rigorous imprisonment for two years and pay a fine of Rs. 5,000/-, in default to suffer further rigorous

imprisonment for four months. The substance of the charge under which he was convicted is that he by utilising his position as a Government servant sent various articles such as Radios, Transistors, Clothes, etc., from Goa to Bombay without paying customs duty. He was also held guilty of sending his personal articles in the vehicles engaged by the postal department without paying any charge. The trial Court supported its conclusion on a further ground namely that the assets of the appellant were more than that he could have acquired by his known sources of income.

2. The charges framed against the appellant made no reference to the fact that his assets were more than that he could have acquired by his known sources of income. In appeal the learned Judges of the High Court did not go into that aspect of the case. Nor was that aspect of the case pressed before us at the hearing. Therefore it is not necessary to go into that aspect. Even otherwise that accusation appears to be without any solid basis. The learned Judges of the High Court also did not go into the allegation that the appellant utilised his official position in sending his personal goods in the vehicles engaged by the postal department. The accusation is that the appellant sent some of his goods in the vehicles engaged by the postal department from Panjim in Goa to Margoa or Sawanthwadi or Belgaum. These places are not very far from Panjim. The High Court held that the offence committed by the appellant in that regard if true, is of a technical nature and therefore it thought it unnecessary to examine the evidence relating to the same. Evidently in its view the accusation regarding the sending of some articles in the vehicles engaged by the postal department was of a trifling nature and therefore not worth examining. But the High Court agreed with the trial Court that the appellant was guilty of evading payment of customs duty and he did so by utilising his official position. In order to examine the correctness of this finding, it is necessary to set out the material facts.

3. In 1961, the appellant was working as a Senior Superintendent of Post Offices at Jaipur. On December 20, 1961 Goa was liberated by the Indian Army. Thereafter the appellant was deputed as a Special Duty

Officer to Goa. He took charge in Goa on December 25, 1961. He assumed additional charge as Director of Posts and Telegraphs on May 11, 1962 and he held that office till August 11, 1962. Thereafter he went back to Jaipur. It is alleged that during the period of appellant's stay in Goa, he made large purchases of certain luxury articles. Utilising his official position in the Posts and Telegraphs department he transmitted those articles to Bombay where he sold the same at profits. The prosecution relied in support of that charge on four different instances. Voluminous evidence was led in support of the prosecution case. But it is not necessary to go into that evidence as in our opinion the charge under which the appellant was convicted is without any legal basis. The learned Counsel for the appellant, Mr. A. S. R. Chari has assailed the judgments of the High Court and the trial Court on various grounds. He contended that the evidence adduced in support of the prosecution case is unreliable and insufficient to support the conviction of the appellant. He also raised various legal pleas in support of the appeal. He contended that as the Prevention of Corruption Act was not in force in Goa at the relevant time, the appellant could not have been held guilty of an offence under that Act. According to him, the investigation of his case was illegal as the required sanction had not been obtained. But the most important plea taken by him is that no custom duty was leviable on the articles said to have been sent by the appellant from Goa to Bombay and as such the entire fabric of the prosecution case must fall to the ground. There is force in this contention. Hence it is not necessary to examine the other contentions.

4. As mentioned earlier Goa was liberated on December 20, 1961. Twelfth amendment to our Constitution which received the assent of the President on 27th March, 1962 made Goa a part of India. It became a Union Territory. The amendment in question is deemed to have come into force on December 20, 1961. Hence Goa must be considered as a part of India from December 20, 1961 and indisputably at any rate from March 27, 1962. Article 1 of our Constitution says:

"1. India, that is Bharat, shall be a Union of States.

2. The States and the territories thereof shall be as specified in the First Schedule.

3. The territory of India shall comprise—

(a) the territories of the States;

(b) the Union territories specified in the First Schedule; and

(c) such other territories as may be acquired".

5. All the territories that this country may acquire in whatever manner become part of India in view of Article 1 (3) (c). Further in the case of Goa by means of 12th amendment to the Constitution, the same is included in the 1st Schedule. Therefore there is no room for the contention that Goa was not a part of India during the relevant time. It may be noted that according to the prosecution the goods complained of were all sent from Goa to Bombay after March 27, 1962.

6. This takes us to the question whether there is any liability to pay customs duty when someone sent goods from Goa to Bombay in 1962. No statute or statutory rule was placed before the Court to show that any customs duty had been imposed on the goods transmitted from Goa to other parts of India after December 20, 1961. The only witness who spoke about the liability to pay customs duties on the goods in question is P. W. 56 Shaikh, the Dy. Superintendent of Central Excise. According to him customs duty on those articles was leviable because of certain administrative instructions. But he refused to place those administrative instructions before the Court. He claimed privilege on the ground that they are confidential documents — a strange claim. Stranger still is that the trial Court appears to have accepted that plea. No tax or duty can be levied or collected except by authority of law. Hence no customs duty was leviable on the basis of any administrative instruction. Every levy of customs duty or any other tax must be sanctioned by law. It is surprising that both the trial Court as well as the High Court were of the opinion that certain customs duties were leviable because of some administrative instructions. It appears that there was a notification issued in the year 1950 declaring Goa to be a foreign territory and thus bringing the exports from that country to India within the purview of Land

Customs Act. But that notification cannot continue to have a legal effect after Goa became a part of India. On becoming a part of India Goa ceased to be a foreign territory. The notification in question must have been issued under Section 5 of the Indian Tariff Act, 1934 as it stood in 1950 (that section has been repealed now). That section read:

"Where a customs duty at any rate prescribed by or under this Act or any other law for the time being in force is leviable on any articles when imported into, or any article when exported from, a port in India the Central Government may, by notification in the official gazette, direct that a duty of customs at the like rate shall be leviable on any such article when imported or exported, as the case may be, by land from or to any territory outside India which it may, by a like notification, declare to be foreign territory for the purposes of this section".

7. The notification under this section could have been issued only in respect of any territory outside India and not in respect of any part of India. That provision empowered the Government to declare any territory outside India as a foreign territory for the purposes of that provision. That provision did not empower the Government to declare any part of India as a foreign territory. But it gave power to the Central Government not to treat any territory outside India as a foreign territory for the purposes of that provision. To illustrate the position, the Central Government could not have declared either Delhi or Bombay as a foreign territory but it could have treated Nepal or Bhutan as not a foreign territory for the purposes of that provision. Once Goa became part of India, the Government was incompetent to declare that territory as a foreign territory. Nor does it appear that any such declaration was made after December 20, 1961.

8. Unfortunately the High Court allowed itself to be influenced by what it says the practical considerations. It is likely that there were considerable foreign goods in Goa which had been imported into that territory before it was liberated, may be even without paying customs duty and those goods were available

for being transmitted to other parts of India. But this circumstance does not change the position in law. It is not necessary for us to consider whether after integration of Goa, the Government could have imposed any duty on the goods that were sent from Goa to other parts of India. Suffice it to say that our attention was not invited to any law imposing such duties. That being so, the conclusion that the appellant had utilised his official position to evade customs duty must fail.

9. In the result this appeal is allowed and the conviction and sentence imposed on the appellant are set aside. He is on bail. His bail bond do stand cancelled and fine if paid refunded.

Appeal allowed.

**AIR 1971 SUPREME COURT 1132
(V 58 C 231)**

S. M. SIKRI, C. J., J. M. SHELAT,
C. A. VAIDIALINGAM,
A. N. GROVER AND A. N. RAY, JJ.

Shri C. K. Daphtary, Sr. Advocate
and others, Petitioners v. Shri O. P.
Gupta and others, Respondents.

The Attorney-General for India,
(By notice).

Criminal Misc. Petition No. 1259
of 1970, D/- 19-3-1971.

(A) Constitution of India, Art. 129
— Publication and circulation of a
booklet in public containing allegations
that a Judge had made up his
mind about the decision of a case and
would not hear the arguments and
manipulated to get the erroneous judgment
delivered from the another Judge
of the Bench and controlled the hearing
and thus ascribing dishonesty to
the Judge amounts to contempt.

(Paras 66, 69)

Even assuming that a judgment
contains errors that can be no excuse
for imputing dishonesty to the Judge.
The fact that booklet was printed for
use by members of Parliament only as
draft of proposed Impeachment Motion
would not absolve the contemner when
its circulation by him in public at large
was proved and there was no proof
that the booklet was published under
the authority of the Parliament.

(Paras 66, 69)

(B) Constitution of India, Art. 19
(1) (a) and (2) — Assuming that Arti-

DC/DO/B445/71/DVT/P

cle 19 (2) applies to the law relating to contempt it imposes reasonable restrictions on the right to freedom of speech — (X-Ref: — Article 129) (X-Ref: — Contempt of Courts Act (1952), Section 3) — AIR 1954 Pat 203 and AIR 1953 All 342 and AIR 1954 Hyd 175, Approved — (Case law discussed). (Paras 52, 85)

Secondly right to punish contempt under Article 129 cannot be said to have been conferred on the Supreme Court in order to curb the right of freedom of speech. (Para 52)

The law relating to contempt as it stands in United States of America cannot be followed in India as the American Constitution does not contain any provision parallel to Article 19 (2) of the Constitution of India. (Para 55)

(C) Contempt of Courts Act (1952), Section 3 — A scurrilous attack on a Judge in respect of a judgment or past conduct effects adversely on the due administration of justice. (Para 61)

(D) Constitution of India, Article 124 (4) — Even if a Judge is said to have committed gross error in judgment that does not amount to "misbehaviour" within meaning of the Article. (Para 68)

(E) Contempt of Courts Act (1952), Section 1 — Whether a contempt proceeding is a criminal or civil proceeding or neither within meaning of Section 3 of the Parliamentary Proceedings (Protection of Publication) Act (Quaere) — (X-Ref: — Parliamentary Proceedings (Protection of Publication) Act (1956), Section 3). (Paras 77, 78)

(F) Parliamentary Proceedings (Protection of Publication) Act (1956), Section 3 — Whether a notice of impeachment under Article 124 (4) if not admitted by the Speaker under Section 3 (1) of the Judges (Inquiry) Act (1968) is a proceeding of Parliament within meaning of Section 3 of the Parliamentary Proceedings Act (Quaere). (Para 77)

(G) Constitution of India, Art. 13 (3) (a) — Whether the law relating to contempt is a law within meaning of Article 13 (3) (a) (Quaere). — (X-Ref.: — Contempt of Courts Act (1952), S. 1). (Para 52)

(H) Constitution of India, Art. 129 — Where an appeal is heard by two Judges to observe that a Judge "tied the line" of another Judge and sur-

rendered his own judgment in deference to or on dictation of that Judge amount to flagrant contempt — (X-Ref: — Contempt of Courts Act (1952), Section 3). (Para 80)

(I) Constitution of India, Art. 129 — Evidence to justify allegations amounting to contempt of Court cannot be allowed — AIR 1954 SC 186, Rel. on. (Para 81)

If a judgment is criticised as containing errors coupled with criticism of dishonesty on the part of the Judge the Court trying contempt of Court cannot act as an appellate Court and decide whether there are errors or not. Contempt proceeding is of summary nature and fair trial is to be given to the contemner. (Paras 81, 84)

(J) Constitution of India, Art. 129 — On the facts as alleged in the petition, if the charge against the contemner is clear and simple, a formal charge need not be drawn up either by the petitioner or by the Court — Cr. Ap. No. 27 of 1964, D/-31-1-1966 (All), Distinguished. (Para 87)

(K) Constitution of India, Art. 129 — Advocates of the Supreme Court including the President of the Court's Bar Association are entitled to file petition under Article 129. (Paras 92, 94)

(L) Parliamentary Proceedings (Protection of Publication) Act (1956), Section 3 — The provision gives protection to newspapers and broadcasting agencies only provided publication is made for public good and without malice. (Para 77)

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- 17 LRA (NC) 572, Re Peter
Breen 57
- Petitioners in person; Respondent
No. 1 in person; Mr. Jagadish Swarup,
Solicitor-General of India and Dr.
V. A. Seyid Muhammad, Sr. Advo-

cate, (Mr. S. P. Nayar, Advocate, with
them), for the Attorney-General for
India; Mr. Mela Ram, one of the
partners of Respondent No. 2 was also
present in person.

The following Judgment of the
Court was delivered by

SIKRI, C. J.: — This is a petition
under Article 129 of the Constitution
of India by Shri C. K. Daphtary and
three other Advocates bringing to
our notice the alleged contempt of this
Court committed by the respondents
(1) O. P. Gupta, (2) Rising Sun Press,
Delhi, through its proprietor, and (3)
M/s. Kanak Book Depot. Respondent
No. 3 — Kanak Book Depot — has not
been traced. Respondent No. 1, O. P.
Gupta, appeared in person, and the
proprietor of the Rising Sun Press,
Mela Ram, also appeared in person.

2. In the petition it is stated
that Civil Appeal No. 1731 of 1967 was
filed in this Court by the State of
U. P. against the judgment of the High
Court of Allahabad whereby the High
Court had held that the order of dis-
missal from service passed against re-
spondent No. 1, O. P. Gupta, was in-
valid. This appeal came up for hear-
ing before this Court on various oc-
casions and was ultimately heard by
a Bench consisting of Shah, J., as he
then was, and Hegde, J., on October
15, 1969 and October 16, 1969 (and, ac-
cording to respondent No. 1, also on
October 17, 1969). It appears that the
appeal was first heard on February 22,
1969 by Hidayatullah, C. J., and an-
other Hon'ble Judge, but later on it
was heard, as already stated, by Shah
and Hegde, JJ., and the judgment was
delivered on October 28, 1969 by
Hegde, J.

3. It is further stated in the
petition that respondent No. 1 "with
the deliberate design of bringing into
disrepute and scandalising this Hon'ble
Court, wrote and got printed and
published, by and through Respondent
No. 2, a pamphlet which though ostens-
ibly meant for the convenient use of
members of Parliament was actually
widely circulated and was made avail-
able for sale at M/s Kanak Book
Depot, P. O. Ramsanehi Ghat, Distt.
Barabanki, U. P., Respondent No. 3".
It is also stated that "the said
pamphlet was, as the petitioners be-
lieve, sold or offered for sale to the
public by Respondent No. 3".

4. It is further stated in the
petition that the pamphlet "disparages

and brings into contempt the authority of this Hon'ble Court and tends to weaken the confidence of the people in it and in any event has the tendency and object of so doing". It is submitted that the pamphlet "by attacking Hon'ble Mr. Justice J. C. Shah and Hon'ble Mr. Justice Hegde, while acting in their judicial capacity, scandalises and brings into disrepute this Hon'ble Court and is clearly contempt of this Hon'ble Court".

5. In para 7 of the petition certain passages from the pamphlet were extracted. It is necessary to reproduce these paras in order to show the nature and content of the scandalous remarks made against Mr. Justice Shah and Mr. Justice Hegde.

"Moreover, having wrongly persisted in hearing the case, he delivered a demonstrably dishonest judgment which cannot fail to show to any discerning person that he did so only to feed fat his prejudice and bias. He has gone to the extent of writing total falsehoods in the judgment in the defiant belief that there is none to look into and scrutinise his judgments. His action is highly condemnable and derogatory of a man in his position".

"As this enquiry proceeds, hundreds of similar other instances of his misbehaviour are bound to come to light, as he appears to be in the habit of being influenced by extrajudicial considerations and of victimising the disliked party through dishonest means".

"In view of the clear admission by the U. P. Government that the file had never gone to the Governor at all, there was nothing on merits for that Government to file an appeal but still the U. P. Government filed an appeal in the Supreme Court in the hope that they may be able to influence the judgment and get a wrong decision in their favour. They thought of Shri J. C. Shah, Judge of the Supreme Court, in this connection".

"So even while the matter remained pending in the High Court they moved for ex parte ad interim stay in the Supreme Court. This was managed to be heard by Shri J. C. Shah and another. Shri J. C. Shah at once ordered stay not only of the balance decretal amount, but even of the Rs. 50,000/- which had been received by Shri O. P. Gupta after furnishing full security".

"The Respondent's counsel, Shri S. P. Sinha, argued on 25th April, 1966 from 11 a. m. to 11.40 a. m. Throughout on these arguments Shri J. C. Shah made such extremely unreasonable, biased and illegal observations that the counsel Shri S. P. Sinha had to give up the arguments in disgust".

"Shri O. P. Gupta went back to Allahabad greatly perturbed and upset at such open dishonesty of a Senior Judge of the highest Court of Justice in the land."

"Whereas in the Lok Sabha every word that is spoken is written down, in the Supreme Court none of the arguments by the parties or observations by the Judge are noted. This is the reason why Shri J. C. Shah makes such illegal and dishonest observations orally in the Court in the belief that these observations will not find place on the record and nobody will be able to catch him."

"Note: Although both the Judges who delivered this judgment are responsible for it, the responsibility of Shri J. C. Shah is much more serious as he was the Senior Judge and had been specifically charged with bias. The other Judge merely toed his line. His cleverness in getting the judgment delivered by his junior colleague will deceive no one".

"It is not as if the Judge has missed those contentions through carelessness. He has done so deliberately and dishonestly, because the High Court had emphasised this contention very strongly and had given clear findings on it".

"It was only the height of dishonesty on the part of Shri J. C. Shah to ignore and go against all law in this matter".

"In view of all these binding rulings, Shri J. C. Shah has not only conducted himself dishonestly in the above observation but has flouted the Constitution most directly and wantonly to feed fat his bias".

"Further, in AIR 1961 SC 1070, the Supreme Court has emphatically laid down that admissions have to be taken as a whole. It is not possible for a Judge to take a few sentences here and there from a statement and treat them as admission and ignore other sentences which explain those so-called admissions. Only a dishonest and prejudiced Judge could have done this".

"In para 9, Shri J. C. Shah himself says that one of the essential requirements of reasonable opportunity is that 'he must be given reasonable opportunity to cross-examine the witnesses produced against him'. He has belied his own standard and shown not only utter dishonesty but also a feeling that being a Judge of the Supreme Court there is none who can scrutinise his actions".

6. In para 8 of the petition it is stated that petitioner No. 3, Shri S. N. Prasad, Advocate, while in Patna and Gauhati during the summer vacation, was asked by several people including some Judges of the High Court about the said pamphlet and was also shown the pamphlet for the first time in Patna. It is further stated that petitioner No. 3 was also informed by one of the Chief Justices that the said pamphlet had been sent to him. It is submitted that "this makes it obvious that the pamphlet had been very widely circulated".

7. Para 9 of the petition may be set out in full:

"That soon after reopening of the Court after summer vacation, Respondent No. 1 was found in the Bar Association room of the Supreme Court and was seen talking to some members. Shri B. P. Singh, Advocate, on spotting the Respondent No. 1, went to the table at which he was sitting with the intention of asking him to leave the Bar Association room as he was not a member. On reaching the table, Shri B. P. Singh found the Respondent No. 1 discussing the aforesaid Pamphlet. Shri B. P. Singh asked the Assistant Librarian of the Bar Association to ask Respondent No. 1 to leave the Bar Association room immediately. However, before the Respondent No. 1 actually left the Bar Association room, he sold a copy of the said Pamphlet to Shri O. N. Mahindroo, Advocate".

8. In para 10 it is submitted that "from the above mentioned facts it is clear that the Respondent No. 1 has personally distributed and published the aforesaid pamphlet". It is further stated in para 11 that the pamphlet as a whole is *ex facie* contempt of Court and has the tendency and object of bringing into disrepute the authority of the Court and to weaken the confidence of the public in its justice and fair play.

9. It is prayed in the petition that this Court be pleased to issue notice to the Respondents to show cause why they should not be committed for contempt of Court and upon hearing the Respondents (a) order attachment and committal, (b) impose such other penalty as may be deemed fit, and (c) pass such order or orders as this Court may think proper.

10. Shri S. N. Prasad, petitioner No. 3, has filed an affidavit with the petition. Shri B. P. Singh, Advocate, Supreme Court, has also filed an affidavit. In this affidavit it is stated: "Sometimes after the re-opening of the Court after the summer vacations in July 1970, I saw Mr. O. P. Gupta moving about in the Supreme Court Bar Association. I recognise Mr. O. P. Gupta, as I remember having seen him arguing his own case in the Supreme Court. On that day Mr. O. P. Gupta was carrying a bag with him and was aimlessly moving about within the Association's premises".

11. It is further stated in the affidavit:

"That Shri O. P. Gupta ultimately sat down to talk to some of the members of the Bar Association and was discussing certain matters with them. Having noticed his presence and having known that he had printed some pamphlet which contains scurrilous remarks against some of the Judges of this Hon'ble Court, I became suspicious as to the purpose of his visit to the Supreme Court Bar Association. I, therefore, went to the table where he was sitting and found that he was discussing the contents of his pamphlet which he chose to describe as a "booklet". Among other members present at the table I distinctly remember the presence of Shri O. N. Mahindroo. I protested against the presence of Shri O. P. Gupta within the Supreme Court Bar Association premises as he was not a member of the Association. In spite of my protest I found that Mr. Gupta had no intention of leaving the Bar Association, and I therefore, called Shri Gopi, Assistant Librarian and asked him to see to it that Mr. Gupta left the Bar Association premises immediately. Thereafter Mr. Gupta agreed to leave the Association premises".

It is further stated that "while he was leaving he collected a few copies of the 'booklet' which he had circulated

amongst the members present there. I distinctly remember that Shri O. N. Mahindroo asked for a copy of the booklet and paid a sum of Re. 1/- to Mr. O. P. Gupta which was the price demanded by Mr. Gupta for the booklet. Thereafter Mr. Gupta was made to leave the association premises".

12. An affidavit was also filed by Shri O. N. Mahindroo. It is stated in the affidavit:

"I have read the Affidavit of Mr. B. P. Singh, Advocate, and I confirm what has been stated in paras 2 and 3 of his affidavit about Mr. O. P. Gupta and me. I did pay him a Rupee as desired by Mr. Gupta for a copy of the booklet as stated in para 3 of the said affidavit."

13. This petition was called for hearing on November 23, 1970, and upon hearing Mr. C. K. Daphtary, one of the petitioners, the Court directed issue of notice of this petition to the respondents returnable 10 days hence, peremptorily. The office reported on December 3, 1970, that "neither the Registered Cover nor the A. D. Card in respect of notice issued directly to Respondent No. 1, viz., Shri O. P. Gupta has been received back so far. Similarly no report in respect of Respondent No. 1 has been received from the District Judge, Allahabad". On December 4, 1970, this Court directed that another notice be sent to respondents Nos. 1 and 3 returnable on December 9, 1970. It was further directed that notice be sent to respondent No. 1 at his Delhi address also, returnable on December 9, 1970. The notices were also directed to be served through the District Magistrate. It may be mentioned that respondent No. 2 was present in Court and had filed an affidavit to which we shall later refer.

14. The Sub-Divisional Magistrate, Delhi, returned the notice in respect of O. P. Gupta, unserved, with the following report:

"The wife of the addressee, viz., Mrs. Mithles Kumari, who was present at the address given in the notice, has stated that her husband had gone out to Poona. She had no knowledge about the return of her husband. She did not inform us about his address at Poona.

On enquiries being made from Shri Baij Nath Kureel, resident of 69, South Avenue (M. P. flats) he stated

that he (Mr. Gupta) comes and stays with him as a guest, off and on, and he goes back.

Mr. O. P. Gupta is deliberately concealing himself and is avoiding service of the notice. Therefore, the notice is being returned unserved. The writing of Mr. O. P. Gupta's wife is enclosed."

15. As regards the notice sent to O. P. Gupta, through the District Magistrate, Allahabad, the Additional District Magistrate who was contacted on Trunk telephone by the Office on December 8, 1970, reported that Gupta was stated to be in Delhi and was staying at 69, South Avenue. The District Judges of Allahabad and Barabanki reported that notices could not be served on O. P. Gupta as he was reported to be in Delhi in connection with some case.

16. On being satisfied on materials before it that respondent No. 1 was deliberately avoiding service, the Court on December 9, 1970, directed issue of non-bailable warrant for the arrest of respondent No. 1 (wherever he may be in India) and his production in this Court on Monday, the 14th December, 1970. The Additional District Magistrate, Delhi, thereupon submitted the following report.

"The local police has informed us that despite best of their efforts they have not been able to arrest Shri O. P. Gupta whose whereabouts in Delhi are not known. However we are making further efforts to find out his whereabouts and will be able to send you a final report on Sunday evening. You may kindly inform their Lordships accordingly."

17. On December 10, 1970, O. P. Gupta sent a letter to the Registrar, giving his address "C/o Station Master, Jagannath Puri (Orissa)", stating that he had heard a rumour that "the Hon'ble Court requires my presence in connection with contempt of Court." He further stated that he was trying to reach Delhi as soon as possible in about ten days. He requested that the matter may be listed for his appearance any day in January, 1971. He gave a firm undertaking that he would present himself before the Court on the day the Court reopened after Winter vacation. On December 14, 1970 this Court ordered that the "warrant will remain outstanding returnable a day after the reopening of the Court in January 1971, i. e., 5-1-1971". On

December 15, 1970, referring to the letter of the respondent, mentioned above, this Court observed that "the address given on the letter is c/o the Station Master, Jagannath Puri, Orissa. This clearly shows that he does not want to disclose his whereabouts so that proper processes may be issued to him... In view of this letter, we are further fortified in our view that he is avoiding service and concealing himself. Warrants will be executed as ordered by us".

18. The office reported again on January 4, 1971 that the authorities had informed that despite their best efforts they had not been able to arrest O. P. Gupta nor his whereabouts could be found.

19. Respondent No. 1 wrote another letter on December 24, 1970, objecting to the issue of non-bailable warrants. He stated:

"As written in my previous letter I had planned to reach Delhi by about the 20th instant and to present myself in Court when it reopens on 4th January, 1971... But the shocking news of a non-bailable warrant has upset all my plans."

He further stated that he had thus no alternative but to go back; he wanted to reach the Court as a free man and before appearing in Court he wished to get about two or three weeks time for medical aid. He, therefore, prayed that the warrant be withdrawn and the case fixed for Monday, the 1st February, 1971.

20. On January 5, 1971, this Court ordered that "warrants be executed as already directed by this Court. District Magistrates of Allahabad, Delhi and Barabanki should take immediate action with the assistance of the Police, to execute the warrants".

21. On January 25, 1971, at last, O. P. Gupta appeared before the Court, and this Court ordered that the "warrant which was ordered to be issued against respondent No. 1 will not be executed on condition that he shall furnish a personal bond in the sum of Rs. 5,000/- with a surety in the like amount to the satisfaction of the Registrar of this Court. Respondent No. 1 will file affidavit in reply within a week from today. Liberty to the petitioners to file a rejoinder, if any. The petition will come up for hearing on the 12th February, 1971".

22. On January 23, 1971, respondent No. 1 filed an application al-

leging that the petition for contempt was not maintainable and deserved to be dismissed without the applicant being called upon to answer it on merits. He stated various grounds regarding the non-maintainability of the petition. On February 12, 1971, the Court adjourned the matter to February 18, 1971, and respondent No. 1 was directed to file an affidavit on merits by February 16, 1971, which, however, he failed to do.

23. On February 22, 1971, respondent moved another application praying that the hearing of the case may be postponed because he wanted to engage a counsel and counsel whom he wished to engage (M/s R. D. Bhandare, Mohan Kumaramangalam, K. K. Nayar, D. L. Sen, etc.), were parliamentarians and they were extremely busy in their elections and could not come to Delhi before the middle of March, 1971.

24. We have given these facts in order to show that respondent No. 1 was deliberately avoiding service for a long time. We could not at first understand his object in doing so, but during the course of arguments the object became quite clear. Chief Justice Shah was due to retire on January 21, 1971 and if the respondent had made the affidavit, to which we will presently refer to, before that date, it would have amounted to contempt. When it was pointed out to him during the course of hearing that he had abused Mr. Justice Shah in his affidavit he replied that it was not contempt because it was the law that there could not be any contempt in respect of a Judge who has retired. It seems to us clear that in order to hurl fresh abuses on Mr. Justice Shah, he deliberately avoided service of the notice so that he would not have to file his affidavit before the date of retirement of Mr. Justice Shah.

25. We are also surprised at the inability of the Executive to have O. P. Gupta traced and warrants served on him. Article 144 of the Constitution provided that "all authorities, civil and judicial, in the territory of India, shall act in aid of the Supreme Court". We have noticed with regret that in this case the Executive has not shown due diligence in complying with this constitutional provision.

26. Respondent No. 1 filed another application on February 18, 1971,

praying that the arguments on maintainability of the petition be heard first and that question decided. It was further requested that the petitioners be asked to produce all their evidence because he would like to cross-examine them. It was further stated that after the petitioners had closed their evidence, he "will summon documentary and oral evidence on his behalf, after which arguments may be heard". He requested that the petitioners be asked to produce the "book" or the "pamphlet" from which they had copied annexure 1 to their petition. It was suggested that it would throw great light on their allegations.

27. We may mention that the pamphlet or the booklet was annexed to the petition in original and we could not understand this prayer. This Court directed that the petition would be heard on the affidavits already filed by the parties. This Court also informed respondent No. 1 that the petitioners had no other evidence to lead.

28. Respondent No. 1 filed a lengthy counter-affidavit on February 18, 1971. He started with tendering unreserved, unqualified and unconditional apology to this Court. He however, went on to state that in borderline cases it was permissible to make alternative and additional defence of no contempt also and he therefore proceeded to submit his defence.

29. In para 3 of the counter-affidavit he maintained that because of the many laches, illegalities and infirmities the petition should be dismissed. In paras 3.2 he stated that "I am not at this stage making any attempt to contradict evidence given or to give any evidence on my side. This will be done if and when the occasion arises or the Hon'ble Court so orders. I will have to summon some documents also for that purpose". This statement was made in spite of the direction of this Court that he should file his affidavit on the merits. Until now we have not been told what documents or evidence he would have called, especially in view of the admissions made by him, which we will presently refer to.

30. In para 4 he complained that he could not find the specific charge. We had informed him that, in brief, the charge against him was that he had committed contempt of Court by the publication and distribu-

tion of the pamphlet or the booklet outside Parliament.

31. In para 5 he proceeded to assert that the petition was not bona fide at all. He cast aspersions on Mr. C. K. Daphtary, who is a senior advocate of this Court, and the President of the Supreme Court Bar Association. We need not refer to these because this is really an abuse of the process of this Court.

32. In paras 8, 8.1, 8.2 and 8.3 the respondent complained against the language of the petition as not being quite respectful to the Members of Parliament. In para 8.4 he stated that "as to facts I must frankly admit that the grievous wrong that Shri J. C. Shah had done to me had created such deep anguish, frustration and desperation in me that had God almighty not intervened Shri J. C. Shah would not have seen the end of 1969." We wondered what exactly he meant by this passage, but he admitted that it meant that he had at one time decided to murder Mr. Justice Shah. He explained that it was some Member of Parliament who saved him from this act by suggesting that he might instead try to convince the Members of Parliament of the genuineness of his case and prepare them to file an impeachment motion.

33. In para 8.5 it was stated that he had a right to approach and convince the Hon'ble Members and he exercised that right. Nobody has said before us that he had no right to approach and convince the Hon'ble Members.

34. In paras 8.6 and 8.7 he mentioned about the filing of the impeachment motion in the Lok Sabha on May 15, 1970 and its rejection by the Hon'ble Speaker.

35. In para 9 he said that "a large number of Hon'ble Members of Parliament made that draft, in the making of which I too took an active part and made my contribution". He submitted that the "drafting" of the motion could not be a charge. We may mention that he has not been charged with the drafting of the motion.

36. Regarding the printing of the pamphlet, he stated in para 9.2:

"The Impeachment Motion was printed by respondent No. 2 and I went to him to get it printed. The printing was done under orders and at the instance of the signatories of the Motion. There were 200 of them and

they were anxious to have several copies each. They had a right to have the copies. It was impossible for them to have the copies without printing the motion. I still possess a letter from Hon'ble Shri George Fernandes asking for six copies which I sent to him by registered post".

He submitted that the printing of the motion could not be a charge against him and that "neither the Hon'ble Members who ordered the printing, nor I who got the work actually done, nor respondent 2, who actually printed the motion are in any way guilty of contempt for that action". We need not go into this submission as he was not being charged for printing or assisting in the printing of the motion.

37. In para 9.3 he contended that the word "pamphlet" for the printed Impeachment Motion was highly condemnable. In para 9.4 he stated that he never offered the book for sale nor did he widely circulate it. Further in para 9.5 he stated that the "book given to Shri O. N. Mahindroo, from which this annexure must have been copied, was not a new copy, but was a used one inasmuch as it contained several red pencil marks and pen writing in its body. This shows and proves that it was not given to him by way of sale and it was not being offered for sale in general."

38. In para 9.6 it was stated that annexure 1 to the petition was nothing but the Impeachment Motion filed in the Lok Sabha reproduced in a printed book.

39. In para 10 he submitted that para 6 of the petition "has needlessly dragged in the fair name of Hon'ble Mr. Justice Hegde in the petitioner's wholesale onslaught". He submitted: "Read the entire Impeachment Motion. The name of Hon'ble Mr. Justice Hegde does not occur even once anywhere either disparagingly or otherwise. I have the greatest regard and respect for His Lordship, just as I have for every other Judge in India". He gave reasons why Mr. Justice Hegde's name was not mentioned in the Impeachment Motion, although he had actually delivered the judgment.

40. In para 10.1 he submitted that "the very same judgment can lead to the Impeachment of one Judge who signs it knowing that its conclusions are wrong while leaving out completely the other Judge who signs it

genuinely believing that the conclusions are right".

41. In para 10.2 he referred to the petition dated 27-10-69 under Article 32 of the Constitution to demonstrate his great regard and respect for Mr. Justice Hegde.

42. In para 10.3 he stated thus: "It is entirely wrong to say that the Impeachment Motion "disparages and brings into contempt the authority of this Hon'ble Court and tends to weaken the confidence of the people in it and in any event has the tendency and object of so doing". The Motion was solely aimed against a "decayed fish" and its laudable object was to save the "entire tank" from contamination, as explained above in para 9.1. Therefore, the object of the motion clearly was to save the prestige and honour of the Hon'ble Court and to enhance public confidence in it, and not the reverse".

43. In para 10.4 he submitted that the judgment in question did not excite respect for Mr. Justice Shah.

44. In para 10.5 he stated that the Impeachment Motion did not attribute any corruption like bribery, liquor, sex, influence, favouritism, etc., to Mr. Justice Shah. He further added:

"what, however, was a fatal weakness in him, was that he made up his mind on the result of a case either when he read the file at home in a few minutes or within the first few minutes of the opening arguments, and once he made up his mind, he dogmatically refused to listen even to the most reasonable arguments of the party disfavoured by him. In order to shut down the arguments of that party, he would go to the length of talking absurdly and like a mad man in open Court. Such behaviour made all his virtues useless and made him a man thoroughly unfit to be a Judge".

45. We need not refer to instances he gave of some other Judges and their behaviour in Court.

46. In para 10.8 he submitted: "The Impeachment Motion ought to be read in this light. Wherever it says "prejudice", "bias", "grudge", "vengeance", etc., everywhere it means the same — that he had formed his opinion and was seeking to stick to it whatever came his way, and the more I tried to make him see reason, the more offended and revengeful he became. "Extra-judicial considera-

tions" also means the same, because becoming prejudiced by one sided argument is certainly not judicial. In this light the entire Impeachment Motion is nothing but extremely fair and just comment on a man who richly deserved it. The two illustrations given on the back of the title cover, which are the gist of the entire impeachment motion, also point to this trait of Shri J. C. Shah's character. There is no hint of any other weakness. Even my letter to Shri C. K. Daphtary, annexure A, clearly points only to this weakness of Shri J. C. Shah. Fair comment is not contempt".

47. In para 11 he asserted that the excerpts given in para 7 of the petition, reproduced above, were all correct excerpts from the Impeachment Motion and not from any pamphlet. He further submitted that "they are all true, correct and fair criticism of Shri J. C. Shah as clarified above".

48. Before dealing with the question of maintainability of the petition and other points raised in his application dated January 28, 1971, we propose to dispose of the point regarding the validity of the existing law relating to contempt of Court. The first respondent has urged that the existing law relating to contempt of Court by writings in respect of proceedings which have finished is repugnant to Article 19 (1) (a), read with Article 19 (2). He contends that the existing law imposes unreasonable restrictions on a citizen's right to freedom of speech guaranteed under Article 19 (1) (a). He urges that we should follow the law existing in the United States of America. Mr. C. K. Daphtary, on the other hand, contends, first, that Article 19 (1) (a) and Article 19 (2) do not apply to the law relating to contempt of this Court because of Article 129 of the Constitution, which reads:

"The Supreme Court shall be a Court of Record and shall have all the powers of such a Court including the power to punish for contempt of itself".

Secondly, Mr. Daphtary urges that the existing law relating to contempt of Court is not a "law" covered by the definition of the word "law" in Article 13 (3) (a). Thirdly, Mr. Daphtary contends that the existing law only imposes reasonable restrictions within

the meaning of Article 19 (2) of the Constitution.

49. In *M. S. M. Sharma v. Sri Krishna Sinha*, (1959) Supp 1 SCR 806 = (AIR 1959 SC 395) this Court held:

"It would not be correct to contend that Article 19 (1) (a) of the Constitution controlled the latter half of Article 194 (3) or of Article 105 (3) of the Constitution and that the powers, privileges and immunities conferred by them must yield to the fundamental right of the citizen under Article 19 (1) (a). As Articles 194 (3) and 105 (3) stood in the same supreme position as the provisions of Part III of the Constitution and could not be affected by Article 13, the principle of harmonious construction must be adopted".

"So construed, the provisions of Article 19 (1) (a), which were general, must yield to Article 194 (1) and the latter part of its Clause (3), which are special, and Article 19 (1) (a) could be of no avail to the petitioner".

50. In Special Reference No. 1 of 1964, (1965) 1 SCR 413 = (AIR 1965 SC 745) the same view was confirmed.

51. Relying on these authorities Mr. Daphtary urges that at the time when the Constitution was enacted it was well known what the powers of a superior Court of Record were in England and what was the law of contempt which the Courts of Record were administering, and therefore, there could be no question of testing that law on the anvil of Article 19 (1) (a), read with Article 19 (2).

52. It is not necessary to decide this point or the point whether the existing law relating to contempt of Court is a 'law' or not within the definition of the word 'law' in Art. 13 (3) (a), as we have come to the conclusion that in any event the existing law imposes reasonable restrictions within the meaning of Article 19 (2). Apart from this, the Constitution makes this Court the guardian of fundamental rights conferred by the Constitution and it would not desire to enforce any law which imposes unreasonable restrictions on the precious right of freedom of speech and expression guaranteed by the Constitution.

53. In this case it is claimed that respondent 1 has committed contempt of Court by circulating a pamphlet or booklet containing criticism of the judgment of this Court, deliver-

ed by Mr. Justice Hegde, on behalf of himself and Mr. Justice Shah, as he then was, and also containing scurrilous criticism of the conduct of both the Judges. Then, what is the existing law on this particular point? We are relieved from reviewing earlier authorities because this Court has recently in two cases examined the law. In *Perspective Publications Ltd. v. State of Maharashtra*, (1969) 2 SCR 779 at pp. 791 and 792 = (AIR 1971 SC 222 at p. 230). Grover, J., speaking on behalf of the Court, reviewed the entire case law and stated the result of the discussion of the cases on contempt as follows:

"(1) It will not be right to say that committals for contempt for scandalizing the Court have become obsolete.

(2) The summary jurisdiction by way of contempt must be exercised with great care and caution and only when its exercise is necessary for the proper administration of law and justice.

(3) It is open to anyone to express fair, reasonable and legitimate criticism of any act or conduct of a judge in his judicial capacity or even to make a proper and fair comment on any decision given by him because "justice is not a cloistered virtue and she must be allowed to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men".

(4) A distinction must be made between a mere libel or defamation of a Judge and what amounts to a contempt of the Court.

The test in each case would be whether the impugned publication is a mere defamatory attack on the judge or whether it is calculated to interfere with the due course of justice or the proper administration of law by this Court. It is only in the latter case that it will be punishable as contempt.

(5) Alternatively the test will be whether the wrong is done to the judge personally or it is done to the public. To borrow from the language of Mukherjee, J. (as he then was) (*Brahma Prakash Sharma's case*, 1953 SCR 1169 = (AIR 1964 SC 10)) the publication of a disparaging statement will be an injury to the public if it tends to create an apprehension in the minds of the people regarding the integrity, ability or fairness of the

Judge or to deter actual and prospective litigants from placing complete reliance upon the Court's administration of justice or if it is likely to cause embarrassment in the mind of the Judge himself in the discharge of his judicial duties".

54. Later, *Hidayatullah, C. J.*, in *R. C. Cooper v. Union of India*, (1970) 2 SCC 298 at p. 301 = (AIR 1970 SC 1318 at pp. 1320, 1321) observed:

"There is no doubt that the Court like any other institution does not enjoy immunity from fair criticism. This Court does not claim to be always right although it does not spare any effort to be right according to the best of the ability, knowledge and judgment of the Judges. They do not think themselves in possession of all truth or hold that wherever others differ from them, it is so far error. No one is more conscious of his limitations and fallibility than a Judge but because of his training and the assistance he gets from learned counsel he is apt to avoid mistakes more than others ... We are constrained to say also that while fair and temperate criticism of this Court or any other Court even if strong, may not be actionable, attributing improper motives, or tending to bring Judges or Courts into hatred and contempt or obstructing directly or indirectly with the functioning of Courts is serious contempt of which notice must and will be taken. Respect is expected not only from those to whom the judgment of the Court is acceptable but also from those to whom it is repugnant. Those who err in their criticism by indulging in vilification of the institution of Courts, administration of justice and the instruments through which the administration acts, should take heed for they will act at their own peril. We think this will be enough caution to persons embarking on the path of criticism".

55. We are unable to appreciate how the law, as summarised in the two cases places unreasonable restriction on the freedom of speech. But the argument of the first respondent was that we have now a written Constitution, like the United States of America, and if in the United States, in order to give effect to the liberty of speech and freedom of expression the common law has been departed from, we should also follow in their

footsteps. But the American Constitution and the conditions in the United States are different from those in India. In the American Constitution there is no provision like Article 19 (2) of our Constitution.

56. The relevant part of the First Amendment to the U. S. Constitution is as follows:—

"Congress shall make no law abridging the freedom of speech, or of the press".

The difference between the First Amendment and Article 19 (1) (a) was noted by Douglas J., in *Kingslay Corporation v. Regents of the University of New York*, (1959) 3 L Ed 2d 1512 at p. 1522 where he observed:

"If we had a provision in our Constitution for "reasonable" regulation of the press such as India has included in hers there would be room for argument that censorship in the interest of morality would be permissible". (In a foot-note he set out Article 19 (2)).

57. Even in the United States, as far as we have been able to ascertain, in some States the law is the same as in England (see *Re Peter Breen* — Annotation at page 572) 17 LRA (NC) 572. We may here quote some passages from the decision of the Nevada Supreme Court in that case. An Attorney had made a statement about a reversal by the Supreme Court of a decision of the Trial Court. In proceedings for disbarment the Court observed:

"In fact, the question is presented whether or not the language and order could, in any event, be deemed contemptuous or warrant any action upon the part of this Court, upon the theory that they are but criticisms of an opinion of a Court which it is the province of anyone to indulge in, irrespective of whether such criticisms are just or unjust, or whether or not they are couched in respectful language. The right to criticize an opinion of a Court, to take issue with it upon its conclusions as to a legal proposition, or question its conception of the facts, so long as such criticisms are made in good faith, and are in ordinarily decent and respectful language, and are not designed to wilfully or maliciously misrepresent the position of the Court, or tend to bring it into disrepute, or lessen the respect due to the authority to which a Court

of last resort is entitled, cannot be questioned. To attempt to declare any fixed rule marking the boundaries where free speech in reference to Court proceedings shall end would be as dangerous as it would be difficult. The right of free speech is one of the greatest guarantees to liberty in a free country like this, even though that right is frequently and in many instances outrageously abused. Of scarcely less, if not of equal, importance, is the maintenance of respect for the judicial tribunals, which are the arbiters of questions involving the lives, liberties, and property of the people. The duty and power is imposed upon the Courts to protect their good name against ill-founded and unwarranted attack, the effect of which would be to bring the Court unjustly into public contempt and ridicule, and thus impair the respect due to its authority. While it is the duty of all to protect the Courts against unwarranted attack, that duty and obligation rests especially upon the members of the Bar and other officers of the Court. It would be foolish, as well as useless, for anyone to contend that the very highest Courts do not make mistakes. Courts themselves prove this by overruling previous decisions".

"If any considerable portion of a community is led to believe that, either because of gross ignorance of the law, or because of a worse reason, it cannot rely upon the Courts to administer justice to a person charged with crime, that portion of the community, upon some occasion, is very likely to come to the conclusion that it is better not to take any chances on the Courts failing to do their duty. Then may come mob violence with all its detestable features. To say that respondent meant no disrespect for this Court is contrary to the plain meaning of the language used, and the order directing that it be spread upon the minutes of the district Court".

58. The question whether the existing law of contempt is unreasonable within Article 19 (2) of the Constitution has been the subject of decisions in some of the High Courts. They have all come to the conclusion that the restrictions imposed by this law are reasonable. *S. K. Das, J.*, then a Judge of the Patna High Court, in *Legal Remembrancer v. B. B. Das Gupta*, (1953) ILR 32 Pat 1069 at p. 1091 = (AIR 1954 Pat 203 at p. 210)

after referring to the arguments of Mr. Ghosh, observed as follows:

"I think that the answer to the arguments of Mr. Ghosh is to be found in the words of Lord Atkin — "Justice is not a cloistered virtue". Any and every criticism is not contempt. One of the tests is, to use the words of Mukherjea, J., in *Brahama Prakash Sharma v. The State of Uttar Pradesh*, (1953) SCR 1169 = (AIR 1954 SC 10) whether the criticism is calculated to interfere with the due course of justice or proper administration of law; whether it tends to create distrust in the popular mind and impair confidence of people in the Courts of law. These tests have been part of the meaning of the expression contempt of Court from before the Constitution and are still a part of its meaning — a meaning which the framers of the Constitution must have known when they used the expression. We are giving no wider connotation to it, and it is idle to contend that such a connotation imports any unreasonable restriction on freedom of speech and expression".

We agree with the observations of the learned Judge.

59. In *Lakhan Singh v. Balbir Singh*, (1953) ILR 1 All 796 = (AIR 1953 All 342) it was held that "the law of contempt as laid down by British and Indian Courts imposes reasonable restrictions on the exercise of the right of freedom of speech and expression and the previous law continues in force even after the amended Article 19 (2) of the Constitution." It was further stated that "conditions in India are different from those prevailing in America. The language of our Constitution after the amendment of Article 19 requires us to see whether the restrictions are "reasonable". It is true that this case was dealing with a publication which prejudiced mankind against a party before the case was heard, but the general observations are relevant for the purpose of this case.

60. In *the State v. Vikar Ahmed*, ILR (1954) Hyd 270 at p. 272 = (AIR 1954 Hyd 175 at p. 178) the High Court of Hyderabad was considering the question of scandalising the Court or the Judge. In this connection they said:

"We may observe that the freedom of press under our Constitution is

not higher than that of citizen, and that there is no privilege attaching to the profession of the press as distinguished from the members of the public. To whatever height the subject in general may go, so also may the journalist, and if an ordinary citizen may not transgress the law so must not the press. That the exercise of expression is subject to the reasonable restriction of the law of contempt, is borne out by Clause (2) of Article 19 of the Constitution. It should be well to remember that the Judges by reason of their office are precluded from entering into any controversy in the columns of the public press, nor can enter the arena and do battle upon equal terms in newspapers, as can be done by ordinary citizens."

61. Respondent No. 1 contends that the present law places unreasonable restrictions because it serves no useful purpose, and even a scurrilous attack on a Judge does not affect the administration of justice. He further says that after a case has been decided, if a judgment severely and even unfairly criticised, and assuming that this has an adverse effect on the administration of justice, it must be balanced against the harm which would ensue if such criticism is stopped. We are unable to agree with him that a scurrilous attack on a Judge in respect of a judgment or past conduct has no adverse effect on the due administration of justice. This sort of attack in a country like ours has the inevitable effect of undermining the confidence of the public in the Judiciary. If confidence in the Judiciary goes, the due administration of justice definitely suffers.

62. The first respondent referred to Article 73, Article 246, List I, Entry 77, and Article 142 (2). These do not throw any light on the question whether the existing law of contempt imposes unreasonable restrictions. Article 73 deals with the extent of the executive power of the Union. Article 246 inter alia deals with legislative power of Parliament. Entry 77 in List I reads:

"Constitution, organisation, jurisdiction and powers of the Supreme Court (including Contempt of such Court), and the

We are not concerned here with the extent of the powers conferred by Article 246 read with Entry 77 of List I.

63. Article 142 (2) reads:

"(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any document, or the investigation or punishment of any contempt of itself".

64. We are here also not concerned with any law made by Parliament. Article 129 shows that the Supreme Court has all the powers of a Court of Record, including the power to punish for contempt of itself, and Article 142 (2) goes further and enables us to investigate any contempt of this Court.

65. We are accordingly of the opinion that assuming that Article 19 (2) applies, the restrictions imposed by the existing law of contempt are reasonable, and are in public interest.

66. Respondent No. 1 sought to justify the extracts which we have reproduced above from para 7 of the petition. His justification was, in brief, that he could show that in the judgment there were numerous errors. He proceeded to point out a number of so-called errors to us but we told him that we were not sitting as a Court of appeal and we were willing to assume in his favour, without deciding the point, that there were errors in the judgment. But even so, there is no excuse whatsoever for using the language which he employed in these passages. It must be remembered in this connection that it was Mr. Justice Hegde who drafted and delivered the judgment. He does not impute dishonesty to Mr. Justice Hegde but to Mr. Justice Shah. He explains this by saying that it was Mr. Justice Shah who controlled the hearing and he would not even allow Mr. Justice Hegde to listen to his arguments. We are unable to believe this.

67. According to Respondent No. 1, the words "dishonest judgment" and "dishonesty" have to be understood in a special sense. He says that these words were used in order to show the manner in which the appeal was heard and the manner in which Mr. Justice Shah, made up his mind quickly and then refused to budge from that position. It is well settled that we have to give the plain mean-

ing to the words used in the pamphlet or the booklet. Giving the ordinary and plain meaning it appears to us that "dishonesty" means dishonesty, i. e., that he has ascribed to the Judge a conduct which would be most reprehensible. In other words he says that although Mr. Justice Shah was convinced that the appeal of the State of U. P. should be dismissed he cleverly asked Mr. Justice Hegde to deliver the judgment and allow the appeal, and that Mr. Justice Hegde wrote down what Mr. Justice Shah dictated or told him to write.

68. We have already set out paras 10.5 and 10.8 of the affidavit filed by the first respondent. We are unable to give any other meaning to the words "dishonest judgment", "open-dishonesty", "deliberately and dishonestly", "utter dishonesty", i. e. the meaning which he now seeks to ascribe to these words. It seems to us that whoever drafted the Impeachment Motion drafted it with a view to bring the facts within the meaning of the expression "misbehaviour" in Article 124 (4) for he must have realised that to say that a Judge has committed errors, even gross errors, cannot amount to "misbehaviour".

69. It seems to us that in view of the decisions of the various High Courts in India and this Court the passages we have extracted, read as a whole, constitute gross contempt of this Court and the two Judges. In this connection we may refer to some of the earlier cases decided by various High Courts. In *Moti Lal Ghosh* in re, (1918) ILR 45 Cal 169 at p. 182 = (AIR 1918 Cal 988 at p. 994) a newspaper published articles scandalising the High Court and the Chief Justice in his administration thereof, by allegations implying that the Chief Justice had constituted a packed Bench. It was held that the articles constituted contempt of Court. One of the reasons given for holding contempt was that "the mere suggestion that such a thing is within the bounds of possibility is a grave reflection upon the Court and the persons responsible for its administration." One passage of this judgment, which may be referred to, is at page 182: (of ILR Cal) = (at page 994 of AIR).

"The other matter to which I refer is the passage at the end of the article in which the author expresses perfect faith in the Chief Justice.

This, to my mind, is so inconsistent with the insinuations previously made in the articles, that it is impossible to conceive that it was genuinely intended. It is much in the same style as the conclusion of the previous article, and I do not think there can be any doubt as to the object of the author in using these words, viz., to try and provide a means of escape for himself if he is taken to task for the previous matter contained in his article."

Similar remarks can be applied to the protestations of the respondent No. 1 that he has respect for this Court and the Judges, including Mr. Justice Hegde.

70. In *Emperor v. Marmadule Pickhall*, AIR 1923 Bom 8 at page 10 the High Court of Bombay observed:

"The article as a whole would leave on the mind of an ordinary reader the clear impression that injustice had been deliberately done on political grounds to some of the accused who were apparently innocent. In other words it attributes judicial dishonesty to the Judges. I am unable to accept the contention that such an article does not constitute a contempt of Court. We have to consider the natural and probable effect of the article and not only the avowed intention of the editor as indicated in his affidavit. I think that the publication of the article in question constitutes a contempt of Court."

Mr. Justice Shah, Acting Chief Justice, further observed:

"I am slow to hold that any unfair criticism of Courts of Judges constitutes such an interference with the administration of justice as should be punished. I am willing to act upon the view that the confidence of the public in Courts rests mainly upon the purity and correctness of their pronouncements and that such confidence is not lightly shaken by a mistake or unfair criticism of this kind. At the same time it is clear that the tendency of such criticism is to undermine the dignity of the Court and in the end to embarrass the administration of justice. The faith of the public in the fairness and incorruptibility of Judges is a matter of great importance."

71. In *Murli Manohar Prasad* In re, (1929) ILR 8 Pat 323 at page 340 = (AIR 1929 Pat 72 at page 78). a Full Bench decision of five Judges, it was observed:

"It is for this Court as a matter of law to construe words and phrases which have no technical significance and to decide what is their meaning and what is the effect which they are calculated to produce, and I have no hesitation in deciding that the words used by the author mean, and are calculated to mean, and intended to mean that the conduct of cases before the Chief Justice is such that arguments and authorities are ignored and that for that reason the life and liberty of the subject brought before the Chief Justice is in peril. Such a statement made about a Judge in the execution of his office is a contempt of Court, of the gravest character."

72. In the matter of K. L. Gauba, (1942) ILR 23 Lah 411 at pp. 423, 424 = (AIR 1942 Lah 105 at p. 108 (FB)) where a book published by an advocate of the Lahore High Court was concerned, the Full Bench observed:

"This book contains most scandalous allegations of improper and even corrupt motives against Judges of this Court. It is, therefore, deliberately calculated to interfere with and bring into contempt the administration of justice in this Province and to lower the prestige of this Court".

We may also mention that following *Ram Mohan Lal* in the matter of, AIR 1935 All 38, *Coats v. Chadwick* LR (1894) 1 Ch D 347 and *Tushar Kanti Ghosh*, Editor, In re, AIR 1935 Cal 419 the Full Bench disallowed the advocate's application to examine witnesses in defence. It observed:

"There is not a single case on record, except one to which reference will presently be made, where a person guilty of scandalising the Court pleaded or attempted to prove that the libel was true. In AIR 1935 All 38 an attempt was made by the contemner to call evidence to prove his allegations but the Court refused to call the witnesses and held that there can be no justification of contempt of Court. Even assuming that the writer of a manifesto believes all he states therein to be true, if anything in the manifesto amounts to contempt of Court, the writer is not permitted to lead evidence to establish the truth of his allegation."

73. In *Coats v. Chadwick*, 1894-1 Ch D 347, *Chitty, J.*, observed in a contempt case as follows:

"The Plaintiffs' counsel not only admitted, but boldly asserted, and made it part of their argument, that the circular was libellous, and that they could justify the libel, and they referred to some of the evidence which apparently had been adduced for the purpose of sustaining justification. But the evidence and the argument founded on it are irrelevant on this motion".

In AIR 1935 Cal 410, Mukerji, J., at page 432, describing the characteristic of proceedings to punish *brevi manu* contempt of Court observed that in such proceedings the contemner is precluded from taking a plea or a defence".

74. The first respondent has argued his case at great length but we are unable to hold that he did not commit contempt of Court. Further, he did so deliberately. He admits that he took part in the drafting of the Impeachment Motion, and it seems to us that whoever is responsible for the final draft deliberately used words in order to bring the allegations within the word "misbehaviour" in Article 124 (4). He said that by assisting in the drafting he did not commit any contempt of Court. That may or may not be so. But so far as the present case is concerned we need not go into that wider question as he has admitted that he gave the booklet or the pamphlet to Mr. Mahindroo though according to him it was not given to him by way of sale and was not being offered for sale in general. He further said that it was admitted that the booklet was widely circulated but that this must have been done by some members of Parliament. He complained that those members had not been arraigned as co-respondents. If some members of Parliament circulated the booklet or the pamphlet, as alleged by Respondent No. 1, to persons who were not members of Parliament they equally committed contempt of this Court. But as no body has chosen to file a petition against them, nor are we aware as to which member or members of Parliament have circulated the booklet or the pamphlet they could not be proceeded against. The fact that these members of Parliament had not been made co-respondents does not exonerate the first respondent or make it any the less contempt of Court.

75. We must now refer to another defence which he relied on. He said that Article 105 (2) of the Constitution and the Parliamentary Proceedings (Protection of Publication) Act, 1956 (XXIV of 1956) protect him. He submitted in his affidavit that "firstly, Parliament's authority can be taken to be implied to this publication as it has taken no exception to or action on it; secondly, the article implies that when the publication is without such authority, only the Parliament shall take action for it". He further submitted that Sections 3 and 4 of the Parliamentary Proceedings (Protection of Publication) Act, 24 of 1956, also protect substantially true reports of Parliamentary proceedings unless made with malice. Article 105 (2) reads as follows:

"No member of Parliament shall be liable to any proceedings in any Court in respect of anything said or any vote given by him in Parliament or any committee thereof, and no person shall be so liable in respect of the publication by or under the authority of either House of Parliament of any report, paper, votes or proceedings".

We are unable to appreciate how on the facts proved in this case Article 105 (2) applies. He has not relied on any express authority of the Lok Sabha, and Article 105 (2) does not say anything of any implied authority resulting from non-action of Parliament. Nothing, in fact was shown to us as to establish the publication of the pamphlet or the booklet as a publication "by or under the authority of either House of Parliament of any report, paper, votes or proceedings".

76. Section 2 of the Parliamentary Proceedings (Protection of Publication) Act, 1956, defines "newspaper" thus:

"In this Act, "newspaper" means any printed periodical work containing public news or comments on public news, and includes a news agency supplying material for publication in a newspaper".

Sections 3 and 4 of this Act read thus.

"3. (1) Save as otherwise provided in sub-section (2), no person shall be liable to any proceedings, civil or criminal, in any Court in respect of the publication in a newspaper of a substantially true report of any proceedings of either House of Parliament,

unless the publication is proved to have been made with malice.

(2) Nothing in sub-section (1) shall be construed as protecting the publication of any matter, the publication of which is not for the public good.

4. This Act shall apply in relation to reports or matters broadcast by means of wireless telegraphy as part of any programme or service provided by means of a broadcasting station situate within the territories to which this Act extends as it applies in relation to reports or matters published in a newspaper".

77. Various questions of interpretation would have arisen if the pamphlet or the booklet had been published in a newspaper, as defined in Section 2. One of them would be whether a contempt proceeding is a criminal or a civil proceeding or not; a question would also arise whether a notice of impeachment under Article 124 (4), if not admitted by the Speaker under Section 3 (1) of the Judges (Inquiry) Act, 1968 (Act LI of 1968), is a proceeding of Parliament within the meaning of Section 3 of the Parliamentary Proceedings (Protection of Publication) Act, 1956. But as here we are not concerned with the publication of the pamphlet or the booklet in a newspaper we need not decide these questions. It seems to us that the protection under Section 3 is only given to newspapers or broadcasting agencies. The protection is available provided that the publication has not been made with malice and is for public good.

78. Even so Respondent No. 1 contends that Sections 3 and 4 of the Parliamentary Proceedings (Protection of Publication) Act, 1956, show that Parliament considers it important that proceedings of the Houses of Parliament should be made known to the public, and therefore, if a private person does what is permitted by Section 3, it cannot be said to be contempt of Court because by permitting publication under Section 3 Parliament must be deemed to have said that publication even of a proceeding which would ordinarily amount to contempt of Court does not affect the due administration of justice. We are unable to deduce such an inference from Sections 3 and 4 on the statute book. This is a limited protection given to newspapers and even then it will require serious consideration whether a

contempt proceeding is a proceeding, civil or criminal, within the meaning of Section 3.

79. In the result we hold that neither Article 105 (2) nor the Parliamentary Proceedings (Protection of Publication) Act, 1956 protect the first respondent in respect of the contempt of Court committed by him.

80. The first respondent said, and he has also stated so in para 10 of his affidavit, that the petitioners had "needlessly dragged in the fair name of Hon'ble Mr. Justice Hegde". According to him, the name of Mr. Justice Hegde did not occur even once anywhere either disparagingly or otherwise, and he had the greatest regard and respect for him, just as he had for every other Judge in India. He said that he took great care to keep out the fair name of Mr. Justice Hegde although he did so at the risk of the impeachment motion not being admitted. It seems to us, however, that at least to persons who knew that the appeal had been heard by Mr. Justice Shah and Mr. Justice Hegde and that the judgment was drafted and delivered by Mr. Justice Hegde, and to persons who are familiar with the practice of this Court the statement that "the other Judge merely toed his line" must appear as gross contempt of Mr. Justice Hegde and this Court. The expression "toed the line" used in reference to Mr. Justice Hegde, by clear implication, means that the learned Judge, contrary to his own views, followed what was imposed upon him by Mr. Justice Shah. There can be no more flagrant contempt of a Judge than to say that he surrendered his own judgment in deference to or dictation by another Judge sitting with him.

81. In para 3.2 of his affidavit Respondent No. 1 submitted:

"But I am not at this stage making any attempt to contradict evidence given or to give any evidence on my side. This will be done if and when the occasion arises or the Hon'ble Court so orders. I will have to summon some documents also for that purpose".

We indicated to him during the course of the hearing that he should file his affidavit or affidavits dealing with the merits of the case but that he would not be permitted to lead any other evidence to justify contempt. We have already referred to cases which show

that he cannot justify contempt. If a judgment is criticised as containing errors, and coupled with such criticism, dishonesty is alleged, the Court hearing the contempt petition would first have to act as an appellate Court and decide whether there are errors or not. This is not and cannot be the function of a Court trying a petition for contempt. If evidence was to be allowed to justify allegations amounting to contempt of Court it would tend to encourage disappointed litigants—and one party or the other to a case is always disappointed—to avenge their defeat by abusing the Judge.

82. This takes us to some of the points regarding maintainability of the petition and the defects in procedure, as alleged in his application dated January 28, 1971 (Criminal Misc. Petition No. 172 of 1971).

83. In *Sukhdev Singh Sodhi v. Chief Justice and Judges of the Pepsu High Court*, 1954 SCR 454 at p. 463 = (AIR 1954 SC 186 at p. 190) this Court observed:

"We hold therefore that the Code of Criminal Procedure does not apply in matters of contempt triable by the High Court. The High Court can deal with it summarily and adopt its own procedure. All that is necessary is that the procedure is fair and that the contemner is made aware of the charge against him and given a fair and reasonable opportunity to defend himself. This rule was laid down by the Privy Council in *re Pollard*, (1868) LR 2 PC 106 at p. 120 and was followed in India and in Burma in *re Vallabhdas*, (1903) ILR 27 Bom 394 and *Ebrahim Mamoojee Parekh v. King Emperor*, (1926) ILR 4 Rang 257 at pp. 259, 261 = (AIR 1926 Rang 188 at pp. 189, 190)."

84. In our view that is still the law. It is in accordance with the practice of this Court that a notice was issued to the respondents and opportunity given to them to file affidavits stating facts and their contentions. At one stage, after arguments had begun Respondent 1 asked for postponement of the case to engage some lawyers who were engaged in fighting elections. We refused adjournment because we were of the view that the request was not reasonable and was made with a view to delay matters. We may mention that the

first respondent fully argued his case for a number of days. The procedure adopted by us is the usual procedure followed in all cases.

85. The first respondent contended that the affidavit of Mr. S. N. Prasad was defective because the verification was not in accordance with the provisions of law relating to affidavits. In para 2 of the affidavit Mr. S. N. Prasad stated:

"that I state that the facts stated in paragraphs 1 and 8 of the petition are true to my personal knowledge and the facts stated in paragraphs 2 to 7 are believed to be true by me on the basis of the information received".

The first respondent said that the source of information had not been disclosed. Para 2 of the petition refers to proceedings in this Court and it was not necessary to have disclosed any further source of information. As far as paras 3 and 4 are concerned, the first respondent admits that he approached members of Parliament to file a motion of Impeachment against Mr. Justice Shah. Calling this a "campaign" is only to describe in a word his activities. Whether it should be strictly called a campaign is beside the point. The essential facts mentioned in para 5 are admitted by the first respondent. Therefore the fact that the source of information was not disclosed does not debar us from taking the facts into consideration. The last sentence of para 5, viz., "The said pamphlet was as the petitioners believe, sold or offered for sale to the public by Respondent No. 3" is a matter of belief. Para 6 contains inferences and submissions in respect of which there was no question of disclosing the source of information. Para 7 contains extracts from the booklet or the pamphlet which was attached as an annexure. In view of the document having been attached it was not necessary that the source of information regarding para 7 should have been disclosed. The allegations in para 9 of the petition are supported by an affidavit of Mr. B. P. Singh, Advocate, who has verified that the contents in his affidavit are true to his knowledge. Para 10 of the petition contains submissions and it was not necessary to state the source of information. We are unable to see any defect in the affidavit filed on behalf of the petitioners.

86. In para 5 of his petition dated January 28, 1971, the first respondent stated that "the complainant must disclose all his evidence with the initial petition and cannot be allowed to supplement any evidence later". He submitted that "in the present petition, no evidence against the respondents has been disclosed except in regard to paragraph 9 of the petition, although there are very wide and sweeping allegations in other paragraphs". There is no basis for this complaint because all the affidavits were filed along with the petition.

87. In para 6 of the petition dated January 28, 1971, he stated that "the charges against the alleged contemptners must be specifically written. It is not sufficient to leave the respondents searching for the charges from the entire petition". He submitted that the petition did not clarify specifically as to what the distinct charges against each respondent were. In the course of his arguments he referred to a number of authorities in support of this para. It is unnecessary to refer to them except one, because it is clear that on the facts the charge against the first respondent is quite clear and simple and it is not necessary that a formal charge should be drawn up by the petitioners or the Court.

88. In *Nagar Mahapalika of the City of Kanpur v. Mohan Singh*, Cr. App. No. 27 of 1964, D/- 31-1-1966 this Court was concerned with the contempt of Allahabad High Court by the Nagar Mahapalika of the City of Kanpur by committing a breach of an injunction issued by the High Court. In this connection Sarkar, J., as he then was, speaking on behalf of the Court, observed:

"We will deal first with the case of the Municipality. It will have been noticed that it was not the respondent's case that the Municipality had issued any new licence after the order of July 14, 1961. In fact, it was conceded that it did not do so. What was said was that the Municipality adopted a practice of realising rickshaw taxes from the owners and printing the fact of the receipt of the tax on the rickshaws and permitting them to ply without licences. The way the case seems to have been put before the High Court was that this was a subterfuge adopted by the Municipality to get round the order of the High Court the object of which was to stop new

rickshaws plying for hire, by permitting rickshaws to ply without a licence on payment of the tax. This contention was accepted by the High Court. It seems to us somewhat unfortunate that the matter proceeded in this way. An allegation of contempt of court is a serious one and is considered by Courts with a certain amount of strictness. A person against whom such an allegation is made is entitled to be told the precise nature of it. In this case the respondent did not state that any subterfuge had been adopted by the Municipality or that the Municipality had sought to defeat the order of the Court; that was only insinuated. This is not a fair or permissible way of charging a person with contempt of Court. The contempt alleged cannot be left to be spelt out from the allegations made nor can the person charged be left to guess what contempt is alleged against him. Further, paragraph 8 of the petition for committal for contempt stated that there was a direct contravention of the order which of course, there was not as no licences had been issued. Neither were any particulars given as to how the alleged practice that was adopted was intended to get round the order, nor of how the Municipality permitted rickshaws to ply without licences. We think the learned Attorney-General was perfectly justified in drawing our attention to these defects in the petition and characterising them as serious".

The facts in this case are quite different and it seems to us that the petition is as clear as it can be. By setting out the extracts from the pamphlet or the booklet pointed attention has been drawn to the offending passages, although the whole booklet or the pamphlet was annexed as an annexure.

89. In para 7 of the application dated January 28, 1971 the first respondent submitted that the petition should not have contained anything which was not a charge against him. He complained that the petition contained several wild allegations based entirely on surmises. He further added that "being without evidence they cannot be, and have not been put down specifically as charges against the respondents, and therefore ought not to find place in the petition". He developed this point by referring to paras 3, 4 and 5 of the petition. These

paras seem to be introductory to the main charge and there is no law that anything introductory should not be put in the petition. He admits that he patiently approached each Hon'ble Member and narrated the deep wrong done to him and he was able to satisfy quite a number. Nobody denies that he has a right to approach and convince the Hon'ble Members and that he exercised that right. But if the petitioners have called it a "campaign" in paras 3 and 4 of the petition, no serious objection can be taken to these paras.

90. In para 3 of this application Respondent No. 1 submitted that there was delay of more than 120 days in filing the petition for contempt. He says that delay is always fatal to contempt action unless it is fully explained and condoned in proper cases and on proper application. We are unable to see any delay in this case. After the first respondent gave a copy of the pamphlet or the booklet to Mr. Mahindroo, the petitioners had to ascertain facts regarding its publication, printing, etc. As the Attorney-General did not move in the matter, the President of the Supreme Court Bar and the other petitioners chose to bring this contempt to our notice. It is no doubt desirable, as stated by Oswald*, that "an application for attachment should be made promptly, or the Court may refuse to attach". But whether there has been delay or not depends on the facts of a particular case. In this connection Respondent No. 1 referred to page 231 of Ramchandra's book on 'Contempt of Court under the Indian Constitution' where the author gives the American Law on this point as follows:

"While delay in contempt proceedings is to be deprecated the power of Court to take such action is not however lost by delay. The summary power is not in any way jeopardised on that account except where delay extends substantially beyond the end of trial, in which event it has been held fatal to the power of summary punishment".

But even the American law is quite clear that delay is not fatal.

91. Similarly, in *State Government, Madhya Pradesh v. Vinaya*

*Oswald — *Contempt of Court*: third edition: p. 196.

Kumar, AIR 1952 Nag 34 it was observed as follows:

"We do not say that delay will always be fatal. There may be cases in which it is not. Examples of both kinds of cases will be found in 7 Halsbury's Laws of England, Hailsham Edition, page 37, Note (p)".

92. In this connection we may also deal with his objection in para 10 of the application that the petitioners have no locus standi. This Court can issue a notice suo motu. Further, the advocates of this Court, including the President of the Supreme Court Bar Association, are perfectly entitled to bring to our notice any contempt of this Court.

93. The first respondent referred to Lord Shawcross Committee's recommendation that "proceedings should be instituted only if the Attorney-General in his discretion considers them necessary". This is only a recommendation made in the light of circumstances prevailing in England. But it is not law. We may mention that the Attorney-General in England has quite a different position than the Attorney-General of India or the Advocates-General of the States. The Attorney-General in England is a member of the Cabinet, and as far as we are aware, unlike the Attorney-General in India, he does not have to receive instructions from Government whether to move a contempt petition or not.

94. Be that as it may, there is nothing in law which prevents this Court from entertaining a petition at the instance of the President of the Supreme Court Bar Association and three other advocates of the Court. The Bar is vitally concerned in the maintenance of the dignity of Courts and the proper administration of justice.

95. The next point mentioned in the petition dated January 28, 1971, is regarding non-joinder of the 200 or so signatories of the motion of impeachment. We are unable to see why the petition is bad for non-inclusion of the said signatories. There is no allegation or proof that any of the said signatories circulated this booklet or pamphlet outside the Parliament, to persons other than members of Parliament.

96. We may now deal with the other legal submissions contained in his affidavit. He submitted, in brief, that the substance of the impeachment

motion had already been put in the writ petition which he filed against Mr. Justice Shah on October 27, 1969. According to him, a reproduction of proceedings of Court is not contempt unless the Court has prohibited the publication. We are unable to appreciate this line of argument. Even if he had filed a writ petition containing the substance of the impeachment motion, we are unable to see how it affords a defence to the commission of contempt of this Court by circulating the booklet or the pamphlet.

97. In para 21 of his affidavit his defence seems to be that he had told Mr. Justice Shah during the course of the hearing that he was only telling the truth and if in telling the truth it was necessary for him to go to jail for contempt he was ready for the same. He seems to suggest that if Mr. Justice Shah did not choose to take any action for contempt it is improper and not open to the petitioners to initiate these proceedings. We are unable to see any force in this submission.

98. In para 23 of his affidavit his defence is that the filing of the petition is itself contempt because "the real object of the petitioners, which is very obvious and writ large on their faces, is to take revenge upon me for having dared to approach the Parliament against their friend, junior and erstwhile boss Shri J. C. Shah. The cloak of "publication and distribution outside Parliament" is too thin to hide their real motive". We are unable to see how the petition is itself contempt. This para shows the real attitude of the respondent. He seems to think that people act only to take revenge as he seems to have done.

99. We have already dealt with his submissions in paras 24 and 24.1.

100. The contention of the respondent in para 25 is that even if it is a contempt it is a technical and trivial contempt which is not actionable. We are unable to hold that on the facts of the case it is a technical and trivial contempt. It constitutes gross contempt of two Judges of this Court and the Court itself. He was well aware of the contents of the pamphlet or the booklet. The affidavit of Mr. B. P. Singh establishes that Respondent No. 1 was showing copies of the pamphlet or the booklet which he was carrying with him to several

members of the Bar in the Bar Association room. His affidavit and Mr. Mahindroo's affidavit further establish that he gave one copy of it to Mr. Mahindroo openly in the Bar room. Being a lawyer he must have known that it would be discussed there.

101. The cases referred to in para 25 and in the course of the arguments are quite distinguishable and are not applicable.

102. Now to come to the case of Respondent No. 2. Mela Ram, one of the partners of Rising Sun Press, stated in his affidavit that in the month of April, 1970, the first respondent went to him for entrusting printing work and said that he had been sent by Shri Tulsi Ram, Proprietor Youngmen & Co., Egerton Road, Delhi, whose printing work was being done by him for the last about 16 years and who used to send customers to him from time to time for printing work. He told the first respondent to see the contractor, Ram Vir, who did composing work for him. He says that he did not look into the material which the first respondent brought for printing and he left the composition work to the contractor above-named. He further says that as at about that time his mother-in-law expired he had to go to District Gurdaspur where he stayed about a week and in his absence the first respondent sat day-to-day with the contractor and compositors for having the composition completed quickly and he also got the printing done in his press before he returned from Gurdaspur. After getting the material printed the first respondent collected the same from the press before his return from Gurdaspur. He further says that the printing forms had already been taken away by the first respondent before he returned and it was not possible for him to know the contents. He further says that the title cover of the printed booklet was not printed by him nor was the binding done by him. He further alleges that the first respondent had not even paid his charges. He expressed his unconditional and unqualified apology to this Court. In view of the unconditional apology tendered by him, we do not think any further action need be taken against him.

103. The third respondent has not been served or traced. We need not say anything about him for the present.

104. It seems to us that on the facts of this case a heavy sentence is called for. Not only did the first respondent commit gross contempt of this Court but he took advantage of the retirement of Mr. Justice Shah and hurled fresh abuses on him in Court. It is true that he has offered an apology, but an apology coupled with fresh abuses can hardly be taken note of. However, we have decided to be lenient and imposed only a sentence of simple imprisonment for two months. We have decided to be lenient because such gross contempts of this Court are happily rare but any future gross contempt of this Court of this nature will be dealt with not so leniently. In the result it is held that O. P. Gupta, respondent No. 1, is guilty of contempt of this Court and sentenced to simple imprisonment for two months. We direct that he be arrested and committed to civil prison for two months. We further authorise the Registrar to take all necessary steps in this behalf.

Order accordingly.

**AIR 1971 SUPREME COURT 1153
(V 58 C 232)**

(From: Calcutta)*

**C. A. VAIDIALINGAM AND
A. N. RAY, JJ.**

Smt. Priya Bala Ghosh, Appellant
v. Suresh Chandra Ghosh, Respondent.
Criminal Appeal No. 275 of 1968,
D/- 4-3-1971.

Penal Code (1860), Section 494 —
Bigamy — Proof of solemnization of
second marriage in accordance with
essential religious rites applicable to
parties is a must for conviction for
bigamy — Mere admission by accused
that he had contracted second marriage
is not enough — (X-Ref.: — Hindu
Marriage Act (1955), Section 17) —
Case law discussed.

(Paras 15, 16, 17, 20)

Cases Referred: Chronological Paras
(1966) AIR 1966 SC 405 (V 53)
= (1966) 1 SCR 606, Bharat
Singh v. Bhagirathi 23
(1966) AIR 1966 SC 614 (V 53)
= (1966) 1 SCR 539 = 1966
Cri LJ 472, Kanwal Ram v.

*(Criminal Appeal No. 393 of 1966, D/-
19-1-1968 — Cal.)

CO/DO/B247/71/GKC/P

1971 S. C./73 VI G—11

Himachal Pradesh Administra-
tion 17, 20
(1965) AIR 1965 SC 1564 (V 52)
= (1965) 2 SCR 837 = (1965)
2 Cri LJ 544, Bhaurao Shankar
Lokhande v. State of Mahara-
shtra 14
(1938) 1938-1 All ER 301, R. v.
Robinson 19
(1882) ILR 5 All 233 = 1883 All
WN 1, Empress v. Kallu 18
(1880) ILR 5 Cal 566 = 5 Cal LR
597 (FB), Empress v. Pitambur
Singh 18
(1767) 4 Gurr 2057 = 98 ER 73,
Moris v. Miller 18
M/s. S. C. Majumdar and R. K.
Jain, Advocates, for Appellant.

The following Judgment of the
Court was delivered by

VAIDIALINGAM, J.: — In this
appeal by special leave, the appellant
challenges the judgment and order of
the Calcutta High Court dated Janu-
ary 19, 1968 in Criminal Appeal No. 393
of 1966.

2. The appellant filed a com-
plaint dated April 11, 1963 against the
respondent, her husband, in the Court
of the Magistrate, 1st Class, Alipur-
duar, alleging that he has committed
an offence under Section 494 of the
Indian Penal Code. Briefly her case
was as follows:

3. The respondent had married
the appellant in or about 1948 accord-
ing to Hindu rites and both of them
had lived as husband and wife
together. But sometime before the
date of the complaint the respondent
began to ill treat her, with the result
that she had to reside with her mother
and brother. The respondent illegally
married one Sandhya Rani as his
second wife on May 31, 1962 and they
have been living together as husband
and wife. As the second marriage has
taken place during the subsistence of
the appellant's marriage with the res-
pondent, the second marriage is in-
valid in law and the respondent is
guilty of an offence under Section 494
of the Indian Penal Code.

4. The respondent pleaded not
guilty of the offence alleged against
him. He further pleaded that he has
never married the appellant and that
the entire prosecution case is false.

5. The trial Magistrate, after
considering the evidence adduced both
regarding the marriage between the
appellant and the respondent as well
as the alleged second marriage between

the respondent and Sandhya Rani, held that the marriage of the appellant with the respondent was established. Notwithstanding the scantiness of the evidence regarding the second marriage, the Trial Magistrate, however, found that the respondent had admitted the second marriage in his objections filed to a claim made by the appellant for maintenance under Section 488 of the Code of Criminal Procedure. In this view the Magistrate held that there cannot be any doubt that the respondent has married Sandhya Rani while his first wife, the appellant, was still alive. The Magistrate further held that as the marriage with the appellant was subsisting, the second marriage is void under Section 17 of the Hindu Marriage Act, 1955 (Act 25 of 1955), (hereinafter to be referred as the Act) and, therefore, the respondent was guilty of the offence under Section 494 of the Indian Penal Code. The respondent was sentenced for the said offence to undergo rigorous imprisonment for one year and also to pay a fine of Rs. 500/- and in default to suffer rigorous imprisonment for a further period of three months. A further direction was given that half the fine, if realised, was to be paid to the complainant, the appellant.

6. On appeal by the respondent, the learned Sessions Judge, Jalpaiguri, by his judgment dated April 30, 1966 held that the evidence does not establish that the essential ceremonies to constitute a valid marriage have been performed either in the case of the marriage claimed to have taken place between the appellant and the respondent or in respect of the alleged second marriage with Sandhya Rani. In this view the learned Sessions Judge set aside the order of the Magistrate convicting the respondent and sentencing him as mentioned above. The respondent was acquitted of the offence under Section 494, I. P. C.

7. On appeal by the appellant, the Calcutta High Court, however, differed from the finding of the learned Sessions Judge regarding the invalidity of the marriage between the appellant and the respondent. On the other hand, the High Court held that the evidence establishes that a valid marriage, according to Hindu Law, by which the parties were governed, has taken place between the appellant and

the respondent. But regarding the second marriage, the High Court agreed with the finding of the learned Sessions Judge that the essential ceremonies to constitute a valid marriage have not been proved to have taken place. In this view the High Court confirmed the order of acquittal passed in favour of the respondent and dismissed the appellant's appeal.

8. Mr. S. C. Majumdar, learned counsel for the appellant, has raised two contentions before us: (1) that the view of the High Court that the essential ceremonies to constitute a valid marriage have not been proved to have taken place regarding the second marriage of the respondent with Sandhya Rani, is erroneous and contrary to the evidence adduced in the case; and (2) In any event in view of the specific admission made by the respondent in Ex. 2 about the second marriage and having due regard to the other surrounding circumstances, it must be held that the respondent is guilty of the offence under Section 494, I. P. C. The respondent has not appeared before us and we have to proceed on the basis of the finding of the learned Sessions Judge, accepted by the High Court, that the appellant was married to the respondent and that the marriage was subsisting on the date of the alleged second marriage.

9. Both the contentions of the learned counsel for the appellant can be dealt with together. It has been pointed out by the learned Sessions Judge that both sides agreed that according to the law prevalent amongst the parties Homa and Saptapadi were essential rites to be performed to constitute a valid marriage. Both sides also agreed before the Court that there was no specific evidence as to the performance of Saptapadi and Homa in the case of the alleged marriage of the respondent with Sandhya Rani. Therefore, the main question that has to be considered is whether the performance of the above ceremonies and rites have to be established by evidence specifically before the respondent could be convicted under Section 494, I. P. C. The findings of the High Court are that the Priest, P. W. 6, who claims to have officiated at the marriage of the respondent and Sandhya Rani has given evidence to the effect that the marriage was solemnized according to Hindu rites. He has not said any-

thing more than this. The other evidence adduced has not been considered to be of any use in this regard. The further finding of the High Court is that no evidence was adduced that the Homa and Saptapadi were performed in the case of the marriage between Sandhya Rani and the respondent and that it has also not been proved that there was any custom prevalent amongst the parties that those essential ceremonies are not necessary for the purpose of solemnization of the marriage.

10. According to Mr. Majumdar, when once the priest has given evidence to the effect that the marriage between the respondent and Sandhya Rani has been performed, it follows that all the essential ceremonies that are necessary to constitute a valid marriage must be presumed to have been performed. In any event, when there is evidence to show that the marriage as a fact has taken place, the presumption is that it has taken place according to law. In this connection Mr. Majumdar referred us to various English decisions where on the basis of certain evidence regarding the taking place of marriage between the parties a presumption has been drawn that the marriage must have been solemnized according to law. In our opinion, it is unnecessary to refer to those cases cited by the learned counsel as the position is concluded against the appellant by the decisions of this Court on both points. Section 5 of the Act lays down conditions for a Hindu marriage. It will be seen that one of the conditions is that referred to in Clause (i), namely, that neither of the parties has a spouse living at the time of the marriage. Section 7 dealing with the ceremonies for Hindu marriage is as follows:

"Section 7 — Ceremonies for a Hindu marriage.

(1) A Hindu marriage may be solemnized in accordance with the customary rites and ceremonies of either party thereto.

(2) Where such rites and ceremonies include the Saptapadi (that is, the taking of seven steps by the bridegroom and the bride jointly before the sacred fire), the marriage becomes complete and binding when the seventh step is taken".

We have pointed out that in the case before us both sides were agreed that according to the law prevalent

amongst them Homa and Saptapadi were essential rites to be performed for solemnization of the marriage and there is no specific evidence regarding the performance of these essential rites. The parties have also not proved that they are governed by any custom under which these essential ceremonies need not be performed.

11. Section 11 of the Act deals with void marriages. One of the conditions, if contravened, which makes a marriage solemnized after the commencement of the Act, null and void, is if any party thereto has a spouse living at the time of the marriage.

12. Section 17 relating to punishment of bigamy is as follows:

"Section 17 punishment of bigamy:

Any marriage between two Hindus solemnized after the commencement of this Act is void if at the date of such marriage either party had a husband or wife living; and the provisions of Sections 494 and 495 of the Indian Penal Code shall apply accordingly".

13. Again in the case before us there is no controversy that the second marriage is stated to have taken place after the commencement of the Act during the subsistence of the first marriage. If the second marriage has taken place, it will be void under the circumstances and Section 494 of the Indian Penal Code will be attracted. Section 494 of the Indian Penal Code is as follows:

"Section 494 — Marrying again during lifetime of husband or wife —

Whoever, having a husband or wife living marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine".

14. In Bhaurao Shankar Lokhande v. State of Maharashtra, (1965) 2 SCR 837 = (AIR 1965 SC 1564), the question arose whether in a prosecution for bigamy under Section 494, I. P. C. it was necessary to establish that the second marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through. The first appellant therein had been convicted for an

offence under Section 494, I. P. C. for going through a marriage which was void by reason of its taking place during the lifetime of the previous wife. The said appellant contended that it was necessary for the prosecution to establish that the alleged second marriage had been duly performed in accordance with the essential religious rites. The State, on the other hand, contended that for the commission of the offence under Section 494, I. P. C. it was not necessary that the second marriage should be a valid one and a person going through any form of marriage during the lifetime of the first wife would be guilty of the offence. This Court rejected the contention of the State and observed as follows:

"Prima facie the expression 'whoever marries' must mean 'whoever marries validly' or whoever marries and whose marriage is a valid one'. If the marriage is not a valid one, according to the law applicable to the parties, no question of its being void by reason of its taking place during the lifetime of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law".

15. Again in interpreting the word "solemnize" in Section 17 of the Act, it was stated:

"The word 'solemnize' means in connection with a marriage, 'to celebrate the marriage with proper ceremonies and in due form', according to the Shorter Oxford Dictionary. It follows, therefore, that unless the marriage is 'celebrated or performed with proper ceremonies and due form' it cannot be said to be 'solemnized'. It is therefore essential for the purpose of Section 17 of the Act, that the marriage to which Section 494, I. P. C. applies on account of the provisions of the Act, should have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the intention that the parties be taken to be married, will not make them ceremonies prescribed by law or approved by any established custom".

From the above quotations it is clear that if the alleged second marriage is not a valid one according to law applicable to the parties, it will not be void by reason of its taking place during the life of the husband or the

wife of the person marrying so as to attract Section 494, I. P. C. Again in order to hold that the second marriage has been solemnized so as to attract Section 17 of the Act, it is essential that the second marriage should have been celebrated with proper ceremonies and in due form.

16. In the said decision this Court further considered the question whether it has been established that with respect to the alleged second marriage the essential ceremonies for a valid marriage have been performed. After referring to the passage in Mulla's Hindu Law, 12th Edn. at page 615 dealing with the essential ceremonies which have to be performed for a valid marriage, this Court, on the evidence, held that the prosecution had neither established that the essential ceremonies had been performed nor that the performance of the essential ceremonies had been abrogated by the custom governing the community to which the parties belonged. In this view it was held that the prosecution in that case had failed to establish that the alleged second marriage had been performed in accordance with the requirement of Section 7 of the Act. The effect of the decision, in our opinion, is that the prosecution has to prove that the alleged second marriage had been duly performed in accordance with the essential religious rites applicable to the form of marriage gone through by the parties and that the said marriage must be a valid one according to law applicable to the parties.

17. In *Kanwal Ram v. The Himachal Pradesh Admr.*, (1966) 1 SCR 539 = (AIR 1966 SC 314) this Court again reiterated the principles laid down in the earlier decision referred to above that in a prosecution for bigamy the second marriage has to be proved as a fact and it must also be proved that the necessary ceremonies had been performed. Another proposition laid down by this decision, which answers the second contention of the learned counsel for the appellant, is that admission of marriage by an accused is no evidence of marriage for the purpose of proving an offence of bigamy or adultery. On the evidence it was held in the said decision that the witnesses have not proved that the essential ceremonies had been performed.

18. It was contended that an admission made by the accused regarding the second marriage is conclusive of the fact of a second marriage having taken place and that without any other evidence a conviction could be based on such admission. This Court rejected the said contention stating:

"...it is clear that in law such admission is not evidence of the fact of the second marriage having taken place. In a bigamy case, the second marriage as a fact, that is to say, the ceremonies constituting it must be proved; *Empress v. Pitambur Singh*, (1880) ILR 5 Cal 566 (FB), *Empress v. Kallu*, (1882) ILR 5 All 233, *Archbold Criminal Pleading Evidence and Practice*, (35th ed.) Article 3796. In *Kallu's case*, (1882) ILR 5 All 233 and in *Morris v. Miller*, (1737) 4 Burr 2057 = 98 ER 73, it has been held that admission of marriage by the accused is not evidence of it for the purpose of proving marriage in an adultery or bigamy case

19. The decision in *R. v. Robinson*, (1938) 1 All ER 301, was relied on in the above decision on behalf of the prosecution in support of the proposition that it was not necessary to prove that all the ceremonies required for the particular form of marriage had been observed. After a consideration of the facts in the English decision, quoted above, this Court has expressed the view that the said decision does not support the proposition enunciated on behalf of the prosecution. We are only adverting to this fact, because the English decision was again referred to us by Mr. Majumdar; and it is not necessary for us to refer to the same over again excepting to say that the said decision does not advance the case of the appellant.

20. As pointed out earlier, this Court in *Kanwal Ram's case*, (1966) 1 SCR 539 = (AIR 1966 SC 314) has laid down that an admission is not evidence of the fact that the second marriage has taken place after the ceremonies constituting the same have been gone through. As the High Court has dealt with the question regarding the admissibility of admission contained in Ex. 2, we will briefly refer to the nature of the admission that was sought to be relied on against the respondent by the complainant. But we make it clear that the discussion regarding this aspect is

only to deal with the contention advanced on behalf of the appellant and to reject the same. The trial Magistrate, whose decision was in favour of the appellant has himself expressed the view that the evidence on the side of the appellant regarding the alleged second marriage is very scanty. But that Court held that the respondent has admitted the second marriage in Ex. 4, which was an objection filed by the respondent in an application filed by the appellant for maintenance under Section 488, Criminal P. C. We have gone through the said objection petition. The respondent has alleged various acts of misconduct against the appellant and he has merely stated that he was compelled to marry again. But no other particulars have been given in the said objection petition. We are of the view that no admission of the second marriage by the respondent with Sandhya Rani can be culled out from Ex. 4. In fact the trial Court has based its finding regarding the second marriage almost exclusively on what it considered to be an admission contained in Ex. 4. As there is no such admission, the finding of the Magistrate was clearly erroneous.

21. Before the High Court, however, we find that the appellant did not place any reliance on Ex. 4. On the other hand she relied on an admission stated to have been contained in Ex. 2. The appellant filed a complaint under Section 494, I. P. C. against the respondent on an earlier occasion on the ground that the latter had contracted a second marriage with Sandhya Rani. That complaint was, however, withdrawn as the particular Court had no jurisdiction. In that proceeding the appellant wanted the said Sandhya Rani to be summoned as a witness. To that application, the respondent filed an objection Ex. 2 wherein no doubt, he has admitted that Sandhya Rani is his wife and that he married her because of the misconduct of the appellant. The High Court considered the question whether this statement of the respondent in Ex. 2 that he has married Sandhya Rani can be treated as an admission of the fact of the second marriage. The High Court was of the view that the statement contained in Ex. 2 would really be a confession statement and declined to act on the same for two reasons: firstly, that the statement in Ex. 2

had not been put to the respondent when he was examined under Section 342, Criminal P. C. so as to give him an opportunity to explain the statements contained therein; secondly, that even if the statement contained in Ex. 2 can be taken into account by themselves they will not be proof of the fact that all the essential ceremonies necessary for a marriage have been performed. In our view the reasons given by the High Court are substantially correct. Though strictly the statements contained in Ex. 2 may not be a confession, nevertheless, those statements, if acted upon, tend to incriminate the respondent. The respondent being in the position of an accused was entitled to be given an opportunity of offering his explanation, if any, in respect of the incriminating statement contained in Ex. 2. Such an opportunity has not been admittedly given to the respondent. His statement in Ex. 2 has not been put to him when he was examined under Section 342, Criminal P. C.

22. Further as pointed out by this Court in Kanwal Ram's case the admission in Ex. 2 cannot in law be treated as evidence of the second marriage having taken place, in an adultery or bigamy case; and that in such cases it must be proved by the prosecution that the second marriage as a fact has taken place after the performance of the essential ceremonies.

23. Mr. Majumdar relied on the decision of this Court in Bharat Singh v. Bhagirathi, (1966) 1 SCR 606 = (AIR 1966 SC 405) to the effect that the admissions made by a party are substantive evidence by themselves in view of Sections 17 and 21 of the Indian Evidence Act, and that if those admissions have been duly proved they can be relied on irrespective of the fact whether the party making them appear in the witness box or not or irrespective of the fact whether such a party had or had not been confronted with those admissions. We do not think that the said decision in any way supports the appellant with regard to prosecution for bigamy under Section 494, I. P. C.

24. To conclude, we have already referred to the fact that both the learned Sessions Judge and the High Court have categorically found that the Homa and Saptapadi are the essential rites for a marriage accord-

ing to the law governing the parties and that there is no evidence that these two essential ceremonies have been performed when the respondent is stated to have married Sandhya Rani. No reliance can be placed on the admissions stated to be contained in Ex. 2. For all the above reasons the contentions of Mr. Majumdar have to be rejected.

25. The appeal fails and is dismissed.

Appeal dismissed.

AIR 1971 SUPREME COURT 1158 (V 58 C 233)

(From Punjab: (1968) 70 Pun LR 253)

I. D. DUA AND V. BHARGAVA, JJ.

Sukhnandan Singh and others, Appellants v. Jamiat Singh and others, Respondents.

Civil Appeal No. 1729 of 1967, D/- 18-2-1971.

(A) Evidence Act (1872), Sec. 115 — Suit for pre-emption — Plaintiff is not estopped from exercising his right of pre-emption on ground of collusion merely because the vendor who is the father of plaintiff-pre-emptor helped him to exercise that right — (1968) 70 Pun LR 253, Affirmed. (Para 7)

It is true that the right of pre-emption is a personal right and is not capable of being transferred. And the right of pre-emption being a right of substitution, the vendor also cannot in the garb of a benamidar pre-empt his own sale. But merely because the vendor who is the father of the plaintiff-pre-emptor is helping his son to exercise the statutory right conferred on the son cannot, without more, deprive him of the right to be substituted for the vendees in exercise of his right of pre-emption. Even in the wider sense of the word "collusion" which suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose, would not apply to such case so as to operate as estoppel against the plaintiffs. (Para 7)

(B) Limitation Act (1908), Art. 10 — Suit for pre-emption — Where even part of land sold was in possession of a tenant, the property sold does not admit of physical possession and there-

CO/DO/A925/71/MLD/P

fore Article 10 of the Act will apply and not Section 30 of the Punjab Pre-emption Act — (X-Ref.: — Punjab Pre-emption Act (1 of 1913), Sec. 30) — (1968) 70 Pun LR 253, Affirmed; (1902) ILR 24 All 17 (PC) and 1908 PR 49 (FB), Rel. on. (Para 8)

The starting point of limitation under Article 10 will therefore be the date of registration of sale deed. In such case Section 30 of Punjab Act (1 of 1913) will not be applicable under which the starting point of limitation will be date on which vendees took physical possession of any part of such land. Section 30 of Punjab Act (1 of 1913) applies only when the case does not fall within Article 10 of Limitation Act. The second part of Art. 10 covers cases where the subject of the sale which means the whole of the property sold does not admit of physical possession and that would be so when a part of the land is in possession of the tenants. The properties in possession of tenants will be incapable of physical possession which means personal and immediate possession. (1902) ILR 24 All 17 (PC); 1908 PR 49 (FB), Rel. on.

(Para 8)

Cases Referred: Chronological Paras
(1908) 1908 PR 49 = 1908 Pun LE

63 (FB), Ghulam Mustafa v. Shahabuddin

(1902) ILR 24 All 17 = 28 Ind App 248 (PC), Batul Begam v. Mansur Ali Khan

Mr. K. L. Gosain, Sr. Advocate, (Mr. Naunit Lal, Advocate, with him), for Appellants; Mr. Purushottam Chatterjee, Sr. Advocate, (Mr. D. D. Sharma, Advocate, with him), for Respondents.

The following Judgment of the Court was delivered by

DUA, J.: — In this appeal by special leave from the judgment and decree of a learned single Judge of the Punjab and Haryana High Court arising out of a pre-emption suit only two questions were raised by the learned counsel for the appellants who were vendees-defendants in the trial Court. The suit was instituted by the three sons of the three vendors who were real brothers, and the two points canvassed in this court challenge the decisions of the High Court and of the court of the District Judge on issues 6 and 7. Those issues are:

"6. Is the suit collusive? If so, its effect.

7. Is the suit within time?"

Both these issues were decided by the trial Court against the plaintiffs but the District Judge on appeal reversed the decision of the trial court on both the issues and the High Court on second appeal affirmed the decision of the first appellate court.

2. The relevant facts may now be stated in brief. Kartar Singh, Bachan Singh and Sardara Singh, sons of Soheli Singh, claiming to be co-sharers, agreed on September 19, 1961, to sell 193 Kanals and 15 marlas of land to Sukhnandan Singh, Sukhmininder Singh and Balkar Singh sons of Gurdev Singh in equal shares, 1/3rd share, Gurminder Singh and Gurbakh Singh sons of Teja Singh in equal shares, 1/3rd share, Gurdas Singh son of Angrez Singh, 1/3rd share at the rate of Rs. 840/- per bigha. A sum of Rs. 7,000/- was received in cash as earnest money. On December 6, 1961 a formal sale deed was executed with some variations in shares and also with the addition of Smt. Chand Kaur, wife of Sardar Inder Singh as one more co-vendee. The sale price was stated to be Rs. 32,550/-. Possession of the land sold was stated to have been delivered and it was also recited that consolidation proceedings under Section 21 (1) of the Consolidation Act had been completed but further proceedings in favour of the vendees would be taken after the proceedings which might be taken under Sec. 21 (2). This sale deed was duly registered on March 9, 1962.

3. The suit for pre-emption by the three sons of the three vendors was instituted on March 6, 1963. It was contested by the vendees. The pleadings of the parties gave rise to several issues but we are only concerned with the issues relating to the pleas of collusive nature of the suit and limitation. The trial Court disposed of the issues Nos. 5 and 6, relating respectively to waiver of the right of pre-emption by the plaintiffs and to the collusive nature of the suit by dealing with them together. Photographs showing the plaintiffs and the vendors being together along with the plaintiffs' counsel in the Court compound during the course of this litigation were produced as evidence in the case. Exhibit P-2 a certified copy of the Register of Consolidation Proceedings, produced by the plaintiffs in evidence showed that this copy had been

prepared at the instance of Kartar Singh, one of the vendors and father of Jamiat Singh, plaintiff. According to the trial Court there was also evidence that the plaintiffs and the vendors resided and messed together. On consideration of this material the trial Court held that the vendors and the pre-emptors resided and messed together and the expenses of the litigation were paid by the vendors. From this it concluded that the suit had been filed by the plaintiffs at the instance of and in collusion with the vendors. The right of pre-emption being a piratical right, according to the trial Court, to quote its own words "it is necessary that the pre-emptors must not act in collusion with vendors or act in bad faith". The plaintiffs were on this reasoning held to be estopped from exercising their right of pre-emption. On the question of limitation the trial Court held that the vendors and not their tenants were in possession of the land sold, which had been allotted to them in the consolidation proceedings and the possession of that land was delivered to the vendees on the date of the sale. The suit was accordingly held to be barred by time. The suit was dismissed for all these reasons.

4. On appeal by the plaintiffs the District Judge reversed the conclusions of the trial Court both on the point of estoppel or collusion and of limitation. According to that Court in order to prove collusion the defendant has to prove that the suit was being fought for the vendors' benefit, the normal presumption being that the plaintiff sues for his own benefit. In support of this view several decisions were relied upon by the District Judge. In the present case, according to the learned District Judge, the plaintiff Jamiat Singh had clearly stated that he was pre-empting the present sale with his own earnings and the learned District Judge found no rebuttal to this assertion. Neither the fact that Ex. P-2 had been obtained by one of the vendors nor the fact that the vendors were present in the Court compound with the plaintiffs and their counsel during the course of litigation indicated that the present suit had necessarily been instituted for the benefit of the vendors. On this reasoning the decision on the collusive nature of the suit which must result in its dismissal was reversed. In

regard to the limitation also the learned District Judge concluded, in disagreement with the trial Court, that a part of the land sold was in possession of tenants and, therefore, it did not admit of physical possession, which means immediate personal possession. In that view of the matter under Article 10 of the Indian Limitation Act, 1908 the terminus a quo was the date of registration of the sale deed. The suit was thus held to have been instituted within one year from the date of registration and, therefore, within limitation under Article 10. The judgment and decree of the trial Court was reversed and the suit decreed.

5. On second appeal a learned single Judge of the Punjab and Haryana High Court held that there was no clear and reliable evidence that the vendors and their sons were united in mess and estate. The other two circumstances, namely, that the vendors and the plaintiffs along with their counsel were seen together in Court compound and that Ex. P-2 had been obtained by one of the vendors one day before the institution of the suit, were not considered sufficient to establish the collusive nature of the suit. In regard to the statement of Jamiat Singh the High Court undoubtedly felt unimpressed by his statement but we do not think it was open to that Court on second appeal to appraise the credibility of the testimony which was believed by the final Court of fact when there was no illegality in the appraisal of the testimony by the District Judge and it was open to him to take the view he did. Jamiat Singh had stated that he was separated from his father since about three years and that he was spending on the litigation from what little amount he earned. The matter was not pursued in cross-examination as to what was the source of his earnings. Even after feeling unimpressed by the statement of Jamiat Singh, the High Court came to the conclusion that it was for the vendees to establish the collusive nature of the plaintiffs' suit. On the evidence produced the District Judge having come to the conclusion that they had failed to discharge this onus this conclusion was one of fact and not being vitiated by any error of law it was held binding on second appeal.

6. The contention that the District Judge was wrong in holding

that a part of the land sold was in possession of the tenant at the time of the sale was also repelled. The conclusion of the District Judge that field No. 24/21 out of the suit land was under the cultivation of Bahadur Singh, a tenant at will, as was clear from Ex. X-4, a copy of Ehasra Girdwari relating to Rabi 1962 and Kharif 1962 was also held to be a finding of fact binding on second appeal. This document was not shown to have been misread by the first appellate Court. On this finding Article 10 of the Indian Limitation Act, 1908, and not Section 30 of the Punjab Pre-emption Act, was held applicable and the suit was thus considered to be within limitation. For this view reliance was placed on two decisions of the Punjab Chief Court and a Bench decision of the Nagpur High Court. The appeal was, however, partly accepted by raising the pre-emption money by an additional sum of Rs. 4,133.50.

7. In this Court again the learned counsel for the appellant-vendees pressed the points of collusion and limitation. We are, however, unable to find merit in either of them. So far as the question of collusion is concerned it was not clarified by the learned counsel how the plaintiffs could be held to have lost their right of pre-emption merely because their fathers either came to the court with them, which they did openly, or allowed their sons as plaintiff to use in court, copy of a public document procured by the father of one of the plaintiffs. Collusion in judicial proceedings is normally associated with secret arrangement between two persons that the one should institute a suit against the other in order to obtain the decision of a judicial tribunal for some sinister purpose. In such a proceeding the claim put forward is fictitious, the contest feigned or unreal and the final adjudication a mask, designed to give false appearance of a genuine judicial determination, and this is generally done with the object of confounding third parties. In such a proceeding the contest is a mere sham. In the case of pre-emption it is open to the plaintiff to find financial aid and from any source he likes. He has a statutory right to pre-empt the sale and it is no concern of the vendees whether he borrows money from someone or otherwise arranges for

finances for pre-empting the sale. It is true that it is a personal right and is not capable of being transferred. And the right of pre-emption being a right of substitution, the vendor also cannot in the garb of a benamidar pre-empt his own sale. But merely because the vendors who are the fathers of the plaintiff-pre-emptors are helping their sons to exercise the statutory right conferred on the sons cannot, without more, deprive them of the right to be substituted for the vendees in exercise of their right of pre-emption. The property pre-empted, if they are successful, will belong to them and not to their fathers who were the vendors. Even in the wider sense of the word "collusion" which suggests a deceitful agreement or compact between two or more persons to do some act in order to prejudice a third person or for some improper purpose, would not apply to the present case so as to operate as estoppel against the plaintiffs. Whether or not a pre-emptor-plaintiff who is a benamidar for the vendor or some other party loses his right because of being a benamidar is a question which does not concern us in this case and we express no opinion thereon. On the facts of the present case there is absolutely no material on which the plaintiffs can be held to have lost their right of pre-emption on the ground of collusion.

8. The next point relates to the plea of limitation. Article 10 of the Second Schedule of the Indian Limitation Act provides a period of one year to enforce a right of pre-emption whether founded on law or general usage or on special contract, the terminus a quo being the date when the purchaser takes under the sale, sought to be pre-empted, physical possession of the whole of the property sold or where the subject of the sale does not admit of physical possession, the date when the instrument of sale is registered. Section 30 of the Punjab Pre-emption Act applies only when the case does not fall within Article 10. On the finding of the District Judge and of the High Court it is obvious that physical possession of the whole of the property sold was not taken by the vendees, on the date of sale. Therefore, the first part of article does not apply. According to the appellants' counsel the land sold does admit of physical possession and if a part of

the land has been taken into possession by the vendees then Article 10 would be inapplicable and Section 30 of the Punjab Pre-emption Act would be attracted. In that case the terminus a quo according to Shri Gosain would be the date on which the vendees took under the sale physical possession of any part of such land. The argument in our view is misconceived. The second part of Article 10, in our opinion, covers cases where the subject of the sale, which means the whole of the property sold, does not admit of physical possession and that would be so when a part of the land is in the possession of the tenants. The argument that use of the expression "subject of the sale" suggests that this article would apply only if the entire and not only a part of the land is in the possession of the tenants is not acceptable. The expression "physical possession" came up for construction before the Privy Council in *Batul Begam v. Mansur Ali Khan*, (1902) ILR 24 All 17 (PC). Lord Robertson speaking for the Judicial Committee said:

"What has to be considered is as the High Court accurately formulated, the question, Does the property admit of physical possession? The word "physical" is of itself a strong word, highly restrictive of the kind of possession indicated; and when it is found, as is pointed out by the High Court, that the Legislature has in successive enactments about the limitation of such suits gone on strengthening the language used, — first in 1859 prescribing "possession", then in 1871 requiring "actual possession" and finally in 1877 substituting the word "physical" for "actual", it is seen that that word has been very deliberately chosen and for a restrictive purpose. Their Lordships are of opinion that the High Courts are right in the conclusion they have stated. Their Lordships consider that the expression used by Stuart, C. J., in regard to the words "actual possession" is applicable with still more certainty to the words "physical possession" and that what is meant is a "personal and immediate" possession".

This view has ever since then been followed by the High Courts in India. No decision holding to the contrary was brought to our notice. Indeed, Shri Gosain virtually conceded that there was none to his knowledge. The

properties in possession of tenants have on this reasoning to be held to be incapable of physical possession which means personal and immediate possession. It was so held in *Ghulam Mustafa v. Shahabuddin*, 1908 PR 49 (FB). In that case the Full Bench of the Punjab Chief Court approved of some of its earlier decisions overruling the dictum in one of the earlier decisions of that Court. This view has consistently held the field in the Punjab and we do not find any cogent reason for disagreeing and upsetting it. If the date of registration of the sale deed be the terminus a quo then indisputably the suit must be held to be within limitation. These being the only two points agitated before us this appeal must fail and is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1162
(V 58 C 234)**

S. M. SIKRI, J. M. SHELAT,
V. BHARGAVA, G. K. MITTER
AND C. A. VAIDIALINGAM, JJ.

(1) *N. Sri Rama Reddy and others*, (In E. P. No. 4 of 1969), (2) *Shri Abdul Ghani Dar and others* (In E. P. No. 5 of 1969), *Petitioners v. Shri V. V. Giri* (In both the Petitions), Respondent.

(1) The Attorney-General for India, (2) Election Commission of India and (3) The Returning Officer, Presidential Election, (By notice).

Election Petitions Nos. 4 and 5 of 1969, D/- 27-4-1970.

(A) Evidence Act (1872), Sections 146, 63, 153, 155, 157 — Tape recorded statement — Admissibility — Is admissible under Section 146 (1), Exception 2 to Section 153, and Section 155 (3) and also for corroboration.

The tape itself is primary and direct evidence admissible as to what has been said and picked up by the recorder. A previous statement, made by a witness and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Thus apart from being used for corroboration, the evidence is admissible

in respect of other three matters, under Section 146 (1), Exception 2 to Section 153 and Section 155 (3). The weight to be given to such evidence is however distinct and separate from the question of its admissibility. Case law discussed. (Paras 13, 22)

(B) Evidence Act (1872), S. 155 (3) — “Which is liable to be contradicted” — Meaning of — Does not mean merely “which is relevant to the issue” — Held statement in (1890) ILR 17 Cal 344 was too broadly laid down — AIR 1928 PC 54, Distinguished. (Para 24)

(C) Evidence Act (1872), Sections 153, 155 — Construction — The provisions of any statute must be properly and strictly construed — Thus Sections 153 and 155 must be strictly construed — (Interpretation of Statutes). (Para 24)

(D) Evidence Act (1872), Sections 146, 153 — Construction — Section 146 not to be read with Section 153 in its entirety.

The statement that Section 146 must be read along with Section 153 cannot be accepted in its entirety. It may be that Clause (3) of Section 146 may have to be read along with the main Section 153 but Clause (1) of Section 146 and Exception (2) to Section 153 deal with different aspects. Under Section 146 (1) questions may be put to a witness in cross-examination to test his veracity and, under Exception 2 to Section 153 a witness may be contradicted when he denies any question tending to impeach his impartiality. (Para 11)

Cases Referred: Chronological Paras (1968) AIR 1968 SC 147 (V 55)

= (1967) 3 SCR 720, Yusuffali v. State of Maharashtra 18, 20, 22 (1965) 2 All ER 464, R. v. Maqsood Ali 15, 16, 20

(1964) AIR 1964 SC 72 (V 51) = (1964) 4 SCR 733, S. Partap Singh v. State of Punjab 18, 19, 20

(1963) 67 Cal WN 191, Manindra Nath v. Biswanath 18, 20, 22 (1962) 3 All ER 293 = 1 WLE 1152, R. v. Mills 14, 15, 16

(1960) Scots Law Times 264, Hoopes v. H. M. Advocate 12, 15 (1956) AIR 1956 Punj 173 (V 43)

= 58 Pun LR 441, Rup Chand v. Mahabir Prasad 17, 18, 20, 21, 22 (1928) AIR 1928 PC 54 (V 15)

= ILR 6 Rang 142, Bhogilal v. Royal Insurance Co. 24

(1890) ILR 17 Cal 344, Khadijah Khanum v. Abdool Kurreem Sheraji 24

M/s. K. C. Sharma, K. L. Rathee, M. S. Gupta, C. L. Lakhanpal and S. K. Dhingra, Advocates, for Petitioners (In E. P. No. 4 of 1969); M/s. S. C. Malik, M. S. Gupta and K. L. Rathee, Advocates, for Petitioners (In E. P. No. 5 of 1969); M/s. C. K. Dapthary, D. Narasaraaju, S. Mohan, Kumaramangalam and S. T. Desai, Sr. Advocates (Mr. S. K. Dholakia, Advocate, and M/s. J. B. Dadachanji, Ravinder Narain and O. C. Mathur, Advocates of M/s. J. B. Dadachanji and Co., with them), for Respondent (In both the Petitions); Mr. Jagadish Swarup, Solicitor-General of India, and Dr. L. M. Singhvi, Sr. Advocate (Mr. S. P. Nayar, Advocate, with them), for the Attorney-General for India, Election Commission of India and the Returning Officer, Presidential Election.

The following Judgment of the Court was delivered by

VAIDIALINGAM, J.: — On April 1, 1970 Shri Jagat Narain (R. W. 25) was being cross-examined by the counsel for the petitioners in Election Petition No. 5 of 1969, when certain suggestions were put to him that he had tried to dissuade the first petitioner in the said Election Petition, viz., Shri Abdul Ghani Dar from filing the election on political reasons and when the witness denied not only those suggestions but also certain other suggestions put to him, counsel for the petitioner represented that Shri Abdul Ghani Dar had a tape recording of the talk that took place between him and the witness and he sought permission from the Court to play the same for being put to the witness. Objection was raised by Mr. C. K. Dapthary, learned counsel for the respondent, that the tape recorded conversation was not admissible in evidence. In view of this objection, counsel on both sides were heard regarding the admissibility of the tape recorded conversation, on April 2, 1970 and, after hearing arguments on both sides, we then expressed the opinion that the tape recorded conversation could be received in evidence and that we would give our reasons later. The further cross-examination and re-examination of the witness proceeded in respect of the tape recorded conversation which was

played in Court in the presence of the witness.

2. We now proceed to state our reasons for holding that the tape recorded conversation could be admitted in evidence. But we make it clear that we have dealt with only the question regarding the admissibility in evidence of the tape recorded conversation, which is distinct and separate from the weight to be given to such evidence which question will be dealt with in the main judgment to be delivered in the election petitions.

3. Before we deal with the question of admissibility of the tape recorded conversation, it is necessary to state that in Election Petition No. 5 of 1969 the petitioners allege that offences of undue influence at the election had been committed by the returned candidate and by his supporters with the connivance of the returned candidate. The material facts relating to the said allegations have also been given in the petition in paragraph 13 of the election petition. It has been alleged that on August 9, 1969 an unsigned pamphlet in cyclostyled form and also a printed pamphlet without bearing the name of its publisher or printer (marked as Exhibits P-18B and P-37B respectively) were published by free distribution among the members of the Electoral College for the Presidential Election. It has been further alleged that the offence of undue influence was freely committed at the election by the returned candidate and the persons mentioned in the election petition and by their supporters and workers with the connivance of the returned candidate, by voluntarily interfering and attempting to interfere with the free exercise of the electoral rights of the candidates and the various electors mentioned in the petition. It is further alleged that with the object of interfering with the free exercise of electoral rights by Sri N. Sanjiva Reddy, a candidate at the election, Sri Jagat Narain and certain other persons named in the petition who are described as supporters and workers of the returned candidate in general with the consent and connivance of the returned candidate published, by free distribution, pamphlets in Hindi and English in cyclostyled form as well as in printed form in which very serious allegations were made against Shri Reddy, which amounted to undue influence upon the

persons referred to in the election petition within the meaning of Section 171 (c) of the Indian Penal Code. There is a further allegation that these pamphlets were distributed from August 9, 1969 to August 16, 1969 among all the electors of the Electoral College for the Presidential election and they were also distributed during this period in the Central Hall of Parliament by the various persons mentioned in the petition, which included Shri Jagat Narain.

4. No doubt the allegations of that undue influence in the manner mentioned was exercised by the respondent or by anybody with his connivance have been strongly refuted in the counter-affidavits filed by the respondent.

5. In the particulars given by Shri Abdul Ghani Dar, relating to the distribution of pamphlets in question, he has stated that the persons who distributed them between August 9 and August 16, 1969 had already been mentioned in the election petition. He has further stated in the said particular that Shri Jagat Narain was one of the persons who distributed the pamphlets in the Central Hall of Parliament on August 11, 1969 to the Members of Parliament whose names have also been given.

6. Issues have been framed whether the respondent, or any person with his connivance, printed published and distributed pamphlet and other matters connected therewith.

7. In chief-examination, Jagat Narain, as R. W. 25, has stated that he has never seen either of these pamphlets being distributed and that he has seen them only in Court, on the day when he was giving evidence, viz., on March 31, 1970. He has also stated that he never received the pamphlets at all. He has further reiterated that he has not distributed the pamphlet as spoken to by some of the witnesses on the side of the petitioners and he has further affirmed that he has never distributed the pamphlets in the Central Hall of Parliament and that he has not seen the pamphlets except in Court. In cross-examination, the witness was asked about the telephone call that he had made to Abdul Ghani Dar about 6 or 7 days before the filing of the election petition i. e., in the first week or second week of September, 1969,

and suggestions were made that the witness attempted to dissuade Abdul Ghani Dar from filing the election petition on the ground that serious consequences would follow from such action. Though the witness admitted that he had a telephone talk with Abdul Ghani Dar, he denied various other suggestions put to him regarding the nature of the talk that took place between him and Abdul Ghani Dar. It was at that stage that the counsel for the election petitioner wanted the tape recording of the talk that took place between Abdul Ghani Dar and the witness to be adduced as evidence on the ground that the answers given by the witness in Court were quite contrary to the nature of the conversation that he had with Abdul Ghani Dar. Objection was raised to receiving the same as evidence.

8. Mr. Daphtary, learned counsel for the respondent, raised two contentions regarding the admissibility of the tape recorded conversation between R. W. 25 and Abdul Ghani Dar: (1) The tape-recorded conversation cannot be admitted in evidence for contradicting the evidence of the witness; and (2) Under Section 155 (3) any former statement, before it could be put in evidence to impeach the credit of witness, the Court must be satisfied that the previous statement is relevant to the matter in issue and the tape recorded conversation in this case, has no relevance to the matters which are in issue in these proceedings.

9. Mr. Daphtary, learned counsel, did not dispute the correctness of two decisions of this Court, to which reference will be made later, wherein the taped records of conversation had been admitted in evidence. But, according to him, in those cases the tape recorded conversations were admitted in evidence to corroborate the evidence given by a witness before the Court, and not to contradict his evidence.

10. Both the grounds of objection raised by Mr. Daphtary have been controverted by Mr. Malik and by Mr. Sharma, learned counsel appearing for the election petitioners in Election Petitions Nos. 5 and 4 of 1969, respectively. According to Mr. Malik, whose contentions were substantially adopted by Mr. Sharma, issues have been framed whether undue influence

has been exercised by the respondent or by any other person with his connivance. According to the petitioners undue influence has been exercised by the publication and distribution of the pamphlets, making of scurrilous attack about the personal character of Sri Sanjiva Reddy. Specific allegations have been made in the election petition that R. W. 25 is one of those who distributed the pamphlets in the Central Hall of Parliament with the connivance of the respondent. The witness denied this allegation in chief-examination and when certain suggestions, that the witness attempted to dissuade Shri Abdul Ghani Dar from filing his election petition on the ground that serious consequences would follow, were put to him in cross-examination, witness denied them and, in that context the tape-recorded conversation between the witness and Shri Abdul Ghani Dar assumes importance. Relying upon that tape recorded conversation, counsel urged that his client is entitled to test the veracity of the witness and to impeach the credit of the witness and satisfy the Court that the evidence given by the witness before us is inconsistent or contrary to what he had stated on an earlier occasion.

11. In this connection counsel relied upon Section 146, Exception 2 to Section 153 and Clause (3) of Section 155 of the Evidence Act. Section 146 deals with questions lawful in cross-examination and, in particular, Clause (1) thereof provides for a witness being cross-examined by questions being put to him which tend to test his veracity. Section 153 generally deals with exclusion of evidence to contradict answers to questions testing veracity, but exception 2 states that if a witness is asked any question tending to impeach his impartiality and answers it by denying the facts suggested, he may be contradicted. Section 155 deals with impeaching the credit of witness by the various ways dealt with in Clauses (1) to (4). One of the ways by which the credit of a witness may be impeached is dealt with in Clause (3) and that is by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted. Mr. Daphtary pointed out that Section 146 must be read with Section 153. We cannot accept this contention in its entirety. It may be that Clause (3) of

Section 146 may have to be read along with the main Section 153 but Cl. (1) of Section 146 and exception (2) to Section 153 deal with different aspects. Under Section 146 (1) questions may be put to a witness in cross-examination to test his veracity and, under Exception 2 to Section 153 a witness may be contradicted when he denies any question tending to impeach his impartiality. The object of the election petitioner to adduce the tape-recorded conversation as evidence is to impeach the testimony of the witness that he has never seen the pamphlet and that he has never attempted to induce the election petitioner not to file the election petition on threat of serious consequences, and to establish that the evidence given in Court is quite contrary to the statements made by him in the conversation that he had with Abdul Ghani Dar and which has been recorded on tape.

12. We will now refer to the case law on the subject. In *Hopes v. H. M. Advocate*, (1960) *Scots Law Times* 264 a tape-recorded conversation which took place between a complainant and a blackmailer was played before the jury and sought to be put in evidence by a police officer who had listened to the conversation as it was transmitted through the loudspeaker. Objections were raised to the admissibility of the said evidence. The learned trial Judge overruled the objection as follows:—

"New techniques and new devices are the order of the day. I can't conceive, for example, of the evidence of a ship's captain as to what he observed being turned down as inadmissible because he had used a telescope, any more than the evidence of what an ordinary person sees with his eyes becomes incompetent because he was wearing spectacles. Of course, comments and criticisms can be made, and no doubt will be made, on the audibility or the intelligibility, or perhaps the interpretation, of the results of the use of a scientific method; but that is another matter, and that is a matter of value, not of competency. The same can be said of visual observation by a witness who says he sees something; his evidence can be criticised because of his sight or because of the sort of glasses he is wearing, and so on, but all these matters are matters of value and not of competency."

Accordingly, the learned Judge allowed the police officer to give evidence as to what he heard on the tape recorder, which was played before the Jury.

13. On appeal to the High Court of Justiciary, it is seen that no objection appears to have been taken to the competency of the evidence furnished by the tape-recorder but the admissibility of the evidence of the police officer based upon his hearing of the tape-recorded conversation was objected to. This objection was overruled by the High Court of Justiciary stating that it is competent for the police officer to give evidence of conversation which he hears with the help or hearing aid or, as in the case before them, when the conversation is transmitted to him over a distance by wireless and that there may be criticism of the quality of his evidence and not about the competency of the evidence of what he has heard. The Court further observed at p. 267:

"The Inspector's evidence of the conversation was as much primary evidence as the evidence from the replaying of the tape recorded. Each received it at the same time, the one recording it in the human memory the other upon a piece of tape". From the above decision it is apparent that the tape itself is primary and direct evidence admissible as to what has been said and picked up by the recorder.

14. In *R. v. Mills*, (1962) 3 All ER 298 a conversation which had been recorded on tape between two of the persons was heard by a police officer who gave evidence that he has himself remembered the various remarks which passed between those two persons which could be corroborated by the conversation recorded on the tape. But the tape recording itself was not introduced in evidence nor was there any production of the record by consent before the Jury. They referred to the decision of the High Court of Justiciary in *Hopes' Case*, (1960) *Scots Law Times* 264 and held that according to the said decision the tape-recorded conversation was admissible as direct evidence. Though the discussion in the Judgment shows that a tape-recorded conversation is admissible in evidence, ultimately the Court left open the question stating:

"The Court has not debated, and is not deciding, any broad and general question of principle whether evidentiary material obtained by the use of a tape-recorder without the concurrence of a human being listening to the same sounds is admissible or is not admissible in evidence in a criminal trial".

But it is significant to note that the Court of Criminal Appeal rejected the contention of the counsel for the accused that there has been any question of introduction of hearsay evidence at the trial by the evidence of the police officer giving evidence after refreshing his memory from the tape.

15. The question again directly arose in *R. v. Masquid Ali*, (1965) 2 All ER 464. In that case a conversation which took place in Punjabi dialect between two persons and which had been recorded on the tape was played before the jury and was admitted in evidence by the trial Judge. Objection was taken before the Court of Criminal Appeal regarding the admissibility in evidence of the tape-recorded conversation between the accused. Therefore the point that specifically arose before the Court of Appeal was 'Is a tape recording as such admissible in evidence, as a matter of law?' After referring to the observations in *Mills' Case*, (1932) 3 All ER 298, the appellate Court noted that the question regarding the admissibility of a tape record was not actually decided in that case. The decision of the High Court of Justiciary in *Hopes' Case*, (1960) Scots Law Times 264 was referred to and it was noted that the evidence of the police officer who listened to the tape recorder was held to be admissible. The Court said, at p. 469:

"We think that the time has come when this Court should state its views of the law on a matter which is likely to be increasingly raised as time passes. For many years now photographs have been admissible in evidence on proof that they are relevant to the issues involved in the case and that the prints are taken from negatives that are untouched. The prints as seen represent situations that have been reproduced by means of mechanical and chemical devices. Evidence of things seen through telescopes or binoculars which otherwise could not be picked up by the naked eye have been admitted and now there are

devices for picking up, transmitting, and recording, conversations. We can see no difference in principle between a tape recording and a photograph. In saying this we must not be taken as saying that such recordings are admissible whatever the circumstances, but it does appear to this Court wrong to deny to the law of evidence advantages to be gained by new techniques and new devices provided the accuracy of the recording can be proved and the voices recorded properly identified; provided also that the evidence is relevant and otherwise admissible, we are satisfied that a tape recording is admissible in evidence. Such evidence should always be regarded with some caution and assessed in the light of all the circumstances of each case. There can be no question of laying down any exhaustive set of rules by which the admissibility of such evidence should be judged". In consequence, the Court held that the tape-recorded conversation was admissible in evidence, subject to the limitations mentioned in the above extract.

16. It will therefore be seen that though the question of admissibility of a tape-recorded conversation had been left open in *Mills' Case*, (1962) 3 All ER 298, the same was specifically considered and decided affirmatively in *Masquid Ali's Case*, (1965) 2 All ER 464.

17. Before we deal with the decisions of this Court bearing on this point, it is necessary to advert to two decisions, one of the Punjab High Court and the other, of the Calcutta High Court. In *Rup Chand v. Mahabir Parshad*, AIR 1956 Punj 173 the defendant, in answer to a suit for recovery of a certain sum of money on the basis of a promissory note, put forward a plea that the original promissory note containing certain endorsement had been destroyed and had been replaced by another promissory note bearing the same date. The defendant attempted to substantiate this plea by the oral testimony of a broker but the latter declined to support him. The defendant requested the Court to permit to confront the broker witness with the conversation which had taken place between himself and the broker in regard to the destruction of the earlier promissory note and which had been faithfully recorded on a tape-recorder.

The plaintiff objected to the admissibility of the evidence by tape recorder, but the trial Court overruled the objection. In the revision taken before the High Court by the plaintiff, the order of the trial Court was confirmed. The High Court relied upon Section 155 (3) of the Evidence Act and held that as the broker appearing as a witness in the case before it had made a statement to the defendant on a former occasion which was at variance with the statement made by him before the Court, there can be no doubt that the defendant could establish that a previous statement which was contradictory to the evidence given before the Court was made by the witness to him. Dealing with the question whether a record of such a previous statement, as prepared by a scientific instrument, could be produced in Court as evidence, the High Court held that such a tape-recorded statement was admissible in evidence, and observed as follows:

"I am aware of no rule of evidence which prevents a defendant who is endeavouring to shake the credit of a witness by proof of former inconsistent statements, from deposing that while he was engaged in conversation with the witness a tape recorder was in operation, or from producing the said tape-recorder in support of the assertion that a certain statement was made in his presence".

This decision lays down two propositions: (i) that a tape-recorded conversation is admissible in evidence and that (ii) if it contains a previous statement made by a witness, it can be used to contradict the evidence given before the Court.

18. In *Manindra Nath v. Biswanath*, (1963) 67 Cal WN 191 the Calcutta High Court had to consider whether a defendant was entitled to adduce in evidence a previous statement of the plaintiff and recorded on the tape to contradict the plaintiff's evidence given before the Court and held that the tape-recorded conversation was admissible in evidence and the previous statement recorded therein could be used to contradict the evidence given before the court. After referring to *Rup Chand's Case*, AIR 1956 Punj 173, the Court observed at p. 192:

"If the plaintiff, while he is in the witness box, makes a statement which is at variance with a statement pre-

viously made by him, the plaintiff may be asked whether he made such previous statement and if he denies having made the previous statement, such previous statement may be proved by the defendant. There, as in this case, it is alleged that the previous statements of the plaintiff were recorded in a tape-recorder, those statements may be admitted in evidence, if it is proved that they were made by the plaintiff and that the instrument accurately recorded those statements. The fact that the statements were recorded in a tape-recorder and the recording was made behind the back and without the knowledge of the plaintiff is by itself no objection to the admissibility of the evidence".

There are two decisions of this Court bearing on this matter: *S. Pratap Singh v. The State of Punjab*, (1964) 4 SCR 733 = (AIR 1964 SC 72) and *Yusuffalli v. State of Maharashtra*, (1967) 3 SCR 720 = (AIR 1968 SC 147).

19. In *Pratap Singh's case*, (1964) 4 SCR 733 = (AIR 1964 SC 72) it has been held that rendering of a tape-recorded conversation can be legal evidence by way of corroborating the statement of a person who deposes that the other speaker and he carried on the conversation and even of the statement of a person who may depose that he overheard the conversation between the two persons and what they actually stated had been tape-recorded that weight to be given to such evidence will depend on the other facts which may be established in a particular case. Though there was a difference of opinion in the majority and minority judgments regarding certain other aspects which arose for consideration, so far as the admissibility of a tape-recorded conversation in evidence, all the Judges appear to have been unanimous in the view that it was admissible. But it must be noted that in the majority judgment it is stated that it was not contended on behalf of the State that the tape-recordings were inadmissible. Similarly, in the minority judgment also it is observed that tape-recordings can be legal evidence by way of corroborating the statements of a person who deposes that the speaker and he carried on that conversation and, as it had not been held by the trial Court that the record of a conversation on tape is not admissible in evidence for any purpose it was not

necessary to pursue the matter further.

20. In Yusufalli's case, (1967) 3 SCR 720 = (AIR 1968 SC 147) the question was whether a conversation between the complainant and a person, who later figured as an accused on a charge of offering bribe, and recorded on tape was admissible in evidence. It is seen from the decision of this Court that the tape recorder was played in Court at the trial of the accused. This Court held that the evidence of the complainant was sufficiently corroborated by the tape-recorder and observed at p. 723:

"The contemporaneous dialogue between them formed part of the res gestae and is relevant and admissible under Section 8 of the Indian Evidence Act. The dialogue is proved by Shaikh. The tape record of the dialogue corroborates his testimony. The process of tape recording offers an accurate method of storing and later reproducing sounds. The imprint on the magnetic tape is the direct effect of the relevant sounds. Like a photograph of a relevant incident, a contemporaneous tape record of a relevant conversation is a relevant fact and is admissible under Section 7 of the Indian Evidence Act".

Reference was made, with approval, to the decision of the Punjab and Calcutta High Courts in Rup Chand's case, AIR 1956 Punj 173 and Manindra Nath's case, (1963) 67 Cal WN 191 and also to the earlier decision of this Court in Pratap Singh's Case, (1964) 4 SCR 733 = (AIR 1964 SC 72) where a tape recorded conversation had been admitted in evidence. The decision in Maqsd Ali's Case, (1965) 2 All ER 464 was also quoted with approval.

21. In particular, it will be noted that this Court, in the said decision, approved of the decision of the Punjab High Court in Rup Chand's Case, AIR 1956 Punj 173, holding that tape recording of a former statement of a witness can be admitted in evidence to shake the credit of the witness under Section 155 (3) of the Evidence Act.

22. Having due regard to the decisions referred to above, it is clear that a previous statement, made by a person and recorded on tape, can be used not only to corroborate the evidence given by the witness in Court

but also to contradict the evidence given before the Court, as well as to test the veracity of the witness and also to impeach his impartiality. Apart from being used for corroboration, the evidence is admissible in respect of the other three last-mentioned matters, under Section 146 (1), Exception 2 to Section 153 and Section 155 (3) of the Evidence Act. Therefore it is not possible for us to accept the contention of Mr. Daphtary that the previous statement can be used only for purposes of corroboration but not for the purpose of contradicting the evidence given before the Court. If a previous statement made by a person can be used to corroborate his evidence given before the Court, on principle, we do not see any reason why such previous statement cannot be used to contradict and also for the other purposes referred to above. In particular the fact that the decisions of the Punjab and Calcutta High Courts in Rup Chand's case, AIR 1956 Punj 173 and Manindra Nath's case, (1963) 67 Cal WN 191 where the previous statements have been used to contradict the evidence given before the Court has been approved by this Court in Yusufalli's Case, (1967) 3 SCR 720 = (AIR 1968 SC 147) clearly establishes that the contention of Mr. Daphtary that the previous statement cannot be used to contradict the evidence given before the Court cannot be accepted. As pointed out already, Mr. Daphtary has not challenged the correctness of the decision in Yusufalli's Case, (1967) 3 SCR 720 = (AIR 1968 SC 147). Therefore the first ground of objection raised by Mr. Daphtary will have to be overruled.

23. Coming to the second contention of Mr. Daphtary, which has been set out earlier, in our opinion that question becomes really academic when once we have held that the previous statement can be used to contradict the evidence given before the Court under Section 155 (3) for the purpose of impeaching the credit of the witness. But, as the question has been raised, we shall deal with that aspect also.

24. According to Mr. Daphtary, the expression which is liable to be contradicted in Clause (3) of Section 155 means 'which is relevant to the issue'. In support of this contention, the counsel referred us to the

decision of the Calcutta High Court in *Khadijah Khanum v. Abdool Kurreeem Sheraji*, (1890) ILR 17 Cal 344 and pointed out that the said decision has been referred to in text-books on the Law of Evidence viz., Woodroffe & Ameerali's Law of Evidence, Field's Law of Evidence and Sarkar's Law of Evidence. In the Calcutta decision the Court has stated:

"I am inclined to think that in Section 155 (3) of the Evidence Act the words, 'which is liable to be contradicted', mean 'which is relevant to the issue'".

In our opinion, the proposition has been too broadly laid down by the learned Judge. A reference to the various clauses in Section 155 in our opinion does not warrant the interpretation placed by the Calcutta High Court. For instance, under Cl. (1), the evidence that is contemplated and which could be given will certainly not be directly relevant to the issue which is before the Court but will be of a general nature that the witness is unworthy of credit. Again, under Cl. (2), the evidence regarding the receipt of bribe will only be to establish that the evidence of the witness regarding the matter about which he speaks cannot be acted upon. Even otherwise, in this case, we have already referred to the relevant issue bearing on the matter and we have pointed out that according to the counsel for the petitioners their attempt is to impeach the credit of R. W. 25, by establishing, if possible, that his evidence cannot be relied on in view of the fact that he is making contradictory statements. On that basis, even applying the test laid down by the Calcutta High Court, it will follow that the previous statement, recorded on tape, must be considered to be relevant to the issue before the Court. Counsel also drew our attention to the decision of the Judicial Committee in *Bhogilal v. Royal Insurance Co.*, AIR 1928 PC 54 to the effect that Sections 153 and 155 of the Evidence Act must be strictly construed. There can be no controversy that the provisions of any statute must be properly and strictly construed. This decision, hence, has no bearing on the matter before us. It is also significant that the Judicial Committee, when dealing with Section 155 of the Evidence Act, makes no reference to the decision of the

Calcutta High Court in *Khadijah Khanum's case*, (1890) ILR 17 Cal 344.

25. It follows that the second ground of objection, urged by Mr. Daphtary, to the admissibility of this piece of evidence, has also to be overruled.

26. In the result we hold that the conversation, which is stated to have taken place between the witness R. W. 25 and the first petitioner in Election Petition No. 5 of 1969 (viz., P. W. 55) and recorded on tape, is admissible in evidence.

27. We once again emphasize that this order relates only to the admissibility in evidence of the conversation recorded on tape and has not dealt with the weight to be attached to that evidence. It must also be pointed out that the question, whether the pamphlets, Exhibits P-18-B and P-37-A, have been circulated in the manner alleged by the petitioners and the further question whether they amount to exercise of undue influence are also matters which have not been considered in this order. The above are all aspects which will be dealt with in the judgment, while disposing of the Election Petitions.

Order accordingly.

AIR 1971 SUPREME COURT 1170 (V 58 C 235)

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.

Writ Petition No. 24 of 1970.

Badri Prasad, Petitioner v.
Collector of Central Excise, Sarvodaya-
nagar, Kanpur and others, Respon-
dents; 1. M/s. Suresh Kumar Mishrilal,
2. Rajputana Jewellery Mart and 3.
Sha Taraji Bhavrlal and Co., Inter-
veners.

and

Writ Petition No. 587 of 1970

Harakchand Ratanchand Banthia
and others, Petitioners v. Assistant
Collector of Central Excise, Poona II,
Division and others, Respondents.

and

Civil Appeal No. 1613 of 1970

Kapurchand Chandanmal Co. and
others, Appellants v. Union of India
and others, Respondents.

DO/DO/B657/71/DVT/P

and
Civil Appeal No. 1659 of 1970
Andhra Pradesh Bankers and
Pawn Brokers Association and others,
Appellants v. Union of India and
others, Respondents; 1. K. Hunsraj and
2. The Madras Financiers and Pawn
Brokers Association, Interveners.

Writ Petitions Nos. 24, 587 of 1970
and Civil Appeals Nos. 1613, 1653 of
1970, D/- 30-3-1971.

(A) Gold (Control) Act (1968), Section 16 (1) — Reasonableness of requirement to make declaration — Provision requiring a pawn broker to make monthly declaration under Form GS III does not impose unreasonable restriction on his right under Article 19 (1) (f) or (g).

(Para 18)

(B) Gold (Control) Act (1968), Section 68 — Notice prior to confiscation proceedings — Necessity — Absence of any provision requiring giving of notice to a pawn broker prior to confiscation proceedings causes him no prejudice — (X-Ref.: — Sections 99 and 71).

(Para 19)

In terms of Section 99 a pawn broker is presumed to be the owner of gold etc., seized from his possession or custody. He can appear before authorities and show reason for not taking any penal action against him.

(Para 19)

(C) Gold (Control) Act (1968), Section 71 — Confiscation of gold — Provision for confiscation of gold on failure of a pawn broker to submit monthly return imposes unreasonable restriction on his right to acquire, hold and dispose of gold and gold ornaments, etc. — (X-Ref.: — Constitution of India, Article 19 (1) (f) and (g) and 19 (5) and (6).

(Para 19)

(D) Gold (Control) Act (1968), Section 2 (p), Explanation — "Gold article and ornament" — Distinction — It cannot be said that the definition section does not make a clear distinction between "article" and "ornament".

(Para 20)

Whether a thing passes as an article or an ornament is a question of proof.

(Para 20)

(E) Gold (Control) Act (1968), Section 58 — Validity — The provision is not invalid on ground that it gives power of search and seizure to Gold Control Officer on suspicion only — (AIR 1968 SC 59, Followed). (Para 25)

(F) Gold (Control) Act (1968), Section 16 — Submission of return by pawn broker — Section 16 is general and is applicable to pawn broker — (X-Ref.: — Section 6 (1)).

The duty of a pawn broker under Section 16 to submit return under Form GS III is not taken away by the provisions of Section 6 (1). Nor the omission to include pawn broker specifically under sub-section (2) of Section 16 has effect upon his obligation to file return.

(Para 29)

(G) Gold (Control) Act (1968), Pre. — Validity of the Act — Enactment of Gold (Control) Act (1968), is not beyond legislative competence of the Parliament — (X-Ref.: — Constitution of India, Article 246).

(Para 31)

The Act does not seek to disturb the provisions of the State Acts relating to money lending or pawning business which are exclusively within competence of the State legislature.

(Para 31)

Cases Referred: Chronological Paras
(1968) AIR 1968 SC 59 (V 55)

= Civil Appeal Nos. 150 to
154, D/- 9-8-1967, Commr. of
Commercial Taxes, Board of
Revenue, Madras v. Ramkishan
Srikishan Jhaver

25

(1958) AIR 1958 SC 731 (V 45)

= 1959 SCR 629, Mohd. Hanif

Quareshi v. State of Bihar

30

The following Judgment of the Court was delivered by

MITTER, J.: — The petitioner in Writ Petition No. 24 of 1970, a citizen of India, who has been carrying on business inter alia of money lending against pledge of gold ornaments, challenges the vires of the Gold Control Act, 1969 read with the rules made thereunder and in particular Sections 6, 8 and 16 (1) of the Act.

2. The facts on which the petition is based are as follows. The petitioner has fairly extensive business of money lending in Etawah in U. P. In pursuit of his business he advances moneys to a large number of persons who pledge ornaments made of gold or containing gold and other precious stones, or silver. It includes a seasonal business of agriculturists taking loans from him in the sowing season and repaying the same with interest by redeeming the pledged ornaments. According to the petition such loans are not always redeemed quickly and

there are instances of ornaments lying with him under pledge for 10 to 15 years. He also owns along with other members of his family substantial quantities of gold ornaments. As he has a strong room for keeping these valuables his friends and relations also are in the habit of keeping their gold ornaments and articles with him for safe custody. The purity of the gold content of the ornaments varies from 10—18 carats to 22—24 carats. The content of the gold is difficult to estimate in some cases where they are pieces containing more than one metal and set with stones. In all such cases a rough and ready estimate of their value is made whenever possible by the indigenous method of determining the purity on a touchstone and loans are advanced to the extent of 50 to 75 per cent of the value of the pledged goods. Over the last 8 to 10 years the petitioner claims to have come into possession of such pledged ornaments and articles which have not been redeemed since their first pledge weighing approximately 42,989 grams. On an average he entertains about 25 transactions of pledge or redemption in a day and the total number of ornaments and articles pledged with him over a year varies from 15,000 to 20,000 pieces. His entire belongings of gold including those of the members of his family are kept in a strong room along with the pledged goods.

3. The petitioner's grievance is based on a raid which took place at his place of business on March 26, 1969 by the Inspectors of Excise under the authority of the Collector of Central Excise. The raid was completed on 9th April, 1969 and a large number of ornaments and articles of gold were seized from his premises. According to the petition the condition precedent to the exercise of such power i. e., that the officer concerned should have a reasonable belief that the provisions of the Act have been violated was non-existent and in any event the Act did not permit Inspectors of Customs or Central Excise to carry out the search or seizure. The validity of the search and seizure is also challenged on the ground that inasmuch as the time to furnish declaration under Section 18 of the Act had been extended since the commencement of the Act from time to time up to the 30th April, 1969

the search which took place on March, 26, 1969 was unjustified.

4. The different provisions of the Act and the grounds of attack on them may be summarised as follows:—

(a) Sections 4, 6, 8 (1), 16 read with 71, 74 and 86 are bad in law as outside the competence of Parliament and/or in violation of the Constitution. Sections 6 and 16 (1) are impugned on the ground that Parliament had no competence to encroach on the field of money lending and money lenders which is covered by a State item of legislation in the Seventh Schedule.

(b) Sections 4 and 16 read with the power of search and seizure, impositions of fine and penalty and power of prosecution, etc., confer arbitrary powers upon the respondents capable of indiscriminate use and as such are violative of Article 14.

(c) The expression "possession, custody and control" in Section 16 is vague, uncertain and incapable of any objective assessment.

(d) The provisions of Section 8 (1) of the Act are violative of the petitioner's fundamental right to acquire, hold or dispose of property in the form of primary gold as it is not in the interest of general public. The section is also impugned as affecting the possession by the petitioner of primary gold found which he has been holding for many years past. It is also attacked on the ground that the Gold Control Officer can always treat a particular piece of ornament as primary gold, the acquisition and disposal of which was prohibited under the Act.

(e) It is impossible for anyone to comply strictly with the form GS III prescribed under the rules. In order to comply with the strict statutory obligations the petitioner would have to incur huge expenses for maintaining the necessary staff and undertaking scientific assessment to ascertain the purity, weight and value of gold content in each and every ornament.

(f) The obligation to furnish declarations in respect of every pledge and/or redemption of the ornament would be incapable of compliance as on an average he enters into about 100 transactions of this character in a day. It was also quite impracticable to comply with the provisions of

Section 16 (4) and (10) to furnish repeated declarations for every acquisition and/or redemption of the pledge of the ornaments.

5. The petition was affirmed on January 13, 1970 and on the 19th January this Court granted interim stay of further proceedings in pursuance of search and seizure.

6. In the counter affidavit of the Assistant Collector of Central Excise reliance is placed on the following facts:—

1. The total quantity of gold seized in the course of the search of the petitioner's premises which started on the 26th March, 1969 and ended on 9th April, 1969 was 95,793.995 gms. of the approximate value of Rs. 14,47,300. This included gold with foreign marking weighing 3,539.842 gms. other primary gold without marks 212.865 gms., gold coins weighing 35.53 gms. and ornaments weighing 91,955.753 gms. Two show cause notices were issued one for contravention of the provisions of the Act and the other for contravention of the provisions of the Foreign Exchange Regulations Act read with the provisions of the Customs Act and the Imports and Exports Control Act.

2. The petitioner took an inordinately long time to seek legal redress; he waited from April 1969 to January, 1970 before complaining of the search and seizure. The petitioner never attempted to avail himself of the opportunity of having a personal hearing before the competent authority i. e., the Collector of Central Excise, Kanpur.

3. On or about March 25, 1969 on receipt of information and being satisfied that the provisions of the Act as also those of the Customs Act and the Foreign Exchange Regulations Act and Imports and Exports Control Act were being contravened, the Superintendent, Central Excise, Mainpuri authorised the Inspectors of Central Excise Department to enter and search the premises of the petitioner and to seize any offending gold, gold articles or gold ornaments. The authorisation of the Inspectors was under powers conferred by Section 58 (2) of the Act and Section 105 of the Customs Act, 1962.

4. The Income-tax Officer, Etawah issued an order under S. 132 (3) of the Income-tax Act, 1961 restraining the

Superintendent, Central Excise, from removing, parting with or otherwise dealing with the gold and gold ornaments seized by the Inspectors of Central Excise.

5. Among the things seized were 30 biscuits of gold including one of foreign marking which was primary gold the possession of which by itself was a contravention of Section 8 (1) of the Act. Neither at the time of the seizure of the gold nor during the course of the investigation the petitioner indicated as to how many and which of the ornaments were his own and how many of them belonged to the various members of his family: no such details have been given in the petition.

6. All the allegations regarding the vires of the Act or the Rules were disputed. The difficulty of complying with the provisions of the Act was also denied and the justification for the retention of the seized articles was based on the powers conferred under the different Acts.

7. In the counter affidavit affirmed by the Secretary to the Government in the Ministry of Finance Department of Revenue and Insurance, a claim is made that the subject matter of the Act does not encroach on the power of the State Legislature to legislate with respect to money lending or money lenders. It, however, contains provisions prohibiting persons from obtaining loan on the hypothecation, pledge or mortgage of primary gold which is a reasonable restriction on the fundamental right of a citizen. It is also asserted that no provision of the Act is vague or uncertain or difficult of compliance. Section 8 (1) of the Act is sought to be justified on the ground that this provision had been inserted in the statute with a view to eliminating the chances of false defences being raised on the detection of smuggled gold and a period of six months from 1st March, 1967 had been allowed under the Defence of India Rules to enable persons who might have gold in their possession to dispose of it either by sale or delivery for conversion into ornaments to licensed dealers or by certified goldsmiths. Stress was also laid on the legislation on the subject by which control of gold was first made law as Part XII (A) (of the Defence of India Rules) promulgated

under the Defence of India Act followed by the Gold (Control) Act, 1968, the Gold Control Ordinance, 1968 and the Gold Control Act of 1969. It was submitted that the object of this series of legislation was with a view to prevent smuggling of gold into India and of the dissemination thereof which results in the loss of Rs. 100 crores of foreign exchange per annum. This object could not be achieved unless there was restriction on the manufacture and sale of new ornaments, declaration of holdings of gold other than ornaments, regulation of the business of gold including the activities of gold refiners and goldsmiths. The impracticability of estimating the purity of gold ornaments was also disputed on the assertion that any experienced goldsmith can easily assess the purity of gold in an ornament by rubbing it on a touchstone. A time limit of 30 days had been given from the commencement of the Defence of India (4th Amendment) Rules, 1966 to persons owning ornaments in excess of the specified limits for making declarations. The petitioner should therefore have made a declaration of ornaments in his possession, custody or control. In writ petitions filed before the present series of petitions, an undertaking had been given to this Court in those petitions that no action would be taken under Sections 16 (7) and 16 (1) and 100 of the Act and the time for making declarations under Section 16 was extended till 28th February 1969 and suitable instructions had been issued to the field staff to comply with the above. The time limit for filing the declarations under Section 16 (7) had been extended up to 30th June but it was denied that the period of making a declaration under Section 16 (1) had been extended up to 30th April, 1969.

8. Before examining in detail the relevant provisions of the Act and the contentions founded thereon, it may be noted that this Act had been challenged by several writ petitions to this Court immediately after it was put on the statute book in September, 1968. The questions which fell for consideration in that series of petitions included:

(a) Whether the Act was within the legislative competence of Parliament under Entry 52 of List I and

Entry 38 of List III of the Seventh Schedule, or

(b) Whether it fell within the exclusive competence of the State Legislatures under Entry 27 of List II. A large variety of propositions was there advanced to declare the Act as beyond the competence of Parliament. It had been argued inter alia that sections 4 (4), 4 (5), 5 (1), 5 (2), 27 (2) (d) 27 (6), 16 (7), 32 read with 46, 88 and 100 were unreasonable and not in public interest and so were violative of Article 19 (1) (f) and (g) of the Constitution. Violation of Article 14 was also urged.

9. Being of the view that the attack on some of the provisions was justified but the provisions which were found to be invalid not being so inextricably bound up with other parts as to render the whole Act unconstitutional, this Court held that several provisions, namely, Sections 5 (2) (b), 87 (2) (d), 27 (6), 32, 46, 88 and 100 were invalid. It is worthy of note that although challenge was directly made to the validity of Section 16 (7) the Court did not express any opinion thereon. The said provision cannot therefore be assumed to have been struck down.

10. The matters with which we are now concerned not only include (1) Writ Petition No. 24/1970 of which details have been given above, but (2) Writ Petition No. 587/1970 the petitioners in this petition having come before this Court on an earlier occasion and (3) two Appeals 1613/70 and 1659/70. The petitioners in the two petitions mentioned as well as the appellants in the appeals are all persons who carry on the business of pawn broking and money lending inter alia, on the security of gold articles and ornaments and the common grievance of all these persons is against some of the provisions of the Act, the appeals involving a further question as to the impact of the Act on several State Acts dealing with money lending and money lenders and pawn broking and pawn brokers.

11. The impugned Act, as is shown by its preamble, is to provide for the economic and financial interests of the community, for the control of the production, manufacture, supply, distribution, use and possession of and business in, gold, ornaments and articles of gold and for matters connected

therewith or incidental thereto. As is well known the object of the Act is to make it difficult, if not impossible, for gold which is smuggled into the country from being circulated evidently with the object of checking smuggling of gold or rendering the same unprofitable and so avoiding a loss of foreign exchange to the country.

12. Although there is no definition of pawn broker in Section 2 of the Act there can be no doubt that some of the provisions of the Act are designed to restrict the use of gold by way of pledge or hypothecation for securing loan. Section 2 (b) of the Act defines an "article" as anything (other than ornament) in a finished form, made of, manufactured from or containing, gold and includes any gold coin and broken pieces of an article, but does not include primary gold. Under Section 2 (j) 'gold' means gold including its alloy (whether virgin, melted or re-melted, wrought or unwrought) in any shape or form, of purity of not less than nine carats and includes primary gold, article and ornament. 'Ornament' is defined as a thing in a finished form meant for personal adornment or for the adornment of any idol, deity or any other object of religious worship, made of, or manufactured from gold, whether or not set with stones or gems, etc. The definition contains an Explanation whereby a thing made of gold though resembling an ornament is not to be deemed to be an ornament unless it is used as such in any part of the country. Primary gold is defined in Section 2 (4) as meaning gold in any unfinished or semifinished form including ingots, bars, billets, etc. Section 2 (1) defines a 'declaration' as one which is required by the Act or was required by Rule 126-I of the Defence of India Rules, 1962 or the Gold (Control) Ordinance, 1968 to be made with regard to the ownership, possession, custody or control of gold. Under Section 4 (1) the Central Government has to appoint an Administrator for carrying out the purposes of the Act. Sub-section (2) gives the Central Government power to appoint Gold Control Officers for enforcing the provisions of the Act.

13. Section 6 (1) empowers the Administrator to require any person who lends money on pledge, hypothecation, etc., of any article or ornament to furnish a return giving full particulars of the things given by way of security and the persons who gave the security. Sub-section (2) of this section authorises the examination of accounts of persons lending money on the security of gold articles or ornaments and declares that any gold which is not entered in the accounts or found to be in excess of the quantity shown in the accounts and it is not otherwise accounted for to the satisfaction of the examining officer is to be deemed to be in possession of such person in contravention of the provisions of the Act. Chapter III of the Act containing Sections 8 to 11 deals with restrictions relating to the manufacture, acquisition, possession, sale, transfer or delivery of gold. Sub-section (1) of Section 8 forbids any person from owning or having in his possession, custody or control or acquiring or agreeing to acquire the ownership, possession, custody or control or buying, accepting or otherwise receiving or agreeing to buy, accept or otherwise receive any primary gold save as otherwise provided in this Act. In other words, there is a complete bar to anybody having possession of primary gold.

14. In this connection it may be noted that there was a notification under the Defence of India Rules requiring the conversion of primary gold either into cash or into ornaments within the time specified therein which had expired long before the Gold Control Act was put on the statute book. Sub-section (4) of Section 8 is aimed at preventing any person from delivering, selling or disposing of etc., of any article to a person who is not a licenced dealer or refiner except as provided in the Act. Sub-sections (3) and (4) have a qualification in sub-section (5) as regards the person accepting or transferring by way of gift or exchange gold coins not exceeding five in number. Sub-section (6) empowers the Administrator to make exemption from the above provisions in special circumstances. Section 10 provides as follows:—

"No person shall obtain from any other person any loan or advance on the hypothecation, pledge, mortgage or charge of—

(a) any primary gold, or

(b) any article or ornament which is required to be included in a declaration unless such article or ornament has been so included:

Provided that, in the case of an article which is not required to be included in a declaration, no transfer or delivery thereof shall be made unless such transfer or delivery has been intimated in writing to the Administrator."

Section 11 contains prohibitions regarding making, manufacturing etc., of primary gold articles except under authorisation by the Administrator.

15. Chapter IV deals with possession of gold by public religious institutions, disposal of gold received by way of offerings, submission of monthly accounts and responsibility of the person in charge of the management of any public religious institution in regard to such gold or gold ornaments. Section 16 which has no less than 13 sub-sections provides for the making of declarations for all practical purposes by every person who owns or possesses or deals with or disposes of gold subject to the exemption created in sub-section (5). Under sub-section (1) every person who owns or is in possession, custody or control of any article or ornament at the commencement of the Act, or acquires the ownership, possession, etc., thereafter must make within 30 days from such commencement or from the acquisition, as the case may be or within such further time as the Administrator may allow a declaration in the prescribed form as to the quantity, description and other prescribed particulars of any article or ornament or both, owned, possessed, held or controlled by him. Such declaration however is not required to be made by any person who has before the commencement of the Act already made a declaration in relation to the article or ornament or both. Sub-section (2) specifies a number of cases from Clauses (a) to (l) of persons who have to make the declarations in such cases and its opening words are as follows:

"For the removal of doubts, it is hereby declared that the declaration referred to in this section shall be made, in relation to any article, or ornament, or both....."

Clause (a) deals with minors and lunatics, the declaration having to be

made by the guardian or manager. Clause (b) deals with owners of idols or deities; Clause (c) deals with properties of a person which are under the management of an administrator or receiver; Clause (d) with a person whose properties are under the management of the Court of Wards; Clause (e) relates to articles or things vested in an executor or an administrator of a will or other testamentary disposition; Clause (f) deals with the case of firms; Clause (g) with the case of a Hindu undivided family; Clause (h) with the case of a private or a public trust; Clause (i) with the case of a company whether incorporated in or outside India; Clause (j) with a temple, church, mosque, gurdwara or any other religious institution; Clause (k) deals with wakf property and Clause (l) deals with societies, clubs or other associations. Clause (m) deals with other persons owning, possessing or holding of gold as may be prescribed for them. Sub-sections (1) and (2) of Section 16 make it quite clear that every person who owns or is in possession, custody or control of any article or ornament, no matter whether he is or is not the owner thereof, is under a duty to make a declaration with respect to all his holdings of gold articles or ornaments. Clause (5) exempts persons holding or owning gold only within up to certain limits from making such declarations. Under Clause (3) any person who did not own, possess, hold or control any quantity of gold in excess of the quantity specified in sub-section (5) before the commencement of the Act but acquires after such commencement the ownership thereof whether by succession, intestate or testamentary or otherwise, must make a declaration if as a result of such acquisition the total quantity of gold which comes to be held or possessed or controlled by him exceeds the limits specified. Sub-section (4) of the section makes it incumbent on all persons who have made declarations either under the Defence of India Rules or the Gold Control Ordinance or under sub-section (1) to make a further declaration as often as he acquires or parts with the ownership, possession, etc., of such gold giving prescribed particulars thereof. Sub-section (7) makes it obligatory on every licensed dealer or refiner to make a declaration as

therein specified. Under sub-section (8) every declaration required under this Section is to be made in triplicate of which one copy is to be authenticated and signed by the Gold Control Officer and to be returned to the person making the declaration and the copy so returned is to be retained by such person as evidence of the declaration made by him under this section. Under sub-section (10) a person who acquires or parts with ownership, possession, custody or control of gold after he has made a declaration has to endorse within 30 days from the date of such acquisition or parting with of gold in such manner as may be prescribed on the copy of the declaration retained by him and to produce such copy within 7 days from the date of such endorsement before the Gold Control Officer who has to make necessary changes in the registers referred to in sub-section (9) and also in the copy of the declaration kept in his safe custody. Under sub-section (11) no person shall own or have in his possession, custody or control any quantity of gold which is required to be included in a declaration unless such gold has been included in a declaration or further declaration as the case may be. It is to be noted however that no restriction has been placed on a pawn broker on receiving articles or ornaments of gold by way of pledge and advancing loans thereon. Chapter XII of the Act deals with entries, search, seizure and arrest for the purposes of the Act. Section 58 (1) and (2) empower any Gold Control Officer authorised by the Administrator to enter and search any premises, refinery etc., if he has reason to suspect that any provision of the Act has been or is being or is about to be contravened. Section 59 empowers any Gold Control Officer authorised in this behalf by the Administrator to detain and search any person or thing if he has reason to suspect that any person has secreted about his person or in any other thing any gold in respect of which contravention of the Act is suspected or any document which in his opinion will be useful or relevant to any inquiry or proceedings in relation to the contravention of any provision of the Act. Section 60 deals with the conditions under which a search is to be conducted. Section 66 gives any Gold

Control Officer if he has reason to believe that in respect of any gold any provision of this Act has been or is being or is attempted to be contravened, the power to seize such gold along with the package, covering or receptacle or any other goods in which any quantity of such gold has been mixed. Section 68 contains the power of arrest in certain circumstances. Under Section 69 the provisions of Sections 102 and 103 of the Code of Criminal Procedure relating to search and seizure are made applicable as far as possible. Chapter XIII deals with confiscation and penalties. Section 71 which is the opening section of the Chapter runs as follows:—

"(1) Any gold in respect of which any provision in this Act or any rule or order made thereunder has been, or is being, or is attempted to be, contravened, shall be liable to confiscation.

(2) Any package, covering or receptacle (including its other contents) in which any gold liable to confiscation under sub-section (1) is found shall also be liable to confiscation.

(3) Where any gold liable to confiscation under sub-section (1) is mixed with other goods in such manner that such gold cannot be separated from those other goods, the whole of such goods shall be liable to confiscation.

(4) Any gold which is liable to confiscation under sub-section (1), shall be so liable notwithstanding any change in its form."

Section 72 provides for confiscation of conveyances or animals etc., by means of which any provision of the Act is sought to be contravened. Under Section 73 whenever any confiscation is authorised by the Act, the officer adjudging it may, subject to such conditions as may be specified in the order adjudging the confiscation, give to the owner thereof an option to pay in lieu of confiscation such fine, not exceeding twice the value of the thing in respect of which confiscation is authorised as the said officer thinks fit. Under Section 74 any person who in relation to any gold does or omits to do any act which act or omission would render such gold liable to confiscation under the Act or abets the doing or omission of such an act or is in charge of the conveyance or animal which is liable to confiscation shall be liable to a penalty

not exceeding five times the value of the gold or one thousand rupees whichever is more, whether or not such gold has been confiscated or is available for confiscation. Under Section 77 no confiscation made or penalty imposed under the Act is to prevent the infliction of any other punishment to which the person affected thereby is liable under the provisions of this Act or under any other law. Chapter XIV deals with adjudication, appeal and revision. Section 78 indicates the limits of authority of different adjudicating officers. Under Section 79 no order of adjudication of confiscation or penalty is to be made unless the owner of the gold, conveyance or animal or other person concerned is given a notice in writing—

(i) informing him of the grounds on which it is proposed to confiscate such gold, conveyance or animal or to impose a penalty; and

(ii) giving him a reasonable opportunity of making a representation in writing within such reasonable time as may be specified in the notice against the confiscation or imposition of penalty mentioned therein and if he so desires, of being heard in the matter.

16. Chapter XV deals with offences and their trial. Section 85 makes the carrying on of the business of a banker or money lender in contravention of the Act or any rule or order made thereunder punishable with imprisonment for a term which is to be not less than six months but not more than three years and also with fine. The Court, however, may, if satisfied that the special circumstances of the case so require, impose a sentence of imprisonment for a term which may be less than six months. Failure to make a declaration under the Act without any reasonable cause or making a declaration which is either false or which the declarant knows or has reason to believe to be incorrect is punishable with imprisonment for a term which may extend to two years and also with fine. Under Section 91 whoever contravenes any provisions of the Act or any rule or order made thereunder for which no punishment is separately provided in this Chapter (Chapter XV) shall be punished with imprisonment for a term which may extend to three months or with fine or with both. There are some miscellaneous provi-

sions in Chapter XVI. Under Section 99 any person who is in possession, custody or control of any primary gold, article or ornament is to be presumed, unless the contrary is proved, to be the owner thereof.

17. Mr. Daphtary, learned counsel appearing in support of Writ Petitions 24 and 287 of 1970 limited his challenge mainly to Sections 6, 8 and 16 of the Act and attempted to show that compliance with all the conditions in form GS III prescribed under Rule 4 of the Act was almost an impossibility. The first question to be considered is, whether there is anything in the Act or the rules regarding the filling up of the form GS III which constituted an unreasonable restriction on the part of a pawn broker to hold, acquire or dispose of property or carrying on his business of money lending unreasonable within the meaning of Article 19 (1) (f) and (g) of the Constitution not saved by sub-clauses (5) and (6) thereof. In our view no exception can be taken to the provisions of the Act to which our attention was drawn by learned counsel for the purpose on this score. If smuggling of gold into the country is to be checked by the prevention of the conversion of smuggled gold into gold articles or ornaments, there is no unreasonableness in the State calling upon all pawn brokers and persons who take pledges or hypothecation of ornaments to furnish declarations so that the Administrator and the Gold Control Officer may keep an eye on the activities of such persons and, if necessary, at any point of time, ask for a return in terms of Section 6 and satisfy himself about the legality of his acts by inspecting his accounts. It would not be difficult for anybody carrying on or wanting to carry on business lawfully to insist on the pawnor producing the copy of the declaration in his possession given to him after authentication by the Gold Control Officer in terms of sub-section (8) of Section 16 in order to satisfy himself that there is no contravention of the Act.

18. Section 16 as is seen is all-embracing and makes it obligatory on every person unless he is exempted under sub-section (5) thereof to make a declaration of all the gold articles and ornaments in his possession, custody or control. In order that there

may not be any uncertainty in the matter of making declarations in certain cases, the Legislature has indicated the persons on whom the burden lay. The requirement of making a declaration as often as a pawn broker acquires ownership, possession custody or control of gold under sub-section (4) is to be read with sub-section (10) and it is enough for a pawn broker to approach the Gold Control Officer with the full and detailed statements of his holding at the end of every month. As such it cannot be said that there is any unreasonable restriction on his holding property or pursuing his business in terms of Article 19 (1) (f) or (g) of the Constitution.

19. The contention that there being no provision for notice to be given to him in case of any proceedings for confiscation the pawnee may be prejudicially affected without a hearing being given to him has no substance inasmuch as he will be the person presumed to be the owner in terms of Section 99 and the gold can only be seized from his possession or custody. He can appear before the authorities and make his submissions as to why no penal action should be taken against him. There does not however seem any justification for an order of confiscation of gold under Section 71 of the Act merely because of a failure to comply with Section 16 relating to declaration. It is no doubt true that the owner is to be given a hearing in terms of Section 79 and he has a right of appeal under Section 80 but the provision of Section 73 which allows the levy of a fine in lieu of confiscation not exceeding twice the value of the thing in respect of which confiscation is authorised appears to be unduly harsh. In this connection, a reference may be made to Section 18 of the Wealth Tax Act and the penal provisions contained therein. Under the Wealth-tax Act the penalty in case of failure to furnish the return without reasonable cause is a sum equal to two per cent of the tax for every month during which the default continues but not exceeding in the aggregate 50 per cent. of the tax. It will be noticed that the fine there is imposed only on failure to pay the tax but in case of gold in respect of which no declaration has been made under Section 16 or the factum of pawn of which has not been

communicated in writing to the Administrator, the owner ipso facto becomes liable to pay an unconscionably high penalty. Section 71 therefore, appears to place an unreasonable restriction on the right of a person to acquire, hold and dispose of gold articles or gold ornaments. It may be applied indiscriminately and cannot therefore, be upheld as saved by Clauses (5) and (6) of Article 19 of the Constitution.

20. A point was also made that the definition section does not make a clear distinction between an 'article' and an 'ornament'. This seems to be without foundation. The explanation to Section 2 (c) shows that nothing made of gold which resembles an ornament will be deemed to be an ornament unless the thing (having regard to its purity, size, weight, description or workmanship) is such as is commonly used as ornament in any state. Clearly it is a question of proof as to whether the thing passes as an article or an ornament in a particular state and the difference in the treatment of these two substances in certain provisions of the Act does not fail to be considered.

21. It was argued that compliance with all the conditions laid down in form GS III under Rule 4 of the Act may be impossible in a number of cases. The form contains a schedule for ornaments or articles under different columns, column 5 being meant for estimated weight and value of gold content and column 6 for 'purity'. It was urged that where the ornament is made up not only of gold but of other metals and stones, precious or otherwise, it will be impossible either to give a true estimate of the weight and value of the gold contained or the purity of the gold. No doubt there may be some difficulty in some cases but it must be realised that a pawn broker who is asked to advance money on the security of such an article will make a fairly accurate estimate of the weight and value of the gold therein so as to be able to judge for himself how much he can safely advance on the security of that article. He is not called upon to give the exact purity of the gold content in the article. He can only give an estimate of its purity.

22. The supposed difficulty in the matter of compliance with Sec-

tion 16 of the Act as regards acquisition or transfer of gold as and when made really does not exist. It would certainly have been onerous and an almost impossible task for any pawn broker to perform if he had to furnish daily declarations in respect of his transactions had during the day and to get the Gold Control Officer to make an endorsement on his declaration every day. He is at liberty to get it done only once a month and surely it would not be difficult for a person who maintains a true and faithful account of his dealings with his borrowers to prepare a schedule of all these transactions up to a certain date and secure the endorsement of the Gold Control Officer to the alterations in the declaration already authenticated by him.

23. There is no difficulty with regard to primary gold found in the possession of the petitioner in the Writ Petition No. 24. Under Section 8 (1) no person can own or have in his possession, custody or control, acquire or agree to acquire ownership, buy, accept or otherwise receive any primary gold except as provided in the Act and the pawn broker or money lender is not such a person.

24. The next question to which we have to address ourselves is, whether the petitioner in W. P. No. 24 of 1970 had any lawful excuse for not making a declaration before the date of the raid on his premises. According to him he was required to file his declaration by 30th April, 1969 and the seizure of primary gold and ornaments before that date was not lawful. In this connection Mr. Daphtary drew our attention to the averments in paragraphs 12 and 16 of the petition which have been already referred to. This is however denied in the counter affidavit. Reference was made in the counter affidavit to the previous petitions and it was said that the time limit for filing the declaration of all the ornaments held by a licensed dealer or refiner was extended up to 28th February 1969 and an undertaking for the purpose was given to this Court with regard to declarations under Section 16 (1) and it was only with regard to the time limit for filing of declarations by licensed dealers or refiners under Section 16 (7) that there was an extension of time up to 30th June, 1969. The printed circulars to

which our attention was drawn do not show that there was any extension of time with regard to declarations under Section 16 (1) beyond 28th February, 1969. Reference to a certain circular addressed only to Gold Control Officers to the effect that no steps were to be taken until after 30th April, 1969 by Mr. Daphtary, cannot be availed of by the petitioner who was not in a position to assert that the circular had been publicly advertised or that he himself had received any copy of such circular.

25. Mr. Daphtary also argued that the provision for search as contained in Section 58 (1) which allowed any Gold Control Officer authorised by the Administrator to enter and search any business premises merely if he had any reason to suspect that any provision of the Act was being or was about to be contravened, was contrary to law and should be struck down. He complained that it would be made an engine of oppression in the hands of any unscrupulous officer if he was minded to do so. He argued that there was no provision corresponding to this in the Sea Customs Act, 1878 under which an officer could only search a person if he had reason to believe and where the person about to be searched could require the officer to take him to the nearest Magistrate or a Customs Collector. He also drew our attention to the Customs Act, 1962 which envisages search only when the proper officer has "reason to believe" and where searches are further subject to the provisions of the Code of Criminal Procedure with respect thereto. It is true that the usual safeguards under the Code of Criminal Procedure are not to be found in this Act except those contained in Sections 102 and 103 of the Code. But that by itself would not be enough to strike down the provision in Section 58. There may be cases where it is necessary for the Gold Control Officer to act with expedition in the matter of search so that the information that he is going to search a premises may not leak out and the only safety in this regard is that the Gold Control Officer must be authorised by the Administrator in this behalf and he in his turn if he is empowered by the Central Government, may authorise other Government officers to enter and search the premises. In this case the

counter affidavit shows that the officer searching had information regarding the contravention of the provisions of the Act and the result of the search showed that huge quantity of gold was lying with the petitioner in respect of which no declaration had been made. It would not be out of place to mention that the Gold Control Act is not the only provision of law where power to search on suspicion has been conferred on an officer. In this connection we may refer to Section 41 of the Madras General Sales Tax Act 1 of 1959 which came up for consideration before this Court in *Commr. of Commercial Taxes, Board of Revenue, Madras v. Ramkishan Shrikishan Jhaver*, Civil Appeals Nos. 150 to 154, D/- 9-8-1967 = (Reported in AIR 1968 SC 59).

26. In Writ Petition No. 587/1970 filed on 4th November, 1970 the challenge is made only to Section 16 of the Act which though questioned in Writ Petitions Nos. 282, 407 and 408 of 1969 had not been adjudicated upon by this Court.

27. In the result the contentions raised on behalf of Writ Petitioners except with regard to Section 71 cannot be accepted and the provisions of the Act impugned before us except the said section cannot be struck down.

28. Mr. Ayyangar appearing for the appellant in Civil Appeal No. 1613/1970 formulated his objections to the Act in the three following propositions:—

1. Section 16 (1) of the Act was a general provision which did not apply to pawn brokers and money lenders as they were governed by Sections 6, 10 and 28.

2. In any view of the matter S. 16 (1) was unreasonable regarding pawn brokers.

3. By reason of the Andhra Pradesh (Andhra Area) Pawn Brokers Act XXIII of 1943 and the Andhra Pradesh (Telangana Area) Money Lenders Act (V of 1349-T) the field of legislation regarding money lending and pawn brokers so far as the State of Andhra Pradesh was concerned was completely and exclusively occupied by those Acts and inasmuch as the Gold Control Act purported to trench upon those State Acts it was beyond the legislative competence of Parliament.

29. On the first point learned counsel drew our attention to Section 6 (1) of the Act which has been already referred to and contended that inasmuch as Section 13 (1) was a general provision while Section 6 (1) was specially directed towards pawn brokers, the former provision i. e., Section 16 (1) was inapplicable to pawn brokers. Our attention was also drawn to Section 28 of the Act under which no licensed dealer could unless authorised by the Administrator so to do carry on business as a money lender or banker on the security of any article or ornament or both in the same premises in which he carried on business as a dealer. In our view Section 16 is not excluded in the case of money lenders or pawn brokers. Any person who comes under the purview of Section 16 (1) has to make a declaration unless there is any provision to the contrary in that Chapter. The only provision to the contrary is contained in sub-section (5) which permits of exemptions in respect of persons holding gold articles or ornaments up to a specified limit. The provision in Section 6 (1) empowering the Administrator to call upon any pawn broker to furnish a return does not do away with his obligation to file a declaration under Section 16 (1). Section 6 (1) empowers the Administrator to take action in special cases where he thinks it necessary to call upon a money lender to make a return and under Section 6 (2) he is empowered to authorise any Gold Control Officer to examine the accounts of such pawn broker. This cannot obviate the requirements of Section 16 (1). Counsel argued that there would be duplication of declaration in respect of pawn brokers if both are complied. No such duplication or difficulty will arise. Every pawn broker will have to file his declaration under Section 16 (1) and he would be obliged to make a return only when he is called upon to do so in terms of Section 6. It was argued further that although under Section 16 (2) the Legislature had expressly provided for returns being submitted with regard to various kinds of persons, pawn brokers were not included therein and so long as no order prescribing for declarations being filed by them under Clause (m) was made they were under no obligation to file declarations. There is no substance in this contention be-

cause sub-section (2) is directed only towards removal of doubts which might be felt in the cases of persons specified in Clauses (a) to (l). In the case of pawn brokers no such difficulty or doubt arises. If a number of pawn brokers carry on business in partnership the declaration can be made by any partner of the firm in terms of Clause (f) and if a company carries on business of pawn broking any person in charge of the management of the affairs of the company can make the declaration.

30. There is no substance in the second point either. It was argued that a pawn broker only kept things in his safe custody and it would be very oppressive on him if he had the obligation to make a declaration as often as he got in a gold article under a pledge or parted with it on redemption. Our attention was drawn to a passage in *Mohd. Hanif Quareshi v. State of Bihar*, 1959 SCR 629 at p. 671 = (AIR 1958 SC 731 at p. 743) where dealing with the case of ban on the slaughter of cows of all ages and her progeny which included bulls, bullocks, heifers, buffaloes, male, female or calves imposing a great hardship on butchers this Court has remarked that the enactment if valid would compel the butchers to make fresh arrangements for the supply of animals which were permitted to be slaughtered for food and said:

"Theoretically it may not be impossible for them to do so, but in practice it is more than likely to cause considerable inconvenience to them and may even involve extra expenses for them The immediate effect of the operation of these Acts is to cause a serious dislocation to the petitioner's business without any compensatory benefit."

We do not think that these observations can apply to the facts of this case. A money lender, specially a pawn broker who enters into a number of transactions of pledge every day has to maintain his account books and he has to record faithfully therein the articles he receives by way of pledge including their weight and general description when he takes them in and making a declaration for the purpose of the Act cannot entail any hardship on such a person.

31. With regard to the last point urged by Mr. Ayyangar it is enough to say that by the Gold Control Act Parliament only sought to control and regulate the production, manufacture etc., use and possession of and the business in gold, gold ornaments etc. It did not seek to disturb or annul the provisions of the State Acts mentioned. The provisions of the State Acts are to have full play and effect so long as the Gold Control Act is not violated.

32. Mr. Natesan appearing for some interveners raised contentions similar to Mr. Ayyangar's and urged that the Act did not contemplate multiple declarations and it purported to affect only owners of gold articles or ornaments and not pawn brokers. We see no force in this contention.

33. Save that Section 71 of the Act is unconstitutional the petitioners in Writ Petitions 24 and 587 of 1970 are not entitled to the reliefs asked for and they will stand dismissed. Civil Appeals Nos. 1613/70 and 1659/70 challenging the vires of the Gold Control Act are also dismissed. The parties will pay and bear their own costs.

Order accordingly.

**AIR 1971 SUPREME COURT 1182
(V 58 C 236)**

(From: Patna)*

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.

The Indian Mica and Micanite Industries, Ltd., Appellant v. The State of Bihar, and others, Respondents.

Civil Appeal No. 770 of 1967, D/- 2-4-1971.

(A) Constitution of India, Article 265 — Vires of the levy made under Rule 111 of the Rules under Section 90 of the Bihar and Orissa Excise Act for a licence to possess denatured spirit used by a manufacturer in his process cannot be upheld as a fee as there is no sufficient quid pro quo for the levy — (X-Ref.: — Bihar and Orissa Excise Act (2 of 1915), Section 90 — Rule 111 of Rules

*(Civil Writ Jurisdiction Case No. 887 of 1965, D/- 14-9-1966 — Pat.)

DO/DO/B743/71/MKS/C

framed under) — (Constitution of India, Sch. 7, List II, Entry 65) — Case law discussed. (Para 17)

To uphold a levy as a fee it must be shown that it has a reasonable co-relationship of a general character (though not with arithmetical exactitude), with the service rendered by the Government. The co-relationship between the services rendered and the fee levied is essentially a question of fact. (Paras 11 and 17)

The State in maintaining an elaborate staff to prevent the licensees from converting it into potable alcohol and thereby avoiding payment of heavy duties renders little or no service to the licensees but only protects its own interest. (Para 17)

The granting of a licence to regulate any trade, business or profession in public interest, generally speaking, does not confer any privilege or benefit on any one. (Para 14)

(B) Constitution of India, Article 226 — Remand of case to enable party to place sufficient materials before High Court.

State through negligence failing to place before High Court sufficient materials to support an impugned rule — Supreme Court in appeal finding rule void on the materials on record — Where the effect of its decision would cause considerable financial loss to the State it would remand the case to give a fresh opportunity to the State to place the necessary materials in support of the rule before the High Court. (Para 18)

Cases Referred: Chronological Paras

- (1971) AIR 1971 SC 344 (V 58)
= (1970) 2 SCR 348, Delhi Cloth and General Mills Co. Ltd. v. Chief Commr. Delhi 10
- (1965) AIR 1965 SC 1107 (V 52)
= (1965) 2 SCR 477, Corporation of Calcutta v. Liberty Cinema 9
- (1963) AIR 1963 SC 966 (V 50)
= (1963) Supp 2 SCR 302, Sudhindra Thirtha Swamiar v. Commr. for Hindu Religious and Charitable Endowments; Mysore 8
- (1961) AIR 1961 SC 459 (V 48)
= (1961) 2 SCR 537, The Hingir-Rampur Coal Co. Ltd. v. The State of Orissa 7
- (1954) AIR 1954 SC 282 (V 41)
= 1954 SCR 1005, The Commr.

Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt 4, 14

(1954) AIR 1954 SC 388 (V 41)
= 1954 SCR 1055, Ratilal Pan-chand Gandhi v. The State of Bombay 8

(1954) AIR 1954 SC 400 (V 41)
= 1954 SCR 1046, Mahant Sri Jagannath Ramanuj Das v. The State of Orissa 8

60 CLR 263, Mathews v. Chicoory Marketing Board 4

Mr. Sarjoo Prasad, Sr. Advocate, (M/s. K. K. Sinha and B. B. Sinha, Advocates, with him), for Appellant; M/s. S. C. Agarwala, R. K. Garg, V. J. Francis, Narayana Netter, and S. P. Singh, Advocates, for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.: — In this appeal by certificate the vires of Rule 111 of the Rules framed under Section 90 of the Bihar and Orissa Excise Act, 1915 is in issue. The appellant, Indian Mica and Micanite Industries contends that the said Rule is ultra vires the Constitution. The High Court of Patna rejected that contention.

2. In the High Court various contentions came up for consideration. The High Court has come to the conclusion that the levy made under the impugned rule is a fee. That finding was not challenged before us by any of the parties. Therefore all that we have to see is whether the fee levied is within the permissible limit. In other words whether there is sufficient quid pro quo for the levy in question.

3. The appellant is a consumer of denatured spirit. It purchases denatured spirit from the wholesalers or the manufacturers for the purpose of manufacturing micanite. The Bihar and Orissa Excise Act, 1915 (Bihar and Orissa Act 2 of 1915) came into force on January 19, 1916. In pursuance of the provisions of that Act, the impugned Rule was framed by the Board of Revenue for levying licence fee. The fee for the licence to possess denatured spirit in 1919 was only Rs. 2/- per annum irrespective of the quantity in the possession of a person. This rate continued to be in force till 1937. At this stage it may be remembered that under sub-section (2) of Section 143 of the Government of India Act, 1935, the Provinces were

authorised to continue to levy tax, duties, cesses or fees which were being lawfully levied prior to the commencement of that Act. Under the 1935 Act as under our present Constitution, the power to levy duties on alcoholic liquor fit for human consumption was allocated to the Provincial Legislature whereas the power to levy duty on alcoholic liquor not fit for human consumption was allocated to the Central Legislature. Denatured spirit though an alcoholic liquor is not fit for human consumption. The power to levy duty on the same was and is given to the Central Legislature. But the same being intoxicating liquor, the Provincial Legislature under the 1935 Act and at present the State Legislature has power to levy fee. The power of any legislature to levy fee is conditioned by the fact that it must be by and large a quid pro quo for the services rendered. If a levy purporting to be a fee is found to be an exaction without doing any service or if it is found that the levy is wholly disproportionate to the services rendered then the levy becomes invalid.

4. The distinction between fee and levy came up for the first time for consideration by this Court in *The Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005 = (AIR 1954 SC 282). Therein this Court speaking through Mukherjea J. (as he then was) quoted with approval the definition of 'tax' given by Latham, C. J. of the High Court of Australia in *Matthews v. Chicoory Marketing Board*, 60 CLR 263. In that case the learned Chief Justice observed:

"A tax" is a compulsory exaction of money by public authority for public purposes enforceable by law and is not payment for services rendered."

5. Dealing with the distinction between "tax" and "fee" Mukherjea J. observed thus in the above-mentioned case:

"It is said that the essence of taxation is compulsion, that is to say, it is imposed under statutory power without the tax-payer's consent and the payment is enforced by law. The second characteristic of tax is that it is an imposition made for public purpose without reference to any special benefit to be conferred on the payer

of the tax. This is expressed by saying that the levy of tax is for the purposes of general revenue, which when collected forms part of the public revenues of the State. As the object of a tax is not to confer any special benefit upon any particular individual, there is, as it is said, no element of quid pro quo between the tax payer and the public authority. Another feature of taxation is that as it is a part of the common burden, the quantum of imposition upon the tax payer depends generally upon his capacity to pay.

x x x x

Coming now to fees, "a fee" is generally defined to be a charge for a special service rendered to individuals by some Governmental agency. The amount of fee levied is supposed to be based on the expenses incurred by the Government in rendering the service, though in many cases the costs are arbitrarily assessed. Ordinarily, the fees are uniform and no account is taken of the varying abilities of different recipients to pay. These are undoubtedly some of the general characteristics, but as there may be various kinds of fees, it is not possible to formulate a definition that would be applicable to all cases.

x x x x

If, as we hold, a fee is regarded as a sort of return or consideration for services rendered, it is absolutely necessary that the levy of fees should on the face of the legislative provision, be co-related to the expenses incurred by Government in rendering the services."

6. The same view was reiterated by this Court in *Mahant Sri Jagannath Ramanuj Das v. The State of Orissa*, 1954 SCR 1046 = (AIR 1954 SC 400) and in *Ratilal Panachand Gandhi v. The State of Bombay*, 1954 SCR 1055 = (AIR 1954 SC 388).

7. The nature of "a fee" again came up for consideration before this Court in *The Hingir Rampur Coal Co. Ltd. v. The State of Orissa*, (1961) 2 SCR 537 = (AIR 1961 SC 459). Therein this Court observed that although there can be no generic difference between a tax and a fee since both are compulsory exactions of money by public authorities, there is this distinction between them that whereas a tax is imposed for public purposes and requires no consideration to support it,

a fee is levied essentially for services rendered and there must be an element of quid pro quo between the person who pays it and the public authority that imposes it. While a tax invariably goes into the consolidated fund, a fee is earmarked for the specified services in a fund created for the purpose. Whether a cess is one or the other would naturally depend on the facts of each case. If in the guise of a fee, the Legislature imposes a tax, it is for the Court on a scrutiny of the scheme of the levy, to determine its real character. The distinction is recognised by the Constitution which while empowering the appropriate Legislatures to levy taxes under the Entries in the three lists refers to their power to levy fees in respect of any such matters, except the fees taken in Court, and tests have been laid down by this Court for determining the character of an impugned levy. In determining whether a levy is a fee the true test must be whether its primary and essential purpose is to render specific services to a specified area or class, it being of no consequence that the State may ultimately and indirectly be benefited by it.

8. In *Sudhundra Thirtha Swamiar v. Commissioner for Hindu Religious and Charitable Endowments, Mysore*, (1963) Supp. 2 SCR 302 = (AIR 1963 SC 966) this Court was called upon to consider whether the levy impugned in that case could be justified as a fee. It upheld the levy which was an annual contribution levied under the amended Section 76 (1) of the Madras Religious Endowments Act, 1951 on the ground that those contributions when collected went into a separate fund and not to the consolidated fund of the State and were earmarked for defraying the expenses for the services rendered. Further they were not even payable to the Government but payable to the Commissioner and were levied not as a tax but only as a fee. Therein this Court further observed that a fee does not cease to be of that character merely because there is an element of compulsion in it, nor is it a postulate of a fee that it must have direct relation to the actual service rendered. Absence of uniformity is not a criterion on which alone it can be said that the levy is of the nature of a tax.

1971 S. C./75 VI G—12-A

9. In *Corporation of Calcutta v. Liberty Cinema*, (1965) 2 SCR 477 = (AIR 1965 SC 1107) the validity of the levy made under Section 548 (2) of the Calcutta Municipal Act 1951 came up for consideration. Therein this Court held that the levy in question is not a "fee and return for services" as the Act does not provide for any services of a special kind being rendered, resulting in benefits to the person on whom it is imposed. Section 527 (43) permits by-laws to be framed for regulating the inspection, supervision and control, among others, of cinema houses; but it is not obligatory to make such by-laws and therefore, there may be no services to render. Even the bye-law made provides only for inspection, and the work of inspection done by the appellant was only to see that the terms of the licence were observed by the licensee. It was not a service to him, and so, no question arises of correlating the amount of levy to the costs of any service. The levy therefore is not a fee and must be tax.

10. In *Delhi Cloth and General Mills Co. Ltd., v. Chief Commissioner, Delhi*, (1970) 2 SCR 348 = (AIR 1971 SC 344) the validity of a levy as a fee came up for consideration by this Court. Therein this Court speaking through Grover J. (one of us) laid down that in each case when the question arises whether the levy is in the nature of a fee the entire scheme of the statutory provisions, the duties and obligations imposed on the inspecting staff and the nature of the work done by them will have to be examined for the purpose of determining the rendering of the services which would make the levy a fee. After examining the various provisions of the Factories Act, 1948 and the rules framed this Court came to the conclusion that a large number of provisions of the Act, particularly in the Chapters dealing with safety involve a good deal of technical knowledge and in the course of their discharge of duties and obligations the Inspectors are expected to give proper advice and guidance so that there may be due compliance with the provisions of the Act. On certain occasions the factory owners are bound to receive a good deal of benefit by being saved from the consequences of the working of dangerous machines or employment of such pro-

cesses as involve danger to human life by being warned at the proper time as to the defective nature of the machinery or of the taking of precautions which are enjoined under the Act. Similarly if a building or a machinery or plant is in such a condition that it is dangerous to human life or safety the Inspector by serving a timely notice on the manager saves the factory owner from all the consequences of proper repairs not being done in time to the building or machinery. In that case the High Court found that 60% of the amount of licence fees which were being realised was actually spent on services rendered to the factory owners. That finding was accepted by this Court and on the basis of that finding this Court upheld the validity of the levy.

11. From the above discussion it is clear that before any levy can be upheld as a fee, it must be shown that the levy has reasonable correlation with the services rendered by the Government. In other words the levy must be proved to be a quid pro quo for the services rendered. But in these matters it will be impossible to have an exact correlation. The correlation expected is one of a general character and not as of arithmetical exactitude.

12. Let us now proceed to consider whether the levy under the impugned rule can be justified as a fee on the basis of the law as enunciated by this Court.

13. But before doing so, it is necessary to dispose of one of the grounds on which the High Court upheld the levy. In paragraph 8 of the High Court's judgment, it is observed:

"..... When a manufacturer wants to keep in his possession, large quantity of denatured spirit for manufacturing purposes, he wants a special privilege or concession of immunity from prosecution. For that purpose he has to obtain a licence or a pass on payment of requisite fees. There is thus a quid pro quo element and the immunity from prosecution is in the nature of a special benefit or privilege."

14. The implication of this observation is somewhat astounding. These observations imply that the

Government can barter away its duty to prosecute an offender for consideration. The requirement to take a licence is prescribed to safeguard public interest and not as a source to gather revenue. What is made punishable is either a person's failure to take the required licence or the breach of the conditions of the licence. Otherwise there would be no sanction behind the rule requiring to take a licence. Generally speaking by granting a licence the State does not confer any privilege or benefit on any one. All that it does is to regulate a trade, business or profession in public interest. There may be cases where a Government which is the owner of a particular property may grant permit or licence to someone to exploit that property for his benefit. Such a right may be given for consideration. It is only in those cases that a licence or a permit is a conferment of a benefit or a privilege and not in the case of grant of a licence for carrying on any ordinary trade, business or profession. If it is otherwise the State can sell the right to practise the profession of law in Courts or to practise the profession of medicine or any of the other numerous professions, at exorbitant prices or may even put up those rights for auction to be given to the highest bidder. Nothing so bad can be within the contemplation of our laws. We are inclined to think that the learned Judges of the High Court have misunderstood the observations of Seligman quoted in 1954 SCR 1005 = (AIR 1954 SC 282) (supra) to the effect that it is a special benefit accruing to the individual which is the reason for the payment of fee.

15. Let us now consider whether in the present case the State is proved to have been rendering any service to the appellant in lieu of the fee levied and further whether if it does render any service whether there is reasonable correlation between the services rendered and the fee levied. In other words whether the fee levied can be considered as a quid pro quo for the services rendered.

16. The averments of the respondents in their counter-affidavit that are relevant on this aspect of the case are those found in paragraph 10 of the counter-affidavit. They read:

"To denature spirit and issue it to Licensees, proper supervision and control is needed vide Board's Rules 63 to 68 at page 177 to 181 of Excise Manual Volume II. There is every risk that any person may attempt to render denatured spirit fit for human consumption which is punishable under Section 49 of the Excise Act.

Besides the above rules of the Board certain instructions have been issued in paragraphs 137 to 196 of the Excise Manual, Volume III (pages 67-71) for the process of denaturing and issue of denatured spirit to the licensees. State Government have to employ supervisory staff and chemical examiner to carry out these obligations of supervision and control.

It may be added that Excise Department does not only supervise and control these intoxicating liquors in the interest of public policy but renders services to the petitioner by getting alcohol manufactured at the distillery by supplying raw materials like molasses and coal to these distilleries at controlled cheap rates. This is the only reason of getting spirit distillery at a very cheap cost by the licensees including the petitioner. And hence levy of fee by the Excise authorities is not a duty or tax but it is clearly fee in return for services rendered as well as for proper supervision, control and regulation of an activity which the legislature desires to control."

17. According to the finding of the High Court the only services rendered by the Government to the appellant and to other similar licensees is that the Excise Department have to maintain an elaborate staff not only for the purposes of ensuring that denaturing is done properly by the manufacturer but also for the purpose of seeing that the subsequent possession of denatured spirit in the hands either of a wholesale dealer or retail seller or any other licensee or permit-holder is not misused by converting the denatured spirit into alcohol fit for human consumption and thereby evade payment of heavy duty. So far as the manufacturing process is concerned, the appellant or other similar licensees have nothing to do with it. They are only the purchasers of manufactured denatured spirit. Hence the cost of supervising the manufacturing process or any assist-

ance rendered to the manufacturers cannot be recovered from the consumers like the appellant. Further under Rule 9 of the Board's rules, the actual cost of supervision of the manufacturing process by the Excise Department is required to be borne by the manufacturer. There cannot be a double levy in that regard. In the opinion of the High Court the subsequent transfer of denatured spirit and possession of the same in the hands of various persons such as whole-sale dealer, retail dealer or other manufacturers also requires close and effective supervision because of the risk of the denatured spirit being converted into potable liquor and thus evading heavy duty. Assuming this conclusion to be correct, by doing so, the State is rendering no service to the consumer. It is merely protecting its own rights. Further in this case, the State which was in a position to place material before the Court to show what services had been rendered by it to the appellant and other similar licensees, the costs or at any rate the probable costs that can be said to have been incurred for rendering those services and the amount realised as fees has failed to do so. On the side of the appellant, it is alleged that the State is collecting huge amount as fees and that it is rendering little or no service in return. The correlation between the services rendered and the fee levied is essentially a question of fact. Prima facie, the levy appears to be excessive even if the State can be said to be rendering some service to the licensees. The State ought to be in possession of the material from which the correlation between the levy and the services rendered can be established at least in a general way. But the State has not chosen to place those materials before the Court. Therefore, the levy under the impugned Rule cannot be justified.

18. In this Court Counsel for the State prayed for an opportunity to place material to show that the levy in question is not disproportionate to the value of the services rendered by the State. Ordinarily we would not have acceded to that request coming at such a late stage, particularly in view of fact that the legal position had been clarified by a long chain of decisions of this Court. There is no doubt

that the State has failed to place the necessary material before the Court to justify the levy. But the fact remains that because of the negligence of those in-charge of the defence of the State, the State may suffer considerable financial loss, if we hold that the impugned Rule is void. Hence we are constrained to give the State a further chance to prove its case.

19. In the result we allow the appeal, set aside the order of the High Court and remit the case to the High Court for disposal according to law in the light of this decision. A further opportunity be given to the State to place material before that Court to show that the value of the services rendered by the State has reasonable correlation with the fee charged. If the State adduces additional evidence, the appellant be given an opportunity to rebut the same. As the further enquiry is necessitated because of the negligence of the State, it should pay the costs of the appellant both in this Court and in the High Court and bear its own costs up to this stage.

Appeal allowed.

**AIR 1971 SUPREME COURT 1188
(V 58 C 237)**

(From: Gujarat)*

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER
AND P. JAGANMOHAN REDDY, JJ.
Parshottam Jadavji Jani, Appellant v. The State of Gujarat and others, Respondents.

Civil Appeal No. 1990 of 1970, D/- 1-4-1971.

(A) Gujarat Industrial Development Act (23 of 1962), Section 1 — The Act is within the Legislative competence of the State Legislature and is valid — (X-Ref.: — Constitution of India, Article 246) — AIR 1970 SC 1771, Foll. (Para 4)

(B) Land Acquisition Act (1894), Section 4 — The establishment of an industrial area by a corporation is a public purpose. (Para 4)

(C) Land Acquisition Act (1894), Section 55 — In an enquiry under Sec-

*(Special Civil Appln. No. 464 of 1970, D/- 31-7-1970 — Guj.)

DO/DO/B738/71/KSB/P

tion 5-A held in accordance with the rules framed under Section 55, the objector is not entitled to cross examine the officers of the corporation, especially when they have given no evidence. It is enough if an opportunity of being heard personally is given to him. (Para 5)

Cases Referred: Chronological Paras (1970) AIR 1970 SC 1771 (V 57),

Ramtanu C. H. Society v. State of Maharashtra 4

(1963) AIR 1963 Guj 50 (V 50)

= 4 Guj LR 326, Gandalf v. State 4

M/s. P. M. Raval and M. V. Goswami, Advocates, for Appellant; Mr. B. D. Sharma, Advocate, for Respondents Nos. 1 and 2; Mr. B. Sen, Sr. Advocate, (Mr. K. L. Hathi, Advocate with him), for Respondent No. 3.

The following Judgment of the Court was delivered by

SIKRI, C. J.: — This appeal, by certificate granted by the High Court of Gujarat under Article 132 and Article 133 (1) (c) of the Constitution of India, is directed against its judgment and order dismissing the present appellant's petition under Article 226 of the Constitution.

2. The appellant is the owner of Survey Nos. 219/1 and 121 situated on the outskirts of Mahuva in Bhavnagar District. By notification dated April 25, 1969, issued under Section 4 of the Land Acquisition Act, 1894, the State Government declared that the above-mentioned lands were needed for the public purpose of construction of an Industrial Estate by the Gujarat Industrial Development Corporation or were likely to be needed for that purpose. On May, 3, 1969 a notice was issued to the appellant by S. O. Collector, Officer on Special Duty, Land Acquisition, informing the appellant that if he had any objection to the acquisition of the lands, he might file objections on or before August 16, 1969. He was further informed that the Officer will hear him or his Counsel at the time of filing the objections. The appellant filed his objections. He took various points, but we are only concerned with one. He pointed out that the Gujarat Industrial Development Corporation

"has come out with ambitious projects for the establishment of the Industrial estate though, in fact, the land already acquired by the Corpora-

tion is in excess of the requirement of the Corporation. I say that the corporation is not in possession of such material as would establish genuineness for the establishment of an industrial estate at Mahuva. I, therefore, claim that the responsible officer should be cross-examined by me for the purpose of showing that the proposed acquisition is not for public purpose and that there is no need to acquire the present lands. The other suitable lands are available and the Corporation has not availed of the same and that the acquisition needs to be dropped. I say that the contiguous lands to the lands under the first notification are available and it would be more suitable than the present land. I, therefore, submit that the proposed acquisition is mala fide inasmuch as my lands are preferred to the other land owners available immediately near the lands required under the first notification."

He accordingly prayed:

"(a) That the officers of the said Corporation which have sought the acquisition and/or such officer I name hereafter be summoned for the purpose of cross-examination.

(b) That personal hearing be granted."

3. It appears that hearing was fixed for September 18, 1969; this date was extended from time to time till November 18, 1969. The appellant did not appear on these dates nor did he apply for any extension of time. His written objections dated August 17/18, 1969 and dated September 18, 1969 were considered and included in the report, under Section 5-A, to the Government.

4. Three points were pressed by the appellant before the High Court. The principal point that the Gujarat Industrial Development Act, 1962 was beyond the legislative competence of the State Legislature no longer survives as this Court has held this Act to be valid in the case of *Ramtanu C. H. Society v. State of Maharashtra*, AIR 1970 SC 1771. The second ground pressed before the High Court was that the establishment of Industrial Area by the Corporation was not a public purpose but a private purpose. In our view the High Court was right in holding that this was a public purpose. The third ground raised before

the High Court was strongly pressed before us. According to the learned Counsel the report under Section 5-A of the Land Acquisition Act was vitiated because the Collector had not granted an opportunity to the appellant to cross-examine the officers of the Corporation for the purpose of showing that the purpose for which the Corporation sought to acquire the lands was not a public purpose and there was no need to acquire the appellant's land. The High Court relying on its earlier decision in *Gandala v. State*, 4 Guj LR 326 = (AIR 1963 Guj 50) held that

"the inquiry under Sec. 5-A (2) is an administrative inquiry and objector is not entitled to cross-examine any officers or members of the acquiring body."

5. Under Section 55 of the Land Acquisition Act certain rules have been made for the guidance of officers in dealing with objections lodged under Section 5A of the Act. These rules are as follows:

"1. Whenever any notification under Section 4 of the Act has been published but the provisions of Section 17 have not been applied and the Collector has under the provision of Section 4 (1) issued notice to the parties interested; and on or before the last day fixed by the Collector in these notices in this behalf any objection is lodged under Section 5A (2), firstly, the Collector shall record the objection in this proceedings, secondly, the Collector shall consider whether the objection is admissible according to these rules.

2. To be admissible (a) an objection must be presented in writing by a party interested in the notified land and must be presented within thirty days after the date of publication of the notification under Sec. 4 or within such period as may be fixed by the Collector; (b) it must allege some specific objections, such as these;

(i) the notified purpose is not genuinely or properly a public purpose;

(ii) the land notified is not suitable for the purpose for which it is notified;

(iii) the land is not so well suited as other land;

(iv) the area proposed is excessive;

(v) the objector's land has been selected maliciously or vexatiously;

(vi) the acquisition will destroy or impair the amenity of historical or artistic monuments and places of public resort: will take away important public rights of way or other conveniences or will desecrate religious buildings, graveyard and the like.

3. After admitting an objection and after having given the objector an opportunity of being heard either in person or by pleader, the Collector shall decide whether it is desirable to hear oral or documentary evidence, which under Section 14 or Section 40 of the Act, he has power to call for. If evidence tendered by the objector is admitted, the Collector shall also afford the other party an opportunity of rebutting it by other evidence or of cross-examining the witnesses:

If he admits evidence, he will fix a time and place of hearing it; and will hear and record it in his proceedings.

4. Agents, other than pleaders, will not be allowed to appear on behalf of persons interested in any enquiry under Section 5-A of the Act.

5. After completing the record of evidence, the Collector shall submit his report and recommendations as to each objection, whether inadmissible or admissible for the orders of Government under Section 5-A (2) of the Act."

It seems to us that the rules have been complied with. The appellant was given an opportunity to be heard personally. He chose not to avail himself of that opportunity. The appellant cannot under these rules claim to cross-examine officers of the Corporation, and in our opinion the prayer to cross-examine officers was rightly rejected. Indeed it was a strange request. The officers had not given any evidence before the Collector and we are unable to see what principle entitles the appellant to claim this right. When rules have been framed regulating the enquiry under Section 5-A of the Land Acquisition Act, it is not necessary to consider whether the enquiry is administrative or quasi-judicial and whether rules of natural justice have been complied

with, and accordingly we say nothing on this point.

6. In the result the appeal fails and is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1190
(V 53 C 238)**

**I. D. DUA AND
V. BHARGAVA, JJ.**

Sub-Divisional Officer and Collector, Shivasagar, Appellant v. Shri Gopal Chandra Khound and another, Respondents.

Civil Appeal No. 1098 of 1967, D/- 23-3-1971.

(A) Constitution of India, Article 226 — High Court does not exceed jurisdiction in quashing orders which suffer from apparent error of law — (X-Ref.: — E. B. and Assam Excise Rules, Rule 300).

The High Court does not exceed its jurisdiction in quashing the orders of the Excise authorities, cancelling the licence of liquor shop, for storing adulterated liquor in contravention of Rule 300 of Rules framed under the Eastern Bengal and Assam Excise Act (1 of 1910), where those orders, having been passed on the basis of incorrect presumptions and also by violating principles of natural justice, suffer from an apparent error of law.

(Para 5)

(B) Eastern Bengal and Assam Excise Rules, Rule 300 — The mere fact that bottles of adulterated liquor with their original seals untampered but loose were discovered on the rack in the shop of the accused does not justify a presumption that he had stored them in his shop with the knowledge that the liquor in the bottles was adulterated.

(Para 3)

The following Judgment of the Court was delivered by

BHARGAVA, J.: — The respondent, Gopal Chandra Khound, is the holder of a licence of a country liquor shop issued by the appellant, Sub-Divisional Officer and Collector, Shivasagar. The Superintendent of Excise

DO/DO/B449/71/MKS/C

of the Sivsagar Sub-Division, in which the shop of the respondent is situated, inspected some liquor shops in the month of June, 1965 and discovered that some of the bottles in the shops were not properly sealed. The covers could be turned all round without detaching them from the bottles and without breaking the seal. There could also be seepage from the covers if the bottles were turned up side down. He felt that this left a scope for tampering as well as deterioration in strength of the liquor in storage beyond the permissible limits; and, consequently, a few days later, on 24th June, 1965, he issued a letter to the Officer-in-charge, Warehouses, Jorhat and Nazira, which were issuing the sealed bottles, to take all possible steps to secure the marked closures properly and to ensure that no sealed bottles of liquor with loose closures were issued from the warehouses. A copy of this letter was endorsed as a circular to all the lessees of the liquor shops, including the respondent. In the endorsement to the lessees, the Superintendent of Excise added that the lessees should not take delivery of such liquor in sealed bottles with loose closures and, in case, through heavy rush at the time of issue, some such bottles with loose closures happened to creep into their consignments, they should be returned at once to the Officer-in-charge, Warehouse concerned for getting them properly secured.

2. Subsequently, on 31st July, 1965, he made a check of the shop of the respondent. He found two bottles on the sale rack with loose covers which appeared to him to be suspicious. He tested their strength and discovered that the strength was far below the strength of issue from the Warehouse. The respondent was expected to store liquor of strength 30 U. P., while the strength of the liquor in these two bottles was 44.9 U. P. and 49.0 U. P. Thereupon, he also checked the remaining 13 bottles which were on that sale rack. He found that the strength of 5 of them was 30 U. P., while the remaining 8 had liquor of strength 48.4 or 48.8 U. P. He marked these bottles, took them in his possession, and recorded a report of his inspection. Thereafter, he sent a report to the appellant informing him of this inspection and stating his opinion that the respondent had deli-

berately diluted and weakened the 30 U. P. liquor in the bottles on the sale rack after having tampered with the seals. He recommended that the respondent should be asked to show cause why his licence should not be cancelled and security forfeited. In pursuance thereof, the appellant issued a notice to the respondent to show cause on 16th August, 1965. The respondent in his explanation denied having diluted or weakened the liquor in the bottles on the sale rack. He explained that the seals were of such a nature that there could be no dilution unless the covers were completely removed, so that, according to him, the charge of dilution was out of question and was absolutely impossible. He suggested in his explanation that, very likely, the deterioration must have taken place in the warehouse before the bottles were issued to him. The explanation contained further details showing cause against the notice issued to him. The appellant asked for comments on this explanation from the Superintendent of Excise. The Superintendent of Excise recorded his comments on 6th September, 1965. On a consideration of these documents, the appellant cancelled the licence of the respondent. The respondent filed an appeal before the Board of Revenue. The Board dismissed the appeal by the order dated 17th January, 1966. Thereupon, the respondent filed a petition under Article 225 of the Constitution before the High Court of Assam and Nagaland. The High Court set aside the order of the appellant and the Board of Revenue. This appeal has, therefore, been brought up to this Court by the appellant against that judgment of the High Court by special leave.

3. The appellant had purported to cancel the licence of the respondent for contravention of Rule 300 of the Rules framed under the Eastern Bengal and Assam Excise Act No. 1 of 1910, which reads as follows:—

"300. No licensed wholesale or retail vendor shall wilfully adulterate or add anything to cause the deterioration of any intoxicant sold or kept for sale by him. He shall not sell any intoxicant which he knows to have been adulterated or to have deteriorated and shall not store such intoxicant or permit such intoxicant to be stored on his premises".

The appellant came to the finding that the respondent had wilfully adulterated or caused the deterioration of the liquor in 10 of the bottles which were found by the Superintendent of Excise on his sale rack; and that was the order which was upheld by the Board of Revenue. The High Court noticed the fact that the Board of Revenue had held that there was no direct evidence to show that the respondent had wilfully caused deterioration in the strength of the liquor in question or that some one else did this on his behalf. The Board of Revenue then proceeded to consider whether there were circumstances in the case to justify recording a conclusion against the respondent and, for that purpose, raised a presumption that the respondent must have knowledge that the liquor in the bottles was adulterated, in the absence of proof to the contrary. The High Court rightly pointed out that such a presumption is not justified on the language of Rule 300. The Board of Revenue, in support of its view, had relied upon some sections of the Excise Act which prescribed penal action in cases of possession of adulterated liquor. It is to be noticed that the proceedings against the respondent were taken not on the ground of being in possession of adulterated liquor, but on the ground that he had deliberately adulterated it. There could, therefore, be no presumption that the charge against him must be treated as proved simply because bottles of adulterated liquor were discovered on the rack in his shop. The High Court also noted the fact that the Board was wrong in thinking that the respondent in his explanation did not deny knowledge of the fact that the bottles were adulterated when, in fact, he had done so. The Board having thus gone wrong on the face of the order in this respect of drawing incorrect presumption, the High Court exercised its jurisdiction to issue a writ of certiorari quashing the orders of the appellant and the Board of Revenue on the ground that there was, in fact, no evidence at all on which a reasonable person could have come to the conclusion that the respondent had himself adulterated the liquor in the bottles.

4. Having heard learned counsel, we are unable to find any error in the judgment of the High Court. The

significant point is that the licence of the respondent was cancelled on the finding recorded by the appellant and upheld by the Board of Revenue that the respondent had deliberately adulterated the liquor in the 10 bottles with the object of causing deterioration and making profits. He was not charged with storage of deteriorated intoxicant under the last part of Rule 300 quoted above. So far as deliberate adulteration by the respondent is concerned, there was no material on which such a finding could have been recorded. Learned counsel appearing for the appellant pointed out some circumstances which, according to him, justified such a finding. He started with the proposition that it was the duty of the Warehouse to supply 30 U. P. liquor to the respondent and, while 10 bottles on the sale rack were found deteriorated to a considerable extent, 5 bottles on the same rack and all the bottles tested from sealed boxes by the Superintendent of Excise were found to contain liquor of proper strength. The Supdt. of Excise also had reported that all these bottles were from the same consignment issued at the same time from the Warehouse. From this circumstance, an inference was sought to be drawn that the 10 bottles on the sale rack must have been deliberately adulterated by the respondent. The facts have, however, to be viewed in the background of the earlier discovery of defective bottles by the Superintendent of Excise in the month of June. A very reasonable possibility exists that some of the bottles, which had defective closures, were issued in this consignment of 24th July, 1965 by the Warehouse either deliberately or inadvertently. The explanation given by the respondent was, therefore, very reasonable and the fact that 10 bottles were found with adulterated liquor was consistent with his explanation, though, of course, it was also consistent with the finding recorded by the appellant and the Board of Revenue. On this possibility, the most adverse inference that could be drawn against the respondent was that he did not follow the instructions issued by the Superintendent of Excise on 24th June, 1965 by carefully checking the bottles and returning them if they were in defective condition. One circumstance, which was relied upon by

both the appellant and the Board of Revenue, was that, in his comments on the explanation of the respondent, the Superintendent of Excise added that he had noticed signs of tampering with the covers of two of the bottles. This circumstance was not noted by him in his memo drawn up at the time of the inspection, nor was it mentioned in his first report to the appellant. At that stage, all he had said was that the covers appeared to him to be suspicious. The suspicion could be because the covers were defective and loose. That was a defect which had been noticed earlier by the Superintendent of Excise himself in some bottles stored in a number of liquor shops, indicating that the defect must have occurred in the Warehouse where the sealing of bottles was being carried out. If there were clear signs of tampering with the closures in the two bottles, that was a strong circumstance indicating that the deterioration may not have taken place in the Warehouse and may be the result of deliberate adulteration after the bottles were received by the respondent. This assertion of the Superintendent of Excise that there were signs of tampering with the covers of two bottles was not only omitted from his original inspection memo and the report to the appellant, but, at the later stage, when he recorded it in his comments, no opportunity was given to the respondent to explain this new fact. Signs of tampering were mentioned by the Superintendent of Excise in his comments behind the back of the respondent. In fact, if there had been signs of tampering, the Superintendent would have prominently drawn the attention of the respondent to them at the time of inspection and would have clearly mentioned it both in the memo and in his report to the appellant. The respondent, in these circumstances, could have explained this charge if he had been asked to do so. It was against all principles of natural justice to allow the Superintendent of Excise to put down a new fact, to give no opportunity to the respondent to explain it and to record a finding on its basis against him. In all these circumstances and while possibilities exist that the tampering of the bottles was not done by the respondent and the bottles might have been received

in defective condition with deteriorated liquor from the Warehouse itself, the High Court was quite justified in setting aside the orders of the appellant and the Board of Revenue.

5. Learned counsel brought to our notice five decisions of this Court in which principles have been laid down for exercise of jurisdiction to issue a writ of certiorari by High Courts under Article 226 of the Constitution. It is unnecessary to quote from those judgments, because we have already indicated above how the orders of the appellant and the Board of Revenue suffer from an apparent error of law in the matter of raising presumptions and how principles of natural justice have been violated. In these circumstances, no charge can be brought that the High Court exceeded its jurisdiction in quashing the orders of the appellant and the Board of Revenue.

6. The appeal is dismissed with costs.

Appeal dismissed.

**AIR 1971 SUPREME COURT 1193
(V 58 C 239)**

(From Gujarat: 11 Guj LR 935)

S. M. SIKRI, C. J., G. K. MITTER,
K. S. HEGDE, A. N. GROVER AND
P. JAGANMOHAN REDDY, JJ.

Jayantilal Amratlal, Appellant v.
The Union of India, and others, Respondents.

Civil Appeal No. 2605 of 1969, D/-
22-2-1971.

Gold (Control) Act (1968), Section 116 (2) — No provision in the Act being inconsistent with Rule 126 (1) (10) of the Gold Control Rules, 1963, notice under the rule initiating proceedings for forfeiture of seized gold must be deemed to continue by virtue of Section 6 of the General Clauses Act on repeal of Gold (Control) Ordinance, 1968 which had protected the action taken under the Gold Control Rules — (X-Ref.: — Gold Control Rules (1963), Rule 126) — (X-Ref.: — General Clauses Act (1897), Section 6) — AIR 1955 SC 84 and AIR 1969 SC 701, Followed. (Para 8)

The reason is that while ascertaining whether the rights and liabilities under the repealed law have been put an end to by the new enact-

ment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. (Para 8)

Cases Referred: Chronological Paras

(1969) AIR 1969 SC 701 (V 56)

= (1969) 72 ITR 787, T. S.

Baliah v. Income Tax Officer

Central Circle VI, Madras

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(1955) AIR 1955 SC 84 (V 42)

= (1955) 1 SCR 893, State of

Punjab v. Mohar Singh

8

Mr. C. K. Daphtary, Sr. Advocate, (Mr. B. Datta, Advocate, and M/s. Ravinder Narain, J. B. Dadachanji and O. C. Mathur, Advocates, of M/s. J. B. Dadachanji and Co., with him), for Appellant; Mr. Jagadish Swarup, Solicitor-General of India, (M/s. J. M. Mukhi and B. D. Sharma, Advocates, with him), for Respondents.

The following Judgment of the Court was delivered by

HEGDE, J.: — The President of India promulgated a proclamation of emergency on October 26, 1962 in exercise of the powers conferred on him by Clause (1) of Article 352 of the Constitution of India. As the Parliament was not in session at that time, the President promulgated the Defence of India Ordinance on the same day (Ordinance No. IV of 1962). That Ordinance was published in the Gazette of India Extraordinary on that very day. In pursuance of the powers given by the said Ordinance, Defence of India Rules 1962 were framed (to be hereinafter called the "Rules"). The Ordinance in question was replaced by the Defence of India Act 1962 (Act 1 of 1962). That Act came into force on December 12, 1962. The "Rules" framed earlier were continued under that Act.

2. By a notification published in the Gazette of India on January 9, 1963, the "Rules" were amended by incorporating therein Part XII-A. The same is called as "Gold Control Rules, 1963." Rule 126 (I) of those rules required every person not being a dealer to make a declaration within 30 days from the commencement of Part XII-A of the "Rules" or within such period as the Central Government by notification specify, to the administrator in the prescribed form, as to the quantity, description or other particulars of the gold owned by him and sub-rule (11) of

that rule lays down that any person in possession or control of gold, not being ornaments shall be presumed, until the contrary is proved, to be the owner thereof. Under Rule 126 (I), the declaration in question was required to be made before the 28th February, 1963. On February 7, 1963, the appellant made a declaration of 25 sovereigns and six gold bars, each of 26.2/3 Tolas in the prescribed form.

3. On November 18, 1964, a squad of Income-tax Officers commenced searching the premises of the appellant. The search continued upto November 21, 1964. On November 20, 1964 the search party discovered huge amount of gold kept buried in one of the rooms of the appellant. The gold bars kept buried weighed 23,329 grams. Along with those bars 154 gold sovereigns weighing 1223 grams were also discovered. The quantity of the gold so kept buried was of the value of Rs. 2,83,320. The discovered gold was kept in the Safe Deposit Vault of a bank and later on December 17, 1964, the same was seized by the Deputy Superintendent of Central Excise, Ahmedabad. Thereafter the Assistant Collector, Central Excise, Baroda issued a show cause notice to the appellant on June 5, 1965 requiring the appellant to show cause to the Collector of Central Excise, Baroda within 10 days of the receipt of that notice as to (1) why the gold under seizure should not be confiscated under Rule 126-M of the Gold Control Rules and (2) why penalty under Section 126-L (16) of the said rules should not be imposed on him.

4. The appellant challenged the validity of that notice before the High Court of Gujarat by means of a writ petition under Article 226 of the Constitution. The High Court upheld the validity of the notice in so far as it related to the confiscation of the gold seized but ruled that the proceedings relating to the imposition of penalty were invalid in law. After the judgment of the High Court, the Collector of Central Excise by means of his communication dated December 6, 1968 informed the appellant that the previous notice is confined to show cause as to why the gold seized should not be confiscated. On January 10, 1968, when the writ petition of the appellant was pending before the High Court, the President withdrew the proclama-

The complaint was that because of the defect in the quality the panel nails had pulled out of some tea chests which required cooping on arrival at London. In forwarding the copy of the letter of complaint to the Chief Conservator of Forests T. P. I. the General Manager of K. D. H. P. commented that "in view of the adverse report received in your plywood I am considering placing my orders elsewhere". The Chief Conservator tried to explain away the defect by saying that in the course of preparation of the plywood panels the glue line had dried up before application of pressure but he had instructed the Manager of T. P. I. to be extra careful in selection of plywood so as to avoid use of defective panels in future. The Manager of T. P. I. did not take the matter lightly and wrote back to the Manager K. D. H. P. on 23rd April 1953 drawing his attention to the fact that the factory of T. P. I. had been supplying over 10 lakhs pieces of plywood to K. D. H. P. from 1941 and defects in 2 or 3 chests did not call for any drastic step like diverting orders elsewhere, at the same time offering to replace any panels which might turn out to be defective. The correspondence does not show that the plaintiff was in receipt of any copies of the above correspondence and it was the Manager of the T. P. I. who sent a copy of his letter to the plaintiff with a request that the plaintiff should contact Mr. Hill of K. D. H. P. in a diplomatic manner to remove the misunderstanding and to secure continuance of custom. There is no letter on record to show that the threat mentioned in the letter of K. D. H. P. dated April 14, 1953 was ever carried into action. Apparently no fresh orders were coming from the said source as on July 13, 1953 the Manager of T. P. I. wrote to the plaintiff referring to large stock of panels of different sizes which had accumulated in the factory and mentioning that no appreciable orders had been received from K. D. H. P., for 3 months although the prior orders had all been executed by April 10, 1953. The plaintiff was requested to procure fresh orders and reference was made to such requests in the past. Nothing tangible appears to have come out as a result of the correspondence which followed and on September 3, 1953 the Manager of T. P. I. wrote to the plain-

tiff saying that although at a meeting of August 19, 1953 a partner of the plaintiff had promised to contact K. D. H. P. within the month he was still in the dark about efforts made to secure orders from K. D. H. P. The plaintiff was informed of the great accumulation of stocks in the factory and warned that inaction on its part might adversely affect its position as sole agents. The plaintiff's answer dated September 23, 1953 shows that it had received other letters from the defendant in the past and was only sending an interim reply. There is a reference in this letter to a meeting with someone in authority of K. D. H. P. and to information received that their decision in letter of April 16 could not be revised but the writer hoped to be able to rectify matters on the return of the General Manager of K. D. H. P. to India within about a month. The above letter was followed by a letter of November 27, 1953 from plaintiff to T. P. I. to say that the Manager of K. D. H. P. (R. Walkar) had agreed to place an order for 33 or 34 thousand sets of panels provided he received a favourable report from his Estates Manager after inspection of T. P. I.'s panels to make sure that they were of prescribed quality. The letter of December 8 from the plaintiff to the Chief Conservator of Forests shows that K. D. H. P. had placed a large order and it was suggested that the panels should be inspected before despatch by a Government Inspector and that lowest prices available should be charged.

10. In view of the above, it is hardly necessary to examine the next complaint regarding quality of panels which appears to have started with the letter of James Finlay & Co. to K. D. H. P. on 25th November, 1953. This complaint too was based on the grievance of P. R. Buchanan & Co. to the effect that there had been a number of instances of teas being contaminated by what was believed to be the immaturity of the wood used for chest battens and also by a strong smelling cement used in the manufacture of the plywood panels. It is also to be noted that this complaint was received after the expiry of the third year of plaintiff's agency and cannot have influenced the K. D. H. P. in withdrawing its custom from T. P. I. before October 31, 1953. Notwithstanding such com-

plaints, the plaintiff was able to inform the defendant on December 8, 1953 that on its intercession K. D. H. P. had placed an order for 36,700 sets of plywood panels but the suppliers should take precaution in ensuring the despatch of goods of required standard to avoid complaints from overseas buyers.

11. In our view, the absence of orders from K. D. H. P. is very satisfactorily accounted for by the plaintiff's dealings with K. D. H. P. which is illustrated by certain documents bearing dates between April 25, 1953 and June 18, 1953. Exhibit P-103 dated April 25 addressed by K. D. H. P. to the plaintiff contains an order for 3100 sets battens urgently required without any stipulation as to the source of supply and only requiring inspection of 5% of panels by a Government Inspector. The price seems to be above that of T. P. I. Ex. P-102 is a similar letter covering an order of 9000 complete chests the plaintiff being asked to commence manufacture for immediate supply. In neither of those letters is there any ban placed on supply of T. P. I.'s goods. There are other letters of this type with orders for panels or chests written on June 3 and June 9, 1953. The last letter of the series dated June 18, 1953 contains an order for a fairly large quantity of goods again without any interdict as to supply from T. P. I.

12. It would however still have been open to the plaintiff to prove the attitude of K. D. H. P. about supplies originating from T. P. I. by calling evidence to that effect. Neither R. Walker, the Manager who was supposed to have issued a direction against supplies from T. P. I. nor Blair Hill who was filling the role of the Manager in Walker's absence was examined in the case. There was no record produced from the office of K. D. H. P. to show that such a ban had been noted or registered. As already stated there is no letter from K. D. H. P. to the plaintiff intimating that goods of T. P. I.'s manufacture were not to be supplied. The letters evince only the possibility of stoppage of orders.

13. The only witness relied on by the plaintiff in this connection, was one Daniel who was head-clerk to the Traffic Manager of K. D. H. P. from 1944 to 1954. He claimed to have been in charge of the transport department

of the company for 32 years and on the strength thereof had the temerity to say that the company had stopped placing orders with T. P. I. because of adverse reports from the company's customers. He admitted that such decision had been taken by R. Walker who had been away from India for six months but added that nobody could go against Walker's decision in his absence.

14. In our view the evidence of Daniel to the above effect is wholly unconvincing. A head-clerk of a traffic department is hardly a person likely to have personal knowledge of such a vital decision taken by the General Manager of a company which managed a very large number of tea estates. Besides, the orders placed by K. D. H. P. between April and June 1953 betray that they were not very selective over the source of supply and trusted the plaintiff to secure panels for them and even manufacture chests itself. We cannot bring ourselves to hold that the plaintiff if so minded could not have placed the orders of K. D. H. P. with the defendant. The evidence leads us to the conclusion that the plaintiff was alone responsible for securing fairly substantial orders from K. D. H. P. in the third year of the agency and placing them elsewhere without any justifiable cause.

15. In the result, we must hold that it was the plaintiff who was responsible for breach of the obligations imposed under Clause 12 of the agreement and the defendant's termination of the agency agreement was not wrongful. The appeal therefore fails and is dismissed subject to the modification mentioned below. The trial Judge had allowed interest on the sum of Rs. 10,000/- at 3% up to the date of the decree and thereafter at 6%. The High Court did not deal with the question but allowed post decree interest at 3% only in modification of the trial court's decree. In our view the appellant should be allowed interest at 6% after the date of the decree of the trial court and at the rate of 3% prior to that date. The appellant will pay the costs of the respondent of this appeal but we do not propose to modify the order for costs made by the High Court.

Appeal dismissed.

tion of emergency. Thereafter the Gold (Control) Ordinance of 1968 was issued. That Ordinance repealed Part XII-A of the "Rules". The provisions therein were replaced by the provisions of the Ordinance. Section 117 (1) of the Ordinance dealt with Repeals and Savings. Section 117 provided:

"(1). As from the commencement of this Ordinance, the provisions of Part XII-A of the Defence of India Rules, 1962 shall stand repealed and upon such repeal, Section 6 of the General Clauses Act, 1897, shall apply as if the said Part were a Central Act;

(2) Notwithstanding the repeal made by sub-section (1) but without prejudice to the application of Section 6 of the General Clauses Act, 1897, any notification, order, direction, appointment or declaration made or any notice, licence or certificate issued or permission, authorisation or exemption granted or any confiscation adjudged or penalty or fine imposed or any forfeiture ordered or any other thing done or any other action taken under or in pursuance of the provisions of Part XII-A of the Defence of India Rules, 1962, so far as it is not inconsistent with the provisions of this Ordinance be deemed to have been made, issued, granted, adjudged, imposed, ordered, done or taken under the corresponding provisions of this Ordinance."

5. In view of Section 117 of the Gold (Control) Ordinance the notice issued on June 5, 1965 initiating proceedings for forfeiting the gold seized must be deemed to have continued. The provisions in the "Rules" relating to forfeiture are not inconsistent with any of the provisions of the Gold (Control) Ordinance, 1968.

6. On August 24, 1968, the Parliament passed the Gold (Control) Act, 1968. The same received the assent of the President on September 1, 1968 and came into force on and from that date. By Section 116 (1) of that Act Gold (Control) Ordinance, 1968 was repealed. Section 115 (2) provided:

"Notwithstanding such repeal, anything done or any action taken, including any notification, order or appointment made, direction given, notice, licence or certificate issued, permission, authorisation or exemption granted, confiscation adjudged, penalty or fine

imposed, or forfeiture ordered, whether under the Gold (Control) Ordinance 1968 or Part XII-A of the Defence of India Rules, 1962, shall in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done, taken, made, given, issued, granted, adjudged, imposed or ordered as the case may be, under the corresponding provision of this Act, as if this Act had commenced on the 29th day of June, 1968."

7. In view of Section 116 (2) of the Gold (Control) Act, 1968, it was urged on behalf of the appellant that the notice issued on June 5, 1965 can no more be operative because under the Gold (Control) Act, 1968, there are no provisions for making a declaration relating to the possession of primary gold. At this stage it may be noticed that under the "Rules" every person who was in possession of primary gold, exceeding the prescribed weight was required to convert the same either into ornaments or sell the same to the licensed dealers within the time prescribed by the "Rules". Possession of primary gold thereafter exceeding the prescribed limit was an offence. That period had expired long before the Gold (Control) Act, 1968 came into force. Hence the Gold (Control) Act naturally did not make any provision for a declaration of the possession of primary gold. In view of that circumstance it was urged on behalf of the appellant that the provisions in the "Rules" requiring a declaration to be made in respect of the possession of primary gold are inconsistent with the provisions of the Gold (Control) Act and therefore the notice issued under the "Rules" cannot be considered as being continued under the provisions of the Gold (Control) Act, 1968.

8. The above contention is untenable. There are no provisions in the Gold (Control) Act, 1968 which are inconsistent with Rule 126 (I) (10) of the "Rules". That being so, action taken under that rule must be deemed to be continuing in view of Section 6 of the General Clauses Act, 1897. It is true that Gold (Control) Act, 1968 does not purport to incorporate into that Act the provisions of Section 6 of the General Clauses Act. But the provisions therein are not inconsistent with the provisions in Section 6 of the General Clauses Act. Hence the provisions of Section 6 of the General

Clauses Act are attracted in view of the repeal of the Gold (Control) Ordinance, 1968. As the Gold (Control) Act does not exhibit a different or contrary intention, proceedings initiated under the repealed law must be held to continue. We must also remember that by Gold (Control) Ordinance, the "Rules" were deemed as an act of Parliament. Hence on the repeal of the "Rules" and the Gold (Control) Ordinance, 1968, the consequences mentioned in Section 6 of the General Clauses Act, follow. For ascertaining whether there is a contrary intention, one has to look to the provisions of the Gold (Control) Act, 1968. In order to see whether the rights and liabilities under the repealed law have been put an end to by the new enactment, the proper approach is not to enquire if the new enactment has by its new provisions kept alive the rights and liabilities under the repealed law but whether it has taken away those rights and liabilities. The absence of a saving clause in a new enactment preserving the rights and liabilities under the repealed law is neither material nor decisive of the question—see *State of Punjab v. Mohar Singh*, (1955) 1 SCR 893 = (AIR 1955 SC 84), and *T. S. Baliah v. Income-tax Officer Central Circle VI Madras*, (1969) 72 ITR 787 = (AIR 1969 SC 701).

9. For the reasons mentioned above we agree with the High Court that the proceedings commenced by the Collector of Central Excise by means of the notice dated June 5, 1965 must be deemed to be continuing.

10. In the result this appeal fails and the same is dismissed with costs.

Appeal dismissed.

AIR 1971 SUPREME COURT 1196
(V 58 C 240)

(From Kerala: 1966 Ker LJ 487)

G. K. MITTER, K. S. HEGDE
AND P. JAGANMOHAN REDDY, JJ.

The Firm Styled Messrs. G. L. Kilikar, Appellant v. The State of Kerala and another, Respondents.

Civil Appeal No. 1928 of 1966, D/- 26-4-1971.

Contract Act (1872), Sec. 73
— Plaintiff in order to succeed in a suit for damages for premature cancellation of a contract by defendant

EO/EO/C17/71/MKS/P

must establish that such cancellation was wrongful. (Para 8)

Hence the plaintiff's claim must fall where on the evidence led it is found that it was the plaintiff's breach of obligations under the contract which led to the termination of the contract by the defendant and therefore the cancellation is not wrongful.

(Para 15)

Mr. D. V. Patel, Sr. Advocate, (Mr. T. M. Mahalinga Iyer, Advocate, and Mr. P. C. Bhartari, Advocate, for M/s. J. B. Dadachanji and Co., with him), for Appellant; M/s. K. P. Radhakrishna Menon, Vishnu, B. Saharya and Miss Yougindra Khushalani, Advocates, for Respondent No. 2.

The following Judgment of the Court was delivered by

MITTER, J. — This is an appeal by certificate from a judgment and decree of the Kerala High Court dismissing the plaintiff-appellant's suit for damages claimed on the basis of a breach of contract and allowing, in modification of the decree of the trial Court, a decree for a sum of Rs. 10,750 only with interest at 3% p. m. from the date of institution of the suit. The trial Court had awarded the plaintiff a decree for Rs. 80,745—62 which was inclusive of Rs. 69,995—62 by way of damages, Rs. 10,000/- representing the amount deposited by the plaintiff in terms of the contract sued upon and Rs. 750/- as interest on the said deposit amount. The trial Court also awarded interest at 6% p. a. on the sum of Rs. 10,000/- from the date of the decree.

2. The facts and circumstances leading to the institution of the suit are as follows. The appellant entered into a sales agency agreement with the Travancore Cochin State on May 11, 1950 the material clauses whereof were as follows:—

1. The agents are given the sole distributorship of the products of the Travancore Plywood Industries including plywood tea chest panels, battons, plywood commercial sheets etc.

2. The agency is to be for a period of one year in the first instance with an option to the agents to continue for a like period or for such further period not exceeding four years to be notified to the Government.

3 and 4. xx xx

5. The agents to be entitled to a commission of 5% on sales up to

Rs. 5 lakhs and 7½% on sales over and above the said figure.

6. The commission is to be payable on all supplies made against orders placed by the agents with the Travancore Plywood Industries (a State venture) either within the agency or outside the agency area.

7 & 8. xx xx

9. The quality of the articles supplied shall conform to standards prescribed by the Forest Research Institute, Dehra Dun. . . . The Travancore Plywood Industries shall be solely responsible for the quality of the supplies.

10. Claims for shortages, replacements for defective manufacture or defective cutting or difference in size or for supplies not conforming to the specifications in any other manner whatsoever are to be met by the Travancore Plywood Industries at their own cost and expense. The agents shall be kept fully indemnified against all claims arising from any of the above defects or for cancellation of contracts by buyers on grounds of defective supplies.

11. The agents to deposit with the Government as security for the due fulfilment of this contract a sum of Rs. 10,000/- in the shape of Government bonds and interest on the bonds to be paid to the agents.

12. The agents guarantee a minimum annual sale of Rs. 5 lakhs worth of the products of the Travancore Plywood Industries. If at the end of the twelve months from the date of the commencement of this contract, the actual value of the goods sold on which the agents are . . . eligible for commission as per clause 5 is found to be less than Rs. 5 lakhs due to default on the part of the agents, then, damages computed on the basis and in the proportion of Rs. 2,000/- for every lakh of rupees worth of goods by which the actual sales for that year fall short of the guaranteed annual sale of Rs. 5 lakhs shall be paid by the agents to the Government. The Travancore Plywood Industries shall not, however, be liable to pay damages if the full quantity indented for could not be supplied for want of stock.

13. On breach by the agents of all or any of the terms and conditions herein contained it shall be open for the Government to terminate this contract forthwith without prejudice

to the rights of either party accrued before the date of such termination."

3. By mutual agreement the date of commencement of the agreement was changed from 11th May 1950 to 1st November, 1950 and the agency was to be for five years. The sales for the year ending 31st October, 1951 were worth Rs. 5,09,789-5-4; the corresponding figure for the year 1st November 1951 to 31st October, 1952 was Rs. 6,73,831-8-3 but in the third year ending on 31st October, 1953 the net sales came to no more than Rs. 3,35,196/-. On December 10, 1953 the Government of Travancore Cochin cancelled the agreement on the ground of failure of the plaintiff to secure orders for the minimum sum of Rs. 5 lakhs during the year ending 31st October, 1953. They also claimed damages on the basis of Clause (12) of the agreement. The plaintiff was equally prompt in serving a notice under Section 80 of the Code of Civil Procedure of their intended suit against the Government on 15th December, 1953. They filed the suit on 24th January, 1955.

4. The plaintiffs' case was that the cancellation of the agency agreement was not justified and the fall off in the sales was due to the deterioration in quality of the goods manufactured by the Travancore Plywood Industries, hereinafter referred to as T. P. I., and was "traceable only to the breach of the contract by the defendant in the sense that it refused or failed to maintain the guaranteed standard of quality in the products manufactured." There was no lack of efforts on the part of the plaintiff to secure orders and actually the plaintiff secured an order for the supply of 34,700 sets of tea chest panels on December 5, 1953 from Kannan Devan Hills Produce Company Ltd., Kunnar (hereinafter referred to as K. D. H. P.) who purchased large quantities of the defendant's products. The plaintiff submitted that it had suffered substantial damages by the premature cancellation of the agency and by the default on the part of the defendant in fulfilling its obligations under the agreement in regard to its duty to maintain the guaranteed standard of quality of the products. The damages were quantified on the basis of the commission which the plaintiff would have earned during the period 10th January 1954

to 31st October 1955 calculated on orders executed in the past. Plaintiff also claimed refund of the initial deposit of Rs. 10,000/- with interest at 6%.

5. The defendant denied the allegations as to default in its written statement and pleaded that it had always maintained a high quality in its manufacture. According to the defence the complaint as to the deterioration in the quality was put forward for the first time in October 1953 without any regard for truth and only because the plaintiff had sold goods of the manufacture of other producers to the defendant's customers.

6. The trial Court framed a large number of issues and came to the conclusion that there was defect in the quality of supplies made by the defendant and that the deficiency in the sales in the third year of the agency was due to defect in quality of the tea-chest panels manufactured by the defendant without any default on the part of the plaintiff. Accordingly it held that the termination of plaintiff's agency before the expiry of the period of the agreement was unjustified and the plaintiff was entitled to damages for such wrongful cancellation besides the return of the amount deposited with interest.

7. The High Court in appeal took a different view. It went elaborately into the question of the alleged defect in the quality of plywood panels etc., supplied by the T. P. I. and came to the conclusion that it was not possible to hold that the panels and other products manufactured by the T. P. I. were below the standard prescribed for or were of inferior quality. According to the High Court all that the plaintiff had been able to establish was that for a short period K. D. H. P. did not place orders with T. P. I. and resumed placing orders with them after an inspection. The High Court held that this by itself did not prove conclusively that the sales fell off on account of defect in the quality of the goods of T. P. I. particularly in view of the fact that the area in which the agency was operative was a large one and K. D. H. P. were not the only customers of the products of T. P. I. in the said area. The correspondence referred to by the High Court led it to conclude that though there might have been some hesitation on the part of

K. D. H. P. to go in for the articles manufactured by T. P. I. that fact by itself would not justify the plaintiff's failure to fulfil its obligations under clause (12) of the agreement. The High Court was not satisfied that the fall off in the sales for the third year to a figure well below Rs. 5 lakhs was attributable to any default on the part of the Government in maintaining the standard prescribed. It also held that the evidence adduced in the case showed that the plaintiff did not make any steady effort to promote the sale of the products of T. P. I. and this failure on its part constituted sufficient cause justifying the termination of the agency by the defendant. However, inasmuch as the defendant had not preferred any appeal against the rejection of its claim to a set off of Rupees 6,890-0-6 as on 31st March, 1954 against the security deposit negated by the trial Court, the High Court found the plaintiff entitled to a decree for Rs. 10,750/- with interest at 3% from 24th January, 1955. On the question of costs the High Court held that the parties were entitled to pay and receive costs in proportion to their success and failure in both the courts.

8. There can be no dispute that in order to succeed in its claim to damages the plaintiff must establish that the cancellation of the agreement before the expiry of the period fixed was wrongful. Clause 13 of the agreement undoubtedly empowered the defendant to terminate the agency in case of appreciable shortfall in the guaranteed annual sale of products worth Rs. 5 lakhs in terms of Cl. 12. The last mentioned term would not apply inter alia if T. P. I. failed to maintain the quality of its products leading to the buyers such as K. D. H. P. refusing to place orders with T. P. I.

9. Counsel for the appellant submitted that the evidence adduced went to prove such refusal and referred us to batches of letters bearing on the question of the defect in the quality of the goods supplied by T. P. I. The exhibits to which our attention was drawn relate solely to the supplies made to K. D. H. P. The first set of exhibits refers to the complaint of a firm in London known as P. R. Buchenan & Co. dated 6th March, 1953 to its suppliers from Calcutta, James Finlay & Co. Ltd. enclosing a sample of plywood taken from a chest manufactured out of T. P. I.'s panels.